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My Numerous Detours – Toward Private Law as Society's Constitution

Auf Umwegen: Zum Privatrecht als Gesellschaftsverfassung

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Zusammenfassung: Der Autor reagiert auf die Beiträge dieses Sonderhefts, die sich mit Themen seiner wissenschaftlichen Arbeiten befassen, auf zweierlei Weise. In seiner ersten, eher allgemeinen Reaktion zeichnet er die Einflüsse nach, die verschiedene Institutionen und Personen auf ihn ausübten und sich in seinen Arbeiten zur Privatrechtstheorie niederschlugen. Im Rückblick versteht er sowohl seine langjährigen Auslandsaufenthalte als auch seine Beschäftigung mit außerjuristischen Disziplinen, besonders der Systemtheorie und der Rechtssoziologie, als eine Suche nach der Identität des Privatrechts in fremden Rechtsordnungen wie in fremden Disziplinen. Am Ende dieser Suche steht das Konzept des gesellschaftlichen Konstitutionalismus. Danach wird das Privatrecht als genuine Gesellschaftsverfassung verstanden, genauer: als die Rechtsverfassung der Selbstorganisation einer Vielfalt von sozialen Systemen. In einer zweiten eher speziellen Reaktion geht der Autor auf einige der Fragen ein, welche die anderen Beiträge des Sonderhefts aufwerfen. In rechtssoziologischer und in rechtsdogmatischer Perspektive spricht der Autor Probleme einer Gesellschaftsverfassung an, die einerseits außerhalb der Grenzen des Nationalstaates in transnationalen politischen Prozessen und andererseits außerhalb des institutionalisierten politischen Sektors, in den "privaten" Sektoren der Weltgesellschaft, entstehen. Sie kreisen um das theoretische und praktische Potenzial des gesellschaftlichen Konstitutionalismus: wie in den nicht-staatlichen Institutionen, den neuen Machtzentren der Gesellschaft, besonders in den entstehenden sozio-digitalen Institutionen, das Privatrecht die normativen Bedingungen für Grundrechte, Rechtsstaatlichkeit, demokratische Partizipation und heute zunehmend für ökologische Sensibilität setzen kann.

Abstract: The author responds in two ways to the contributions in this special issue dealing with aspects of his scholarly work. In his first, more general response, he traces the influences that various institutions and individuals exerted on him and

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were reflected in his work on private law theory. In retrospect, he understands both his many years abroad and his involvement with extra-legal disciplines, especially systems theory and sociology of law, as a search for the identity of private law in foreign legal systems as well as in foreign disciplines. At the end of this search stands the concept of societal constitutionalism. The author understands private law as society's constitution, more precisely: as the legal constitution of the self-governance of a variety of social systems. In a second, more specific response, the author deals with some of the questions raised in the various contributions to the special issue. From the perspective of both sociology of law and legal doctrine, the author addresses problems of society's constitution that arise, on the one hand, outside the borders of the nation-state in transnational political processes and, on the other hand, outside the institutionalized political sector, in the "private" sectors of world society. They revolve around the theoretical and practical potential of societal constitutionalism: how, in non-state institutions, the new power centers of society, particularly in the emerging socio-digital institutions, private law can set the normative conditions for fundamental rights, the rule of law, democratic participation, and, increasingly today, ecological sensibility.

Keywords: Societal constitutionalism, private law theory, non-state institutions, socio-digital institutions, regulating self-governance, constitutionalization of private power.

My academic life did not follow a straight path but rather many, many (too many) detours. Instead of orderly appointments to German law faculties, it was a series of search movements, errors, and confusions, even escape movements and, at the same time, experiences of liberation. All in all: I emigrated from Germany as well as from legal doctrine and in the end – I returned to both. In retrospect, I see it as a search for identity in the foreign. I searched for the identity of private law in foreign legal systems (USA, UK, Italy) as well as in foreign disciplines (systems theory, sociology of law). In the end, I have come to understand private law as society's constitution, or more precisely: private law as the constitutional framework for the self-governance of numerous social domains – not just for markets. And the most difficult task of private law is to set strict constitutional limits, not only to the economic profit principle but to the multiple surplus pressures in society that are the blessing and the curse of late modernity (Teubner 2020a). This is how I see a genuine constitutional role for private law at the end of my detours, the stages of which I want to report here. In several additional *excursūs*, I will reply to the arguments that some of my colleagues and friends who had the patience to accompany me on my detours have developed in this special issue of the *Zeitschrift für Rechtssoziologie*.

Göttingen: Uncertainties

Only hesitantly, I decided to study law. The failure of my father's generation under the Nazi regime made me suspicious of the political opportunism within the legal profession. That's why I was determined to study not only the law but, at the same time, philosophy and sociology in order to understand contemporary society and its normative foundations better. Of course, it was naïve to believe that totalitarian tendencies could be fought via legal reasoning instead of outright political resistance. But in those days, I only realized I could not engage in such an ambitious *studium generale.* More modestly, I concentrated first on studying law and later on engaging with the sociology of law at Berkeley.

Tübingen: Ambivalence of private law doctrine

At first, however, I was fascinated by the complex architecture of private law doctrine, which Joachim Gernhuber virtually celebrated in rhetorically brilliant lectures. At that time, Tübingen was the stronghold of post-war legal doctrine, which reacted to the collectivist phantasms of National Socialist private law. It did so by returning to the traditional private autonomy of the individual and reconstructing concepts, norms, and principles of classical private law. In this somewhat too narrow intellectual environment, I accepted synallagmatic contracts as entirely autonomous structures and processes insulated from politics and society. In a strictly doctrinal monograph, I followed this perspective of legal formalism. I interpreted problems of mutual breach of contract as internal escalation stages of contractual purpose disruptions and worked this out in detailed legal rules (Teubner 1975).

But gnawing doubts about such crystalline norm structures soon led me to orient myself more and more toward the jurisprudential work of Josef Esser and Ludwig Raiser, the two leading private law theorists in Germany, who opened private law doctrine toward social institutions. As for Esser's theory of legal principles (written long before Ronald Dworkin), which refers to social conventions, standards, and directives, I was fascinated by the hermeneutic circle between socio-political pre-understandings and legal norms in the tradition of Hans-Georg Gadamer (Esser 1972). Likewise, I took up with great interest Raiser's institutional reinterpretation of subjective rights, in which social institutions and legal norms appear closely intertwined (Raiser 1977). In my doctoral thesis, both scholars inspired me to examine more closely how the general clauses of private law refer to social institutions, ranging from the legal reception of social norms to judicial law-making in

close contact with public opinion-forming processes (Teubner 1971). Still, it took only a short time before such mere outlooks on society from within the closed doctrinal edifice seemed to me no longer sufficient.

Berkeley: Sociological Jurisprudence

I found the wild intellectual debates in restless Berkeley, California, a liberation from the stern German research style in solitude and freedom. For me, Philip Selznick's sociological jurisprudence was an even greater liberation, according to which contract and corporate law need to be supported by a systematic institutional analysis of the underlying social phenomena (Selznick 1969). This analysis is by no means limited to empirical research on legal facts. Instead, it deals intensively with normative inquiries of social institutions and focuses on the law's conceptual readiness to respond to social opportunity structures. Within this framework, I was particularly concerned with the contingency theory of organizational sociology, according to which external conditions predominantly influence formal organizations' internal structure. This became the guiding perspective of my habilitation thesis. Whenever private associations assume public functions in the political and other function systems, they need to change their internal legal structures fundamentally (Teubner 1978). Private law's task is moving associations' constitutions toward internal democracy to a much greater extent than the rudimentary regulations of the private law of associations have done so far.

Bremen: Alternative Legal Doctrine

My four years excursion to the radical Bremen university, to which a Tübingen professor commented, "Mr. Teubner, do you want to break yourself?" led me into heated political debates with the most exciting legal minds of the '68 generation, including Ulrich Preuss, Karl-Heinz Ladeur, Christian Joerges, and Gert Brüggemeier. In Bremen's new model of legal education, I enjoyed participating in the close integration of university education and court practice, in the inclusion of social science aspects, and in the in-depth project work in the last semesters, some elements of which were later partially introduced in the general German legal education. In my work on the *Alternativkommentar* on the BGB, I soon learned to distinguish between two types of alternative legal doctrine. I felt partisanship in favor of partial social interests, advocated by some of my colleagues, was a false politicization of private law. In contrast, I tried to gain a view of private law from a social theory perspective. In the interpretation of the general clause of § 242 BGB ("good faith"), I traced the

intricate connections of private law to three social institutions – interaction morality, market/organization, and function systems (Teubner 1980). However, as an adherent of Niklas Luhmann's systems theory, which in the Bremen law school was declared reactionary, I very soon got into political turmoil, which I finally escaped by fleeing to beautiful Florence.

Florence: Law as an autopoietic system

I experienced thirteen exciting years at the European University Institute in Florence as the happiest time of my professional life. Compared to heavy-blooded German thinking, I found the Italian lucidity, imagination, and liveliness of scholarship, supported by solid historical erudition, extremely attractive. The privilege of working with an international and interdisciplinary group of colleagues and doctoral students made me feel obliged to make a contribution to European private law theory based on the German academic tradition. For this, my previous concentration on mere contact zones of law and sociology, where selective points of entry for the social sciences into law could be found, had to be deepened. It seemed obvious to me that only Niklas Luhmann's systems theory, probably the most ambitious social theory of our time (Luhmann 2004; 2012/2013; 1995), could provide the basis for a renewed private law theory. In controversial discussions with colleagues from the French, English, and Italian legal traditions, however, I had to cool down some German theory heat.

For me, understanding law as an autopoietic system (Teubner 1993) meant giving up the conventional system concept of private law, which generally understands the law as a system of concepts and norms, and private law, particularly as a system of subjective rights. Not legal norms, as in the traditional understanding, form the elements of the legal system, but performative legal acts provoked by social conflicts (judicial decisions, legislative acts, and especially contracts). Only such a temporalised system/environment concept made me understand the dynamics of private law developments and, at the same time, their strong dependence on changes in their social environment. Secondly, the sociological autopoiesis theory revealed an obstinate autonomy of legal doctrine. This autonomy differs from the mainstream understanding in law since it opens legal doctrine toward the social sciences but only under the constraints of its operative closure. Although I had sympathized with the unity of the social sciences, including law, I came to concede that sociology or economics cannot directly supply the law with their knowledge but can only provide external impulses to which legal doctrine reacts with its own conceptual means. And thirdly, the view of law moving as an autopoietic system in a world of

various autopoietic systems caused me to abandon all my fantasies of direct social regulation through law in favor of more indirect irritations of social self-regulation. With the concept of reflexive law, I tried to understand how private law can be adjusted to the novel task of irritation design, which has a chance of success despite the great distance between law and society (Teubner 1983).[1]

I increasingly moved away from understanding economic rationality as the basis of private law, as both the concept of the "private law society", widely accepted in civil law, and the economic analysis of law presuppose. Private law cannot be theorized on the normative premises of only one social subsystem but needs to be understood as the normative framework of the entire civil society, which is in itself differentiated in many ways. I now see private law as framing a multiplicity of self-organizing social systems whose idiosyncratic rationalities it has to respect – and protect against today's overwhelming economization.

Excursus Malte Gruber[2]

This is where Malte Gruber comes in, continuing this line of thought. Throughout his paper, he attacks the domination that legal economics exerts on private law today. In particular, he criticizes economists' orthodoxy of methodological individualism, which requires any collective action to be reduced to the decisions of individuals. With determination, Gruber moves in the opposite direction and suggests a bipolar relation of collective responsibility. On its one pole, the law needs to personify various endangered ecological entities and endow them with new, carefully calibrated collective rights. On the other pole, he requires the law to create new liability subjects in the form of collective risk pools, which become liable whenever their typical dangers for vulnerable species are realized. Regarding the details of this collective responsibility, Gruber criticizes the economic assumption that liability rules needs to be oriented to rational-choice actors who will optimally react to fine-tuning incentives and sanctions. Instead of this rather unrealistic basis for liability law, he suggests an experimental approach that would introduce binding goal definitions and discover concrete legal instruments via trial-and-error procedures. This implies carefully monitoring and correcting the goal-instrument relation if needed in a long-term and thorough observation process.

1 The article created several controversial reactions; among them, I refer to one theoretical reflection and one empirical examination: Luhmann (1992); Refslund (2022).
2 Gruber in this issue.

I support these ideas and suggest developing them further into a generalized concept of "bipolar personification by law" that would support the creation of new legal actors on a broad socio-legal basis. It implies transforming the victim-perpetrator relation in liability law, extending it beyond an inter-individual connection, and creating a bipolar liability relation between collective actors explicitly established by law. It is a certain irony that Weinrib (1995), the staunch defender of private law's autonomy vis-a-vis society, suggests basing tort law systematically on the social relation between a victim and a perpetrator. This allows for contextualizing tort law within an interpersonal relationship and enriches positive law through interactional morality. But as a reaction to new ecological and digital dangers, private law will have to abandon such an exclusive reference to individual actors and invent, by its own authority, on both sides of the relation new collective legal subjects and allocate rights and duties between entities that have not existed as social actors before.

However, Selznick's sociological jurisprudence leads me to an additional suggestion on how the law's conceptual readiness will respond to social opportunity structures. Only when the liability relation between new collective actors is tied to incipient self-organization processes within society, the law will play the required maieutic role. Digital liability is a good case in point. Algorithms are gradually becoming participants in social communication (e.g. Cohen 2019: 221 ff.). Private law is under pressure to recognize their emerging social status and grant them legal action capacity. At present, it would be premature to construct them as full juridical persons. Rather, due to their socio-digital institutionalization as "actants", "hybrids", and "swarms", they should be endowed with more limited, carefully circumscribed rights and duties, especially in the law of contracting, liability, and political regulation. In the future, the full legal personification of algorithms might be necessary, but only when newly-established socio-digital institutions treat them as members of society and attribute communicative capacities and correlated responsibilities to them. Today, however, granting full legal personality to "electronic persons" cannot (yet) rely on autonomous digital entrepreneurship as a corresponding socio-digital institution. So far, only limited personality rights should be attributed to algorithms that act as agents within the existing institution of digital assistance (Beckers & Teubner 2021).

Similarly, the increasing legal personification of rivers and mountains should be welcomed. But again, it always needs to be tied closely to the viability of social systems that surround the endangered ecological entities. And if the law designs procedures for their self-organization, it needs to build on existing political action potentialities in the ecological communities. In this way, personification by law will have to deal with intercultural collisions when indigenous knowledge embedded in a holistic cos-

mology must be protected against the intrusions of modern scientific and economic rationalities (Korth & Teubner 2011). At the same time, while the law's conceptual readiness should respond to opportunity structures that emerge in such ecological relations, the law needs to put limits to their economic colonization.

Back to my London years. I tried to make more concrete the legal critique of economic reason. I re-interpreted the groundbreaking ruling of the German Federal Constitutional Court on guarantee contracts by family members (*Familienbürgschaft*). In my view they did not primarily protect individual rights, but rather a social institution's integrity against its economic colonization (Teubner 2000b). Compared to such explosive problems, which remained only latent in the judgment, the Court's paternalistic correction of contractual imbalances on a case-by-case basis seemed too harmless to me. Rather, I saw in bank guarantees by family members a private law problem of the first order. They should be qualified as conflicts between social spheres of action, concretely, as an intrusion of economic rationality into family solidarity, which needs to be counteracted by institutional protection via fundamental rights. I understood the "colonization of the life-world" here: the family, by rational economic action, as a "third-party effect" of the family's constitutional protection, which needs private law sanctions. In my view, if understood in this way, the Court's ruling could become a precedent for other collisions between social spheres, the destructive aspects of which are increasingly recognizable today and to which private law must find answers.

In contrast, my excursions into corporate law at that time were rather frustrating. In the heyday of deregulation in the 1980s, my attempts to establish a systems-theoretical foundation for a pluralistic legal concept of the enterprise interest (*Unternehmensinteresse*) or even a legally supported corporate social responsibility (Teubner 2009a), was met with an icy silence on the part of German corporate lawyers. My American colleagues reacted with blunt irony à la Milton Friedman: "The sole social responsibility of business is to make a profit." Even EU law, which today – after the shocks of the financial crisis – celebrates itself as pioneering corporate social responsibility, was at that time, probably under the influence of British neoliberal policies, distanced, if not hostile, towards a legally supported responsibility of companies for the public interest. I did not fare much better when I reinterpreted corporate groups as polycorporative networks, as "many-headed hydras", and proposed a corresponding drastic expansion of corporate group liability (Teubner 1990). "Free-floating construction" was still the most benevolent comment on my article, which actually meant: "unlawful." At that time, the consensus was that corporate law should open up to the allegedly superior rationality of the capital markets and not intervene "constructivistically". Against that, I thought a pluralist constitu-

tion would protect organizational autonomy against one-sided domination by the capital markets.

London: Global Bukowina

Moving from the Florentine ivory tower to the more reality-prone London School of Economics was fraught with challenges. The appointment of a German lawyer to the Otto Kahn-Freund Chair for Comparative Law was discussed controversially in the London Jewish community but ultimately accepted. I found Kahn-Freund's studies in private law, comparative law, and legal theory, which had become very influential in English law, to be a model for my work. In the passionate debates of the London legal theory group, left-liberal LSE clashed with radical Birkbeck. In these debates, I began to confront Luhmann's autopoiesis theory with Derrida's deconstruction as each other's dangerous supplements (Teubner 2001). In legal education, I taught students English contract law by systematizing the chaos of case law with rigorous German-style legal doctrine and case-solving techniques. The internationally mixed students, I felt, were not ungrateful for this support.

In legal research, I was exposed to new kinds of private law problems caused by the shock waves of globalization that were particularly noticeable in London. Their norm-hunger had led transnational regimes to create their autonomous law without a state, primarily shaping private law instruments, contract, organization, and standardization. With the metaphor of Global Bukowina, inspired by Eugen Ehrlich, I tried to break two deeply engrained private law taboos, which stipulated that a-national law was impossible and that private ordering could not produce genuine law (Teubner 1997). I interpreted *lex mercatoria, lex finanziaria, lex constructionis, lex sportiva, and lex digitalis* as autonomous private law institutions in the transnational sphere, whose genuine law-making capacities I sought to explain with a modified theory of legal pluralism. The emerging laws of transnational regimes collided with each other, particularly with the laws of the state world, considerably expanding the nation-state-bound perspectives of private international law. It was no longer only collisions between national legal systems that conflict law had to resolve, but their collisions with transnational regime laws (Fischer-Lescano & Teubner 2004). By the way, I was amazed at the British coolness with which my colleagues reacted to my rather continental European contaminated proposals.

Excursus Hugues Rabault[3]

*Using the image of the Global Bukowina, Rabault discusses how the recent debate on transnational law relates to Eugen Ehrlich's theory of living law. He comes up with a new interpretation of Ehrlich's work and a suggestion for its revision. In Rabault's understanding, Ehrlich's "living law" opposed a "legal theology", that is, a "creationist" conception of law, in which the State takes the place of God the Creator. Ehrlich's work appears thus as an attempt to "de-theologize" the law. Although political science and legal theory continue to be strongly influenced by the "creationist" imaginary, Ehrlich makes for Rabault a first step towards formulating a paradigm of law as a spontaneous social emergence rather than as the legislator's intentional, conscious, and rational production. At the same time, Rabault sees a need to revise Ehrlich's theory. While for Ehrlich, the centers of law-making had been social organizations (*Verbände*), i.e. associations, ethnic groups, and families, the social source of global law can no longer be the lifeworld of personal relations, but the proto-law of specialized, organizational, and functional networks, which are forming a global and sharply limited identity.*

I would like to take up these ideas on emergence by connecting Ehrlich's contribution to a central controversy in legal sociology, the (in)famous distinction between law and social norms. While Rabault identifies emergence with the gradual build-up of decentralized spontaneous social orders in the sense of Friedrich von Hayek, I would like to distinguish emergence from below and from above. Emergence from below, which is mainstream today, defines emergence as the appearance of new properties out of the interplay of existing elements (Hoyningen-Huene 1994: 172 ff.). In contrast, emergence from above is more ambitious (Luhmann 1995: 22 f.). It is not only new properties but full-fledged new social systems that are emerging. And they do so only when these systems constitute new elementary operations. While they use existing material, they produce their new elementary operations, which in a circular way produce the new autopoietic system. This sheds new light on the difference between social and legal norms in transnational law. The moment of emergence comes up when existing social norms are utilized, e.g., in a transnational agreement or in an arbitration tribunal, to decide a social conflict via the binary code legal/illegal. Then a simple social communication has been transformed into an authentic legal act that connects with a chain of other legal acts and becomes part of the overarching legal system. This is how in the new transnational law – without the help of the state world – authentic elementary legal operations are emerging. Thus, we can replace Ehrlich's often ridiculed

3 Rabault in this issue.

criteria for distinguishing law from social norms, which he found in the different emotional reactions to rule violations, with the empirically identifiable emergence of authentic legal acts, as opposed to simple social communication.

Frankfurt: Private law as society's constitution

Today, after my double return, to Germany and to private law doctrine, I have been increasingly inspired by the Frankfurt *genius loci*. Hugo Sinzheimer, Franz Böhm, and Rudolf Wiethölter, the courageous discoverers of non-state economic and social constitutions – it is their ideas which I now try to generalize in societal constitutionalism. I combine this private law corollary of state constitutionalism with theories of transnational legal pluralism (Teubner 2012). It is after the four great ruptures of modern society – the revolution of functional differentiation, the emergence of the organization society, the transnationalisation of many social subsystems, and most recently, the digitalization of the social world – that private law is under fundamentally new challenges. It must develop genuine constitutional norms dealing with the new intermediary powers. These intermediaries have interposed themselves between state and individuals – functional systems, formal organizations, transnational regimes, and socio-digital institutions. Constraining intermediaries' power through private-law norms seems to me the most important task. It will not suffice merely to unleash the dynamics of social self-governance in numerous social institutions with the help of private-law instruments. Rather, effectively combating the destructive effects of these dynamics is likely to be a more difficult task. In the new power centers of society, private law must go beyond its traditional inter-individual perspective and set in trans-individual institutions the normative conditions for fundamental rights, the rule of law, democratic participation, and, today, increasingly ecological sensitivity (Teubner 2020b).

The most recent challenges for societal constitutionalism are the radical nationalism and authoritarianism that reappear worldwide, revealing tendencies towards a political totalisation of all areas of society (e.g., Atilgan 2023; Belov 2022). Against this threat, countervailing powers will emerge whenever the self-governance of civil society institutions is strengthened. According to David Sciulli (1992), against the drift toward political and social authoritarianism, societal constitutionalism is the only social dynamic that has effectively worked in the past and can offer resistance in the future.

Excursus Atina Krajewska[4]

At the centre of the new nationalism and authoritarianism are biopolitical strategies, in particular anti-abortion policies. Combining population policies with disciplinary techniques and moralistic arguments, they extend political control into the most intimate aspects of social life. In her critique of anti-abortionism, Krajewska uses sociological systems theory, focusing on the role of impersonal social processes in the abortion conflict. She submits that the "anonymous matrix" is central among repressive politics and illegitimate intrusions into private existence. Krajewska argues that in the abortion controversy, human rights conflicts are not at all limited to the relation state-individual. Of course, massive biopolitical intrusions into human life have come from health population policies of nation-states, but equally intrusive are biopolitical attacks from powerful private actors. She refers to the professional figures of the doctor or the scientist as powerful biopolitical actors who today move into a no man's land where once only the sovereign could venture (Agamben). Parallel to such attacks from individual professionals, well-organized collective anti-abortion campaigns are initiated by powerful private associations. In the end, the concept of the anonymous matrix makes visible impersonal communicative processes that exert structural violence (Galtung) on the female body. They do so when neither individual nor collective perpetrators are in sight. Krajewska shows in an exemplary way how anonymous discourses, social systems, institutions of religion, medicine, science, economy, education, and morality compete to dominate the normativity of abortion. These impersonal processes exert their disciplinary power on the health system as well as on the female body and mind.

In my view, it comes as a certain surprise that new support for anti-abortionism seems to come from the ecological discourse insofar as it is constantly expanding the personification of living processes to grant them legal-political protection. Not only animals, rivers, and mountains but also future generations and unborn children are treated as new subjects, endowed with human rights, and protected by vicarious speakers of their interests. This discourse is supported by more and more detailed medical explanations and widely distributed media images. In this situation, the law finds itself in a position where it no longer balances exclusively the legal rights of the unborn child against that of the woman but has to find a precarious balance between violently competing socio-political discourses. One major difficulty is identifying the tipping point where legitimate outside irritations become illegitimate intrusions. Krajewska offers the criterion: the threshold is reached when the very existence is threat-

4 Krajewska in this issue.

ened by the expansionist system. I agree but would suggest the more comprehensive integrity criterion defines the tipping point. The integrity of the female body and mind, as well as the integrity of the health discourse, which is not a matter of external scientific, medical, political, or legal definition but a matter of individual and collective self-determination, the law has to respect. Thus, the woman's self-determination about her body moves into center stage, however with the important qualification that she acts as the guardian of a hybrid relation between her and the fetus in a bodily unity which changes constantly the internal weight of both.

This combination of self-determination and stewardship might indicate how the law could deal with the abortion conflict. However, I suspect that the range of illegitimate intruders is not limited to medicine, religion, and politics. Rather, the law itself seems to overstep its legitimate boundaries when it claims to make final decisions on abortion issues. Krajewska points rightly to the impossibility of legal communication when it goes beyond human rights in their institutional and communicative dimension and attempts to reach the female mind-body-unity. Moreover, the juridicality of abortion will end up in outright undecidability once one realizes that the Other of every foundation of order, in our case, the hybrid bodily unity, allows "an extraordinary" to emerge – as Waldenfels (2006) and Lindahl (2010: 52, fn. 40) put it – as "a-legal", implying a surplus of reference beyond the binary code of legal and illegal. This suggests recognizing boundaries of the juridical by the legal system itself: Abortion could be seen as one of the exceptional cases of what is a-legal, neither lawful nor unlawful. This would require the paradoxical legal operation of juridifying the de-juridification of abortion: The law orders itself to keep out of abortion.

One of the many other topics of societal constitutionalism I am dealing with in Frankfurt is the emergence of a digital constitution (starting with Teubner (2004), ending with Teubner and Golia (eds.) (2023)). I find it remarkable that almost exclusively private law norms shape the online world of the internet, the socio-digital networks (Facebook & Co.), and the digital platforms (Amazon, eBay & Co.). Here, social power is combined with the inscrutable dynamics of a new technology, the destructive consequences of which need to be fought against, also employing private law. The triangular constitutionalization of the digital space, i.e., the division of labor between self-constitutionalisation of the new digital institutions, constitutional interventions of the state world, and constitutional reviews of private ordering by the civil law courts, should be the practical and theoretical task of societal constitutionalism.

***Excursus Nofar Sheffi*[5]**

*At this point, Nofar Sheffi's paper comes in as a provocation. The present debate on digital constitutionalism focuses too narrowly on the economic power of the offline companies behind social networks and digital platforms, as well as on their regulation by political actors. The constitutional issues involved are, of course, highly relevant but not really new: combating private power, which is now reinforced by digital weapons. In contrast, the title of Sheffi's paper, "Bit by bit constitution" underlines the algorithmic center of the digital constitution, which authors obsessed with the economic power of Facebook & Co. tend to overlook. The bit-by-bit constitution is the real novelty for the constitutional discourse. Sheffi digs deeper than her colleagues and reveals massive constitutional contingencies hidden in the so-called political neutrality of technical processes that build up the internet architecture. Throughout the paper, Sheffi connects a fine-grained analysis of the algorithm's technical details with social theory, political semantics, translation theory, literary allusions, and constitutional concerns. She shows painstakingly how political ideologies have deeply influenced various ruptures within the internal evolution of the techno-constitution. For example, the internet's centralization, which would be highly attractive for digital bio-power, i.e., repressive state control of the entire population, has been avoided, and Californian counterculture motives of decentralization as well as massive economic interests, e.g., on trade secrets, have instead shaped the internet governance. In contrast, the new state-capitalist regimes of China and Russia attempt to revolutionize the digital constitution by sharply centralizing their national digital networks for the sake of totalizing social control. At the same time, they want their networks to function as efficiently as their capitalist counterparts. Following Michel Foucault, Nofar describes websites as "*réalités de transaction*", as domains of reference born "from the interplay of relations of power and everything which constantly eludes them, at the interface… of governors and governed."*

Another concern comes with Sheffi's analysis of an "algorithmic bias" that potentially influences, changes, or even falsifies human-machine communication. It appears as a recursive process: The hermeneutical richness of human thought and debate is translated into the rigid machine language of the programmers, then via several protocols, transformed into mathematical calculations and finally reduced to simple commands – either open or close the flow of electronic signals – and then, after the interplay of myriads of electronic commands, re-translated into the world of human hermeneutics. Does this not imply that the social world is exposed to a structural drift

5 Sheffi in this issue.

driven by this fundamental algorithmic bias? Would this mean that a social counter-hermeneutics needs to compensate for this structural drift, giving new momentum to the Geisteswissenschaften*, the old-fashioned humanities?*

While Sheffi describes meticulously translation processes within the bit-by-bit constitution, I would like to raise the question of whether, between computers and humans, genuine communication takes place. Sheffi analyzes in detail how the algorithms transform differences of information via conversion and re-conversion. Complicated translation processes are going on within the computer – and at the same time within human consciousness. But beyond that, the fascinating question arises whether or not a genuine social system is evolving, which takes place not in the interaction between humans but in the interaction between computers and humans, in the interface of human and computer messages. It is detached from the calculations of the machines as it is detached from the concatenation of thought in human consciousness. Here, the subface/surface/interface distinction, which Sheffi refuses to make use of becomes relevant. While in the subface, electronic signals are processed, and in human consciousness, thoughts are processed, on the surface, the semiotic distinction between utterance and information is produced, and understanding takes place in the interface. Thus, genuine communication between "persons", i.e. semantic artifacts of the algorithms and humans, occurs in the emerging social system. Of course, algorithms remain mindless machines, but when social attribution of action to them is firmly institutionalised via personification, they become (non-human) members of society.[6]

In addition, I would raise the question of whether one has just to accept a path-dependent "blind" evolution of digitality, which is concealing potential constitutional alternatives. Or could one imagine, in the language of Rudolf Wiethölter (2005: 71), "criteria, venues/fora, procedures" for political and legal intervention into these deep structures of the internet? Could ICANN, for example, be transformed via procedural reforms into the most important "collegial formation" as a deliberative institution in the sense of David Sciulli's societal constitutionalism?

At this point, liability law's contribution to an emerging digital constitution becomes visible. Certainly, liability is about optimizing standards of care and levels of activity of algorithms. But the constitutional requirements on digitality are not exhausted with such legal-economic arguments. In the recursive dynamic of technology/institutions/liability, a mutual constitution of legal norms, legal subjects, social institu-

6 Several authors from different theory approaches argue for the personification of autonomous algorithms. Information theory: Floridi and Sanders (2011: 187 ff.). Sociological systems theory: Esposito (2017). Political theory: Cohen (2019: 221 ff.). Private law theory: Teubner (2006).

tions, and technological innovation takes place. Autonomous algorithms in their quality as novel quasi-subjects ("actants"), pose a constitutional question of the first order. Private law should react with the legal personification of both individual algorithms and human-algorithm associations, especially under liability law (Beckers & Teubner 2021: 23 ff., 97 ff.). This development is not only shaped by technology or economics but also depends on various legal-political decisions about the social responsibility of digital technologies. Insofar as liability law, which only appears to be technical, produces arguments and decisions about combating responsibility deficits, about the productive chances and destructive risks of personalizing algorithmic processes, about the standards of care for algorithms' decisions, about the protection of individual rights endangered by wrong digital decisions, about the extent of compensation payments and about the necessary reprogramming of algorithms that involve risk, liability law contributes considerably to the digital constitution that is currently developing.

After the detours: An outlook

These, then, are the detours in my biography on which I have tried to find my way in the winding paths of private law's transformations in the 20th and 21st centuries. Factually, these transformations are taking place on a massive scale, but they require a strong normative orientation. I personally make a plea for their constitutional orientation. But what does constitutionality mean for the following four ongoing transformation processes?

Europeanization/transnationalization

The Europeanization of private law has brought about profound changes, at least in the last fifty years. In particular, the comparative law method that European and national courts use has provided various impulses for the unification of law, not only as an analysis but also as a secret source of law-making. However, I believe that the paradoxes of the *unitas multiplex europaea* should inspire European private law's formation not as comprehensive legal unification, but as targeted constitutional interventions in neuralgic zones where social problems create specific challenges for private law. Respecting differences in national legal cultures as well as taking account of the varieties of capitalism within Europe (Teubner 1998; 2024), should encourage building a kind of federal constitution of European private law systems (Joerges 2022). This should also defuse the controversial "battle of the courts", the dispute between the self-confident guardians of the European constitu-

tion in Luxembourg and Strasbourg on the one hand, and the equally self-confident guardians of the national constitutions in Karlsruhe, Rome, Warsaw, and Budapest on the other. I would argue against the primacy of national constitutions, neither would I argue for an unconditional primacy of the European constitution, but rather for a heterarchy of constitutional courts, which, however, provides a right of final decision for Luxembourg and Strassburg to the extent necessary to preserve a quasi-federal order.

Europeanization finds its extension in the transnationalization of private law, which needs to assert itself today against tendencies towards nation-state isolation, but given the new East-West divide, can arguably only do so in the more universalistically oriented "Western" legal systems. Full globalization of private law will probably be reduced to its regionalization. Here, the private transnational regimes already mentioned are in the foreground, for the constitution of which, in addition to international dispute resolution bodies, nation-state civil courts can provide important impulses.

Materialization

The materialization of private law has become its second major transformation. Max Weber (1968 [1914–1920]: Ch. VII, §§ 5, 8) had warned against the intrusion of material tendencies into the formal rationality of modern law, while Franz Wieacker (1996: Ch. 28) welcomed this master trend in the history of modern private law. Materialization became effective as a welfare state transformation of liberal private law, which particularly led to the rise of labor law, consumer law and social law, but also influenced the core areas of civil law. I can imagine that private law, beyond combating social inequality involved here, will in the future take a closer look at other grave societal risks, above all the dramatic ecological hazards.[7] Materialization, understood in this way as ecologization, is likely to change the foundations of legal methodology. Beyond Rudolf von Jhering's purpose orientation and Philipp Heck's interest jurisprudence, it will transform the "value jurisprudence" that dominates today. I consider its reliance on the old-fashioned philosophy of values, widespread among German lawyers, futile. Rather, a political reflection internal to the law would have to orient its values, understood as preference rules, to the political reflection in other social subsystems, of course, also modifying them

7 Here, private law should take up insights from social theory, *locus classicus*, Beck (1992). For first efforts to realize ecological sustainability in private law doctrine, Schirmer (2023); Akkermans and Van Dijck (2019).

via the rule of law. Today's consensus is that the legal methods of balancing have overridden, if not replaced, the traditional techniques of subsumption and interpretation. I would imagine, however, that this is not limited to the mere balancing of interests of private actors, nor only to the balancing of group interests, but that balancing of different social rationalities moves into the foreground.

Ultimately, this leads to an understanding of justice under private law that is neither exhausted in equality-oriented conceptual consistency nor in responsiveness to the contingencies of external demands but that amounts virtually to self-transcendence of law (Teubner 2009b). As it becomes clear in the paradoxes of the abuse of rights and other hard cases, justice understood in this way transcends the boundaries of positive law exposing itself to what Jacques Derrida (1990) calls invocation, abyss, disruption, experience of contradiction, chaos in order to return to positive law with new normative intuitions potentially emerging in such borderline experiences.

***Excursus Richard Nobles and David Schiff*[8]**

Their reflections on self-subversive justice add an important distinction to the debate. But first, they criticize Rawls' and Dworkin's concepts of justice. They judge Rawls' ideas as relevant for justice within the political process but only of limited value for the legal process. Unlike political justice, law's justice cannot hide behind the veil of ignorance, instead needs to dig deeply into the peculiarities of singular cases and the needs of the individuals involved. Nobles and Schiff submit that Dworkin is too much involved in law's internal normative contextualization. While to a certain degree, he oversteps law's boundaries in the direction of moral and political principles, he does so only under the condition that they are compatible with "other propositions of law generally treated as true". In contrast to both, Nobles and Schiff insist that justice needs to radically transcend law's boundaries.

Here, they introduce the distinction between law's transcendence and self-subversive justice. In a subtle analysis of the common law tradition, they show that the techniques of distinguishing and overruling have indeed transcended law's boundaries. But all this is not yet self-subversive justice which only comes in when it works as what they call an "attractor". It attracts those who are motivated to achieve justice: those who refuse to learn from disappointment and insist on a fundamental normative orientation. Nobles and Schiff attribute meaning to legal justice which is not

8 Nobles and Schiff in this issue.

explicable in terms of political, economic, moral or even religious motives. They look for a propensity in individual consciousness to approach a self-subversion of law from the perspective of infinite justice.

"Much is too tender to be thought of, even more, to be spoken". Nobles' and Schiff's distinction resonate with this quotation from Novalis (Hardenberg) (1798: 70–106, § 23), *a poet of German romanticism. Self-subversive justice is in the end neither a matter of legal communication nor is it to be imagined as individual legal thoughts. Rather, its place is in individual consciousness, what the philosopher Christoph Menke (2020: Ch. 15) calls the "pre-conceptual affection", which precedes and dominates rational legal debate. Thus justice is re-oriented towards the affective, emotional, and a-rational dimensions of judgment, in a process of reflective transformation of affective evidence, of which theories of rational argumentation have taken no account.*

At this point, Luhmann's theory of justice needs to be modified considerably. While it is his merit to distinguish clearly communicative and psychic processes, in his relentless drive toward autonomy and closure of social systems, he tends to undervalue the massive influence that the individual mind exerts on social communication, despite their mutual closure. This is particularly true for the pre-conceptual affections of justice in people's consciousness whose importance is rightly stressed by Nobles and Schiff.

At the same time, however, I would emphasise that the pre-conceptual affection of justice cannot be reduced to the emotions of the individual alone. What matters equally is the specific signification of justice that affective communication creates, in distinction to individual sentiment. Novalis (Hardenberg 1798: 70–106, § 23) who rightly insists that only "tender" emotions will grasp the signification of "pudency, friendship, love and piety" – and I suggest to add: justice –, allows at the same time for "rare moments to talk about it in silent mutual understanding". The difference between consciousness and communication implies that – like communication in literature – a genuine communication of affective justice takes place paradoxically via the linguistically non-communicable that happens alongside the communication of legal arguments. Communication of pre-conceptual justice is similar to aesthetic communication in literature: the aesthetic message of its words cannot be found in their content, but rather in non-verbal communication, i.e. what cannot be verbally communicated.[9] *Similarly, the message of affective justice will be co-communicated in words of law but goes beyond what can be said.*

9 "Art functions as communication although – or precisely because – it cannot be adequately rendered through words (let alone through concepts)" (Luhmann 2000: 19, 52 ff.; cf. Stenner 2005).

And we should not forget that even the much-praised reflective transformation of the pre-conceptual affective evidence of justice has a dark side. Levinas (1982: 98) makes us painfully aware that affective justice has self-subversive tendencies whenever it is exposed to rational justification: "General and generous principles will be inverted in their application. Every generous thought is threatened by its own Stalinism." The price for exposing the infinite experience of justice to its rational justification is high – new injustice. Due to the poverty of legal formalization, but also due to the insensitivity of philosophical norm-universalization, the very search for juridical justice produces injustice which in its turn provokes a renewed self-transcendence, and then again new rational constraints. What remains is nothing but a desperate search for justice which produces the permanent inner restlessness of law. New criteria of justice are invented again and again, and new legal arguments are presented, but these very constructs destroy the possibility of justice. The search for justice becomes the addiction of law, destructive and inventive at the same time.

Pluralization

Alongside this search for justice within the master trend for the private law's materialization, the pluralization of private law is another transformation that, although already well advanced, has nevertheless remained highly controversial. The emergence of the large special branches of private law (labor law, consumer law, antitrust law), the autonomisation of various private law areas through their own values and terminology, the explosion of new types of contracts, and the internal differentiation of tort law are often criticized as private law's history of decay. However, it seems to me that attempts to restore the former unity of private law against this deep fragmentation are futile. Fragmentation should rather be interpreted in its historical context, in which law reacts to the external differentiation of society with internal differentiation. It does so not as one-to-one mirroring but as legal changes triggered by social irritations.

Perhaps, a new unity of private law will be established by conceiving private law not only as substantive law but also as a special type of conflict of laws. It seeks to deal with the collisions of norms and principles of the various special private law orders, different fields of private law, and diverse regimes of private ordering. In this sense, contract cannot be understood merely as a synallagmatic relationship between two parties but as an intermediary between different "contracting worlds" (Teubner 2000a). Contracting becomes a space of compatibility between the conflicting requirements of economic transactions, social production processes, political regulations, and legal obligations. Resolving collisions between these "contracting worlds" and re-balancing them against overwhelming tendencies of one world over

the other will be the task of contract law which, compared to its traditional individual orientation, gains an additional institutional orientation. Of course, contract law will need to be interdisciplinary, but not one-sidedly as "law and …", neither sociology, economics, nor political science. Still, it would have to seek a balance according to the philosophical concept of transversality (Teubner 2014). What is more, it will have to deal with the excesses that are produced by diverse competing surplus orientations – economic profit, power augmentation, reputation gains, etc. (Teubner 2020a).

Excursus Vagias Karavas[10]

"Capitalism with a Human Face" – that is what Karavas calls "Teubner's life project". He criticizes my ideas of a multitude of social surplus values which includes not only economic profit but as well a variety of non-monetary surplus pressures. For Karavas, this is nothing but the logical continuation of liberal doctrines, which offers the "idyll" of an invisible-hand society that "always wants evil and always creates good". This sounds like a harsh attack. However, apart from some exaggerations, I tend to see Karavas' reaction to my text rather as driven by critical empathy. What is more, he teaches me a lesson.

*As for empathy, Karavas considerably enriches my thesis on the origin of surplus extraction. While I am tracing it to the deadly sins in medieval Christian society (*avaritia, superbia, contentio, etc.*), he supplements it with two narratives from Greek mythology. One is the connection* "hybris – ate – nemesis – tisis," *which means, in short, severe punishment for hybris. The second one is* "hamartia" (ἁμαρτία). *Again, in short: Missing a goal becomes an encouragement for a new effort. In my view, both shed light on potential reactions to excessive surplus extraction. Either they stand for severe negative sanctions to suppress the excesses or for taking them themselves as productive pressures for learning.*

Karavas' second supplement to my text is to apply a similar surplus analysis to digitality. He takes up the idea of multiple surplus values in contemporary society and adds to them digitality that he sees as also driven by endogenous surplus pressures. Karavas makes the never-ending internal digital dynamics responsible for relentlessly driving digital calculations into permanent growth pressures. I find this suggestive but would prefer to distinguish two constellations. Digitality in itself does

10 Karavas in this issue.

not seem to me a success medium, only a distribution medium comparable to orality, writing, and printing, which do not imply surplus pressures. In contrast to monetary operations, power threats, or scientific insights, digital calculations create no endogenous motives for their acceptance in communication. However, when programming introduces the goals of profit, power, and reputation into algorithmic calculations, Karavas' observation is plausible since a turbo is added to these surplus pressures, which speed up with overwhelming force and increase their destructive tendencies.

As for critique, Karavas accuses me of relying on invisible hand mechanisms which are supposed to guide individual surplus extraction necessarily toward the common good. He says I am deceiving the reader: Not Karl Marx is my intellectual authority but Adam Smith. In my view, Karavas rather selectively concentrates on one paragraph in my text which argues that the surplus pressures may sometimes contribute to the common good. But at this point, Karavas ignores my central concern about the "excessive ambivalence" of all surplus pressures (Teubner 2020a: 13 ff.) I believe the various surplus pressures are indeed working as invisible hand mechanisms. However, not at all do they drive society automatically toward the common good, but in both directions, to good and evil. Under certain conditions, they arrive at Adam Smith's common good (see China's new capitalism in its fight against hunger), and under different conditions, they end up in Karl Marx's destructive consequences (see China's account of massive corruption, exploitation, and human rights violations).

My question for Karavas is: Why does he concentrate only on economic profit and remains silent on my main thesis – surplus pressures in a variety of social systems, which do augment monetary profit, but equally recreate the specific communication medium in other social systems: power, reputation, educational rewards, religious faith? If there are a variety of surplus pressures, what follows for social theory and political practice? For example, is indeed the hope elusive that by abolishing private property, the ills of capitalism will be cured? Will not the destructive consequences of the other powerful surplus pressures remain?

What did I learn from Karavas? He insists throughout his paper on the individual-psychological aspect of surplus orientation, while I tended to stress the social-institutional aspects. At this point, Karavas makes me rethink systems theory's psyche/communication relationship. Like in the case of self-subversive justice, I would now understand this relationship less as mutual insulation and more as a symbiosis. Decisive is the flow of material energies from biological and psychic life into social systems. Thus, I can better appreciate the strong influence that human drives and desires have on social communication. While I described in my article how social

surplus pressures shape individual drives and desires, now I think that, equally, and perhaps more intensively, the other way around, individual desires are overwhelmingly driving the social dynamics of surplus orientation.

Here, however, theories of subjectivation are deficient. They are right regarding the modern subject as produced by discourses and practices but they are wrong refusing to separate psychic and social aspects. In this respect, the systems-theoretical distinction between consciousness and communication has advantages again. It suggests that the communicative surplus value orientation is clearly separated from the psychic energies of desire but at the same time depends on them. While the energies of desire remain relatively undirected it is the codes and programs of social systems that channel these energies and redirect them toward the regeneration of the communicative medium and its surplus value.

In the end, Karavas compares my life project to "Katéchon"*, one of the most enigmatic concepts of the New Testament. The* "Katéchon" *preserves the world from chaos by preventing the appearance of the Antichrist, but at the same time, prevents the coming of Jesus Christ and thus the world's redemption. Now Karavas asserts: "The law plays a similar, ambiguous role in Gunther Teubner's life project. It prevents the collapse of modern society, but at the same time, due to its own limited rationality, it prevents the completion of the project of modernity."*

Yes, I think suspension of the catastrophe is needed because the very hope of redemption is a false eschatology. Therefore, instead of redemption, we better look for more modest and more realistic second-best solutions. Karavas' secret redemption hope seems to lie in abolishing the "idyll" of functional differentiation. In contrast to such a misled redemption strategy, I would plead not for Capitalism with a human face, but instead define my life project: Polycontexturality with an ecological face.

Constitutionalization

To return to the various transformations of private law, its constitutionalization is probably the royal road towards which the paths of the other transformations could run. Today, the constitutionalization of private law means that the political constitution of the nation-state, with its fundamental normative orientations, especially with human rights, reshapes private law's principles. In my opinion, however, the constitutionalization of private law would take on an additional meaning. Private law receives its guidelines not only from the political constitution of the state but also from the constitutions of various social domains, from the constitution of the

economy, science and technology, education, the mass media, the health system, and the digital world. In particular, the horizontal effect of fundamental rights should be expanded, not only as individual rights protection against social power in the various subsystems but also as the protection of fragile social institutions (such as art and science) against their colonization by expansive social systems (Hensel & Teubner 2016).

***Excursus Isabel Hensel*[11]**

What this means for the labor constitution in times of digital platforms is carefully analyzed by Hensel in its multifaceted dimensions. The platforms' precarious and low-paid employment structure makes the long-term organization of traditional trade unions difficult to realize. The fluctuation of employees, the limited duration of employment contracts, the use of temporary workers, the part-time nature of the employment, and the young age of the employees, the majority of the migrant workforce, are the factors that impede collective action. Karl Polanyi's strategies for re-embedding the disembedded economy are of no help anymore in the platform economy (Polanyi 1991 [1944]). Labor unions, the main of Polanyi's non-market institutions that are supposed to correct the marketization of the fictitious commodity of labor, obviously do not play their corrective role when counteracting the infamous exploitation practices of digital platforms.

Surplus analysis will bring about new aspects when it is not reduced to economic profit but considers competing surplus pressures. The platform workers are sandwiched between several surplus pressures. On the one side, the profit motive of digital platforms is drastically strengthened by the additional digital surplus pressures (as already mentioned in my comments on Karavas' paper). On the other side, labor unions are not just the altruistic supporters of exploited workers but are themselves under massive surplus pressures of a specific kind. The drive for power surplus in the internal politics of labor unions as well as organizational surplus pressures for the labor unions' growth, tend to marginalize the platform workers' interest.

It is difficult to see how labor unions can escape this dilemma. With Polanyi, against Polanyi, and beyond Polanyi, a new search for fighting false surplus pressures in the platform economy is probably needed. Hensel indeed points to intra-organizational democracy in labor unions, which could strengthen the minority's position by grant-

11 Hensel in this issue.

ing them constitutional rights. But the well-known obstacles to labor union democracy lead her rightly to recommend wide-ranging changes in the labor constitution, which would strengthen the countervailing power of other forms of collective action, in particular, digital activism, the interweaving of analog and digital resistance, spontaneous protest, and autonomous associations outside established labor unions. "Gorillas workers collective", wild cat strikes, and the calls for a walkout in three warehouses – to these concrete instances of collective resistance, Hensel recommends granting constitutional protection under the German Basic Law.

The overarching principle in the private law constitution remains private autonomy, which should indeed continue to be the self-determination of individual human beings in a variety of their contractual arrangements, but which in the future needs to incorporate additional dimensions. Private autonomy cannot remain only individual autonomy; at the same time, it is to be understood as social autonomy, more precisely: as freedom of self-determination of a variety of social domains, associations, organizations, foundations, networks, commons, and function systems. It would include autonomy guarantees under private law as well as help for self-help against self-destructive tendencies. The problem is whether the conceptual readiness of private law will be able to correspond to the opportunity structures of the late modern society, in the words of Wiethölter (1988), whether

> "... 'autonomy' can be taken seriously as self-determination and, nevertheless, can become suitable as essential externalization (control), not as external determination, but as a possible help in situations of impossible self-help, not unlike 'counselling' help and 'compatibility' therapy outside the law" (my translation).

Thus, the future task of private law as society's constitution would be to secure the eigen-normativity of social subsystems and, at the same time, set clear limits to their expansive tendencies.

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