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Constitutionalizing Connectivity: The Constitutional Grid of World Society

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Global law settings are characterized by a structural pre-eminence of connectivity norms, a type of norm which differs from coherency or possibility norms. The centrality of connectivity norms emerges from the function of global law, which is to increase the probability of transfers of condensed social components, such as economic capital and products, religious doctrines, and scientific knowledge, from one legally structured context to another within world society. This was the case from colonialism and colonial law to contemporary global supply chains and human rights. Both colonial law and human rights can be understood as serving a constitutionalizing function aimed at stabilizing and facilitating connectivity. This allows for an understanding of colonialism and contemporary global governance as functional, but not as normative, equivalents.

INTRODUCTION

This article proposes an epistemological shift within the ongoing debate on the metamorphosis of constitutionalism. A shift away from a focus on differentiation to a focus on connectivity, that is, a focus on inter-systemic, rather than intra-systemic, processes, as also expressed in the notion of interlegality originally coined by Boaventura de Sousa Santos at a speech at Cardiff University.[1] Systems theoretical approaches to constitutionalism

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1 B. de Sousa Santos, *Towards a New Legal Common Sense: Law, Globalization, and Emancipation* (2002, 2nd edn.) 437.

have, as a consequence of the architecture and basic assumptions of the theory, a primary focus on the inner worlds of systems and the constitutive and limiting functions of law in relation to focal social processes, such as the economy, the mass media, politics, science, and so forth.[2] While the internalistic perspective is both necessary and fruitful, it implies a de-emphasizing of the issue of connectivity, that is, the question of how the probability of sustained and continued social communication flows is increased on a global scale within a world characterized by multi-contextuality. Without dismissing the crucial question concerning the 'inner integrity' of systemically organized communication and the role of legal norms in achieving such integrity, the issue focused on here is the classical sociological question of 'how is society possible?[3] under the structural condition of the existence of world society and the role of legal norms and constitutions in this regard. The point of departure is, therefore, not a dismissal of systems theory but, rather, the development of an outlook which stands orthogonal, an outlook which is complementary, to classical systems-theoretical perspectives, thereby filling a blind spot through a strategy of theoretical metamorphosis starting from within systems theory and ending somewhere else.

The notion of world society, that is, the proposition that only one society exists in our world, is central to systems theory. It refers to the Husserlian notion of common horizons of opportunity, and thereby stipulates a potential of connectivity on a global scale. This article goes beyond the very general proposition of world society advanced by Niklas Luhmann through an understanding of global legal norms as instruments of connectivity which play a significant role in the realization of world society. Drawing on a rich literature concerning the function of legal norms, the perspective will be developed that legal norms not only limit connectivity but also serve as enablers of connectivity. This is central for our understanding of the position and function of global legal norms, as world society, paradoxically, consists of many worlds. World society is an acentric society which is not only horizontally differentiated between function systems, but also vertically differentiated between social processes relying on local, national, and trans-national organizing principles.[4] Also paradoxically, increased globalization has, furthermore, resulted in an increase, rather than a demise, of contextual diversity. The logic of differentiation associated with the acentric world society therefore has to be complemented by the logic of connectivity. It is

2 N. Luhmann, 'Verfassung als evolutionäre Errungenschaft' (1990) 9 *Rechtshistorisches J.* 176; G. Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (2012).

3 G. Simmel, 'Wie ist Gesellschaft möglich, 22 – 30' in G. Simmel, *Untersuchungen über die Formen der Vergesellschaftung* (1908), at: <http://socio.ch/sim/soziologie/soz_1_ex1.htm>.

4 S. Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (2006).

against this background that global legal norms have emerged as instruments of connectivity.

Apart from the classical function of norms in relation to the stabilization of expectations, global legal norms are specifically aimed at the structuration of transfers, that is, the extraction, transmission, and implantation of condensed social components (*Sinnkomponente*) from one context to another. This is the case in relation to all functional systems in so far as such transfers can be observed in relation to political decisions, legal judgments, economic capital and products, scientific knowledge, and so forth. It is through their orientation towards such transfers that global legal norms obtain a role as connectivity-enhancing instruments.

This is also reflected in the evolutionary transformation of the legal norms aimed at stabilizing globally unfolding processes. One of the most central, perhaps *the* most central, structural transformation with which contemporary law and social sciences are grappling, is the still ongoing decentring of the world after the implosion of the Eurocentric world and the gradual decline of the Western-centric world. This transformation has not yet been fully conceptually and empirically understood, leaving the world in a vacuum of uncertainty.[5] Looking specifically at the institutionally embedded legal infrastructure of world society, this transformation can also be understood as a structural transformation from colonialism to contemporary transnational governance and human rights. Both colonialism and contemporary transnational governance go far beyond a mere focus on the economy, while, at the same time, the structuring of economic transfers remains central to both.[6] Zooming in on the economic dimension, one might empirically observe a shift from the economic dimension of colonialism to global supply chains as the central change in the structuring of global processes of economic transfers. Both colonialism and contemporary global supply chains rely on legal instruments, and both are characterized by a hierarchy of norms, which enable one to speak of their constitutionalization. The substantial norms upon which they rely are, however, very different, thereby allowing for an understanding of the economic dimension of colonialism and global supply chains as functional, but not as normative, equivalents. Or, to express it differently: the transformation from colonialism to global supply chains implies a fundamental shift in the constitutional grid of world society.

The article proceeds as follows: the first two steps are context-denoting exercises, briefly outlining the contours of world society and of global law. This is followed by the location of the approach advanced within the existing theoretical landscape highlighting the ambition to carve a path between unifying and radical pluralist approaches to global law. This ambition is

5 H. Brunkhorst, 'Constitutionalism and Democracy in the World Society'in *The Twilight of Constitutionalism?*, eds. P. Dobner and M. Loughlin (2010) 179, at 185 ff.

6 M. Xifaras, 'The Global Turn in Legal Theory' (2016) 29 *Canadian J. of Law & Jurisprudence* 215, at 219 ff.

substantiated in the two subsequent steps through the development of the notion of connectivity norms as a particular type of legal norm which, for structural reasons, tend to gain prominence in relation to globally unfolding social processes, and through a brief reconstruction of the central stages of the transformation from the economic dimension of colonialism to global supply chains and human rights. The article ends with a discussion of the implications of the findings for our understanding of constitutionalism in world society.

THE SOCIETAL CONTEXT: THE EMERGENCE OF WORLD SOCIETY

When introducing the concept of world society in the early 1970s, Luhmann encapsulated a whole string of developments which, several decades later, became part of the broader narrative on globalization.[7] The core element of Luhmann's concept of world society is the Husserlian concept of intentional horizons,[8] to which he gave a twist by arguing that, in world society, the social world in its entirety shares a common pool of potential experiences. Luhmann stipulated a process characterized by a fusion of horizons (*Horizontverschmelzung*) in Gadamer's sense.[9] As the concept of horizons are embedded in – and indeed constituted in – time, this development is furthermore closely linked to the emergence of world time as developed in the latter half of the nineteenth century, that is, a unitary concept of time enabling communication throughout the world without losing time.[10]

One might identify three phases in the historical emergence of world society: first, the European discovery of the world as a singular globe in the wake of the scientific and exploratory sightings of the fifteenth and sixteenth centuries and the concordant development of a singular – Eurocentric – legal order claiming to be valid for the world in its entirety.[11] Second, the emergence of a synchronized world which, as already mentioned, manifested itself in the emergence of world time from the 1850s onwards, a development which took place in the wake of technological changes, such as the steam ship, railways and the telegraph, as well as the second wave of European (and Japanese and United States) imperialist expansion leading to

7 For the Bielefeld school on world society, see R. Stichweh, *Die Weltgesellschaft: Soziologische Analysen* (2000); for Stanford school, see J.W. Meyer et al., 'World Society and the Nation-State' (1997) 103 *Am. J. of Sociology* 144.

8 N. Luhmann, 'Die Weltgesellschaft' (1971) 57 *Archiv für Rechts- und Sozialphilosophie* 1 (reprinted in N. Luhmann, *Soziologische Aufklärung 2. Aufsätze zur Theorie der Gesellschaft* (2009/1975) 51.

9 H.-G. Gadamer, *Wahrheit und Methode*, *Gesammelte Werke, Band I* (1986) 310 ff.

10 N. Luhmann, *Die Gesellschaft der Gesellschaft* (1997) 145 ff.

11 P.F. Kjaer, *Constitutionalism in the Global Realm – A Sociological Approach* (2014); C. Schmitt, *Der Nomos der Erde. Im Völkerrecht des Jus Publicum Europaeum* (1950).

the succumbing of the world in its entirety to globally unfolding and connected processes.[12] This is expressed in the globalization of function systems in relation to the economy, law, the mass media, politics, science, and so forth, and is also reflected in semantic articulations such as the 'world economy', 'world politics', and 'world literature'.[13] Third: the intensification of these processes from the 1960s onwards, as foreseen by Luhmann, through steady increases in global communication flows in the wake of new technologies, such as container shipping, satellite communication, and the Internet, as well as profound changes in the legal and regulatory set-ups, as, for example, reflected in the liberalization of capital flows during the last decades of the twentieth century, which led to a massive intensification of social exchanges with a global reach.

However, in spite of this development, the concept of world society remains underdetermined.[14] Systems theory stipulates the predominance of functional differentiation throughout world society. Indeed, the global systems of the economy, mass media, politics, and so forth, *do* exist today, a development which implies that other forms of differentiation such as centre/periphery, stratification, and segmentary differentiation increasingly become internal, and thus secondary, forms of differentiation unfolding *within* functionally-delineated systems. This is, for example, reflected in stratified global rankings *within* the area of higher education or the reliance on centre/periphery for the organization of global finance through the City in London and Wall Street in New York *within* the economic system. Questions, however, arise concerning the depth and degree of advancement of this development. The parts of the world where modernity, defined as the primacy of functional differentiation,[15] has gained outright dominance remain limited to a rather small part of the world, most notably, the North Atlantic area. Global cities characterized by strong elements of modernity exist throughout the world,[16] but, in most parts of the world, functional differentiation continues to stand in an orthogonal relationship to other forms of differentiation (centre/periphery, segmentary and stratificatory differentiation) in a manner which makes the thesis of an outright dominance of functional differentiation empirically questionable.[17] This might, of course, merely be a matter of 'causality in the south'.[18] But social evolution is blind

12 J. Osterhammel, *The Transformation of the World: A Global History of the Nineteenth Century* (2014) tr. P. Camiller.

13 R. Stichweh, 'Das Konzept der Weltgesellschaft: Genese und Strukturbildung eines globalen Gesellschaftssystems' (2008) 39 *Rechtstheorie* 329.

14 M. Amstutz and V. Karavas, 'Weltrecht: Ein Derridasches Monster' in *Soziologische Jurisprudenz. Festschrift für Gunther Teubner zum 65. Geburtstag*, eds. G.-P. Calliess et al. (2009) 645.

15 Luhmann, op. cit., n. 10, 145 ff.

16 S. Sassen, *The Global City: New York, London, Tokyo* (2001).

17 M. Neves, *Verfassung und Positivität des Rechts in der peripheren Moderne* (1992).

18 N. Luhmann, 'Kausalität im Süden' (1995) 1 *Soziale Systeme* 7.

and no guarantee exists for a future duplication of the modernization which unfolded in large segments of Europe and North America in the rest of the world. Only the current condition remains observable, a condition which can also be seen as characterized by crossbreeding and creolization, that is, a mixing of different types of communication, in a manner which evades the claim to 'purity' inherent to function systems.[19] So, although function systems do have global reach, they operate, in most contexts, in a manner which is characterized by a limited degree of distillation and only act as a thin layer of varnish spread out 'on top' of far more deep-seated forms of communication.[20] This is, for example, observable in post-colonial contexts in which interstices have emerged between the operations of formalized systems imposed from the outside and the pre-existing logics of organizing communication.[21]

THE LEGAL CONTEXT: THE EMERGENCE OF GLOBAL LAW

The gradual emergence, and intensification, of social exchanges within world society has been accompanied by, and, to a large extent, also been created by, a concordant appearance of global law as an emerging legal field. Emergent in so far as it still remains 'incomplete', making it a legal phenomenon, rather than a fully-fledged legal (sub)system.[22] This is the case as the delineation of the phenomenon of global law vis-à-vis national, international, transnational, as well as local community-based law remains blurred. National law has, from a classical positivist perspective, been understood as the internal law of nation states as derived from the concept of sovereignty. Classical international law is, as a reflection of the concept of national law, typically understood as the law between states, allowing for a conceptual exclusion of types of law, or law-like, phenomena which do not fit into its inter-state conceptual frame.[23] Transnational law can be understood as a category of any law which, one way or the other, in terms of jurisdiction, source or effect, crosses national borders. Hence, transnational law, in its original meaning, refers mainly – though not exclusively

19 M. Amstutz, 'Métissage. Zur Rechtsform in der Weltgesellschaft' in *Europäische Gesellschaftsverfassung. Zur Konstitutionalisierung sozialer Demokratie in Europa*, eds. A. Fischer-Lescano et al. (2009) 333; P.F. Kjaer, 'Law of the Worlds – Towards an Inter-SystemicTheory' in *Recht zwischen Dogmatik und Theorie. Marc Amstutz zum 50. Geburtstag*, eds S. Keller and S. Wipraechtiger (2012) 159.

20 Kjaer, id.

21 Amstutz, op. cit., n. 19; A. Mbembe, 'Qu'est-ce que la pensée postcoloniale?' *Esprit*, December 2006.

22 P. Le Golf, 'Global Law: A Legal Phenomenon Emerging from the Process of Globalization' (2007) 14 *Indiana J. of Global Legal Studies* 119.

23 J. Klabbers, 'Of Round Pegs and Square Holes: International Law and the Private Sector' in *Regulatory Hybridization in the Transnational Sphere*, eds. P. Jurèys et al. (2013) 29.

– to the external effects of national law.[24] It is against this background that the more recent notion of global law has emerged. Global law can, according to Neil Walker, refer to the mere rhetorical usage of the term 'global', for example, by law firms that present themselves as global actors. It can refer to a specific type of law with a (near) global reach, mainly referring to globally-acting institutions such as the United Nations or the World Trade Organization. However, in contrast to such perspectives, Walker conceptualizes global law as any type of law, irrespective of its origin or orientation, which *in principle* is, or can be, unlimited in its reach. Thus, global law claims – or can potentially claim – validity without reference to or being limited by a specific territory or population, although, for material and practical reasons, it will be limited in most cases.[25] Against this background, Walker considers EU law to represent the incarnation of global law, as it operates in a manner which means it is not strictly linked to territorial delineations just as there are, in principle, no limitations to its reach.[26]

While this universalizing dimension is a central feature of global law, one might, however, add two dimensions which give additional substance to the notion: in-between-ness and transfer. The basic structure of world society as characterized by global function systems, while faced with substantial indeterminacy in most parts of the world concerning the relationship between the different logics of differentiation and the increased internal fragmentation of function systems, implies that different function systems reconfigure this indeterminacy in different ways. In particular, although not just for the global systems of law and politics, this is expressed through a three-layer world. Whereas Luhmannian systems theory focuses solely on the horizontal fixation of function systems, which, in principle, enjoy equal status, a central element of world society is that it is also characterized by a vertical layering between local, national, and transnational processes.[27] It is in this complex matrix that a multitude of observations, transfers, and collisions between contextually-embedded units located both within the same layer and within different layers takes place. Global law can thus be defined as a universally applicable legal phenomenon of the 'in-between',[28] which is materially aimed at facilitating the separation, transmission, and incorporation of social components from one legally-structured context to another. Global law might, therefore, also be understood as a decentred

24 N. Walker, *Intimations of Global Law* (2015); P. Jessup, *Transnational Law* (1956); M. Avbelj, 'The Concept and Conceptions of Transnational and Global Law' (2016) WZB Discussion Paper SP IV 2016–801, 9.

25 Avbelj, id.

26 Walker, op. cit., n. 24. For a critique of 'boundaryless law', see A. Supiot, 'The Territorial Inscription of Laws' in Calliess et al. (eds.), op. cit., n. 14, p. 375.

27 Sassen, op. cit., n. 4; T.C. Halliday and G. Shaffer (eds.), *Transnational Legal Orders* (2015).

28 Amstutz and Karavas, op. cit., n. 14; de Sousa Santos, op. cit., n. 1.

phenomenon manifested in inter-legality,[29] which is universal in so far as it can appear in an infinite number of settings throughout the globe at the same time as it is a type of law which produces autonomous effects on the world: global law is not just reproducing 'structural couplings' or 'black boxes' merely serving as transmission belts between different (sub)systems. On the contrary, the structuring of the separation, transmission, and incorporation of condensed social components from one (sub)system to another by global law implies (as we will return to later) that the condensed social components and the meaning ascribed to them is changed in the process of separation, transmission, and incorporation. Or, to express it differently: what is separated is not equal to what is incorporated.

THE APPROACH: CARVING A THIRD WAY BETWEEN UNIFICATION AND PLURALISM

A general implication of the above insight is that systems theory needs to be complemented with a theory of the 'in-between' which stands in an orthogonal relationship to systems theory itself. Such an undertaking goes beyond the scope of this article, but looking into global law might, however, provide some clues concerning the direction.[30]

Global law relies on and combines elements from local, national, international, and transnational law, while also reproducing legal figures of its own. International public law, defined as the rules and norms guiding relations between governments and other state entities, as well as private international law, understood as rules for selecting the applicable law and type of contract in cross-border constellations, including the issue of court competence in cases of dispute,[31] can both serve as vehicles of global law. The same goes for the academic discipline of comparative law which has, as its core element, the comparison of different legal systems, and, as such, provides a foundation for the divergences which international public and private law focuses upon and thus also provides for any possible harmonization efforts. As such, comparative law, as an academic discipline, can be seen as producing performative effects which are essential for global law. International economic law, defined as the rules and norms guiding cross-border economic transactions and including sub-fields such as trade and investment law, as well as the disputed phenomenon of *lex mercatoria*, the body of principles guiding cross-border commercial contracts, are also phenomena which provide essential building-blocks for global law at the

29 G. Palombella, 'Global Law and the Law on the Globe. Layers, Legalities and the Rule of Law Principle' (2012) 4 *Italian J. of Public Law* 53.

30 See, however, P.F. Kjaer, 'Systems in Context: On the Outcome of the Habermas/Luhmann-debate' (2006) *Ancilla Iuris* 66.

31 See Le Golf, op. cit., n. 22, pp. 122 ff.

same time as the notion of global law becomes broader by going beyond economic transactions and by stipulating a broader contextual impact 'on society as such', rather than merely dealing with economic logics.[32]

With the emphasis on the decentred universality of global law, a path is formed between the major positions dealing with global law to date: unifying and pluralist, or convergence- and divergence-oriented, perspectives. The unifying perspective has been most clearly developed from within international public law, that is, positions which claim the existence of a singular hierarchy of legal norms in world society, typically seen as embedded in the law of the United Nations and an understanding of the UN Charter as a 'constitution for the world' upon the basis of a claim to normative singularity.[33] A loosely system-theoretically inspired variant of this has emerged through the claim that a singular legal system is constitutive for the world, as such, providing the (international) public law dimension of the legal system with a foundational position as the meta-system which constitutes society.[34] But also within (international) private law, harmonizing efforts have been central, as expressed in the attempt to establish a European civil code project[35] and the call for a singular global commercial code.[36] In contrast, pluralist perspectives have highlighted the fundamental acentric and non-hierarchical nature of law in world society, emphasizing a reworked conflict-of-laws perspectives for a fragmented world[37] and the political dimension of legal diversity.[38]

This paradoxical unity of diversity can, however, be dissolved through recourse to time, to a historical unfolding of the evolution of global law and global legal norms: a historical sociology of law approach aimed at analysing the functional pull leading to the emergence of global legal norms, combined with an evolutionary theory approach aimed at the transformation

32 id.

33 The Charter of the United Nations, 26 June 1945, at <http://www.un.org/en/sections/un-charter/un-charter-full-text/>; B. Fassbender, '"We the Peoples of the United Nations" Constituent Power and Constitutional Form in International Law' in *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, eds. M. Loughlin and N. Walker (2008) ch. 14.

34 See C. Thornhill, *A Sociology of Transnational Constitutions: The Social Foundations of the Post-National Legal Structure* (2016).

35 C. von Bar et al., *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Vol. 2* (2009).

36 O. Lando, 'A Global Commercial Code' (2004) 50 *Recht der Internationalen Wirtschaft* 161.

37 A. Fischer-Lescano and G. Teubner, *Regime-Kollisionen: Zur Fragmentierung des Weltrechts* (2006); M. Koskenniemi, 'Legal Fragmentation(s) – An Essay on Fluidity and Form' in Calliess et al. (eds.), op. cit., n. 14, p. 795. See, also, the contributions of C. Joerges et al., 'A New Type of Conflicts Law as Constitutional Form in the Postnational Constellation' (2011) 2 *Transnational Legal Theory* 153.

38 N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (2010).

of global legal norms over time, and the internal and external effects produced through such norms.[39] From such a perspective, a key insight is that global legal norms in a particular imperial, that is, transcendental and universal, form preceded Westphalian (nation-)state law.[40] In addition, it can be observed that modern nation-state law and the law of modern transnational governance co-emerged over a century-long process in a dialectically and mutually reinforcing relationship.[41] This was a process which, simply put, came in two phases: first, the gradual emergence of territorial states in western Europe from the sixteenth century onwards and the concomitant and simultaneous build-up of large-scale colonial empires with a global reach upon the basis of global colonial law. Second, the globalization of statehood through the structural transformation initiated with the breakdown of the central and eastern European empires in the wake of the First World War, which subsequently expanded throughout the globe via mid-twentieth century decolonialization, combined with a concomitant replacement of colonialism and colonial law with contemporary global governance and law.[42]

THE PROBLEM: THE PRESTATION OF GLOBAL NORMS

The structure of world society and global law as described above poses the classical sociological question, 'how is society possible?'[43] in a new light. The progressive decentring of first, the Eurocentric, and in our time, the Western-centric world implies that, paradoxically, growing globalization has increased, rather than diminished, the decentredness of world society.[44] The issue of connectivity in the decentred world society has therefore become *a* crucial, and maybe *the* most crucial, question of our time. This development

39 For the term historical sociology of law, see M. Rask Madsen and C. Thornhill, 'Introduction: Law and the Formation of Modern Europe – Perspectives from the Historical Sociology of Law' in *Law and the Formation of Modern Europe: Perspectives from the Sociology of Law*, eds. M. Rask Madsen and C. Thornhill (2014); for further reflections on its method specifically in relation to constitutional research, see Thornhill, op. cit., n. 34, pp. 12 ff.

40 For this perspective, see, in particular, H. Brunkhorst, *Critical Theory of Legal Revolutions: Evolutionary Perspectives* (2014). Neil Walker also distinguishes a particular set of 'historical-discursive approaches' to global law, but merely includes contemporary debate on global constitutionalism, constitutionalization of international law, and global administrative law while essentially discarding any long-term historical perspective on global law: see Walker, op. cit., n. 24, pp. 86 ff.

41 Kjaer, op. cit., n. 11, pp. 31 ff.

42 id., pp. 17 ff.

43 Simmel, op. cit., n. 3.

44 P.F. Kjaer, 'Facilitating transfers: regulatory governance frameworks as "rites of passage"' (2018) 24 *Contemporary Politics*, published online 15 March 2018, doi.org/10.1080/13569775.2018.1452105.

might amount to a shift from a relative predominance of logics of differentiation to an increased centrality of logics of connectivity, that is, inter-systemic connectivity.[45] How do systems increase the probability of connectivity in relation to globally unfolding processes marked by an indeterminacy concerning which form of differentiation is the primary one in large segments of the world, and especially in situations which imply connectivity between components of communication situated in different contexts characterized by different constellations and primacies of the forms of differentiation? And how does the internal fragmentation of function systems affect such processes?

As a reflection of this state of affairs, new types of intermediaries have emerged which tend to be network-based and rely on legal instruments for their stabilization.[46] Global supply chains, the global human rights regime, and the climate change regime are examples of such intermediary structures. Strategically, they tend to be located within a single function system such as the economic, the legal or the imaginary but, nonetheless, socially real system of the ecological environment, at the same time as their *raison d'être* is a double one: to produce internal coherency and connectivity within their respective function systems on a global scale and externally to recontextualize communicative components when they are transferred from one context to another, for example, from a context characterized by a primacy of functional differentiation to a context where such primacy is not manifest or vice versa. Their function is therefore to reproduce a paradoxical unity between function systems and multiple social contexts, as defined by the involved systems, while facilitating the transfer of condensed social components between such contexts.

In world society, the central issue of connectivity is therefore one of transfer. Following Rudolf Stichweh, the transfer of condensed social components (*Sinnkomponente*), as is known from the literature on legal transfers, has at least five characteristics. First, 'the objects of transfer' are compact and distilled units of meaning, such as political/bureaucratic decisions, legal judgments, economic products, economic capital, and scientific or technological knowledge, all of which are clearly demarcated and possess a clear functional orientation. Second, an act of transfer implies that the transferred unit(s) possess significant information value which is likely to be both recognizable and able to produce an impact in the receiving context. Third, transfer implies boundary crossings, in so far as the units are dispatched from one context to another in a manner which is conceived of as a boundary crossing by both the dispatching and the receiving systems. Fourth, transfer implies distance, either spatially and/or in terms of time.

45 Kjaer, op. cit., n. 30, p. 77.

46 P.F. Kjaer, 'The Metamorphosis of the Functional Synthesis: A Continental European Perspective on Governance, Law and the Political in the Transnational Space' (2010) *Wisconsin Law Rev.* 489.

Fifth, a certain permanence needs to be observable, typically based upon a *repetition* of the processes of the dispatch and receipt of the condensed social components which are similar, or at least recognizable as similar, over a longer time span.[47]

Adding to Stichweh's list, one might, however, argue that norms of transfer and connectivity are constitutive for increasing the probability of successful transfers. When introducing the concept of world society, Luhmann advanced the 'speculative hypothesis' that the emergence of world society would imply a relative reduction in the centrality of normative expectations and a relative increase in the centrality of cognitive expectations for the reproduction of world society. Social phenomena and processes which rely heavily on normative expectations, such as law, politics, and morality will, according to Luhmann's expectation, lose out while the economy, technology, and science which, he argues, are characterized by a stronger reliance on cognitive expectations, will gain in centrality.[48] Normative expectations are understood here as expectations which are upheld even if not fulfilled, thereby making them into contra-factually stabilized expectations, whereas cognitive expectations are understood as expectations which are changed in the event of non-fulfilment.[49] Twenty years before the publication of Jürgen Habermas's *Between Facts and Norms* (*Faktizität und Geltung*) which, as reflected in the original title, departs from a basic distinction between the factual and the normative, Luhmann had explicitly dismissed this distinction and replaced it with a distinction between normative and cognitive expectations. One of the advantages of this is to highlight that normative based contra-factual expectations are as real as cognitive expectations. The social world is characterized by a doubling of reality (*Realitätsverdopplung*) between the factually existing world and equally real communicatively articulated contra-factual visions of how the world should be.[50]

While accepting the latter point concerning the doubling of reality and the equally real reality of normative based communication, one might, however, question the empirical validity of the former, concerning a relative reduction in the centrality of normativity, expressed through expectations, in world society. Globally unfolding processes do not rely on norms to a lesser extent than more locally or nationally embedded processes.[51] Rather, they rely on a specific subtype of norm different from those norms associated with local or national unfolding processes.

47 R. Stichweh, 'Transfer in Sozialsystemen: Theoretische Überlegungen' in *Rechtstransfer in der Geschichte*, eds. V. Duss, N. Linder et al. (2006) 1: for more detailed analysis of the transfer issue, see Kjaer, op. cit., n. 44.

48 Luhmann, op. cit., n. 8.

49 N. Luhmann, *Rechtssoziologie Auflage: 4* (2008/1972) 40 ff.

50 N. Luhmann, '*Quod Omnes Tangit*: Remarks on Jürgen Habermas's Legal Theory' (1996) 17 *Cardozo Law Rev.* 883.

51 For more on this, see Kjaer, op. cit., n. 11, pp. 43 ff.

Within analytical philosophy, the core focus of norms is the issue of validity, that is, whether a given norm is the right one or not.[52] However, from a sociological perspective, the issue of validity is not the central question. Instead, two contrasting views appear to which one might add a third one which is particular relevant for globally unfolding processes:

- *Coherency norms*: within a 'traditional' sociological perspective, norms tend to be seen as 'instruments of collectivity', which is aimed at establishing coherency within a group, such as a tribe or a nation, through the prescription of specific actions, which are considered as desirable for the members of the group, prescriptions which are combined with an injunction, that is, a sanction, aimed at increasing the probability of future compliance with the norm by members of the group.[53]
- *Possibility norms*: from this perspective, a norm introduces a distinction through a distance to the factually existing social reality as perceived in a given social context, through the introduction of a contra-factual perspective. Possibility norms are, in direct opposition to coherency norms, instruments through which possible alternatives to the given social reality are unfolded, thereby marking possible futures in a manner which accentuates the openness, rather than the reticence, of the future.[54]
- *Connectivity norms*: it is in contrast to the above two perspectives that one might introduce a third variant particularly suited for global contexts, combining elements of the two previous ones while also going beyond them. Here, norms are considered as instruments aimed at facilitating the separation, transmission, and incorporation of social components from one context to another. They are oriented towards the separation of social components from one social context, and provide guiding principles for their transmission and incorporation into other context(s) while relying on sanctions as well as inducing reflexive learning mechanisms vis-à-vis agents based in different contexts in order to increase contra-factually the probability of successful transfers in the future.

Connectivity norms increase possibilities, in so far as they are aimed at opening up the possibility of transfers while at the same time very much aimed at ensuring compatibility between processes unfolding in different contexts, a form of compatibility which implies that the stabilization of processes of transfer, rather than the opening up of possibilities, takes precedence, as compatibility does not amount to an intention to establish coherence *within* a collectivity. But, at the same time, the notion of

52 See, for example, C. Korsgaard, *The Sources of Normativity* (1996).

53 J. Blake and K. Davis, 'Norms, Values and Sanctions' in *Handbook of Modern Sociology*, ed. R.E.L. Faris (1964) 456; H. Hydén, *Normvetenskap* (2002) 96 ff.; T. Parsons, *The Structure of Social Action: A Study in Social Theory with Special Reference to a Group of Recent European Writers* (1968/1937).

54 N. Luhmann, *Rechtssystem und Rechtsdogmatik* (1974); C. Möllers, *Die Möglichkeit der Normen: Über eine Praxis jenseits von Moralität und Kausalität* (2015) 13 ff.

collectivity remains crucial in so far as increasing the probability of transfers implies the development of internal images, or imaginaries, of collectivity within both the departing and receiving systems, which are typically manifested in legal constructions of collectivity, for example, through legal notions of 'the nation' or 'the community', which serves as the addressees of transfers.

The three norm dimensions can also be seen as representing the three meaning dimensions of any social process: the substantial, the temporal, and the social.[55] This again highlights that all three dimensions are always present within a given norm while the weight between them will differ in relation to different types of social processes and in different contextual circumstances. In praxis, the three dimensions of norms provide three different types of intentionality as expressed in the objects against which the norms are oriented, namely, collectivities, articulated futures, and acts of transfer, while each of them predominantly rely on three different types of instruments in their intention to bridge the factual and non-factuality: punishment, programmes articulating possible futures, or processes of maintaining connectivity.

Table 1. The three norm dimensions

Norm dimensions	**Coherency**	**Possibility**	**Connectivity**
Types of meaning	Substantial	Time	Social
Objects of intentionality	Collectivities	Articulated futures	Acts of transfer
Instruments of realization	Punishment	Programmes	Processes

Global legal norms are, according to the argument advanced here, overwhelmingly oriented towards the connectivity dimension, to the extent that one might argue that the prestation (*Leistung*) of global legal norms is to increase the probability of connectivity. This, for example, is the case in relation to the micro-economic constitution of the European Union, the constitution of the internal market.[56] The internal market might be seen as a paradigmatic case of a legal constitution of a substantial social process, namely, economic exchange, which is aimed at increasing economic connectivity across diverse legally-entrenched contexts through the introduction of a hierarchy of norms as expressed through the four freedoms for goods,

55 N. Luhmann, *Soziale Systeme* (1984) 112 ff.
56 K. Tuori and K. Tuori, *The Eurozone Crisis: A Constitutional Analysis* (2014) 13 ff.

capital, services, and labour. A constitution which, furthermore, has no prescribed territorial limits as expressed by the inclusion of the European Economic Area (Iceland, Lichtenstein, and Norway) as well as the partial inclusion of a whole string of other jurisdictions.

FROM COLONIALISM TO GLOBAL SUPPLY CHAINS

The internal market was already laid down in the Treaty of Rome of 1957 and its realization was inherently linked to the implosion of both continental and overseas European empires and the progressive decentring of the eurocentric world which followed from these implosions.[57] It is therefore not surprising that what is now known as European Union law has gained the status as the prototype of contemporary global law.[58] In spite of the avant-garde position of European Union law, it only represents one species of global law, as legally-entrenched norms of connectivity can be observed throughout world society. Phenomena such as ecological communication, in relation to climate change, or migration and global health management, in relation to the epidemic diseases, the global tourism infrastructure as well as global infrastructures, in relation to telecommunication and the Internet or aviation and shipping logistics,[59] are all bound on norms of connectivity and global law.

Two other examples include global supply chains and the global human rights regime. The former is predominantly linked to (international) private law while the latter might be seen as originating from the (international) public law regime. However, the distinctiveness of the global human rights regimes when it comes to global law is, as we will see in the final section, not so much linked to its origins within public law as to the way it provides a self-reflexive constitution of global law.

Global supply chains have become a central piece of infrastructure of the global economy. A typical definition of a supply chain characterizes it as 'a system of organizations, people, activities, information, and resources involved in moving a product or service from supplier to customer.'[60] A global supply chain furthermore implies that the chain crosses boundaries. From the background outlined above, this definition might be rephrased in the following manner:

57 Brunkhorst, op. cit., n. 40; J.E. Fossum and A.J. Menéndez, *The Constitution's Gift: A Constitutional Theory for a Democratic European Union* (2011).

58 Walker, op. cit., n. 24, pp. 110 ff.

59 B. Larkin, 'The Politics and Poetics of Infrastructure' (2013) 42 *Annual Rev. of Anthropology* 327.

60 See <https://en.wikipedia.org/wiki/Supply_chain>.

> A network stretching from suppliers to customers which is engaged in the extraction, transmission and incorporation of condensed social components, that is, capital, products and persons, from one societal context to another which can be either upstream or downstream or a combination hereof and implying boundary crossings, as part of the production of economic processes as well as the re-production of societal conditions allowing for the production of economic processes.

Global supply chains can furthermore be distinguished from global supply-chain management, which might be defined as the second-order dynamic stabilization of global supply chains through organizational, managerial, and legal instruments with the objective of increasing the probability of extraction, transmission, and incorporation of condensed social components with economic value from one social context to another. The term 'dynamic stabilization' is crucial here, as it implies that the second-order stabilizing layer itself is moving, but at a slower pace than the focal first-order processes that it is oriented towards. The distinction between supply chains and supply-chain management is therefore tightly linked to the distinction between cognitive and normative structures of expectation in so far as cognitive expectations are constantly changing while normative expectations are characterized by a higher level of stability. In contrast to the Luhmannian view concerning the constancy, that is, the non-changeable characteristics of normative expectations, it should, however, be noted that normative expectations also change over time, only at a slower pace than cognitive expectations. Under modern conditions, the function of constitutions might therefore be understood to be its orientation towards bridging the time gap between first-order cognitive expectations and second-order normative expectations.[61]

Global supply chains are typically understood as a post-war phenomenon which gained increased relevance from the early 1980s onwards through a fundamental reconceptualization, implying increased formalization as well as the emergence of (self-)reflective formations, through the emergence of the educational, legal, and organizational praxes specifically dealing with global supply chains. The post-war 'invention' of global supply chains was, however, largely a 're-invention', as supply chains have, of course, been a constitutive element of commerce from day one just as global supply chains have been running at least since the emergence of European colonialism in the late fifteenth century. For example, the slave trade coming out of Africa also implied complex supply chains for the Arabic world as well as the Americas.[62] The organizational dimension of colonialism might furthermore be considered as a particular form of global supply-chain management, as

61 Kjaer, op. cit., n. 11, pp. 45 and 66 ff.

62 P. Manning, 'The Slave Trade: The Formal Demography of a Global System' in *The Atlantic Slave Trade: Effects on Economies, Societies and Peoples in Africa, the Americas, and Europe*, eds. J.E. Inikori and S.L. Engerman (1992) 117.

the core purpose of colonialism was the extraction, transmission, and incorporation of condensed social components with a predominantly, albeit not exclusively, economic value. The central societal transformation related to the emergence of the contemporary form of global supply chains is therefore to be found in the structural transformation away from centre/periphery-organized colonialism to functionally-differentiated sectorial regimes within the global economic system.

In this context, tightly woven second-order normative frameworks have emerged which have global supply chains as their point of orientation. A focus point has been the 'principled approach to doing business' outlined in the ten principles of the UN Global Compact, which covers areas such as human rights, labour, environment, and anti-corruption.[63] Similar frameworks have been developed by UNCTAD and the OECD, just as NGOs and, not least, multinational firms engaged in global supply chains themselves have developed extensive normative frameworks aimed at regulating and stabilizing such processes.[64]

Luhmannian functional equivalence, which is not to be equalled with classical functionalism à la Durkheim, Malinowski, Merton or Parsons, has three implications: (i) that a given problem can be addressed in multiple ways; (ii) that the essential problem for social systems is to connect to the next future operation; and (iii) that function systems seek to expand, thereby universalizing, their reach.[65] Against this background, when considered as in-between structures oriented towards the problem of establishing a reproductive chain of extraction, transmission, and incorporation, colonialism and global supply chains might be considered functionally equivalent structures, as they are aimed at addressing the same problem. The contemporary form of global supply chains emerged in the wake of decolonialization acting as 'substitutes' for the type of extraction, transmission, and incorporation that unfolded through colonialism. This image is reinforced through the asymmetric relationship between upstream and downstream flows in both settings. Upstream is defined here as a move towards the end receiver, that is, the consumer, of social components which are being increasingly condensed in the process of flowing upstream, while flow downstream characterizes the opposite movement.

63 UN Global Compact, at <https://www.unglobalcompact.org/what-is-gc/mission/principles>.

64 See, for example, L.C. Backer, 'Economic Globalization and the Rise of Efficient Systems of Global Private Lawmaking: Wal-Mart as Global Legislator' (2007) 37 *Connecticut Law Rev.* 1739.

65 For a pedagogical explanation of the concept of functional equivalence, see M. Hanna, 'Between Law and Transnational Social Movement Organizations: Stabilizing Expectations of Global Public Goods' (2017) 44 *J. of Law and Society* 345, at 352 ff. More generally, see, also, N. Luhmann, *Zweckbegriff und Systemrationalität: Über die Funktion von Zwecken in sozialen Systemen* (1973/1968); Stichweh, op. cit., n. 7.

Considerable variation can be observed between the legal foundations of, for example, Belgian, British, Danish, Dutch, French, German, Spanish, and Portuguese colonial law, thereby opening up another 'yet to be developed' scholarly field of comparative colonial law.[66] A common feature of colonialism in its various forms was, however, that it obtained a second-order normative, that is, legal, stabilization through the principles of *dominium* (ownership), *ius gentium* (the law of peoples), and *bellum iustum* (just war).[67] For the economic dimension of colonialism, the central element was the development of a horizontal network of *dominium* based upon contracts and globally enforceable property rights combined with an equally global principle of unhindered commerce and access to resources. This upstream economic orientation was furthermore combined with a downstream principle concerning unhindered access for Christian missionary activities. Instead of annexing territory, global capitalist exchanges and the transmission of religious values thereby became the legally-structured foundation of colonialism, making an upstream and downstream 'right to extraction, transmission, and incorporation' upon the basis of connectivity norms, the core principle on which global exchanges relied.[68] However, due to the distinction between Christians and non-Christians on which the norms of connectivity relied, they opened up for and reinforced fundamentally asymmetric exchanges.

For the first phase of colonialism running from the late fifteenth century to the nationalization of the Dutch East India Company in 1800, the French conquest of Algeria from 1830 onwards, and the nationalization of the British East India Company in 1858, private law principles of commercial law provided the normative underpinning of colonialism. This only changed gradually with the increased transformation of colonialism into directly state-driven endeavours which increasingly shifted colonialism towards direct territorial conquest and rule. This was, for example, reflected in the series of wars from 1821–1895 through which Dutch East India was transformed from a collection of more or less secure trading-posts into an entity characterized by the exercise of widespread territorial control; the consolidation of British rule in India through both direct and indirect means in the mid-nineteenth century; and the colonization of the inner parts of Africa from the late 1870s onwards, a development which gave the central

66 O. Le Cour Grandmaison, 'L'exception et la règle: sur le droit colonial français' (2005) 212 *Diogène* 42; M. Koskenniemi, 'Colonial Laws: Sources, Strategies and Lessons?' (2016) 18 *J. of the History of International Law* 248.

67 M. Koskenniemi, 'Empire and International Law: The Real Spanish Contribution' (2011) 61 *University of Toronto Law J.* 1.

68 id., pp. 32 ff.

impetus for the development of modern international law, providing a different normative underpinning to global connectivity while running in a complementary fashion to the previous developed principles of private colonialism. This shift implied an increased emphasis on the civilizing responsibility of colonialism in a manner which went beyond the previous right to evangelism, and emphasized issues such as 'societal progress' and 'modernization' instead.[69]

Only with the third phase of globalization emerging in the post-war era did the combined element of global supply chains and modern human rights become the central factual and contra-factual infrastructure of global commerce. The history of global human rights is a long one which, in its modern version, can be traced back to at least the 'Atlantic Revolutions', the revolutionary wave unfolding throughout Europe, and North and South America in the late-eighteenth and early-nineteenth centuries.[70] Specifically for the global reach of human rights, the anti-slave trade movement has furthermore been identified as central,[71] while the opposite case has also been made on the basis of the view that a fundamental shift in the purpose and set-up of human rights occurred in the latter half of the twentieth century as a consequence of decolonization.[72]

While the history of global human rights can thus be considered as one which is characterized by both continuities and discontinuities, the debate so far has been conducted by legal historians with little emphasis on sociology of law perspectives on the changed status of human rights in the third wave of globalization. Within established and institutionally stable democracies, constitutionally guaranteed basic rights are legal rights intrinsically linked to their operational realization within the legal system upon the basis of the dual function of securing functional differentiation and individual autonomy.[73] Global human rights have a different dual function both of which can be conceived of in constitutional terms: first, to secure the stabilization, and with it the legitimization, of regimes of transfer on a global scale. This, for

69 For the classical reconstruction of this, see M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (2001).

70 Brunkhorst, op. cit., n. 40, pp. 233 ff.

71 J. Martinez, *The Slave Trade and the Origins of International Human Rights* (2014).

72 S. Moyn, *The Last Utopia: Human Rights in History* (2010). For a 'third way' between Martinez, id. and Moyn, see P. Alston, 'Does the Past Matter? On the Origins of Human Rights An Analysis of Competing Histories of the Origins of International Human Rights Law' (2013) 126 *Harvard Law Rev.* 2043; Walker, op. cit., n. 24, pp. 73 ff. See, also, S.L.B. Jensen, *The Making of International Human Rights: The 1960s, Decolonization, and the Reconstruction of Global Values* (2016).

73 N. Luhmann, *Grundrechte als Institution. Ein Beitrag zur politischen Soziologie* (1965); G. Verschraegen, 'Human Rights and Modern Society: A Sociological Analysis from the Perspective of Systems Theory' (2002) 29 *J. of Law and Society* 258; G. Verschraegen, 'Systems Theory and the Paradox of Human Rights' in *Luhmann on Law and Politics: Critical Appraisals and Applications*, eds. M. King and C. Thornhill (2006) 101.

example, is the case within company internal approaches[74] as well as broader regime-based approaches to human rights as embedded in strategies of corporate social responsibility.[75] Such strategies are aimed at generalizing communication across contextual boundaries, thereby allowing for multi-contextual embeddedness, that is, the simultaneous compatibility of condensed social components with multiple social environments at different stages of a supply-chain stream. The ten principles of the UN Global Compact and similar frameworks in such contexts are intended to provide a second-order stabilization of the legal and managerial set-up of globally-unfolding economic processes, thereby giving them a character as constitutional principles establishing hierarchies of norms vis-à-vis such processes.

Secondly, in contrast to previous colonial forms of justification and normative stabilization, contemporary human rights-based forms are not formally based upon an asymmetric distinction, such as the colonial distinction between Christian and non-Christian. Factually, however, they tend to be characterized by inbuilt asymmetries in terms of resources and the articulation of values and direction.[76] This gives global human rights an aspirational function in a broader societal as well as in a narrow legal sense in relation to their own realization. Societally, global humans rights can be seen as oriented towards the realization of functional differentiation and individual autonomy in the segments of the world which are characterized by communicative crossbreeding and creolization. Legally, what gives it a strategic position of constitutional worth *within* the legal system is its function as a framework for the transfer of transfers, in so far as the function of a global human rights regime is to facilitate the transfer of legal norms which are aimed at facilitating broader societal transfers of, for example, an economic or religious nature. Or to put it differently, the contra-factual orientation of the global human rights regime is to transpose legal norms which originally emerged in the Western world on a global scale, that is, to universalize the legal system of Western law,[77] thereby constitutionalizing the legal system's own global connectivity.

74 K.P. Japp, 'Zur Funktion der Menschenrechte in der Weltgesellschaft – Niklas Luhmanns "Grundrechte als Institution" Revisited' in *Menschenrechte in der Weltgesellschaft*, *Deutungswandel und Wirkungsweise eines globalen Leitwerts*, eds. B. Heintz and B. Leisering (2015) 65.

75 K. Buhmann, 'Business and Human Rights: Understanding the UN Guiding Principles from the Perspective of Transnational Business Governance Interactions' (2015) 6 *Transnational Legal Theory* 399.

76 Kjaer, note 46 above.

77 A. Supiot, 'The Labyrinth of Human Rights. Credo or Common Resource?' *New Left Rev.* no. 21, May–June 2003, 118.

CONCLUSION

Within the framework of systems theory, an elaborated and sophisticated theory of global societal constitutionalism has been developed. While this approach has provided essential insights into the possibility of constitutionalizing global processes, this contribution has developed an alternative perspective, standing orthogonal to the systems theoretical approach, on the basis of an epistemological switch from a focus on differentiation to a focus on connectivity. The core thesis advanced is that global legal settings are characterized by a relative predominance of connectivity norms as opposed to coherence or possibility norms. Connectivity norms are oriented towards the facilitation of transfers of legally condensed social components of, for example, an economic or religious nature from one legally structured societal context to another. Connectivity norms were the predominant form of norms in colonialism as well as in contemporary global governance. But while reproducing identical functions of transfer, they rely on fundamentally different normative set-ups. They are therefore to be understood as functional but not as normative equivalents. Colonialism relied on highly asymmetric distinctions, namely, between Christians and non-Christians, while contemporary global governance subscribes to symmetric distinctions as embodied in the global human rights regime – a human rights regime which obtains a second-order constitutionalizing function through its role in facilitating the transfer of law itself.