

Taking Ingolf Pernice Seriously¹

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I have known Ingolf Pernice through his writings long before I met him, unforgivably late in my career, but still in time to influence my thinking, in Frankfurt in 2014. On the occasion of the 100th anniversary of its foundation, the University of Frankfurt was inviting key scholars during the year to look back, to assess the present, to give perspectives for the future. Nobody who ever met Ingolf would doubt that he leaned firmly towards the last. In light of the eminent role of Frankfurt for the development of public law beyond the state, the Faculty of Law and the Cluster of Excellence “The Formation of Normative Orders”, where I was working on my *Habilitation*, had convened, in June 2014, a workshop analyzing the past, present and future of international and European law.

The three speakers selected who spoke about the future challenges of the international legal order were Martti Koskenniemi, preeminent *renaissance* publicist and theorist of international law (who spoke on the potential of international law to realize our goals, our utopias), Joseph H.H. Weiler, one of the most influential experts on European law, especially from outside of Europe (who looked at Europe’s future through Europe’s values) and, of course, Ingolf Pernice himself, who presented his approach to allow for the participation of all persons actually affected by global decision-making in the decision-making processes themselves at the example of Internet Governance. Where Koskenniemi extolled us to take international law seriously and Joseph H.H. Weiler showed that we needed to take Europe and its values seriously, Ingolf focused on the legal *monad*: the individual, and in a Dworkinian formulation demanded we take “people seriously”.²

TAKING PEOPLE SERIOUSLY IN CONSTITUTIONALIZING THE INTERNET

Ingolf Pernice is a ground-breaking scholar, well versed in taking concepts and flipping them on their head, to much intellectual and practical gain. Taking *people* seriously in an age of powerful companies; a *constitution* for the most ungoverned socio-political arena; the internet. He has helped us tremendously in understanding the

¹ With a friendly nod to Ingolf Pernice, *Global Constitutionalism and the Internet: Taking People Seriously*, in Rainer Hofmann and Stefan Kadelbach (eds.), *Law Beyond the State* (Frankfurt am Main: Campus, 2016), 151-206 (also published as Ingolf Pernice, *Global Constitutionalism and the Internet. Taking People Seriously*. HIIG Discussion Paper Series (2015/01), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2576697.

² *Ibid.*

normative dynamics of the internet. Where John Perry Barlow declared the independence of cyberspace,³ Ingolf de facto declared independent thinking on cyberspace his (or rather one of his) chosen domain(s). He did so in an exemplary fashion in his Frankfurt presentation, which gave insight into his and his team's work at the HIIG and Humboldt University, Berlin. In his paper he showed how different approaches to, and concepts of, global constitutionalism can be useful to develop a "constitutional frame of governance" for the internet and, importantly, through the internet: "It is the Internet that seems to allow the information and transparency, communication and discourse, participation of and control by (global) citizens necessary for organizing legitimacy."⁴ While his study is a must-read for any scholar interested in the dynamics of online rule-making, I found his seven elements or stages of a norm-setting process for the emergence of "globally binding rules" most interesting. This is indeed a key question to which few have found any remotely satisfactory answer: How can we develop – in light of the overlapping spheres of authority, the new normative vocabularies and the ever richer field of normative actors – binding rules that are legitimate – and legitimated. Ingolf saw seven steps to lead to norms that are "validated and revisited in a manner giving people a voice and so taking people seriously":⁵ a common knowledge basis, a public sphere, an institutional framework, a multistakeholder-based method, validation, a fair dispute settlement apparatus and the openness of norms (through processes of monitoring and revisiting).⁶

By now I have moved academically and physically to Hamburg, where global constitutionalism – a topic of Ingolf Pernice's that predates his engagement with the internet – has very strong roots. But it is his writing that sums up best why constitutionalist approaches to the internet can be useful. Global constitutionalism and the Internet, for Ingolf, are related and mutually reinforcing:

"the Internet is an important tool for developing a system of democratically legitimate regulation at the global level, giving people a voice, and so favours global constitutionalism, both for the space of communication and participation in politics it offers, and for the models of multi-stakeholder processes it has developed."

But constitutionalism also 'gives':

"As the Internet is becoming the most important infrastructure for worldwide communication, constitutionalising its governance is required in order to ensure its security and resilience as well as the pro-

³ John Perry Barlow, A Declaration of the Independence of Cyberspace, EFF (8 February 1996), <https://www.eff.org/cyberspace-independence>.

⁴ Pernice (2015).

⁵ Ibid.

⁶ Ibid., 33-45.

tection of the individual rights of all people involved, including the freedoms of information and expression, of sciences and education, intellectual property rights and the protection of data and privacy as elementary aspects of human dignity.”⁷

For Ingolf Pernice, thus, global constitutionalism can be harnessed to ensure that the rights of people are realized in Internet rule-making. Over the last years, I have pursued a similar project in which I developed a theory of order of the internet: the normative order of the internet. I see it as being one way to formalize the frame in which Ingolf’s global constitutionalist approaches can influence internet-related norm-development.

THE NORMATIVE ORDER OF THE INTERNET⁸

When speaking of the concept of ‘normative order’, I refer to the approach by Forst and Günther, who see norms less in terms of legality grounded in *formality* and more in terms of *functionality*. Norms, to them, are “practical reasons to act [containing] the claim of being binding upon the addressee.”⁹ These claims are narrativized and contextualized, habituated in practices, contained in customs (implicit, instituted normativity) and conventions *as social contracts* (implicit again) or conventions *as treaties* (explicit constituted normativity). The claims of being binding are thus *not legal* in that they are premised upon a legal procedure to ensure compliance, but nevertheless exercise, through their claim to be binding, a certain compliance pull.

But norms in the context of my study are *legal* in the sense that they shape and frame the *legal space* (*Rechtsraum*), contribute to ensuring *legal peace* (*Rechtsfrieden*), provide for a *law of collision* (*Kollisionsrecht*) between applicable regimes and are treated by and large *as legal norms* or at least *legality* heuristics which ease decisionary burdens.

Taken together, the norms constituting the normative order of the internet (those *normatively* relevant for the internet and digitality in a *materially* relevant way) form a multi-layered legal order. This does not mean that they are centrally *ordered* or *hierarchically* layered. A normative order is a “complex of norms and values with which the fundamental structure of a society (or the structure of international, supranational or transnational relationships) is legitimated, in particular the exercise of

⁷ Pernice (2015), 48.

⁸ Cf. Matthias C. Kettmann, Deontology of the Digital: The Normative Order of the Internet, in Matthias C. Kettmann (ed.), Normative Ordnungen. Neue Perspektiven / Normative Orders. New Perspectives (Frankfurt/Main: Campus, 2020).

⁹ Rainer Forst and Klaus Günther, Die Herausbildung normativer Ordnungen. Zur Idee eines interdisziplinären Forschungsprogramms, in Rainer Forst and Klaus Günther (eds.), Die Herausbildung normativer Ordnungen. Interdisziplinäre Perspektiven (Frankfurt/New York: Campus, 2011), 11-30 (16).

political authority and the distribution of basic goods.”¹⁰ These are key *legal* functions. At the same time, the normative order of the internet is more than a purely legal order as it relies on norms and processes that cannot easily be conceptualized in the language, logic and legitimacy structures of traditional legal systems.

The order extends to regulating and legitimating (or providing the normative tools for contestation of) the exercise of private or public authority and the distribution of basic goods in relation to the use and development of the internet by multiple actors, including internet access and access to internet content. It enshrines a *rule of norms*, the set of norms and normative expectations that shape the use and development of the internet, which lead to a *rule of law*.

The measure of *legality* of the normative order cannot be the “political constitution” (of states), against which it would fall short (but so does the international *legal* order). Rather the normative yardstick must be the normative order of the internet’s *Eigenverfassung*,¹¹ as instituted by practices, and auto- and hetero-constituted. Norms from the third category (transnational regulatory arrangements, internet standards ...) may not be *legal norms* in traditional national or international legal approaches (they are the *tertium*), but they can be considered to have some or most of the qualities of legal norms (*Rechtsnormqualität*) if they meet internal, regime-specific transnationalized and objective human rights-based checks and balances as to their production, content and application.¹²

The normative order of the internet encompasses norm-generative processes and includes, through its processes, normatively relevant action by all actors. These actors develop normative expectations which are debated, contested and realized on the basis of shared principles within the order.

The concept of the normative order of the internet is thus an empirical-conceptual and a normative construct: it provides legitimacy (and justification) narratives and functions as an elastic normative space, with principles and processes for solving public policy conflicts connected to safeguarding the internet’s integrity and protecting states and societies, natural and legal persons, from dangers related to internet use and misuse. The order integrates norms materially and normatively connected to the use and development of the internet at three different levels (regional, national, in-

¹⁰ Forst and Günther (2011), 15: “Unter ‘normativer Ordnung’ verstehen wir den Komplex von Normen und Werten, mit denen die Grundstruktur einer Gesellschaft (beziehungsweise die Struktur inter- bzw. supra- oder transnationaler Verhältnisse) legitimiert wird, namentlich die Ausübung politischer Autorität und die Verteilung von elementaren Lebens- und Grundgütern“ (translation by the author).

¹¹ Gunther Teubner, *Globale Zivilverfassungen: Alternativen zur staatszentrierten Verfassungstheorie*, 63 ZaöRV (2003), 1-28 (22).

¹² Thomas Vesting: *Die Medien des Rechts: Computernetzwerke* (Weilerswist: Velbrück Wissenschaft, 2015), 144.

ternational), of two types (privately and publicly authored), and of different character (from *ius cogens* to technical standards). As a legal order it operates through the form of law and analogously to it. Its actors – states, legal persons, natural persons – fulfil diverse functions as norm entrepreneurs, norm appliers, and norm enforcers. The order’s justification narratives control new norms by assessing their technical consistency and their legal-cultural consonance vis-à-vis the order’s purposes. Though not without autonomous elements, the normative order of the internet is interlinked through legitimation relationships with national and international legal orders.

The order is made up of international law, national law, and transnational regulatory arrangements of variable normativity. Apart from international and national norms, a ‘third’ category of norms exists, a normative tertium, which has only recently emerged as a normative category in its own right. Tertium norms are fundamentally technical standards and soft law norms that emerge in the contested space between technical necessity and socio-legal values. They evidence a variable normativity and transcend binary normative solutions and can thus counteract diffusions of regulatory responsibility in transnational settings.

The order’s normativity shapes technicity. The technology-orientation of non-legal normativity, including its focus on code and standards, needs to be reoriented through a value-based normative approach, while the effective internal norm (re) production mechanisms of private standards need to be embraced. It is thus not technicity that shapes normativity. Rather than letting a technical medium define our societal values, it is the values embedded in the normative order of the internet that define the evolution of the internet’s underlying technologies through normative framing and regulatory interventions. Value-based normativity must influence standard-setting to ensure the primacy of international legal commitments, and their national legal counterparts, in determining the finality of the normative order of the internet. Rather than accepting arguments out of technical necessity, we demonstrate that technical norms are properly placed within the value-oriented common frame of the normative order of the internet.

The internet’s forces of normative disorder can be identified and countered. Centrifugal forces contribute to the emergence of normative redundancies (“normative froth”), real conflicts of norms between regulatory layers and geographically bounded normative spheres (“normative friction”), substantial structural problems (“normative fractures”), and political, commercial and technological fragmentation of the internet. However, technical invariants of the internet exercise defragmentation forces. These are then normatively reified within the normative order of the internet.

The internet has taken a normative turn. A study I have completed last year has shown that a normative turn has taken place on the internet, allowing norms im-

pacting its use and development to self-constitutionalize and – through autonomous normative processes – to develop and legitimize other norms within the order.¹³ This approach has considerable explanatory and predictive potential regarding the evolution of norms and how this process will impact the internet. For instance, the study demonstrates that attempts at norm entrepreneurship that are in dissonance with key principles of the normative order, or that do not cohere with other order norms, will fail.

The normative order of the internet is a legal and legitimate order which is connected to, and legitimated by, international and national legal processes. It is further a legitimate order of norms. Processes of legitimation of norms take place within the order, but also through national law and the international legal system. Each field of norms within the order – international law, national law, transnational normative arrangements – is legitimized either through traditional normative processes or by its integration into national legal orders. Each actor group is legitimized directly or indirectly and transfers this legitimacy potential to the normative outcome, which is often – additionally – epistemically legitimate. The normative order itself is legitimate as a necessary order to ensure protection of and from the internet. The process of justifying the order is narrativized. As any order participant has a right to justification against norms and practices generally-reciprocally, the normative order of the internet is an order of justification.

CECI N'EST PAS LE FIN

My approach of a normative order of the internet sits comfortably with the ideas developed by Ingolf. As becomes a *theory* of a normative order of the internet, my analysis remains structural-abstract where his is solution-oriented. But, arguably, the seven steps/elements he has proposed to constitutionalize the internet fit well as norm production and legitimation elements of a coherent normative order of the internet. I have described the normative order of the internet as producing a liquefied normativity which learns from itself. Such a normativity learning from its environment can no longer be modeled in traditional concepts of subjectivity. We might have to re-think the Kantian theory of normativity (of “the law”), which sees self-organization as the principle of life that enables the transcendental constitution of normativity. How does this now relate to global constitutionalization? Can a similar approach be useful to conceptualize a “Constitution for the Internet”, a normative order that learns from itself?

If someone can answer these questions, it is Ingolf Pernice. A grand book of his on the constitution(alization) of the internet would be needed now more than

¹³ Matthias C. Kettemann, *The Normative Order of the Internet* (Oxford: Oxford University Press, 2020).

ever. Apart from the book itself I would particularly look forward to the title, as Ingolf has a very subtle hand with sophisticated references. Just think of the 2008 *Ceci n'est pas une Constitution*¹⁴, which invokes René Magritte so aptly (given the subject) that I wouldn't be able to classify the constitutionalist discourse (now and then) much differently than with a nod to the Belgian surrealist. We are accustomed to the subject (harnessing power, legitimating authority), but somehow everything is different (intermediaries?), something is not right, not common place (governance by contract, by algorithm, by affordances?). The German word *Störgefühl* fits well here. Traditional constitutional lawyers have many *Störgefühle*, when seeking to extend their reach online with Karlsruhe in the backpack. Ingolf, however, is happily untraditional and, in a certain way, a surrealist or at least a magical realist of constitutionalism. Which is good, as anyone who writes about constitutionalizing the internet so profoundly and influentially as Ingolf has (and will continue to do so) really needs both ingredients: reality (what does the law say) and magic (what surprising but not impossible development needs to happen to come to a happy ending, a normative outcome that leaves the audience, the stakeholders, satisfied).

Ending where I started, with Ingolf: In the written version of his contribution on *Taking People Seriously*, Ingolf argued:

“The Internet presents, in particular, new tools for discourses across borders, without limits also to the number of participants. The model of the IGF [...] seems to be particularly appropriate for not only organising the public space regarding global Internet governance, but also as a catalyser and focal point for people around the world interested to participate in the debate on equal terms and so to be respected and taken seriously.”¹⁵

Let us take this suggestion seriously, especially in a year like 2019, when Germany has hosted the Internet Governance Forum in Berlin which might well prove a kick-start for a new generation of value-based internet governance research and practice.¹⁶

¹⁴ Ingolf Pernice and Evgeni Tanchev (eds.), *Ceci n'est pas une Constitution – Constitutionalisation without a Constitution?* (Frankfurt am Main: Nomos, 2008).

¹⁵ Pernice (2015), 37.

¹⁶ See the ideas contained in Wolfgang Kleinwächter, Matthias C. Kettemann, Max Senges (eds.), *Towards a Global Framework for Cyber Peace and Digital Cooperation: An Agenda for the 2020s* (Hamburg: Verlag Hans-Bredow-Institut, 2019), <https://leibniz-hbi.de/de/publicationen/towards-a-global-framework-for-cyber-peace-and-digital-cooperation>.

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