

# **From National Sovereignty to International and Global Cooperation: The Changing Context and Challenges of Constitutional Law in a Global Society**

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## 1 Introduction: National Constitutionalism and the New International Treaties

Constitutions and constitutionalism have been vital parts of the normative tradition of the nation state as it evolved first in the post-Westphalian era and then in the age of the evolution of democracy and human rights. *Nation-states, delimited territories, citizens, sovereignty, basic rights, democracy and constitutions* have been closely linked historically and also mutually stabilized by conferring meaning on each other. Each nation-state has also been embedded in specific historical trajectories, socially, economically and politically, and also to one or several languages and cultural traditions. *Constitutions*, both as symbols and as more active documents, have played a vital role in the traditions of nation-states in their specification of principles, procedures and competences and by inducing stability. *Constitutionalism* as a way of thinking has been closely linked to the existence and the idea of the nation-state and its *sovereignty*.<sup>1</sup> Constitutionalism has then also been seen as a vital expression of the division line between sovereign nation-states on the one hand and the international society on the other hand and the political order which this has been linked to. Constitutions have been seen as an almost necessary expression of national sovereignty. In most cases the constitutions are written and positively given, but they are also “lived” and practiced. Because constitutions also are about principles and rules which are deemed to be long lasting, interpretation is often vital. *Democracy*, the practice of democratic institutions and the practice of human rights have also in the period of modernity, to a significant extent, been expressed by or via the institutions of *nation states* and their *democratic elections*. Inter- and transnational institutions have only indirectly built on the democratic representations of the nation states, but have contributed more directly to the ideas and the practice of human rights internationally.

Constitutions have then played a role in the expression and stabilization of national *sovereignty*. They have been parts of the establishing and the stabilizing of *democratic elections and institutions*, and they have functioned as vital parts of the framework of *the legal system* of the nation states. The interaction and interdependence between these different aspects or institutions of the politico-legal order are so close that it may be difficult to know the exact contribution and significance of each. Their embeddedness in specific historical and social contexts may also blur the possibilities of analyzing the contributions of the more formal institutions. The variations of such contexts also make generalizations about the more exact role of constitutions difficult. Constitutions do however have a dual function of *boundary-setting* and delimiting on the one hand and *enabling* institutions and competences on the other. Constitutions are part of the internal/external boundary-setting. They are part of the creation of the *internal* sovereign and enabling state competences and the demarcation of their

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1 J.H.H.Weiler, *The European Constitution*, Oxford: Oxford University Press, 1999, ch. 9 and 10; Gunter Teubner, *Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory*, and Inger-Johanne Sand, *Polycontextuality as an Alternative to Constitutionalism*, in *Transnational Governance and Constitutionalism*, eds. Joerges, Sand and Teubner, Oxford: Hart, 2004.

boundaries towards other nation states. Constitutions will also include the definition of the *external* sovereignty of nation states, that is the competences to cooperate and enter into treaties with other states. The principles of national sovereignty and the use of constitutions have been parts of the post-Westphalian political order of a balance of sovereign nation-states on the one hand and voluntary (and limited) cooperation between these on an interstate level, on the other.<sup>2</sup>

With the increasing *factual globalization* of many areas such as the economy, trade, environmental and climate change, cultural exchange and the development of knowledge and new technologies an increasing number of social dynamics have become global. Social, economic, political etc problems will then increasingly have to be solved also on an international basis.<sup>3</sup> The last twenty years have thus seen *a qualitative rise in the number of new international treaties*. The treaties are also increasingly covering areas which previously were regulated only by national authorities and for national purposes.<sup>4</sup> The areas particularly affected are trade and competition law, human rights and environmental law, but to some extent these areas are regulated in ways which also affect other areas such as economic law in general, public administrative law, social services, health law, the regulation of biotechnology and of the internet etc. Particularly the rules on the free movement of goods, services, persons and capital in the EU, and similar rules in the GATT, have had very comprehensive regulatory effects for both public and private law. In some instances such as the EU supranational competences with direct effect are transferred to an international organization. In most instances however the treaties are results of international negotiations and cooperation, with national transformations and implementation. The number of *international organizations* has grown, and they have also become increasingly active and relatively independent (*de facto*). An increasing number of *international courts and other conflict-resolution mechanisms* have also been constructed.<sup>5</sup>

The result is that significant parts of the constitutional competences of national authorities either have been transferred to *supranational* organizations or are *de facto* being conducted as part of and in the context of *international* negotiations and obligations by national authorities and international organizations jointly. Also when international treaties are without legal sanctions, there is today an increasing political, economic and symbolic pressure to enact and respect the treaties. Vital tasks are also taken on by *transnational* organizations and markets. What used to be seen solely as national constitutional

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2 David Held, *Cosmopolitan Democracy* in *Models of Democracy*, London: Polity Press, 1997.

3 Cf. Jan Art Scholte, *Globalization – an Introduction*, Basingstoke: Palgrave, 2000; David Held, *A Global Covenant*, Cambridge: Polity Press, 2004.

4 J.H.H.Weiler, *ibid.*, 1999, ch.9 and 10; Robert Howse, *Democracy, science and free trade: Risk regulation on trial at the world trade organization*, *Michigan Law Review*, vol.98, p. 2329 f., 2000.

5 Gunther Teubner and Andreas Fischer-Lescano, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of International Law*. *Michigan Journal of International Law*, vol.25, 2004, p. 999-1046.

competences to be used by national authorities, are now increasingly de facto and de lege being used as part of international cooperation, negotiations and treaties. *The function and the role of national constitutions both as authorizing and as authoritative descriptors of constitutional competences are then challenged.* The legitimacy embedded in the democratic procedures of the nation-state-model is also then at stake. *The interaction and relations* between national and inter-, supra- and transnational actors are not always clear and seem to be very insufficiently described in the legal literature. These are the questions which will be further discussed in the following. The theme is comprehensive and complex to put it very mildly. The following can then hardly be more than fragments and preludes to some of the questions which are being raised. The idea is to participate in and to insist on the necessity of drawing *a new juridical terrain* in constitutional theory and in the relations between the national, inter-, supra- and transnational competences.

## 2 Cross-boundary Dynamics and Problem Solving

The practical significance of national sovereignty has been enabled by the fact of and the presumption that it was possible to regulate or to solve most social and practical problems which arose, within the boundaries of the nation-state. The nation-states which over time were created with partly historically based and partly more politically contingent boundaries, were increasingly also made into problem-solving and practical governing entities. With the emergence of modernity with industrialization and urbanization legislation and governance was not only or primarily a question of the will of the sovereign, but increasingly a question of taking care of the needs and the welfare of the citizens and the social infrastructure.<sup>6</sup> The emerging democracy created the legitimacy necessary for the comprehensive forms of interventions which evolved. Sovereignty was then linked to what emerged as comprehensive political, legal, administrative and practical forms of decision-making and problem-solving. The presumption of nationally delimited problem-solving has emerged with the emergence of democratic and politico-legal institutions on the nation-state level.

Today however the general presumption of national problem-solving capacities as self-sufficient has been broken. Economic, technological, cultural, social and other aspects of the processes of globalization have resulted in both cross-boundary problems and cross-boundary problem-solving capacities.<sup>7</sup> International trade and financial transactions have reached a level where national economies are largely dependent on the fluctuations which these create. Interest rates and monetary politics have become largely internationally dependent even if decisions still are taken on a national level. International trade has increased

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6 Michel Foucault, *Governmentality*, in *Essential Works*. Vol.3. Power”, New York: The New Press, 2000.

7 On the factual aspects of globalisation see among many other works: Jan Aart Scholte, *Globalization. A Critical Introduction*, 2000; David Held, *Global Covenant*, 2004; Saskia Sassen, *Territory, Authority, Rights*, Princeton: Princeton University Press, 2006.

due to both economic and political dynamics and necessitates some form of cross-boundary decision-making and conflict-resolution systems. At its present level also working conditions and environmental problems in production countries become a problem and a responsibility for the importing and consumer countries. Numerous transnational corporations with significant economic power, in relation to the nation-states, have emerged and are moving their investments and operations around without political consent, and thus also contributing to a transnational space.

Environmental damage and climate change are inherently cross-boundary in their effects. Significant parts of the problems created can only be solved by cross-boundary cooperation. It has for example become known that air and chemical pollution is particularly highly concentrated in arctic areas because of the magnetic fields. It is also step-by-step admitted that the environment and its biodiversity, with the variety of species, in the various states and regions are so biologically inter-dependent that the responsibility for taking care of it must be shared. Intensive international trade also underlines the fact that pollution and environmental damage in one country may in fact be caused by financial interests and/or consumers in other countries. Changes in the ozone layers and in the climate are also inherently global problems which can only be solved by comprehensive and binding forms of international cooperation. Hurricanes, flooding etc. will strike randomly and not directly at areas which have produced the most pollution or heating.

Knowledge and new technologies travel fast and are applied more or less simultaneously across geographical and cultural boundaries. The developments within information- and telecommunication technologies have in the *internet* created a transnational communicative infrastructure enabling transnational communication to some extent irrespective of the national regulations and thus enabled and strengthened the tendencies of transnational exchange of information, knowledge and new technologies. The construction and the functioning of the internet are largely done on technological and not explicitly political terms. It has been done by US based authorities, albeit in a relatively neutral way, and by a user organization, ICANN.<sup>8</sup> Regulation on access, e-trade, privatization etc. is largely done by nation-states or regionally, but obviously there will be tendencies to harmonize and learn from each other. Simultaneous transmission of new knowledge and technologies may lead to equivalently simultaneous learning processes of regulation.

The use of new biotechnologies will also have transnational effects which need to be coordinated and regulated (such as the spreading of GMOs and of new species both when they are placed in the environment, and when they are used in foodstuffs, cfr. The Bio-Safety protocol). International trade also requires or eventually leads to some forms of standardization in the application of new knowledge and technologies. Technical standards have multiplied and become increasingly important, in some cases also political in terms of de facto having environmental and social consequences. When new technologies are

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8 Jochen Bernstorff, *The Structural Limitations of Network Governance: ICANN as a Case in Point*, in *Transnational Governance and Constitutionalism*, eds. Joerges, Sand, Teubner, 2004.

applied simultaneously in different countries and cultures there may also be common regulatory discussions and legal transplants. Even when the legislature of one nation-state decides to ban the application of a new technology (GMOs, research on stemcells etc.), it will be affected by the fact that other states allow them. Discussions on new technologies are cross-boundary. Producers, consumers and patients will travel to get what they want. Genetically modified organisms can be spread in the environment beyond the boundaries where they have been permitted. Foods with minor ingredients from genetically modified plants can be hard to avoid if GMOs are widely used in some food-producing countries. National legal regulations may then not be sufficient alone for securing certain goals. Situations which are considered ethical dilemmas in one state, may not be considered problematic in other states. Other examples could also be mentioned.

International migration be it for political, security, economic or cultural reasons is also a cross-boundary dynamic and which is not only caused by or affecting the states involved in a specific migration. The number of migrants today can probably to a significant degree be explained partly by the enormous economic differences between the different regions of the globe and partly by the simultaneous "closeness" enforced on us by TV and internet. Migration is then one of the inherently global phenomena and closely entangled with other aspects of globalization. It is also illustrative of the inabilities of single states to solve the problems attached to it.

War and terrorism, in its many forms, have also become international phenomena at times occurring in contingent places, almost anywhere, and not, at least in some cases, as explicit boundary-conflicts. Conflicts may be started in and connected to particular places, but war- or terrorlike actions may occur anywhere. Some of the conflicts are also argued to be at least partly based on the general economic injustices between global regions. Both the war- and terrorlike actions and the attempts at counter-measures follow inter- and transnational trajectories.

The trajectories and dynamics shortly described in the above refer to quite different types of cross-boundary and global phenomena which may need access to cross-boundary and global problem-solving procedures to very different degrees and for quite different reasons.<sup>9</sup> The different dynamics are also deeply entangled in and interdependent of each other and may thus be difficult to single out in a regulatory context. Parts of the environmental and climate changes are inherently global, and the problems caused by these can hardly be solved without binding forms of international cooperation. The economic global dynamics have come about by a combination of economic, technological and political trajectories which also mutually seem to re-enforce each other. International trade has increased for economic reasons, but probably also because new politico-legal treaties have enabled it. Telecommunications have also enabled much closer and more intensive production-process cooperation across geographical distances. Financial markets have become global also to the extent that national monetary politics depend on international financial

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9 Jan Aart Scholte, *ibid.*, 2000.

fluctuations. The national central banks have developed close coordinating mechanisms. The international regulations of trade and the free movement of goods etc. have also led to a number of regulatory side-effects involving environmental, health, social etc regulations, which at least initially were not intended. The internet is in itself a transnational dynamic and a “space” enabling the cross-boundary spread of information, knowledge and technologies in ways which are difficult to hinder or regulate by national authorities. International migration and more multi-cultural societies have evolved from a mix of regional economic differences, the possibilities of traveling and the use of telecommunications. New knowledge and technologies will “travel” irrespective of constitutional authorities. The same is to some extent true for health problems, viruses etc. The result is that in vital policy areas *any clear distinction between national and international dynamics has broken down*. The transnational character of financial markets, the enormous increase of trade, also of natural resources, the transnational character of pollution and of climate change, the internet as a transnational space, the transnational exchange of knowledge and new technologies etc. are all cases in point.

### **3 Factual Globalization and the Inter-, Supra- and Transnationalization of Law**

The rise of trans- and international factual dynamics and problems have led to a radical increase in the number of international treaties enacted. Many of these treaties also deal with issues which affect nationally internal as well as international dynamics, and which previously were primarily regulated only on national levels. Due to the factual developments mentioned above problems which previously could be solved on a national and internal level, are now increasingly regulated and also adjudicated internationally either because this is seen as necessary (the environment) or desirable (trade and human rights), for a variety of reasons. International regulation also with nationally internal effects has increased particularly in areas such as trade, environmental protection, climate change and protection of human rights. The emphasis on more effective forms of regulation has also resulted in regulatory side-effects for aspects not explicitly regulated.

Trade is increasingly regulated regionally as well as internationally and in ways to create more effective liberal trade regions. Not only tariffs, but also equivalent measures are banned as conditions of trade (under the EU treaties, but also to some extent under the GATT/WTO). The effect is that also (nationally enacted) regulatory (and protective) measures are evaluated as potential barriers to trade. If the regulation is not seen as necessary or proportional in relation to the purpose given, it may be considered an obstacle to trade and thus in violation of the treaties. The EU treaties include quite comprehensive legislative competences both for trade and competition law and for harmonizing protective measures concerning health, the environment, social protection etc. Legislation concerning the free movement of goods, services, persons and capital and the relevant harmonizing legislation is based on supranational competences. The

Commission has powers of administrative control, and the European Court of Justice has adjudicative powers. The EU has *legislative, executive and judicial supranational* powers in some areas and *international* powers in others, all in areas which are relatively comprehensive. The regulation of free movement and competition are in themselves comprehensive material areas. The regulatory side-effects of treating “equivalent measures” as possible obstacles to trade and of allowing for harmonizing protective regulation in several areas significantly increases the material (and supranational) competences of the EU.<sup>10</sup>

EU member states have then delegated considerable and quite vital parts of their constitutional competences to the EU. In Scandinavia this includes Denmark, Finland and Sweden. Norway and Iceland are only members of the European Economic Areas, the EEA, and are then only internationally and not supra-nationally affiliated with the EU. Their obligations to harmonize their legislation (and implementation and adjudication) of the areas of free movement and competition are however so strict that any decision not to harmonize with the EU decisions may be considered a lack of implementation of the treaty. The EEA treaty is thus often considered close to a de facto supranational treaty, but without the participatory powers of the EU members in the legislative process.

The consequence of an EU membership is as mentioned above that significant parts of the constitutional powers of the member states are delegated to the EU and cannot be taken back without leaving the organization. The preparatory parts of the legislative process is also a common EU process. Decisions within the mentioned areas are taken with a qualified majority voting. EEA members are obliged to harmonize their legal processes and decisions within the mentioned areas with those of the EU, but without the equivalent participation in the legislative processes.

The WTO/GATT is not a supranational organization, but its effectiveness has increased significantly politically as well as legally since the 1992 extensions of the treaty.<sup>11</sup> The GATT treaty has been significantly extended by the WTO treaty and its several agreements. Partly the material competences have been extended and clarified (the TRIPS, TBT, SPS, GATS agreements). Partly a new and more legally effective conflict resolution mechanism has been agreed upon in the Dispute Settlement Understanding (DSU). The WTO/GATT treaties are international, but they do oblige the members to participate in an economic regime furthering free trade, according to the texts of the treaties, and in negotiations developing this in ever more areas. Membership and consent to new amendments are of course voluntary, but membership is not gradual or partial. Once a state is a member there will be a significant pressure to

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10 It is not possible to describe the EU competences and the relationship between the EU and its member-states more fully and in detail here. I can only refer to central parts of the literature describing both the evolution of and the present competences of the EU institutions: J.H.H.Weiler, *The Transformation of Europe*, Yale Law Journal, 1990, and *The Constitution of Europe*, 1999; Paul Craig and Grainna de Burca, eds., “The Evolution of EU law”, Oxford University Press: Oxford, 1999.

11 Cf. J.H.H.Weiler, *Epilogue: Towards A common Law of International Trade*, in *The EU, the WTO and the NAFTA. Towards a Common Law of International Trade*, ed. Weiler, Oxford: Oxford University Press, 2002.



participate in the processes of implementing and developing the treaties further. Membership in the WTO is also generally considered vital for participation in international trade. Politically speaking there are then also strong pressures for becoming and staying a member of the WTO. The DSU contains the rules and procedures for the new Dispute Settlement Bodies (DSB), a Panel and an Appellate Body. Weiler has argued that judging from the procedures and the decisions so far the new dispute settlement seems to function in a much more legal and judicially independent way than the previous more diplomatic and negotiative systems.<sup>12</sup> The treaties are then being implemented more effectively, according to their texts and purposes, than previously. The WTO is not only a political organization operating in a diplomatic manner, it is increasingly a more full-fledged politico-legal organization with the instruments to implement the treaties at least to some extent in a legally binding way. The enforcement of the decisions of the DSU is done partly by the possibility of economic sanctions, which to some extent works.

The main purposes of the WTO treaties are to promote and enable regimes of free trade. Traditionally this has meant abolishing tariffs and other quantitative restrictions to trade. In the current regimes restrictions to trade also include review of domestic regulatory regimes in the areas relevant to trade, cfr. GATT art.XX and the SPS agreement. The SPS agreement allows for national policies in the areas of protection of human and animal health, but requires that these are kept on the least trade-restrictive level, and that they are non-discriminatory.<sup>13</sup> National policies must also be based on risk assessment, scientific principles and evidence.

Decisions by the WTO and the DSB do thus have vital side-effects for environmental, social, health and other policy areas. The DSB will, as the EU bodies, consider whether the various such (national) regulations are valid as exemptions of free trade, cfr. GATT art. XI and XX, and whether they in effect are discriminatory and obstacles to trade. The problem with this is that the WTO treaties do not contain positive regulation of such forms of social and other protection. They are primarily seen in relation to the economic goals of the treaties. The decisions by the DSB will then probably not be able to deal with such other considerations in full depth. There are also not other equivalently effective international organizations, courts or other conflict-resolution bodies with these other areas as their primary responsibility.

Another area with comprehensive international regulations is human rights. Practically "all" "European" states are signatories to The European Convention of Human Rights (ECHR) and its Court of Human Rights.<sup>14</sup> This is also an international organization and an international court, but the states are obliged to implement the decisions of the Court also when it means having to change their legislation. The articles of the Convention are relatively general, but the

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12 J.H.H.Weiler, *The Rule of Law and the Ethos of Diplomats*, Jean Monnet Working-paper, Harvard University, no.9, 2000.

13 Robert Howse, *ibid.*, 2000.

14 "Europe" is here a debatable term, but the membership to the ECHR now extends relatively far east.

interpretation by the Court in the various cases does exert a considerable influence on the national practices. The Council of Europe also issues other types of reports on the implementation of human rights in the different member states. In the UN system there are committees reviewing the states' practices of human rights. This is however not a conflict-resolution system, and their influence is probably quite variable. In total there is however a considerable set of international organizations working on the national and international implementation of human rights and creating at least some form of harmonizing and influential negotiative system. The nation-states have in one sense of the term their sovereignty intact in this area, formally and materially, but they are also part of a European and an international legal "system" obliging them to harmonize their respect of and their practice of human rights and to participate in a partly legal partly "negotiative" system developing common norms and standards of interpretation. This participation does at least contribute to a relative change in the modus of the term of sovereignty. Internationally negotiated rules and standards of interpretation do directly or indirectly significantly influence the national processes of legislation and adjudication in vital areas.

There are a number of other international treaties, particularly in the areas of climate change and environmental protection which do play a significant role in both the political and the legal processes of sovereign states. There are both material standards and rules and procedures for international cooperation and national obligations in these fields. The Kyoto protocol has been signed by 164 states and contains an ambitious and detailed form of coordination and cooperation in the area of climate control. The Montreal Protocol on the ozone layer depletion has worked much more effectively than expected. The Stockholm and Rio Declarations on environmental protection are politically ambitious, but have not been very operative legally. In the area of environmental protection it is probably correct to say that there are still vital disagreements on the degrees of urgency on different types of environmental protection. The legal standards are relatively vague and thus still being negotiated, such as the concepts of sustainability and precaution. There is however little doubt that the international treaties on climate and environmental policies are increasingly influential and being incorporated into national legislation.

The "internationalization" of law thus consists of different forms and instruments of law which all have contributed to the changes of national constitutional law. One of the most vital innovations has undoubtedly been the evolution of *EU law as supranational* and as relatively comprehensive in its material scope. The dynamic interpretation of EC art.28 has been vital in the expansion of EC/EU law into domains which were previously national. Significant parts of the member states' constitutional powers have been effectively transferred to the EU. The institutions behind this has been the Commission as the independent and European executive, the Court which also has been European and independent (and the use of EC art.234 to make preliminary decisions for the national courts) and the legislative procedures with the use of qualitative majority. The WTO has learnt from the EU and with its dispute resolution mechanism become a very significant legal actor. *International treaties* have also been vital in creating negotiation networks, in

spreading internationally negotiated norms and in contributing to create stronger political and symbolic obligations to international law, particularly in the areas of environmental law and human rights. It is probably correct to say that there is now, at least for many nation-state and in many areas of law, a new climate of an increased and more serious notion of obligation to international treaties. In some cases this is supported by international courts. Even if international treaties do not have direct effect, they do have both a *de lege* and a *de facto* considerable influence on the practice of national constitutional powers and institutions. It is in my mind undoubtedly fair to say that the principle of international cooperation is by now as important as national sovereignty. *Transnational law* has also emerged and expanded alongside the international. Saskia Sassen has referred to “the reconfiguring of this market since the 1980ies and the corresponding ascendance of financial norms as the criteria for economic policy....” as a vital part of the dynamics behind the expansion of transnational law.<sup>15</sup> Transnational corporations and their transactions are increasingly creating law in the form of comprehensive contracts, standardization etc. Sassen has referred to this as new forms of territories or new geographies of power denationalizing vital decision-making processes and thus indirectly reducing the power of national constitutional authorities by creating new institutions.<sup>16</sup>

#### 4 The Effects of International Treaties and Obligations on National Constitutions and Sovereignty

International law used to deal with the relations and the problems occurring between states – whereas national (constitutional) law dealt with national internal affairs. It was presumed that most economic, social, labour, environmental etc. problems were part of national trajectories and could be solved within the framework of the national constitutional powers and procedures. National constitutional law has thus been a vital and defining framework for the legal systems and for the understanding of how law operates. In the above two types of changes have been described which may also affect the functions and the practical significance of national constitutions. First it has been shown that several *vital factual dynamics have become increasingly cross-boundary and global*. National decision-making may then not be sufficient or satisfying. Secondly particularly since the Second World War and increasingly since there has been *an increase in the numbers and the comprehensive character of international treaties* and organizations dealing with dynamics and problems which are both *internal to the nation-state and cross-boundary*.<sup>17</sup> What used to be seen as internal affairs and problems, are increasingly seen as inter- and transnational dynamics and dealt with as such. The changes in the relations between *the constitutions and politico-legal institutions of the nation-states* on the one hand and *international relations, treaties and organizations* on the other

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15 Saskia Sassen, *ibid.*, 2006, p. 223.

16 Saskia Sassen, *ibid.*, p. 264 f.

17 Robert Howse, *ibid.*, 2000.

have occurred on many levels, via many different types of mechanisms and trajectories and with direct and more indirect effects on the role and function of national constitutions.

The changes in the relations between the national and the inter-, supra- and transnational levels are complex to describe because they concern several *institutional, procedural and material aspects* of the relations. There are new institutions, new procedures, new material obligations and norms, and these will both replace and supplement existing institutions in several ways. New international organizations and procedures may establish new international dynamics, create new relations between the different levels and also indirectly change the national processes and institutions. The most important aspect of these changes is probably that there is established a greater degree of *inter-relatedness and inter-dependence* among the different levels of government and governance. The relations between the local, national, regional and supra- and international institutions are characterized by *cooperation, combinations, overlapping and competition* and not by a separateness.<sup>18</sup>

It is also characteristic that the relations between specific levels may not be totally clear. It is for example not totally clear how a disagreement on the interpretation of the EU treaties in relation to national constitutions should be resolved.<sup>19</sup> There is an inbuilt ambiguity or a certain gap in the relations between the member states' constitutions and the EU treaties which can be explained by the ambitions of the latter and its very comprehensive and at times unclear material competences. It may be argued that there is *an inbuilt and accepted conflict with contradictory elements* between the principle and traditions of sovereignty of the member states on the one hand and the ambitious and dynamic purposes and style of the supranational EU on the other. Because both sets of institutions are working, and because it has not been strictly necessary to draw the lines sharply, the potentially conflictual "constitutional balance" still functions. This may also be used as an illustration of and an argument in favor of the fact that we live in a world of *interdependent* institutions rather than separate and hierarchical. The complexity of the problems to be solved can also be used as an argument in favor of involving several actors and institutional levels in the decision-making.<sup>20</sup> The EU institutions have also applied a more dynamic style of interpretation than has usually been common in the legal systems of many member states to accommodate for institutions and problem-solving in change.

The demands for an increasingly international legislation and decision-making have been met by different forms and modes of law: - supra-, inter- and transnational law, cfr. above, which change and pose different types of challenges to the national constitutional law. Supranational treaties and

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18 Inger-Johanne Sand, *Understanding the New Forms of Governance: Mutually Interdependent, Reflexive, Destabilized and Competing Institutions*, in *European Law Journal*, no.3, vol.4, 1998, p. 282 f.

19 J.H.H.Weiler, *The Autonomy of the Community Legal Order: Through the Looking Glass*, in *The Constitution of Europe*, 1999.

20 Oliver Gerstenberg and Charles F.Sabel, *Directly-Deliberative Polyarchy: An Institutional Ideal for Europe*, in "Public Governance in the Age of Globalization", ed.Karl-Heinz Ladeur, Aldershot: Ashgate, 2004.

organizations, with the EU as the primary example, result in *the transfer of national constitutional powers* to the supranational organization. Here the goal is very directly to achieve *more effective forms* of international governance by transferring national powers and establishing them with supremacy vis-a-vis national law and with direct effect in relation to the citizens of all member states. In the case of the EU quite comprehensive powers on vital areas have been transferred. Supranational treaties are then substantial changes of the national constitutions because there is a direct change in who the constitutional powers are endowed to. The EU has developed into a relatively autonomous, effective and dynamic organization and actively preparing and deciding on quite substantial areas of regulation. In the practice of the Commission and the Court on the interpretation of art.28 (30) and 30 (36) and the chapter on competition law they have also contributed to changing vital and decisive aspects of the regulation of the market and the dynamics between the market and regulatory law.<sup>21</sup> This has been done on the basis of treaty texts enacted by the member state, but it can also be argued that vital aspects of these changes (the specific interpretations) have been done by the relatively independent and European institutions, the Commission and the Court, and with very little assistance from the member states. This is of course a complex case and example, but I do think it is consistent with authoritative literature on this area to emphasize the action taken by the supranational institutions.<sup>22</sup> The interpretation of and the practice of the articles on free movement of goods etc. and on competition law in the EC amounts then to a very clear example of the influence of and direct changes from supranational treaties and organizations on national and national constitutional law.

The largest number of new and recent treaties are still by far *international* and have thus only indirect effect in the member states (depending slightly on the different national systems of incorporation and transformation). New treaties and conventions with relevance also for internal affairs have particularly dealt with areas such as environmental law, bio-safety, health protection, human rights, investments, intellectual property rights etc. The international organizations with responsibility for these have in many cases become increasingly effective and autonomous. Courts or other conflict resolution mechanisms have been set up and have in some cases, such as the WTO and the ECHR, at least relatively speaking, contributed to an increased effectiveness.<sup>23</sup> Even if international treaties are used, and not supranational, there seems to be a tendency to respect and to implement international treaties more loyally and effectively than previously. *International organizations, negotiations and obligations* – and international cooperation in general – play more important

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21 J.H.H.Weiler, *ibid.*, 1991; and *The Constitution of the Common Market Place: Text and Context in the Evolution of the Free Movement of Goods*, in *The Evolution of EU Law*, eds. Grainna de Burca and Paul Craig, Oxford: Oxford University Press, 1999; Christian Joerges and Christine Goodt, *Free Trade: the erosion of national and the birth of transnational governance*, in *European Review*, vol.13, 2005.

22 Cf. the references in footn.19, 20 and 22.

23 Gunther Teubner and Andreas Fischer-Lescano, *ibid.*, 2004, p. 999-1002.

roles than previously because many of the dynamics which are legally regulated also are global or cross-boundary in some respects. Many obligations stemming from international treaties are today respected and treated by national constitutional authorities as (relatively) effective limitations on national legislation and adjudication.<sup>24</sup> National legislators increasingly pay attention to and include international obligations as part of their preconditions. *It may be argued that some international treaties get a semi-constitutional status or are in fact treated as such.* This can be supported by that they have become relatively stabilized, and that there is a general consensus on and significant respect for their main goals. The principle of democracy is of course still primarily embedded in the national constitutions, but the principles of human rights, environmental protection and international cooperation are probably as much or more embedded in international treaties. Vital parts of the political and legal processes concerning *international environmental protection, respect for and implementation of the principles of sustainability and precaution and the regulations on climate change and the ozone layer* have been international and embedded in international negotiations and the work of international organizations. The principle of sustainability was for example a focal point first in the work of a UN appointed Commission on Sustainability and Economic Growth (1986). The report from the Commission was one of the first steps of international reports and treaties which have been instrumental in the “institutionalization” of the principles of environmental protection, sustainability and precaution in environmental law and politics. Later has followed the Rio Declaration, principle 27, Agenda 21, chapter 39 and more.<sup>25</sup> The principles of human rights and environmental protection are to a significant degree treated as having a semi-constitutional status.

Both the WTO/GATT and the ECHR are also *international*, not supranational, treaties with *ambitious goals, legal norms in vital areas and increasingly effectively working courts or conflict resolution systems.* They represent forms of international cooperation with both comprehensive material obligations in the form of legal norms and comprehensive obligations to participate in political negotiations, legal procedures etc. This includes obligations to implement the norms of the treaties and to accept decisions by administrative and judicial bodies. Membership in such organizations exerts a very significant influence on how national constitutions function, and how national authorities work. It can then probably be argued that not only supranational, but also international treaties and organizations have played vital roles in the evolution of new legal, political and constitutional principles in the period after the second world war, and that they have contributed considerably to defining and delimiting the relative freedom of national authorities both in terms of material and procedural competences.

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24 Cf. report to the Norwegian Commission on the study of Power, 1999-2003, no.18, Geir Ulfstein, Hans-Christian Bugge, Ole Kristian Fauchald, Inger-Johanne Sand, *Folkerettslige rammer for norsk miljøpolitikk* (The framework of international law for Norwegian environmental politics), 2000.

25 Patricia Birnie and Alan Boyle, *International Law and the Environment*, Oxford: Oxford University Press, 2002, ch.2, p. 56 f.

*Transnational* is the term applied for international interaction or cooperation which is not part of resulting from the cooperation by national governments.<sup>26</sup> Transnational cooperation has spiraled into effect partly due to the significant growth of *transnational actors*, in the form of transnational corporations, INGOs, expert organizations etc. *The reconfiguration of the market* and its increasing significance locally, nationally, inter- and transnationally have probably also played a role.<sup>27</sup> With a more dynamic market the transnational may take over some of the dynamics of the inter-national with its links to the state and to government. Saskia Sassen has referred to these processes as the “new geographies of power” and new “territories” in the forms of global firms and global markets.<sup>28</sup> The enormous influence of knowledge production and new technologies in so many fields today is another factor behind the transnational as a new “space” or territory. The internet as it functions today has not been created by governments and political decisions, even if its origin is within the US defense system. It has rather been created by experts, corporations and the users of the net. The result is a very unclear situation as to how it should be regulated.<sup>29</sup> *Transnational law* is then the law played out by these actors. Product and technical standardization is one important example. International technical standards have become increasingly important and abundant and are set by private organizations.<sup>30</sup> *Lex Mercatoria* and comprehensive contracts between transnational corporations are other examples.

The transnational is then a challenge to national constitutions more in the form of a totally new space and a new way of defining territories, authorities and rights.<sup>31</sup> The global economy, the market and the role of new knowledge and technologies have contributed to the creation of new paths, new dynamics and new ways of defining territories. The transnational is probably both a supplementing and a challenging force in relation to the national constitutions.

## 5 How National Constitutions Have Responded to the Increasing International Treaties and Obligations

National constitutions are part of the formal definitions of the sovereignty of nation-states. The basic principles, the basic rights of citizens and the constitutional authorities with their competences are defined. This has been the internal meaning of constitutional sovereignty. The nation-states and their authorities have however also been seen as the primary political actors globally

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26 J.H.H.Weiler, *ibid.*, 1999, p. 277. Weiler uses the term infranational instead transnational, but the meaning is the same.

27 Saskia Sassen, *ibid.*, 2006, p. 223 f.

28 Saskia Sassen, *ibid.*, 2006, p. 222 and 269 f.

29 Jochen Bernstorff, *ibid.*, 2004.

30 Harm Schepel, *The Constitution of Private Governance. Product Standards in the Regulation of Integrating Markets*, Oxford: Hart, 2004.

31 Saskia Sassen, *ibid.*, 2006.

and regionally. International organizations have been established by the nation-state authorities and base their competence on the treaties enacted by the states. The competences by national authorities to enter into treaties and other forms of inter-national cooperation are relatively simply defined in most constitutions – only as the power to enter into treaties. In some constitutions, as the Spanish, the Danish (§ 20) and the Norwegian (§93), there is defined the power to enter into treaties where specified and delimited parts of the constitutional competences of the state authorities are transferred to an international organization which the state is a member of. This would then constitute a supranational organization. Denmark and Norway refer to this article for the question of membership in the EU. Most constitutions do not go further than this in defining the powers to enter into binding forms of international cooperation. Finland has included articles in its latest constitutional reform where Finnish membership in the EU is explicitly referred to.

The result is that the present European national constitutions do give a relatively misleading and partial picture of how the actual legislative, executive and judicial powers which have originated in the nation-states, and which have effect for the nation-states, are handled and executed. The national constitutions tell the story of the powers of the nation-states which are handled inside the nation-states. They present the nation-states and their constitutional authorities as still fully sovereign formally as well as in practice. Either the possibility for transfer of power to an international organization is included, and /or membership in the EU is explicitly mentioned. In neither case is the full scope of the powers transferred to the EU and contained in the treaties revealed. It is generally not possible to read from the texts of the constitutions how the constitutional powers are distributed and applied between the nation state authorities and the relevant supra- and international organizations. Some states refer to their membership in the EU in their constitutions. Others do not. In neither case is it possible to read or to understand from the text of the constitution how comprehensive and far-reaching the international cooperation in general and the transfer of powers specifically to supranational organizations are. The actual practice of the constitutional powers and the scope and significance of the transfer of national powers to international organizations are not presented. The national constitutions only define the national powers and refer to that these may be transferred to international organizations.

The written constitution of a nation-state may in these cases either be accepted as purely the description of the national and internal powers, or *as part of a larger system of texts* which include the various treaties which the state has entered into. The role of the national constitution has in any case changed because sovereignty as the form of a state has been changed. The preconditions of sovereignty have been changed, and the powers which constituted and enabled sovereignty in practice have been changed. The “system” of sovereign nation-states and very moderate forms of international cooperation between them has been replaced with a regime of nation-states which have transferred and delegated parts of their internal powers and also otherwise entered into extensive forms of international cooperation. They have also accepted substantial international obligations materially and procedurally in the areas of human rights, environmental protection and trade. The nation-states thus



participate in international organizations and in treaty-making in ways which also contribute to blurring the boundaries between the states and the forms of cooperation.

National constitutions do then give a misleading picture as to how the constitutional powers are applied and distributed, and how vital areas are regulated politically and legally. Neither the national constitutions nor any other equivalent text do reflect the paradigmatic change from the predominance of the powers of national sovereignty and its authorities to the current and comprehensive forms of cooperation between nation states and international organizations.

The legal relations between the nation-states and the international organizations they are members of are not always fully or sufficiently clearly regulated. There may be gaps in the treaties, and there may be left room for various applications of the treaties in practice. The inter- and supranational organizations may have been given a scope of competences which are applied to very different and varying degrees. The procedures and institutions set up on the basis of a treaty may vary both in their form and in their practice depending on the political situation. The application of inter- and supranational treaties as part of de facto national constitutions will tend to be continuously “*in process*” because the treaties will have a scope of competences which will be quite sensitive to political and other situations.

This does raise some questions on *the role of the written national constitutions* in relations to inter- and supranational treaties – both formally and in practice. It seems that there has been established a de facto *multi-level governance* system where the national constitutions function in an intricate interplay with inter- and supranational treaties, and where there the functioning constitutions thus are in a continuous process of change rather than being completely stable frameworks. How inter- and supranational treaties are represented or referred to in the national written constitutions should however be reconsidered. These changes are at least three-fold: Partly there has emerged *an increasing number of significant international organizations* creating international fora and dynamics of decision-making. Partly this has contributed to *significant changes of the national institutions and their procedures*.<sup>32</sup> Partly *the interplay between the national, inter-, supra- and transnational levels* and their various institutions have become increasingly vital and influential.

## **6 The Theoretical Challenge of Describing and Analyzing Multi-level Governance, Nation-states and Constitutionalism**

There are several attempts both in law and political science of describing and analyzing the present situation of multi-level governance with its variety of decision-making trajectories and combinations of a nation-state authorities and inter-, supra- and transnational organizations. There does however still seem to be a clear distinction between nation-state constitutional law on the one hand

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32 Saskia Sassen, *ibid.*, 2006.

and international law and multi-level governance theories on the other. “Constitutionalism” is still basically applied as a reference to the basic organization and principles of the nation-states. The nation-state is in legal theory still very much seen as a unique construction based on the concept of national sovereignty, with a hierarchy of authorities which are vertically integrated, and with competences which are fully comprehensive. The links between the power of the people and the legislative and executive authorities are also a defining part of the present nation-states. Territory, authority and legitimacy are seen as descriptions of the same entity. “Constitutionalism” has become a term which in some contexts, is applicable only to the nation-state. The nation-state and constitutionalism have then become a set of terms which refer to and explain each other, and which also include and monopolize the legitimate government of the people, their authorities and rights. In the light of the factual, political and legal changes described above there is however an emerging and promising trend of applying “constitutionalism” also to international organizations with comprehensive competences and their relations to nation-states, but this is still very much in process and controversial. The contributions often focus on different aspects of the immensely increased international cooperation and the use of international organizations with active and comprehensive competences. This is understandable in the view of the diverse, multi-faceted and complex situation. The relations between the nationally based and the various inter- and transnational organizations are more like a multiplicity of trajectories than attempts at building new hierarchies.

Below I will shortly describe and discuss some of the contributions to the analysis of the new combinations of nation-state authorities and international organizations, and how these transcend the previous distinction between the nation states and international law and politics. It is needless to say that this discussion will be as fragmented and unfinished as the situation itself. None of the contributions mentioned below see the nation-state as disappearing. They do however offer various descriptions on how it is changing due to the increased international cooperation.

## 7 A Normative Basis for Multi-level Governance

One of the most distinguished and interesting voices in these debates is Joseph Weiler. His contributions have to a large extent been shaped by his writings on “The Constitution of Europe”, the EU treaties and their institutional practices.<sup>33</sup> His approach has been both normative and realistic. *Citizenship and democracy*, and the links between them, are the main and basic values. The nation-state constitution and institutions are recognized as representations of the power of citizens, but not seen as the end of, the ideal or the essential outcome of a process. Citizenship is not seen as conflated with nationality, but something which may be expressed on several levels.<sup>34</sup> The “demos” can be conflated with

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33 J.H.H.Weiler, “The Constitution of Europe”, 1999, ch.10.

34 J.H.H.Weiler, *ibid.*, p. 337.

the “state”, but can also be linked to other entities. Democracy is vital, but can also be expressed on the different institutional and territorial levels and with different degrees of intensity. From earlier thinkers Weiler has pointed to the two human values of *belongingness and originality*, and the understanding that these may have their expression on several territorial and social levels. Here he points to *the family and the tribe, the nation, the region, (the inter-group of nations (Europe))*, and then the *global level* – as different configurations and expressions of “the social”. These configurations are different and have different qualities in terms of social and political organization. The nation is about a belongingness which is mutual, to accept others and to be accepted. The modern state however, Weiler argues, is more about the instrumental organization enabling the nation to reach its potential. The state is then a pragmatic arrangement, but it must always be coupled with an organization of the citizens and their power. The organization of citizens may include smaller or larger groups, more or less heterogeneous, and with different expressions of belongingness and originality.

Weiler sees the tribe and the family as the close connections, “the bonds of blood”. Nationhood transcends this and signals the mutual value “to accept” and “to be accepted”. Both the nation-state and Europe may be seen as nations and defined as a unity or a community, but Weiler here remarks the difference between the two. The nation-state has been more closely connected to the values of belongingness and originality, and with the basic functions of security and welfare. Values are shared. Europe is closer to being a community than a unity. There are shared values, but there is also respect across the difference of values. “Supranationality does not seek to negate as such the interplay of differentiation and commonality.”<sup>35</sup> EU as a supranational community project is then another type of organization and state than the nation-state. Weiler argues that the community type organization as the EU supplements the nation-state in interesting and paradoxical ways. The nation-state can provide security, integration and welfare. The EU as a community may enable free movement, provide guarantees against discrimination, universal norms, cultural pluralism etc. The two types of political organization provide different and to some extent contradictory qualities, but which still may be valuable in their combination: The nation is about *shared values*. “The community” (here in the form of the EU) is about *acceptance across differences and a plurality of values*. Global cooperation is about respect for *the globe as a common heritage*. The tribe, the family and the local community take care of *the more direct forms of social recognition and acceptance*. All these social organizational qualities may be needed today. In this discussion Weiler underlines *the close interdependence between different forms of citizenship and of democracy and forms of social organization*. The varieties of social and political organization also in more stable forms are a functional answer to the complexities of differentiated societies and to the identities of the citizens. Social dynamics are occurring on many levels of organization. The forms of citizenship may need to adapt to that. The degrees of differentiation in the levels described above may necessitate

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35 J.H.H.Weiler, *ibid.*, p. 342.

double or more sets of “constitutions” ensuring different, but supplementary qualities vis-à-vis the citizens and in terms of political coordination.

Weiler has then given a *normative basis* for the foundation of a multi-level governance orientation and for a critique of the nation-state as the only political-constitutional level. He has offered an argumentation for how citizenship and democracy currently exist on several levels, and thus also have to be dealt with as such legally and constitutionally. It is however implicit in his argumentation that there must be a certain connection between the qualities of belongingness and of politico-legal organization. He does however define the type of belongingness on the European level, and its potential of legitimacy, such as to qualify for a comprehensive politico-legal organization with constitutional elements.

## 8 Liberal Markets: Political-constitutional or Technocratic?

Other authors have focussed on an analysis of the regional and international regulations of a more liberal market, particularly as it is done in the EU and WTO treaties. Weiler and others have argued that the regulations of the free movement of goods etc. and how these regulations have been implemented in the EU, have resulted in a supranational regime with constitutional elements and consequently with democratically problematic effects. Other authors, such as Giandomenico Majone and Ernst-Ulrich Petersmann, have maintained that the regulation of a liberal market as it is done in these treaties primarily is an implementation of an economically efficient system which should be seen as technical and politically neutral due to its efficiency.<sup>36</sup> They maintain that because liberal markets are more efficient than alternative economic orders they should be seen as technical economic and not as political or of having redistributive effects. Their regulation should be defined as “negative” integration and not as “positive” integration and thus not seen as democratically problematic. According to this view liberal markets are seen as legitimate because they are economically efficient.<sup>37</sup> The liberal market treaties and their implementation are then not seen as having constitutional qualities or producing democratic deficits.

Joseph Weiler, Christian Joerges and many others have criticized this way of distinguishing between negative and positive integration. They have argued that the regulation of liberal markets as it has been done in the EU and also in the GATT/WTO treaties, do not result in purely technical and negative integration. When not only quantitative restrictions, but also “all equivalent measures” to trade are banned, the result is a comprehensive review of numerous public regulations on social, environmental and health protection and of many other

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36 Ernst-Ulrich Petersmann, *European and International Constitutional Law: Time for Promoting “Cosmopolitan Democracy” in the WTO*, in : Grainna de Burca and Joanne Scott, eds., *The EU and the WTO. Legal and Constitutional Issues*, Oxford: Hart, 2001; Gian Domenico Majone, *Regulating Europe*, London: Routledge, 1996.

37 Fritz Scharpf, *Negative and Positive Integration in the Political Economy of the European Welfare States*, in Gary Marks, ed. *Governance in the European Union*, London: Sage, 1996.

measures. Many social and other protective measures which have been politically motivated, have been banned under EC art.28 and GATT art.XI. The argumentation behind a social measure must be seen as objective and have a sound purpose. Environmental and health protection must be seen as necessary based on scientific proof in order not to be seen as equivalent measures to quantitative restrictions. Liberal market regulations as presently implemented in the EC/EU and in the WTO/GATT are then in their effects both positive and negative integration. In reviewing protective measures in relation to the free movement of goods etc. and also the principle of competition the treaties are in effect political and potentially redistributive. They will then be part of treaties with possibly constitutional qualities and not only technical regulations without demands of legitimacy.

## 9 Risk Society, Expert Communities and Constitutionalization

Both national and international legal and political decision-making are today challenged by the regulation of the application of new and complex technologies, particularly in areas such as bio- and genetic technologies, food safety, new medicines, chemicals, the internet, other forms of telecommunication etc. Such regulations are often part of or influenced by supra- or international treaties on liberal trade and on the protection of human health and the environment, and thus also part of the challenges of international regulation. The challenges concern several aspects. First of all the technologies are complex, and it may be difficult for legislators to fully assess their various qualities. Secondly the application of many new technologies often combines positive and useful effects with elements of uncertainty and unpredictable, at times possibly significant, negative consequences.<sup>38</sup> Assessing the positive potential and the possible risks towards each other may seem an impossible task because they often will be incomparable. It is particularly challenging to decide on the level of acceptable risks. New technologies are often applied before they can be fully researched in terms of all consequences because of their positive potential. Thirdly decision-making in this area is also complex because it often may have effects on the regulation of trade and competition, cfr. the regulation of the free movement of goods in the EC treaty and the ban on trade restrictions in the GATT treaty. Regulations protecting health and the environment are only allowed when they can be documented as necessary on the basis of scientific proof. The result is that environmental, health or ethical considerations produced in a local or national community may be deemed irrelevant as long as they are not consistent with the principles of international treaties.

Christian Joerges has however argued that the regulation of complex technologies may be particularly suited to profit from being discussed and

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38 Olivier Godard, *Social Decision-making under Conditions of Scientific Controversy* in Integrating Scientific Expertise into Regulatory Decision-Making, Joerges, Ladeur, Vos, eds., Berlin: de Gruyter, 1997; Christian Joerges, *Good Governance through Comitology*, in EC Committees. Social Regulation, Law and Politics, Oxford: Hart, 1999.

decided on in regional or international fora.<sup>39</sup> Partly regional and international fora are currently less influenced by existing corporatist compromises and channels and thus more ready for open and deliberative strategies where all possible solutions are discussed indiscriminately. Partly the regulatory decision-making may profit from discussions with representatives from a range of different regulatory traditions. Christian Joerges and Jürgen Neyer have done research on some of the comitology committees of the EC and their work on foods safety and other regulations. Their evaluation of this was that the various expert and member state executive representatives in these committees approached the themes of regulation indiscriminately and with an open mind. This may be taken as an argument in favour of applying regional and international fora in new, controversial and technically complex questions of regulation when there is a cross-boundary interest in the regulatory themes in question.

The experiences so far of regulation of new technologies such as bio- and genetic technologies and telecommunications and information technologies hint at two aspects of limitations of national constitutions as regulatory frameworks. Partly the technologies are new and complex in how they work. Exchange of experiences from different regulatory traditions and deliberative strategies may thus be helpful. Partly the technologies are in fact traded, spread and applied across boundaries. There may thus be a certain pressure towards some form of coordination of regulations. The complexity and the controversial questions of the regulations may however also imply that it may be a good idea to try out different regulatory solutions in order to have an international learning process.

## **10 De-nationalization or the Disaggregation of the State?**

Another perspective on the increasing internationalization and globalization of law has been to point to the dis-aggregation of the (nation-)state into a variety of institutions with a de facto semi-autonomy and linking up with other states' similar institutions, international organizations or NGOs.<sup>40</sup> Anne Marie Slaughter has described this as the creation of a web of relations among various government institutions ("government networks") and among these and international organizations where the links are directly between the various institutions working in the same areas and not via centralized state or executive offices. International cooperation has become so comprehensive and widespread that it cannot always be conducted via hierarchies or centralized organizations. There are international, transnational or global networks among state institutions, Central Banks, NGOs, churches, indigenous people, transnational corporations etc. The result is not that the states are disappearing or necessarily losing their power, but that they operate and function in new ways, and that international cooperation has become an increasingly vital part of governmental

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39 Christian Joerges, *ibid.*, 1999.

40 Anne-Marie Slaughter, *A New World Order*, Princeton: Princeton University Press, 2004, ch.4.

institutions work. Slaughter labels this the emergence of a “transgovernmental order”. The basis for this can only be the increasing number of international treaties and organizations creating international orders, negotiations, competences and also conflict-resolution mechanisms. The result is an increasing decentralization of how the states operate in international cooperation and thus an increasing flexibility. Various forms of interaction and cooperation among experts, NGOs, transnational corporations and others contribute to an increasing transnational activity.

Saskia Sassen has described the situation as a form of de-nationalization.<sup>41</sup> The trias of “territories, authorities and rights” in the nation-state tradition has been broken down so that the territories remain with the states, but significant parts of the authorities and rights are spread to organizations on inter-, supra- and transnational levels. Sassen emphasizes that the nation-states are not disappearing, but that they have become part of interaction and networks of inter-, supra- and transnational dynamics. The states are not only part of a more global dynamics. Their own processes and organizations are also changing from within, diversifying their modes of operation. Specialized government agencies are also cooperating with each other and with non-state and transnational organizations across boundaries in decentralized ways and often without centralized state coordination. Diverse agencies such as standardization committees, technical regulatory agencies and central banks have direct cross-border transactions with each other often via common international organizations. Western democratic states are also members of or linked to economic organizations such as the OECD, IMF, WB and WTO. These are not only governed by their state members, but do also have a considerable relative autonomy in the tasks they are given, their expertise and in how they actually function.<sup>42</sup> They exert considerable power in interpreting the economic situation and in their actions also vis-à-vis the nation-states. They have all developed an organizational apparatus and employ a considerable number of experts with a relative autonomy in relation to the member states. They are also part of a considerable segment of transnational organizations and networks. The basis for the power of such international economic organizations is partly the treaties, the policies and the purposes on which they are founded, and partly that the economy has become increasingly global so that some forms of coordination and common regulations are seen as necessary. The separate and sovereign member states can not govern their economy autonomously. The international organizations have been set up to coordinate and balance the economy. The price of this may be that the international organizations in their tasks have achieved a relative autonomy which may be difficult to control by democratically elected governments. These organizations may help generate international economic policies which are part of the policies of the national governments, and they may generate policies which are distinct products of the international organizations.<sup>43</sup> Sovereign states are then today in a situation where vital parts of their economic

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41 Saskia Sassen, *ibid.*, 2006, ch.5.

42 Saskia Sassen, *ibid.*, p. 264 f. ; Robert Howse, *ibid.*, 2000, p. 2329 f.

43 Saskia Sassen, *ibid.*, p. 267 f.

preconditions are results of international economic dynamics and beyond the control of the states. The international economic situation is also a result of the accumulated decisions of various governments, corporations and international organizations in ways which at times are quite intransparent.

## 11 The Fragmentation of National and International Law

Many authors have tried to describe and discuss the multiplicity of international treaties and their consequences. An international project on “International Courts and Tribunals” has identified 125 international institutions in which independent authorities reach final legal decisions.<sup>44</sup> Martin Koskenniemi has headed the International Law Commission for a couple of years in a work documenting international treaties and organizations.<sup>45</sup> Koskenniemi, Gunther Teubner and many other authors have documented the legal consequences of multi-level governance, the increasing number of international treaties and their increasing effectiveness. Few international treaties are supranational and result in decisions with direct effect in the member states. Many international treaties are however today implemented more effectively than previously and with the help of courts or other conflict resolution mechanisms. International treaties are defined by their specific competences and purposes. They are thus sectoral and not coordinated by a hierarchical or common constitutional system. There is then no “control” of collisions or conflicts between the treaties or the decisions they result in. The international implementation of law has become increasingly significant in an increasing number of areas, and in some areas the interpretation and practice is also dynamic rather than conservative. Questions have then been raised concerning how to deal with the possible conflicts. So far most authors have however concluded that *regime-collisions* and *fragmentation of law* are better solutions than attempts of creating hierarchies on the international level.<sup>46</sup> The various treaties are sector-specific and vary significantly as to how they are formulated, what conflict-resolutions mechanisms which are used etc. Generalized ways of solving the possible conflicts between them might turn out to be too complex and inappropriate.

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44 Project on International Courts and Tribunals (PICT) was founded in 1997 by the Center on International cooperation, New York University. Cf. Andreas Fischer-Lescano and Gunther Teubner, *ibid.*, 2004, p. 999-1046.

45 Martti Koskenniemi and Paivo Leino, *Fragmentation of International Law? Postmodern Anxieties*, in *Leiden Journal of International Law*, vol.15, 2002, p. 553-572; Martti Koskenniemi, *Global Legal Pluralism: Multiple Regimes and Multiple Modes of Thought*, manuscript, Harvard, 2005.

46 Martti Koskenniemi and Paivo Leino, *ibid.*, 2002; Andreas Fischer-Lescano and Gunther Teubner, *ibid.*, 2004.



## 12 National and International Constitutionalism

National constitutions still describe and authorize the national constitutional authorities and specify their competences as they function within the boundaries of the respective state. One of the constitutional competences is the authority to enter into treaties with other states and to join international organizations. The constitutions will usually just refer to the existence of these competences. National constitutions are usually written within the tradition of a sharp distinction between the national and internal competences of legislative, executive and judicial powers on the one hand and participation in international cooperation and treaties on the other hand, where the latter deal with international matters between the states. Some European constitutions refer directly to the membership of the state in the EU, others do not. The national constitutions do then, generally, not in any way refer to the very significant increase of the number of treaties entered into by the states, of the material comprehensiveness of the treaties or of the increasing number of courts and conflict-resolution mechanisms. When membership in the EU is referred to, there is usually no further qualification of it.

As shown above there has been a significant change in the later years with respect to how the constitutional powers are applied. Members of the EU have transferred significant parts of their constitutional legislative, executive and judicial powers to the EU authorities. Members of the EEA have not transferred their powers, but are obliged to keep their legislation and its implementation harmonized with the EC legislative etc. decisions in the area of free movement and competition law. The legislative areas of the EC/EU and the EEA are relatively central parts of the economic, social and environmental legislation. The European Convention of Human Rights is part of the legislation of the member states. The Court's decisions are not directly executed in the member states, but they are obliged to follow up on the material contents of its decisions in their legislation. The UN covenants on human rights, the WTO and several other treaties/organizations on environmental, health etc. law are either incorporated into the legislation of the (member) states, are applied as international law and/or treated with significant symbolic power. The WTO dispute settlement bodies play a significant role in the implementation of WTO law. Their decisions are linked up to economic sanctions which increase the factual effectiveness. Many other examples could be mentioned.

Common to all the examples mentioned here is that the treaties in question deal with affairs which are both internal and external to the states. Many vital social dynamics are simultaneously occurring inside the states and across their boundaries. *The previously sharp division between internal and external affairs has in very many areas broken down.* International treaties are used to harmonize politico-legal decision-making across national boundaries and to relate to and solve problems which are cross-boundary. The treaties are answers to increasingly global, international and regional factual and social-normative dynamics. Environmental and climate problems must be solved by international and binding forms of cooperation. The internet has created faster, more direct and more comprehensive forms of communication across national and regional boundaries. Global communications will also need global forms of regulation.

The enormous increase in international trade is partly enabled by trade treaties, but also emphasize their unavailability. New technologies are transmitted and applied across boundaries today almost instantly and can not only be regulated nationally. The increase in migration, cultural exchange and communication have resulted in more multi-cultural communities or relations and then also more acute needs of international standards of and deliberations on human rights.

The national constitutions of most European states were originally created in a different time when focus was on sovereignty, independence and nationally based problem-solving. Today legal and political decision-making has been adapted to *the increasingly global, international and regional dynamics* and the needs of cross-boundary problem-solving. What was previously understood by *constitutional powers* (in a material sense), is now changed and distributed among several organizations. There is also a significant divergence between the formal and the functioning powers. National sovereign and constitutional powers as expressions of the functioning government have been supplemented by inter- and supra-national treaties, competences and organizations and also by transnational and trans-governmental networks. There is a need for a further legal elaboration *on the combinations of national constitutions and inter-, supra- and transnational legal regimes*. The more radical change is probably the change from national hierarchies to a situation of combinations of institutions and treaties where interdependence is a better relational description than hierarchies. Another vital change and challenge concern the democratic legitimacy of nation-states and how to establish this at the inter- supra- and transnational levels.