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Global Constitutionalism and the Internet. Taking People Seriously

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Abstract

States and societies are globally interconnected and interdependent. External effects of national policies challenge democratic self-determination in other states. An increasing density of relations among people worldwide through communication, migration, traveling as well as through global challenges like climate change, deregulated financial markets, terrorism and organized crime require common rules. Existing models and practices of governance beyond the state do not seem to present solutions that are both efficient and legitimate. They show, nevertheless, elements that, if combined, could be a basis for a new method for developing legitimate global rules. Diverse concepts of global constitutionalism can provide conceptual tools for constructing a constitutional frame of governance at the global level including emerging legally binding rules. 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. On that basis the present contribution takes experiences from the diverse arenas of governance producing principles, standards and rules, and uses theoretical approaches of global constitutionalism for depicting seven elements or stages of a norm-setting process through which globally binding rules emerge, are validated and revisited in a manner given people a voice and so taking people seriously.

Keywords

Global Constitutionalism, Internet, Internet Governance, multistakeholderism, legitimacy, rule-making, participation

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I. Introduction

Talking about global constitutionalism encounters serious scepticism in constitutional theory and international legal thinking. There are reasons, however, for accepting that the concept of constitution is not applicable to states only, but also helps understanding and describing processes of establishing, legitimizing and limiting public authority beyond the state.[1] The present contribution does not go into this debate. It rather strives to emphasise the role of the individual in constitutional thinking beyond the state; this approach, therefore, focuses on people as individuals, not *the* people as a political entity.

From the perspective of the individual, and on the backdrop of European experience, constitutionalism is proposed to be understood as encompassing several levels – sub-state, state, regional (like the EU), global – of legitimate public authority established for different purposes and serving the interest of people that have decided to define themselves respectively as the citizens of the local, national, regional (European) and, arguably, global communities. Contrary to what the term "multilevel" may imply, the system is understood as non-hierarchical, as a pluralistically integrated legal system composed of political shells around the individual, with a division of attributed powers according to the principle of subsidiarity.[2]

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[1] For the debate see Matthias Kumm, The Cosmopolitan Turn in Constitutionalism: An Integrated Conception of Public Law, Indiana Journal of Global Legal Studies, Vol. 20, No. 2 (2013), pp. 605, 606 et seq.; Anne Peters, The Merits of Global Constitutionalism, in: *Indiana Journal of Global Legal Studies* 2009, pp. 397, 399-402; Antje Wiener, Anthony F. Lang, James Tully, Miguel Poiares Maduro and Mattias Kumm, Editorial – Global Constitutionalism: Human Rights, Democracy and the Rule of Law, in: 1 Global Constitutionalism (2012), pp. 1, 5-10.

[2] First: Ingolf Pernice, Constitutional Law Implications for a State Participating in a Process of Regional Integration. German Constitution and "Multilevel Constitutionalism", in: Eibe Riedel (ed.), German Reports on Public Law Presented to the XV. International Congress on Comparative Law, Bristol, 26 July to 1 August 1998 (1998), pp. 40-65; for a short summary of the debate see Ingolf Pernice, The EU – A Citizens' Joint Venture. Multilevel Constitutionalism and Open Democracy in Europe, in: José M. Magone (ed.), Routledge Handbook of European Politics, 2014, pp. 184, 185-187. For the integrative approach see also Kumm (note 1), p. 612: "International law is neither derivative, nor is it autonomous. National and international law form an integrative whole." The consequence is that: "The standards of constitutional legitimacy are to be derived from an integrative conception of public law that spans the national-international divide" (ibid., p. 625). On the principle of subsidiarity in international law see also: Andreas Follesdal, The principle of subsidiarity as a constitutional principle in international law, in: 2 Global Constitutionalism (2013), pp. 37, 55-62, with a convincing

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The concept of multilevel constitutionalism is driven by the basic understanding that what ultimately matters is the individual, not legal or political constructs like the states. States cannot be understood as an end in themselves and must always be considered instrumental to the individual, the human being or, as members of a political community, the citizens, for their purposes. All modern legal systems, as *Jürgen Habermas* states, are ultimately based upon the subjective rights of the citizens,[3] and so are states and any of the supranational or global institutions they may have established. Law serves the individuals and the protection of their rights, not less and not more.

The political community, be it a state, the EU or whatever may develop at the global level, has no other purpose.[4] This is what can be learned from the guarantee of human dignity, the mother of all other fundamental rights.[5] Contrary to a widespread approach on global constitutionalism,[6] the perspective

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critique on "claims that a principle of subsidiarity may help justify several 'state-centric' features of international law, as a normative 'constitutional principle'."

[3] Jürgen Habermas, Die Krise der Europäischen Union im Lichte einer Konstitutionalisierung des Völkerrechts – Ein Essay zur Verfassung Europas, ZaöRV 2012, pp. 1, 22.

[4] See also Article 1 of the "Herrenchiemsee"-Draft for the German Grundgesetz (HChE): "Der Staat ist um des Menschen willen da, nicht der Mensch um des Staates willen"; see also Horst Dreier, Article 1 I, note 18 in: id. (ed.) Grundgesetz Kommentar, vol. I (3rd ed. Beck, München 2013).

[5] See, for instance, Jürgen Habermas, The crisis of the European Union. Response (Polity Press, Cambridge 2012), p. 75, 76-77: "...something that was inscribed in human rights implicitly from the outset, namely, the normative substance of the equal dignity of every human being that human rights only spell out". Crit. Dreier (note 4), Article 1 I, note 161.

[6] See Thomas Müller, Global constitutionalism in historical perspective: Towards refined tools for international constitutional histories, in: 3 Global Constitutionalism (2914), p. 71, 73: "...constitutional structures as a set of fundamental and prioritized principles and rules that serves as a framework for the self-ordering of relations between polities" (not people!). See also Kumm (note 1), p. 607, who mentions the fact "the individual has long emerged as a subject of rights and obligations under international law", but this does not mean that the individual is understood as the source of legitimacy also of the law and institutions at the international level; the instruments he mentions – human rights, international criminal law – are still rule made and applicable among states. – With an individualistic approach, however, see: Anne Peters, The Merits of Global Constitutionalism, in: *Indiana Journal of Global Legal Studies* 2009, p. 397, 399: "The ongoing process of humanizing sovereignty is the cornerstone of the current transformation of international law into a system centred on individuals." See also Ulrich Petersmann, Human Rights, Constitutionalism and the World Trade Organization: Challenges for World Trade Organization Jurisprudence and Civil Society, *Leiden Journal of International Law* 2006, p. 634, 641: "My publications define 'multilevel constitutionalism' from a citizen's perspective [...], thus proceeding from the value premise of *normative individualism* rather than state sovereignty" (original emphasis); Karolina Milewicz, Emerging Patterns of Global Constitutionalization: Toward a Conceptual Framework, *Indiana Journal of Global Legal Studies* 2009, p. 413, 422-3 and 427 ("[T]he recognition of human rights is synonymous with the recognition of the individual as the subject of international law. IT implies that modern international law is no longer exclusively concerned with the regulation of state-to-state relations but also with relations between the individual and the state."); cf. Andreas L. Paulus,

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of the individuals – people - is key for constitutional thinking at the national level and beyond. This is what leads to the central ambition of the present paper: Global constitutionalism is about rethinking constitutional law from the perspective of global citizens. Despite the major challenges that democratic participation and activism are facing online[7] the Internet has still certain potential of empowering people. To a new extent there is a chance to actively participate in political process and to legitimise regulation at all levels, including the global level.[8]

Obviously, the phrase: *taking people seriously* is borrowed from *Ronald Dworkin*: Taking rights seriously.[9] Among all that ought to be taken seriously people come first – because each of us bears his or her end in herself and deserves full recognition and respect as equal member of the human society, full respect of his or her individuality and otherness. What *Dworkin* develops as "the right of each individual to the equal respect and concern of those who govern him",[10] seems to be closely connected to the concept of human dignity, the founding principle of how I understand "constitution". It is also a fundamental right of all citizens as members of a political community, at least according to the understanding known in German constitutional law and included in Article 1 of the European Charter of Fundamental Rights. It has been given a broader meaning, however, encompassing a social dimension, to serve as a basic theory of the state by *Hasso Hofmann* who defines the promise

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The International Legal System as a Constitution, in: Jeffrey L. Dunoff and Joel P. Trachtman (ed.), *Ruling the World? Constitutionalism, International Law, and Global Governance* (CUP 2009), p. 69, 72; Neil Walker, Reframing EU Constitutionalism, in: *ibid.*, p. 149, 156 ("[A]uthority rests upon a putative idea of the individual as the basic unit of society and as the (presumptively equal) source of moral agency, with the very idea of a political domain built upon and dedicated to that secular premise"); see further infra, III.1.

[7] Mikah L. Sifry, *The Big Disconnect: Why the Internet Hasn't Transformed Politics (Yet)* (New York 2014); Evgeni Morozov, *The Net Delusion: How Not to Liberate the World* (Penguin 2011).

[8] In this vein, e.g., Samantha Besson, Whose Constitution(s)? International Law, Constitutionalism, and Democracy, in: Dunoff and Trachtman (note 6), p. 381, 393-399; Andreas Follesdal, When Common Interests Are Not Common: Why the Global Basic Structure Should be Democratic, *Indiana Journal of Global Legal Studies* 2009, p. 585.

[9] Ronald Dworkin, Taking Rights Seriously, 1977, in particular p. 184 et seq..

[10] Drawing from John Rawls, Theory of Justice, 1972, ibid., p. xii, 149, 150-183, 205, 227 et al.. But see his discussion of dignity as a primarily ethical principle in: Ronald Dworkin, Justice for Hedgehogs (Belknap/Harvard 2011), p. 191 ff.

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of individuals to mutually respect each other's dignity as the foundational concept of the state as a community of solidarity.[11]

If this proposition is correct, why should *Hofmann's* understanding of human dignity not apply *mutatis mutandis* for emerging political communities beyond the state?[12] What I am suggesting, thus, is to examine more deeply to what extent and under which conditions the approach of *dignity as mutual promise* among individuals (people) defining themselves as citizens of a political community can be beneficially harnessed not only with regard to the EU[13] but also to the global community emerging as a "constitutional community".[14]

The Internet, it is submitted, could play a crucial role in catering to this mutual promise.

The subject "Global Constitutionalism and the Internet", thus, invites us to reflect upon the question, whether and, if so, under what conditions, driven by the need to meet the global challenges, globally available information and communication through the Internet and, in particular, emerging social networks across borders amalgamate people of the existing local, regional, national communities progressively to constitute a global community "on top" of a multilevel global constitutional system. What I have developed as a

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[11] Hasso Hofmann, "Die versprochene Menschenwürde", 118 *Archiv des öffentlichen Rechts* (1993), p. 353, 367-369.

[12] For a more general approach see only Habermas, Crisis (note 5), p. 81: "'Human dignity' performs the function of a seismograph that registers what is constitutive for a democratic legal order – namely, just those rights that the citizens of a political community must grant themselves if they are to be able to respect one another as members of a voluntary association of free and equal persons. The guarantee of these human rights first gives rise to the status of citizens who have a claim as subjects of equal rights to be respected in their human dignity". For the extension of the concept from a state-centered to a universal recognition of human dignity in a "constitutionalised world society" see ibid., p. 87-93.

[13] See my proposition in: Ingolf Pernice, Solidarität in Europa. Eine Ortsbestimmung im Verhältnis zwischen Bürger, Staat und Europäischer Union, in: Christian Calliess (ed.), Europäische Solidarität und nationale Identität - Überlegungen im Kontext der Krise im Euroraum (Mohr Siebeck, Tübingen 2013), pp. 25, 54-56.

[14] For the term see: Anne Peters, Membership in the Global Constitutional Community, in: Jan Klabbers, Anne Peters, and Geir Ulfstein (eds.), The Constitutionalization of International Law (Oxford University Press, 2009), p. 153-157, observing a "dialectical process": "the emergence and extension of a global constitutional community is both a manifestation and a driver of global constitutionalism, while the constitutionalization of international law is at the same time an explanation and a promoter of this communitarization" (ibid., p. 157).

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theoretical approach under the heading of "the global dimension of multilevel constitutionalism"[15] would so gain a practical perspective.

While many questions regarding our daily life can be dealt with effectively at local, regional, national levels, there is an increasing list of problems – like international peace and security, terrorism, climate change, global trade, financial markets and the Internet – that can not. Ruling these matters effectively is outside the reach of national democratically decided policies. In addition, it becomes more and more visible that policies "democratically" decided by one country may have (external) effects on other countries to an extent that is not acceptable to their peoples.[16] This is why the European Union, with the tasks and powers conferred upon it, does not take away, but adds to the sovereignty of her Member States. Thus, the EU is not a challenge to democracy but can be depicted as a remedy to democratic deficits at the national level.[17] The European constitution can therefore be conceived as establishing a complementary level of legitimate ruling and policies, it compensates for deficits of self-determination at the national level.[18]

But also beyond Europe – due to trade, tourism, migration and new information technologies – modern societies are more and more interconnected, interdependent and embedded in a dense web of global relationships, to an extent that common ruling on the basis of mutual respect and understanding among people worldwide is required. Common rules and mutual respect among people, yet, exist only in part. People are first of all citizens of their respective countries. There is some sign, however, of people

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[15] Ingolf Pernice, The Global Dimension of Multilevel Constitutionalism: A Legal response to the Challenges of Globalisation in: Pierre-Marie Dupuy, Bardo Fassbender, Malcolm N. Shaw and Karl-Peter Sommermann (eds.), *Common Values in International Law. Essays in Honour of Christian Tomuschat,* (N.P. Engel, Kehl-Strasbourg-Arlington 2006), p. 973-1005

[16] See also Kumm (note 1), p. 612 et seq., talking about "justice-relevant negative externalities". See also below II.1.

[17] See for the European Union Jürgen Neyer, The Justification of Europe. A Political Theory of Supranational Integration, (Oxford University Press, 2012), p. 4; following this line: Ingolf Pernice, The EU – A Citizens' Joint Venture. Multilevel Constitutionalism and Open Democracy in Europe, in: José M. Magone (ed.), Routledge Handbook of European Politics, 2014, p. 184, 187-190.

[18] For the compensatory function, accordingly, of global constitutionalism see: A. Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures', 19 Leiden Journal of International Law (2006, pp. 579 – 610, 591. See also: Lars Viellechner, Constitutionalism as a Cipher: On the Convergence of Constitutionalist and Pluralist Approaches to the Globalization of Law, Goettingen Journal of International Law 4 (2012), pp. 599, 605-6: "concept of compensation".

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being conceived as global citizens too,[19] and international law is said by some observers to be transforming into a "World (Internal) Law" in a "multilevel system".[20] Legal instruments at this level, however, such as the Charter of the United Nations or international conventions on the protection of human rights can hardly be described as expressing sufficient commonality, and even less so as elements of a global constitution.[21] People do not consider themselves as origin and owners of these instruments, which indeed are laws or institutions among states, not among citizens.

Does the Internet have the potential to change anything in this analysis? The answer is probably yes: It offers the potential as a tool for establishing a global public sphere allowing for a political discourse among people across borders and continents.[22] This discourse could become constitutional in the meaning outlined above. As *James Bohman* puts it:

> "In public spheres there is a demand for the inclusion of all those who participate and recognize each other as participants; this inclusion is not merely a matter of literal size and or scope but of mutually granted equal standing."[23]

The Internet could develop as the medium for achieving this at a global scale. Mutual recognition among people as equals or, with the words of Dworkin, the acceptance of a right to equal concern and respect is close to what human dignity implies and requires. The Internet, thus, could emerge as an instrument through which the mutual promise of dignity mentioned above might reach a global dimension.

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[19] Anne Peters, Dual Democracy, in: Jan Klabbers, Anne Peters, Geir Ulfstein (eds.), The Constitutionalization of International Law (Oxford University Press, 2009), p. 263, 296 -313, in particular p. 307-313: "the globalization of citizenship". Habermas, Crisis (note 5), p. 58-59, 62, 65, uses the term "world citizen". A number of civil society organisations use the term global citizen, e.g. http://www.globalcitizen.org/, or http://www.newglobalcitizens.org/.

[20] Jost Delbrück, Prospects for a "World (Internal) Law?": Legal Developments in a Changing International System, in 9 Indiana Journal of Global Legal Studies (2002), pp. 401-402, 429-430, using the term "multilevel system", however, in a vague and unspecified sense.

[21] For the UN Charter, see however the proposal of Bardo Fassbender, The United Nations Charter as the Constitution of the International Community, Martinus Nijhoff Publishers, Leiden/Boston 2009.

[22] See, e.g., Hauke Brunkhorst, Solidarity – From Civic Friendship to a Global Legal Community (MIT Press, Cambridge, MA 2005), p. 158-9: "It appears as if a worldwide people, made up of the addressees of law, is beginning to express itself for the first time as a globally '*active*' and '*legitimating* people' (represented by freely associated organizations): 'the vanguard of a slowly developing transnational 'people.'"

[23] James Bohman, The Transformation of the Public Sphere. Political Authority, Communicative Freedom, and Internet Publics, in: v.d. Hoven/Weckert (eds.), Information Technology and Moral Philosophy, Cambridge University Press 2008, p. 66 (75).

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Some basic terms in this discussion need clarification. Four perhaps provocative definitions or theses shall serve as a point of departure:

- "Constitutionalism" means theoretical thinking about the idea and basic elements or values of a constitution[24] as well as the political and legal processes it implies and drives ahead; but it can also encompass the practice of political movements striving to make this idea a reality.
- "Constitution" is the political process and, finally, the legal instrument establishing, organising and limiting legitimate public authority within a political community, based upon the rule of law, democratic principles, separation of powers, and fundamental rights reflecting a mutual promise of human dignity.[25]
- "Global constitutionalism" is an extension of constitutionalism beyond the state and includes the instruments and processes for establishing, organising and limiting legitimate public authority at the global level as a matter of people so giving themselves the legal status of global citizenship.[26]

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[24] For these values see Article 2 TEU; with regard to global constitutionalism see also: Antje Wiener, Anthony F. Lang, James Tully, Miguel Poiares Maduro and Mattias Kumm, Editorial – Global constitutionalism: Human Rights, democracy and the rule of law, in: Global Constitutionalism (2012), p. 1-2: rule of law, human rights protection, separation/limitation of powers of government, democratic self-determination of a polity.

[25] Human dignity, though, is not regarded as a basic fundamental right in all constitutions, at least not expressly. For surveys see Matthias Mahlmann, Human Dignity in Modern Constitutional Orders, in: Michel Rosenfeld & Andras Sajó (Eds.), The Oxford Handbook of Comparative Constitutional Law (OUP 2012), p. 370 ff.; Christopher McCrudden, "Human Dignity and Judicial Interpretation of Human Rights", European Journal of International Law 19 (2008), p. 655, 664 ff.

[26] This definition extends somewhat the general approach regarding the term of global constitutionalism (see Wiener et al. (note 24), p. 5-10), with the perspective of the individual - though critical views are mentioned, ibid., p. 7, stating "that a constitution without a state as the context of the people as the constituent power of any constitution is neither desirable nor possible (Grimm 1995; Loughlin 2010)". Some hint for an individualistic perspective is given, however, by Peters, Merits (note 6), p. 399. For this self-referential approach of citizenship see Ingolf Pernice, Der Europäische Verfassungsverbund auf dem Wege der Konsolidierung Verfassungsrechtliche Ausgangslage und Vorschläge für die institutionelle Reform der Europäischen Union vor der Osterweiterung, in: Peter Häberle (ed.), *Jahrbuch des Öffentlichen Rechts der Gegenwart*. Neue Folge/Band 48 (Tübingen 2000), p. 205, 211. Citizenship, thus, is not conceived here as "a status granted to citizens by a state or international legal regime and a set of private and public institutions in which its two main types of rights and duties can be exercised", as James Tully, A Dilemma of Democratic Citizenship. University of Victoria May 8, 2010, p. 19, qualifies as "modern citizenship", as opposed to what he develops as "cooperative citizenship", available at: http://www.hivos.net/Hivos-Knowledge-Programme/Themes/Civic-Explorations/News/A-Dilemma-of-Democratic-Citizenship (last visit January 2, 2015); see also below, IV.1.

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- The “Internet” is one of the great global challenges requiring itself a global regulatory framework for which the constitutional bases are yet to be developed, but it is likewise an instrument that may enable the processes needed of establishing and legitimising rule-making at the global level.

The Internet provides us with two closely linked aspects relevant to how global constitutionalism is understood here: The experience with Internet governance can teach us about new forms of non-governmental norm-building processes. It also provides us with the public sphere needed for effectively setting up a framework and legitimating processes for constituting a global political community.

Some evidence for my assumption that there is an increasing democratic deficit and a need for new forms of democratically legitimate and binding regulation at the global level (infra II.) will be followed by examples for arrangements established to meet these challenges allowing to identify some principles guiding the constitutional foundations of such regulation (infra III.). Current concepts for the construction of legitimacy rooted in the individual as discussed under the heading of global constitutionalism (infra IV.) can, on this basis, be further developed to discuss some critical elements for a global constitutional arrangement sustaining democratically legitimate regulation at the global level (infra V.).

II. Democratic Deficits and Global Regulation

The increasing interconnectedness of states and people around the globe gave David Held already in 1995 reason to reject, in his seminal book on “Democracy and the Global Order”, the traditional concepts of democracy that assume “a ‘symmetric’ and ‘congruent’ relationship between political decision-makers and the recipients of political decisions”. The problem, in his view,

> “for defenders and critics alike of modern democratic systems, is that regional and global interconnectedness contests the traditional national resolutions of the key questions of democratic theory and practice. The very process of governance can escape the reach of the nation-state. National communities by no means exclusively make and determine decisions and policies for themselves, and

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governments by no means determine what is appropriate exclusively for their own citizens".[27]

Two different phenomena allow us to explain in more detail the insight that – as Jürgen Neyer recently put it – the establishment of supranational public authority like the EU should be understood not as a threat to democracy but as a solution to the democratic deficit of the Member States.[28] The first group of phenomena are the "external effects" of national policies (infra 1.); the second group are global challenges that individual states acting by themselves cannot sufficiently cope with (infra 2.). The remedy for the problems of democratic self-ruling of peoples in the actual system based upon nation states could be modes and methods of global regulation supported by the Internet (infra 3.).

1. Externalities of National Policies

Held does not primarily look at decisions made by supra- or international organisations like the EU, NATO or the IMF, which in one way or another limit the (regulatory) autonomy of states. As topical examples he rather refers to phenomena such as isolated monetary policy decisions, like the increase of interest rates, the permission for 'harvesting' of rain forests and the construction of nuclear plants near the frontiers. Many other examples for "external effects" of national policies affecting neighbours or people worldwide can be identified.[29] Let me name but four areas of concern:

- Reckless and solipsistic energy policies disregarding the adverse effects on the global climate may cause droughts in other states or even make them disappear, in part (e.g. Netherlands, Bangladesh) or completely (e.g. low lying countries in the south pacific) and generate waves of refugees across continents.
- Likely, totalitarian government, inhuman treatment and human rights violations, or even corruption and selfish economic behaviour of public authorities in one country may cause such migration of political or

[27] David Held, Democracy and the Global Order. From the Modern State to Cosmopolitan Governance (Stanford University Press 1995), p. 16.
[28] Neyer (note 17), p. 4.
[29] For the problem see also Armin von Bogdandy, Demokratie, Globalisierung, Zukunft des Völkerrechts – eine Bestandsaufnahme, 63 ZaöRV (2003), p. 853, 870; Kumm (note 1), p. 612 et seq.

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economic refugees and result in unbearable pressures on neighbouring or other states.

- The establishment of tax havens threatens, in a globally interlinked financial market, the effectiveness of national tax and monetary policies of most states, built on solidarity and differing ideas of social justice, and, thus, could put at risk these policies as well as the functioning of the financial system altogether.
- Failures to provide for effective regulation on data protection and privacy, or on intellectual property rights – as well as policies of systematic mass surveillance – in one country are about to destroy the Internet as a means of worldwide information and communication with all its benefits for other states and people.

Politics here, therefore, can be of great concern for people there, not only economically but also politically, as a matter of security or under a social or humanitarian perspective.[30] There is not only a need for respect and cooperation, but also a responsibility of each state for adverse effects of its policies abroad. European food aid may destroy economic structures in developing countries; western values and patterns undermine traditional cultures and civilisations. To avoid domination, Matthias Kumm, therefore, sees international law in demand:

> "It is the point and purpose of international law to authoritatively resolve these concerns by way of a procedure that involves the fair participation of relevantly affected stakeholders, and it is the duty of states to support and sustain the development of an international law that is able to effectively fulfil such a function."[31]

Beyond national self-determination, he pursues, States have a "duty of justice" to act as "trustees of humanity", and "adequately take into account the legitimate interests of affected outsiders".[32] This "duty of justice" seems to have much to do with the mutual respect of the other, as an aspect of human dignity. But there are questions: How can international law ensure this "fair

[30] See also the account of three types of "justice-sensitive externalities" made by Kumm (note 1), p. 617-624.
[31] Kumm (note 1), pp. 613-14.
[32] Kumm (note 1), p. 614.

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participation"? How can "outsiders" practically be given a relevant voice in internal politics of a state? Is the "duty of states to support and sustain the development" of such an international law actually existing law, or is it a vision to be worked on?

2. Global Challenges

There are other issues and, in some way, there is another perspective on the issues just mentioned, indicating that there exists a democratic deficit in our societies. As mentioned, there are global challenges that individual states are not able to cope with: impede climate-change, regulate the global financial markets, fight against organised crime and international terrorism or protect human rights as well as the security of the Internet – to name but a few.[33] If we want to preserve suitable conditions of life for future generations, if we do not want to leave our future in the hands of some self-empowered private actors but continue to believe in the beneficial role of individual and collective self-determination through democratically elected and controlled public authorities, each accountable to those who are affected, the establishment of new institutions capable to act efficiently and democratically beyond the reach of the state seems to be needed. This is a requirement of democracy that so far has been neglected. Jürgen Habermas rightly states:

> "In view of a politically unregulated growth in the complexity of world society which is placing increasingly narrow systemic restrictions on the scope for addition of nation states, the requirement to extend political decision-making capabilities beyond national borders follows from the normative meaning of democracy itself."[34]

Cooperation among sovereign states through international agreements and organisations are the traditional instruments of states for dealing with common problems since the Peace of Westphalia in 1648. Yet, history shows that they do

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[33] See also Tully (note 26), p. 2, who counts "four major local and global problems of public goods today: (1) the problem of environmental destruction and climate change; (2) the problem of the horrendous inequality, exploitation and poverty of the Global South and the growing inequalities within the Global north and south; (3) the problem of global wars and the militarization; and (4) the problem of distrust and disrespect for different civilizations and peoples", and states that "when global citizens try to exercise their civic response-abilities in response to these four problems they find the official modes of citizenship available to them are not very effective" (ibid., p. 3).

[34] Habermas, crisis (note 5), p. 15; see also ibid., p. 55, on the "global need for regulation".

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not always serve the purpose, in particular with regard to the preservation of peace. The limited scope and reach of national policies in a state-centred system of global governance also shields the global challenges from public engagement or even give rise to these problems. I understand Tully in this regard to conclude from the existing "limits on official channels of citizenship", that in addition to the "four global problems" he as identified[35] that there is

> "a fifth problem, the limitation or *incapacitation* of responsible citizenship. This limitation on and ineffectiveness of the exercise of civic capacities or capabilities is what we can call a democratic deficit of local and global citizenship".[36]

3. The Remedy: Global Regulation

The traditional answer to transnational questions among sovereign states was cooperation among sovereign states through international conventional law – if war was not an option. History shows that the effectiveness of this system is limited. If meaningful international agreements on common issues can be reached at all, not all countries involved may participate and violations of the obligations laid down in the agreement cannot efficiently be sanctioned. And national citizens engaged in finding solutions have little impact in the development of international cooperation even to address the problems.

Externalities of national policies and global challenges often require regulatory solutions at a supranational or even global level, because citizens of even states on their own are unable to handle them. Climate change is an example insofar as excessive greenhouse gas emissions in some industrial countries threaten future generations everywhere, and, in particular, threaten the conditions of life in other countries, or even the very existence of some low-lying states. Taking measures against climate change, thus, is a global common interest, but it is of a particular interest of states that are not responsible for climate change.

Data protection and privacy on the Internet is another example: EU legislation requires far-reaching protection standards for users without regard where in the world data are stored or processed. This is a particular interest of Europeans. Given that not only most of the technology but also a great deal of services, including cloud services are offered by American undertakings,

[35] See supra, note 33.
[36] Tully (note 26), p. 3.

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however, this legislation either remains ineffective or has external effects in requiring these undertakings to apply European standards. As the global reach of the Internet does not easily allow for selectivity without threatening the idea of a globally free Internet, European standards need to be applied also in other regions of the world, where other rights or principles would prevail. Thus, if a globally open Internet were considered in the common global interest, only a global regulatory framework on privacy – and for other issues alike – would effectively protect the fundamental rights of the individual users.[37]

III. Models of Governance Beyond the State

Diverse attempts have been made to give an answer to the question how to set up appropriate structures and procedures for ensuring effective legitimate government and regulation regarding common issues at the appropriate levels of political action. Let me shortly discuss some examples in search of democratic or, at least, participatory or judicial effectiveness: The EU, the UN, the Rio process the WTO and Internet governance.

1. The European Union: Supranational legitimacy as a model?

The first and perhaps the most developed model for legitimate political action at a supranational level in the interest of the people concerned is the European Union. Historically, it has been established for – and indeed did achieve – preserving peace, freedom and prosperity for the European people(s). Despite of allegedly conceptual shortcomings and of recent failures to "deliver" the common goods of prosperity and general welfare its success is evidenced, for instance, by the number of people and states that are still eager to accede the EU. Faced with the pressing challenges of globalisation, however, the EU has its own limits of reach. For effectively participating in the shaping of a new world order – as sketched out in Article 21 TEU – it may serve as a vehicle as well as a model, but it is limited to one region of the world, it is the result of specific historical conditions and its founding treaties, therefore, may not serve

[37] For the efforts made in this regard at the UN-level see Ingolf Pernice, Das Völkerrecht des Netzes. Konstitutionelle Elemente eines globalen Rechtsrahmens für das Internet, in: Giovanni Biaggini (ed.), Festschrift für Daniel Thürer zum 70. Geburtstag, 2015, forthcoming.

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as an institutional template for other regions in the world and less so for the development of a global constitution.[38]

2. United Nations: Usurped Sovereignty at the Global Level

With the same purpose, but more limited both in scope and in effectiveness, the United Nations can be understood as the most important institution and building block of global governance. Nearly all nations are contracting parties of the UN system. The problem, however, is that its structures do not reflect the principles and values it is bound to. It has no express legislative powers, there is no adequate system of equal representation of people and hence it lacks democratic accountability. What is more important, the architecture of the UN is not about to guarantee that its primary mission, to preserve international peace, is effectively implemented under changing conditions of the international system.

Nor can we find an effective protection of human rights insofar as the Security Council is acting as a quasi-legislator in the fight against terrorism, a fact that has given rise to the Kadi-jurisprudence of the European Court of Justice (ECJ)[39] and to the jurisprudence of "equivalent protection test" of the European Court of Human Rights.[40] Jean L. Cohen understands the resolutions of the UN Security Council on smart sanctions as a "usurpation of global constituent power" the legitimacy of which is questionable.[41] Although some authors

[38] For attempts to further develop his approach, however, see Habermas, crisis (note 5), pp. x-xii, 11-12, 57-70.

[39] ECJ Case C–402/05 P and C–415/05, Kadi and Al Barakaat International Foundation v. Council and Commission [2008] ECR I–6351; see on this Anne Peters, Membership in the Global Constitutional Community, in: Jan Klabbers, Anne Peters, and Geir Ulfstein (eds.), The Constitutionalization of International Law (Oxford University Press, 2009), p. 153, 164; Juliane Kokott & Christoph Sobotta, The Kadi Case – Constitutional Core Values and International Law – Finding the Balance?, European Journal of International Law 23 (2012), pp. 1015-24; Gráinne de Búrca, The European Court of Justice and the International Legal order After Kadi, Harvard International Law Journal 51 (2010), pp. 44 ff.

[39] Jean L. Cohen, Globalization and Sovereignty. Rethinking Legality, Legitimacy, and Constitutionalism (Cambridge University Press 2012), p. 278, 280, 282 et seq.

[40] See recently Sébastien Platon, The "Equivalent Protection Test". From European Union to United Nations, from *Solange II* to *Solange I* (with reference to the *Al-Dulimi and Montana Magegement inc.* V. *Switzerland* Judgment of the European Court of Human Rights), 10 European Constitutional Law Review (2014), p. 226-262.

[41] Jean L. Cohen, Globalization and Sovereignty. Rethinking Legality, Legitimacy, and Constitutionalism (Cambridge University Press 2012), p. 278, 280, 282 et seq.

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already give the UN Charter a constitutional quality,[42] the typical characteristics of constitutionalism – a direct relationship between the authorities and the individuals concerned (elections, legislative competence, direct effect), a meaningful separation of powers or checks and balances, the protection of fundamental rights and general observance of the rue of law – are still absent. Without a substantial reform, thus, the UN-system would not be an appropriate model for a "constitution" of global governance and regulation.

3. The WTO System: Towards Judicial Dispute Settlement

Since the establishment of the WTO the world trade system has a new face: What was started as a pure international agreement, the GATT, now developed towards a multifaceted system of agreements on trade of goods and services including issues of intellectual property and based upon an effective dispute settlement arrangement, all within the legal frame of the WTO. The Dispute Settlement Body and the Appellate Body of the WTO seem to give the international agreement more bite, as the contracting parties can enforce their rights to a considerable extent, so coming close to judicial powers. This is, indeed, a big step towards effectiveness. It does not, however, allow talking about a constitutionalisation of the WTO[43] or even about the constitution of the WTO.[44] It remains a treaty among states that does not confer any direct rights upon individuals. Nor is there any provision for legislative powers and democratic participation in the procedures of decision-making.

4. The Rio Process – Towards Multistakeholder Participation

More adequate as a conceptual approach could be the Rio-Process: Sustainable development is a common concern worldwide. Accordingly, a "global compact"

[42] Bardo Fassbender, The United Nations Charter as the Constitution of the International Community (Martinus Nijhoff 2009).
[43] Critical for more reasons also Deborah Z. Cass, The Constitutionalization of the World Trade Organization. Legitimacy, Democracy, and Community in the International Trading System (Oxford University Press 2005); for a more theoretically grounded critique see Jessica Lawrence, Contesting constitutionalism: Constitutional discourse at the WTO, Global Constitutionalism 2 (2013), pp. 63-90.
[44] See Ernst-Ulrich Petersmann (ed), Reforming the World Trading System: Legitimacy, Efficiency and Democratic Governance (Oxford University Press, 2005).

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was negotiated in 1992 and designated to inform and give guidance to the policies of all states. Both, the principles laid down in the Rio Declaration and the policies agreed to in the Agenda 21 initiate and stimulate a process of awareness-rising and action at all levels through international conventions and national policies monitored and discussed at the UN level by the "Commission for Sustainable Development" (CSD). With a view to establish a more effective system, the Rio+20 Conference in 2012 has replaced the CSD by the "High-Level Political Forum of Sustainable Development".[45] One of the innovations in this Forum is the idea that, to make the outcome of the reporting and review process on the implementation of the Rio Agenda in the Forum "relevant and impactful",

> "... it is important to engage fully non-state actors (UN system, major groups including business and industry and other relevant stakeholders) in the forum. This was seen as an important way to improve transparency and implementation at all levels. Non-governmental stakeholders are an important part of shaping the forum and its work in the future".[46]

To set up the Forum, an Expert Group "on the role of the high-level political forum on sustainable development in post-2015 development framework" was established and met on April 30th and May 1st 2014. In one of its "key messages", the Experts highlight the "hybrid" structure of the Forum, "where major groups and other stakeholders can engage through solid modalities". It was qualified as "a great achievement for the UN". Another key message goes even one step further:

> "The UN is a 'norm-setting' institution; how best can the forum and international community help to translate agreed norms into policies at the national level?"[47]

At least the ambitions of the Expert Group seem to indicate that the new High-Level Political Forum of Sustainable Development will take the form of a multi-stakeholder body. Their architects intend so to give its work a relevant impact

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[45] See http://sustainabledevelopment.un.org/csd.html

[46] UN Sustainable Development Knowledge Platform, Announcement for the Expert Group Meeting on the role of the high-level political forum on sustainable development in post-2015 development framework, 30 April – 1 May 2014, available at: http://sustainabledevelopment.un.org/index.php?page=view&nr=667&type=13&menu=1556.

[47] See http://sustainabledevelopment.un.org/index.php?page=view&nr=998&type=12&menu=1556.

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upon national politics in matters of common global concern: Such "norms" issued in a multi-stakeholder process may not be binding law, but they are intended to impact national policies and be transposed, as appropriate, into binding law.

The mechanism reminds the "open method of coordination" (OMC) invented by the EU for intergovernmental processes complementary to the exercise of EU competences.[48] It differs from the OMC, however, in that the OMC does not involve the civil society and other stakeholders. If multistakeholerism is open to their participation and even includes individuals, the question may be asked whether participatory multi-stakeholder processes – at the European or global level – can be regarded as more effective, and as more legitimate than coordination, cooperation and treaties among states or their governments.

In the ongoing process of defining and developing this new form of governance not only its strengths but also its limits gain visibility: Even though "multistakeholer governance has dramatically shifted traditional procedures of inter-governmental politics towards the inclusion of non-state actors", Stefania Milan and Arne Hintz suggest that "multistakeholderism risks becoming a smokescreen that involves civil society in – and thereby legitimizes – substantial transformations that may not necessarily be in the interest of users and citizens."[49] This does, however, not deny the potential of the approach for an openness and transparency of processes that were so far regarded as a matter of governments and their diplomats acting in secrecy. The question remains how multistakeholderism ought to be organised and structured so to produce legitimate outcomes.

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[48] See for details: Beate Braams, Koordinierung als Kompetenzkategorie (Mohr Siebeck, Tübingen 2013), p. 215-216.

[49] Stefania Milan and Arne Hintz, In multistakeholderism we trust: On the limits of the multistakeholder debate. *In Multistakeholderism We Trust: On the Limits of the Multistakeholder Debate (CGCS* 2014, Sept. 19), available at: http://www.global.asc.upenn.edu/in-multistakeholderism-we-trust-on-the-limits-of-the-multistakeholder-debate/.

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5. Internet Governance: Exploring Private-Public Ordering

Internet governance[50] is an example for regulation at the global scale where neither national legislation nor international agreements are the method for ensuring the proper functioning of the system. Though the initiative originates from the American military,[51] relevant rules were made originally – and continue to be made – by private actors, academics, engineers and business-people. Those who invented and developed the Internet understood it to constitute a virtual second world characterised by openness and freedom: The "cyber-space" where governments and regulators had no say. What Jon Perry Barlow proclaimed in his "Declaration of the Independence of Cyberspace" in February 1996,[52] however, could not develop without rules and institutions.[53] Today, nobody contests that there cannot be an exemption from the application of general law also in the cyberspace.[54] Yet, the global reach of the Internet implies that Internet law cannot be a matter of singular national legislators. Both, the infrastructure and the operation of the Internet need common global regulation.[55] Classical international law – for the difficulties to reach consensus on the critical points[56] – can only give partial solutions.[57] It is true that new

[50] For a comprehensive overview see: Jeanette Hofmann, Internet Governance: Zwischen staatlicher Autorität und privater Koordination, IPG 3/2005 p. 10; Wolfgang Kleinwächter, From Self-Governance to Public-Private Partnership: The Changing Role of Governments in the Management of the Internet's Core Resources, Loyola of Los Angeles Law Review 36 (2003), pp. 1103-1126, for a new attempt to define the term "Internet Governance" see: Jeanette Hofmann, Christian Katzenbach, Kirsten Gollatz, Between Coordination and Regulation: Conceptualizing Governance in Internet Governance, HIIG Discussion Paper Series No. 2014.4, available at: http://ssrn.com/abstract=2484463.

[51] Lawrence Lessig, Code Version 2.0 (Basic Books, New York 2006), p. 2, refers to a research project in the Defence Department; see also: Simon Hülsbömer, Vom Arpanet zum WWW. Zeitreise: So entstand das Internet, in: PC Welt of 1.4.2013, available at: http://www.pcwelt.de/ratgeber/Vom-Arpanet-zum-WWW-So-entstand-das-Internet-312786.html; Christian Tiedje and Karsten Novroth, Das Internet im Fokus des transnationalen Wirtschaftsrechts: Normative Ordnungsstrukturen für den E-Commerce, 47 Archiv des Völkerrechts (2009), pp. 328-331.

[52] Jon Perry Barlow, A Declaration of the Independence of Cyberspace, 8 February 1996, available at: https://projects.eff.org/~barlow/Declaration-Final.html.

[53] For a short account on the development and debate, with some conclusions see also Larry Lessig, Code Version 2.0 (Basic Books, New York 2006), pp. 2-8.

[54] On the debate and development see Lars Viellechner, Transnationalisierung des Rechts (Velbrück, Weilerswist 2013), pp. 111-114.

[55] Ibid., p 115-117.

[56] Ibid., p. 117-120, referring also to the difficulties of a hybrid regulation (Henry Perritt).

[57] For an account, nevertheless, of international economic law, in particular WTO-law, setting important rules on e-commerce, intellectual property rights etc., see Tiedje (note 51), pp. 335-359.

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initiatives are taken to explore the potential of an "international law of the net" more deeply i.e. with a view to ensure the respect of human rights also in the Internet.[58] Yet, from the beginning, the legal setting of Internet governance differs profoundly from any national, supra- or international public law arrangement.

Technical norms or codes, indispensable for the functioning of the Internet and the interoperability of the network infrastructures, emerge from an open process based upon "requests for comments" that may get normative value through a "rough consensus" within the framework of the Internet Engineering Task Force (IETF).[59] For one of the key regulatory tasks of the Internet, the distribution of the domain names, a private non-profit organisation incorporated in Californian law was formed in 1998, named ICANN.[60] It is based on a number of agreements, including a memorandum of understanding with the US Department of Commerce, under which ICANN is entrusted with the management of the domain name system, notwithstanding some supervisory function of the Department of Commerce.[61] For the making of its policies ICANN follows a multi-stakeholder-model of decentralized governance placing "individuals, industry, non-commercial interests and government on an

[58] Initiative on "Völkerrecht des Netzes" in the coalition-agreement of the three German parties in government of November 27, 2013, available at: http://www.cdu.de/artikel/der-koalitionsvertrag-von-cdu-csu-und-spd, p. 149: "Um die Grund- und Freiheitsrechte der Bürgerinnen und der Bürger auch in der digitalen Welt zu wahren und die Chancen für die demokratischen Teilhabe der Bevölkerung am weltweiten Kommunikationsnetz zu fördern, setzen wir uns für ein Völkerrecht des Netzes ein, damit die Grundrechte auch in der digitalen Welt gelten. Das Recht auf Privatsphäre, das im Internationalen Pakt für bürgerliche und politische Rechte garantiert ist, ist an die Bedürfnisse des digitalen Zeitalters anzupassen." See already Franz Mayer, Review Essay. The Internet and Public International Law – Worlds Apart?, 12 EJIL (2001), p. 617-622, and Pernice, Völkerrecht (note 37).

[59] See Wolfgang Kleinwächter, Editorial, in: id. (ed.), Internet und Demokratie, MIND #5 (2013), pp. 7, 9.

[60] ICANN Website: https://www.icann.org/resources/pages/what-2012-02-25-en. For the development and structure see: Lars Viellechner, Transnationalisierung des Rechts (Velbrück, Weilerswist 2013), pp. 128-141; in short: id., Constitutionalism as a Cipher: On the Convergence of Constitutionalist and Pluralist Approaches to the Globalization of Law, Goettingen Journal of International Law 4 (2012), p. 599, 613-4.

[61] Memorandum of Understanding between the U.S. Department of Commerce and Internet Corporation for Assigned Names and Numbers, available at: https://www.icann.org/resources/unthemed-pages/icann-mou-1998-11-25-en. For the background see Robert Uerpmann-Wittzack, Multilevel Internet Governance Involving the European Union, Nation States and NGOs, in: Andreas Follesdal, Ramses A. Wessel and Jan Wouters (eds.), Multilevel Regulation and the EU. The Interplay between Global, European and National Normative Processes (Martinus Nijhoff Publishers, Leiden.Boston 2008), pp. 145, 150 et seq.

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equal level".[62] Governments are represented in the Governments Advisory Committee (GAC) only, they have no direct control on the ICANN policies. It is a construction of private actors under private law, in addition, that ICANN has developed with a view to give a solution to the "cyber-squatting" problem: The Uniform Domain Name Dispute Resolution Policy (UDRP). The rules of procedure of the UDRP are made part of every single registration of a domain name, so, thanks to the access ICANN has on the register, it also can directly execute decisions made by the competent arbitration panels.[63]

The elaboration of specific standards of web-technologies, such as html5, is among the tasks of the World Wide Web Consortium (W3C). These standards too are proposed, discussed and adopted by the diverse stakeholders, members of the W3C, through a consensus-based process including also the public.[64]

The multi-stakeholder approach is applied, in particular, for the discourses organised at the Internet Governance Forum (IGF), and it has proven very effective at the NETmundial of April 23 and 24, 2014.[65] The IGF was initiated by the 2003/05 World Summit on the Information Society (WSIS) in Geneva/Tunis that was organised by the International Telecommunications Union (ITU) according to the Resolution 56/183 of the UN General Assembly.[66] One of the outcomes of this Summit is the "Tunis Agenda", that states on Internet governance in its paras. 29-31 as follows:

> "29. We reaffirm the principles enunciated in the Geneva phase of the WSIS, in December 2003, that the Internet has evolved into a global facility available to the

[62] See the Handbook published as the "Beginner's Guide to PARTICIPATING IN ICANN, 2013", available at: https://www.icann.org/en/system/files/files/participating-08nov13-en.pdf, p. 2.

[63] For details see Viellechner, Transnationalisierung (note 60), p. 141-143. Generally on non-state actors as standard setters in the international arena see Anne Peters, Till Förster, Lucy Koechlin, Towards non-state actors as effective, legitimate, and accountable standard setters, in: Anne Peters et al (eds.), *Non-State Actors as Standard Setters* (CUP 2009), p. 492 ff.

[64] For details see Facts about W3C on the W3C website, available at: http://www.w3.org/Consortium/facts#public.

[65] Global Multistakeholder Meeting on the Future of Internet Governance, on the invitation of the government of Brezil, official website: www.netmundial.org. For the outcome see the NETmundial Multistakeholder Statement of April 24, 2014, with the "Internet Governance Principles" and a "Roadmap for the future evolution of the Internet Governance Ecosystem", available at: http://netmundial.br/wp-content/uploads/2014/04/NETmundial-Multistakeholder-Document.pdf.

[66] See the UN General Assembly Resolution 56/183 (21 December 2001) giving the ITU a leading role in the management of the World Summit. For more information see the website of WSIS available at: http://www.itu.int/wsis/basic/about.html.

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public and its governance should constitute a core issue of the Information Society agenda. The international management of the Internet should be multilateral, transparent and democratic, with the full involvement of governments, the private sector, civil society and international organizations. It should ensure an equitable distribution of resources, facilitate access for all and ensure a stable and secure functioning of the Internet, taking into account multilingualism.

30. We acknowledge that the Internet, a central element of the infrastructure of the Information Society, has evolved from a research and academic facility into a global facility available to the public.

31. We recognize that Internet governance, carried out according to the Geneva principles, is an essential element for a people-centred, inclusive, development-oriented and non-discriminatory Information Society. Furthermore, we commit ourselves to the stability and security of the Internet as a global facility and to ensuring the requisite legitimacy of its governance, based on the full participation of all stakeholders, from both developed and developing countries, within their respective roles and responsibilities".[67]

It is the UN General Secretary who was asked, under para. 72 of the Tunis Agenda, to not only convene the IGF, but also to review its operation and to make recommendations regarding the extension of its mandate after five years. Nine IGF-meetings have taken place, meanwhile, around the world. As Janis Karklins, the Chair of the Multistakeholder Advisory Group (MAG) stated in his address to the ninth IGF meeting in Istanbul, more than 3000 participants from all continents representing different stakeholder groups (governments, private sector, civil society, technical community, and academia) came together. He explains why "so many government ministers and parliamentarians, CEOs and Internet entrepreneurs, civil rights defenders, scholars, engineers and other key stakeholders in the global Internet community devote one week of their time to engage in discussions about the future of the Internet" as follows:

> "The answer is clear – all of these stakeholders care about maintaining a free, open, interoperable, stable, secure and trustworthy Internet within a multilateral, democratic, transparent and inclusive framework of multi-stakeholder governance as defined by the Tunis Agenda for the Information Society and endorsed by the World Summit on the Information Society (WSIS) in 2005. The

[67] Paras. 29-31 of the Tunis Agenda for the Information Society, 18 November 2005, available at: http://www.itu.int/wsis/docs2/tunis/off/6rev1.html.

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> IGF is a unique global forum for convening these multi-stakeholder discussions. It ensures the Internet continues to evolve in the global public interest consistent with these fundamental characteristics and objectives for the benefit of all Internet users".[68]

It is important to note the term "global public interest" used by the Chair, in this introduction, as guiding the future evolution of the Internet, and the self-conception of the IGF to serve this interest. And the global public interest, insofar, is understood to be articulated in a deliberative way at the IGF within a "multilateral, democratic, transparent and inclusive framework of multi-stakeholder governance". Given the openness of the discussions led in each session on specific topics at the IGF for active online participation from around the world, it is possible to conclude that at least the IGF gives voice to people at a global scale on issues of greatest general concern, and it so serves as a platform of a global public discourse. As participation is open and inclusive, everybody present off-line or online, connected through the Internet, has a voice and is respected as a participant with full rights. To some extent, thus, the "constitution" of Internet governance can be understood as an expression of what is required by the principle of human dignity.

The IGF does not take decisions, but innovations introduced at the ninth "edition" of the IGF in 2014 aim at "identifying more focused and concrete outcomes and the promotion of best practices on a range of important issues such as the multi-stakeholder model of Internet governance, child online protection, local content creation, ensuring security and combatting spam".[69] In addition, among the more specific key issues of the Internet addressed at this edition are policies enhancing access, growth and development on the Internet, bridging the digital divide, freedom of expression, privacy, and cultural and linguistic diversity. The outcome of these discussions will certainly give some reference points for future principles and rules on these issues to be adopted in some way through other procedures at the international, regional and national level.

[68] Ambassador Janis Karlins, IGF 2014 – the gateway for the future, available at: http://www.intgovforum.org/cms/blog-igf-2014.
[69] Ibid.

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It is an open question whether or not at all, on the basis of another review presented to the General Assembly of the United Nations the mandate of the IGC will be extended in 2015 for another five or ten years. If so, it could also be amended so as to provide for procedures ensuring, on the basis of the clear recognition of the right to equal concern and respect of all participants, a more concrete outcome through conclusions or principles to be adopted by consensus of the participants present or connected to its meetings online.

6. Elements of a Constitution of Global Governance

The EU is not a model for organising a system of democratically legitimate and effective governance at the global level, for it involves a too advanced degree of integration. Many of its characteristics, such as the recognition of the active European citizen as a fundament for the legitimacy of the EU policies,[70] are worth to be considered in the effort to design a system of global decision-making and regulation for matters of global concern. Also the UN and the WTO regulatory system of world trade, the Rio process and the development of Internet governance from ICANN to the IGF offer elements that help institutionalizing a meaningful global public discourse on what is in the global public interest. On top of platforms offering opportunities for people and organisations to contribute to this discourse there is a need for common institutions for democratically legitimate rule-making and compliance-control, a system of judicial review and dispute settlement as well as provision for the participation in the decision-making processes of the relevant stakeholders, if not the (global) citizens, and for the effective protection of fundamental rights.

If these conditions are met, global constitutionalism can exercise its function as a compensation[71] for democratic and efficiency deficits of national policies. It is clear, also, that a different concept of citizenship is required for a global system of governance open to a determining role to be played beyond state-centred institutions and processes. What Tully takes as

> "the classic democratic premise that people become citizens by actually exercising their civic capacities or *response-abilities* by participating in civic

[70] Highlighting the European citizenship in its democratic sense: Christian Calliess and Moritz Hartmann, Zur Demokratie in Europa: Unionsbürgerschaft und europäische Öffentlichkeit (Tübingen 2014), in particular p. 101-154.
[71] See above, note 18.

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> activities with fellow citizens for the sake of public goods in the webs of relationships of governance to which they are subject. People acquire the democratic form of subjectivity and intersubjectivity, as well as the complex arts of being a citizen, by engaging in public-oriented activities for the sake of public goods. This is the starting point for thinking of citizenship that accords with the dignity of self-governing persons and peoples",[72]

Tully conceptualizes on this basis what he calls "cooperative citizenship", it is not a status but rather an attitude and engagement that constitutes public spheres in a broad sense. Hard work of cooperative citizens over centuries, he points out, has produced representative governments, but the concept of cooperative citizen is not limited to the relationship of state institutions to the individual. If the institutions established for the common good do not deliver, the cooperative citizens may "take back their response-abilities of self-governing citizenship and exercise them themselves" by either reforming them, or by organising "democratic negotiation networks locally and globally around the relationship in question and around the way it causes a global problem", so exercising non-violent pressure through "activities such as protests, petitions, boycotts, non-cooperation, arguing and bargaining, alternative dispute resolution, and transformative justice", or – "when the powers-that-be refuse to enter into such negotiations", Tully says – they

> "simply re-appropriate the capacities that they were exercising in the privatised activity that they find unjustifiable and they exercise these capacities themselves in their own organisations. They exercise powers of popular sovereignty directly - rather than delegating them to private or public corporations that exercise them in ways that harm public goods and evade democratic control".[73]

What is important in this concept for the present proposition are the dynamics and openness, in contrast to any statist state-related approaches. With the affirmation that "citizenship accords with dignity of the self-governing persons and peoples", who exercise, in case, "powers of popular sovereignty directly…", Tully puts the individual in the centre of what may be established progressively, in a process of trial and error, for effectively producing public goods, and this without evading democratic control. And if he emphasizes as the ethical basis

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[72] Tully (note 26), p. 19.

[73] Tully (note 26), p. 23-24. See also ibid., p. 25: "They simply re-appropriate and exercise democratically the relevant capacities of popular sovereignty that they are said to have delegated to states and corporations in modernisation theories."

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of cooperative citizenship: “one should be the change” and not wait for modern governments to change the world,[74] this clearly demonstrates a new way of understanding how governance, from the local to the global level, can be undertaken and organised by individuals connecting for action in diverse forms, settings and levels. The European Union is but one of the examples, where supranational and intergovernmental structures have been established for better achieving goals that are beyond the reach of individual states, the Rio-Process and, within its scope, the Aarhus-System[75] and the emerging system of Internet governance are other cases for the increasing participation of citizens and the civil society in norm-generating processes that are complementary to the classical forms of national legislation and international treaties.

IV. Global Constitutionalism and Legitimacy

Experience from these and other models of rule-making in matters of common interest for the public good can be helpful for shaping institutions and procedures for regulation at the global level in a more or less democratic form. It allows further developing existing concepts for a new world order, for the constitutionalization of international law and the UN, or for global constitutionalism[76] that do not provide a satisfactory answer to the question of legitimacy. Granted, some legitimacy also for action at the international level follows from the representation of democratically elected governments negotiating agreements that are later ratified by national parliaments. The UN system, the WTO and many other international organisations are based upon this approach, though not all of their member states can be qualified as democracies. In addition, the work of the International Committee of the Red Cross, a private organisation, as well as the quasi-legislative activity of the tri-

[74] Ibid., p. 27 et seq.

[75] In particular for the functioning of the compliance mechanism under Article 15 of the Aarhus Convention see: Thomas Bunge, Rechtsbehelfe in Umweltangelegenheiten: Vorgaben der Aarhus-Konvention und deutsches Recht, Natur und Recht (2014), p. 605. Understanding the interaction of the global, European and national actors as a dynamic multilevel system: Ingolf Pernice, Umweltvölker- und europarechtliche Vorgaben zum Verbandsklagerecht und das System des deutschen Verwaltungsrechtsschutzes. Impulse zur Rechtsentwicklung im Mehrebenenverbund, in: Ekkehard Hofmann (ed.), Demokratisch-Funktionale Analyse der Öffentlichkeitsbeteiligung im Umwelt- und Infrastrukturrecht, Workhop Saloniki 4.-6 December 2014 (2015 forthcoming).

[76] For a critical overview see Stefan Kadelbach and Thomas Kleinlein, International Law – a Constitution for Mankind? An Attempt at a Re-apprisal with an Analysis of Constitutional Principles, in: German Yearbook of International Law Vol.. 50, 2007, S. 303-347.

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partite organs of the International Labour Organisation are examples for non-state actors of the civil society being involved in international normative processes and so adding to their legitimacy and giving the organisations a certain constitutional character.[77]

Constitutionalism however, as understood here, is beyond this indirect and very limited legitimation: It implies a direct relationship between people and institutions, both for the decision-making processes and for the binding effect of such decisions upon the individual. Constitutionalism requires that norms that directly impact rights or create obligations of the individual, within or beyond states, to be accepted as legitimate can be reconstructed as rooted in their own will. An example for this at a supranational level is the EU, even though there is a potential for improvement.[78] Wherever a need for common global regulation is identified, it cannot be conceived as legitimate without constitutional structures and provisions ensuring people's political participation, democratic control and accountability, the respect of the rule of law as well as the protection of human dignity and other fundamental rights. People, their will and their rights need to be taken seriously.

Recent contributions to the discussion of global constitutionalism indicate a re-discovery of the individual for constituting legitimacy at the global level (infra 1.) and a specific role of the judiciary in the development of a general global law legitimized by the transnational cosmopolitan citizenry (infra 2.). For both approaches the Internet seems to present a specific tool enhancing the impact of the thesis through the empowerment of citizens and stakeholders (infra 3.).[79]

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[77] See Kadelbach/Kleinlein, note 76, p. 324-327, where emphasis is given on the legitimacy based upon "the participation of NGO's on an institutional basis, so taht it may claim to have incorporated a procedure of co-operation with interested groups and to have established a special standard of legitimacy" (ibid., p. 327).

[78] Ingolf Pernice, Multilevel Constitutionalism and the Crisis of Democracy in Europe, lecture given at the Aristoteles University of Saloniki the 4th of December 2014, stream available at: https://www.youtube.com/watch?v=Do081tYopAE.

[79] For another approach focussing on the individual regarding "global commons" see: Markus Kotzur, Völkerrecht von der Menschheit her denken, in: Alexander Blankenagel (ed.), Den Verfassungsstaat nachdenken. Eine Geburtstagsgabe (Duncker&Humblot 2014), p. 43, talking about the globally "internetted" humanity. Constitutionalism, for him, is not dependent on states, but always a matter of people. Humanity, and so the global community of human beings, is conceptualised as a constitution-making power, related to the global commons (among which he also counts the Internet as – potentially – humankinds' common resource of knowledge and information) or "concerns of all humankind", see ibid., p. 49, 55, 59.

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1. Anne Peters: From Bourgeois to Citoyens

Anne Peters describes, in a remarkable clear manner, not only the contingence of the loss of the individual from the vantage point of international law in the 19th century, but also detects a return of the individuals' rights and obligations into the focus of international law during the last decades. She observes a "paradigm shift in international law in the sense that the integration of individuals in the international legal process, far beyond human rights, has become 'the basic axiom' of the international legal order". She concludes that:[80]

> "From a constitutionalist perspective, the empowerment of individual beings is a core objective of any constitutional order [...] The constitutionalist interpretation of Articles 6 Human Rights Declaration and 16 (2) IPCCR is that these provisions may not reasonably be limited to the domestic legal capacity, but that they enshrine a human right to have international legal personality".

Her account on already existing individual rights to participation in processes of global governance, developments towards individualized law-enforcement in international and national forums, the emergence of individual rights beyond human rights, individuals' role as "creditors of international responsibility" and subjects of obligations under international law allows her to conclude on a "trend towards *citoyenneté*" or "a transformation 'from subject of international law to international citizen", which is, as she posits,

> "part of the transformation of the international legal system from a Vattelian inter-state system into a universal constitutional democracy".[81]

Not far from the EU model of dual legitimisation (Article 10 TEU) Anne Peters pursues her approach in advocating for a "duality of global democracy" (the "*statist track*") rooted in the will of the peoples in their nation state as well in "direct democratic action on the supra-state level" (the "*individual track*").[82] For similar reasons as outlined above, she observes that "governance has become a multilevel process" and concludes that "a new design to enhance global democracy is needed".[83]

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[80] Peters (note ·), p. 158.
[81] Ibid., p. 178,
[82] Anne Peters, Dual Democracy, in: Jan Klabbers, Anne Peters, and Geir Ulfstein (eds.), The Constitutionalization of International Law (Oxford University Press, 2009), p. 263, 264-5.
[83] Ibid., p. 268.

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The problem is how to design democratic decision-making processes at the global level. A world parliament, as already advocated by Walter Schücking and proposed, more recently, by Jürgen Habermas,[84] is difficult to imagine as a meaningful representation of the diverse political interests in each part of the globe and would not bring people closer to the rule-making institutions. Anne Peters discusses alternative types of democracy, such as a deliberative, a participatory and a contestatory model. They all avoid the need for aggregation of will of "*demoi*" in pre-determined territories such as required for voting, and in some way substitute voice to voting. But she concludes that they "are no real substitute for formal democracy".[85]

Instead, Anne Peters spells out her "two-track" model of global democracy taken from EU experience: As states act as "democratic mediators", she pleads for the recognition of "a global constitutional principle of domestic democracy", coupled with a "transnational citizenship" to be the basis for a "non-state democratisation of international governance" organised through "schemes of participation and representation that cut across nation states".[86] Not a uniform language, not homogeneity of a people is required in her view, but "a uniform space of communication".[87] Transnational referendums and consultations as well as the installation of a "global peoples' assembly" are considered, though she accepts that "true parliamentary powers, namely the adoption of global laws which would complement or replace inter-state treaties, are utopian".[88] Nevertheless she discusses parliamentary assemblies for the diverse organisations like WTO and, in particular, a "UN Parliamentary Assembly" as useful for the "typical mediating function of parliaments" creating transparency and organising interests.[89] More transparency, finally, is advocated as a "prerequisite of accountability" and "a manifestation of constitutionalisation".[90]

The potential of the Internet is not addressed in this account, though it could well be the tool for organising the space of communication on issues of

[84] Footnote 211 ibid., p. 320, Habermas, Crisis (note 5), p. p. 54, 63-70.
[85] Peters, Dual Democracy (note 82), p. 268-271.
[86] Ibid., p. 296-341. See also Habermas, Crisis (note 5), pp. 58-59, 62, 65, using the terms "world citizens", "constituted world society" (p. 68), or "cosmopolitan community" (p. 69).
[87] Ibid., p. 308.
[88] Ibid., p. 320.
[89] Ibid. p. 324-325.
[90] Ibi., p. 326-330, 329.

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common concern – like Internet governance, but more than this. Could it not be the path towards "non-state democratisation of international governance", providing means to ensure transparency of political processes and decision-making and give people access to all relevant information and data, necessary to make their informed judgment on questions of global public interest? If a global parliamentary assembly with legislative powers is utopian and may be difficult to establish, a Global Governance Forum designed upon the experience with the IGF could be the more appropriate platform for an open discussion of the issues at stake, preparing for taking regulatory decisions by institutions to be vested with the powers needed.[91]

2. Cassese and von Bogdandy/Venzke: International Courts

For Sabino Cassese there is another path towards the emergence of a new global legal order. In his view the judges, national and international, are progressively forming a network beyond national borders developing some common principles through which the diverse legal orders worldwide are linked together and receive a common basis. Cassese concretizes Anne-Marie Slaughter's concept of "A Global community of courts"[92] and concludes, on the basis of a number of striking cases, that through their judicial dialogue or conversation the judges are constituting a new global legal order. If the outcome were not to be a "diritto globale generale",[93] the judges nevertheless would seem to find rules of co-existence, "passarelles" or linkages among the legal orders – national, supranational, even private like the ICANN-system – that do not follow rules of legal hierarchy.[94] But he finds them surmounting fragmentation and constructing "a global system of legal orders".[95]

Cassese rightly raises the question of legitimacy, in particular since such activities of general impact may be considered "counter-majoritarian". For him, it is the special role of the judges whose competence is an essential part of the

[91] See infra V.2.
[92] Harvard International Law Journal 44 (2002), p. 191.
[93] Sabino Cassese, I Tribunali de Babele. I giudici alla recerca di un nuovo ordine globale (Donizilli editore, 2009), p. 42.
[94] Ibid, p. 44.
[95] Ibid., p. 93-101: "I giudici come costruttori del sistema globale degli ordini giuridici".

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balance of powers as a guaranty for liberty, so the question of legitimacy appears as "un 'falso problema'".[96]

Armin von Bogdandy and Ingo Venzke, instead, look for a specific source of legitimacy. Their fascinating book with the telling title: "In wessen Namen. Internationale Gerichte in Zeiten globalen Regierens" describes the role of courts and, in particular, international courts not merely as dispute settlement bodies, but in a much broader sense as multifunctional actors of public authority and integral part of the system of global governance.[97] They are making law, exercising public authority, and therefore they need democratic legitimacy. The analysis shows that only the peoples and the individuals constituting the peoples can provide the democratic legitimacy as members of a transnational cosmopolitan citizenry.[98] This is why the authors conclude that international courts would take their decisions in the name of the peoples and the citizens[99] – a result, which is not far from the idea of double legitimacy we find in Article 10 TEU and in the propositions of Anne Peters and Jürgen Habermas already mentioned.

This account, however, remains abstract. There is no doubt that courts, national as well as international, are established by constitutional law, general law or international agreements ratified by parliaments. They consist of judges that are chosen through procedures establishing some link of legitimacy between democratically elected bodies and the courts. Courts have the task of interpreting and applying democratically adopted law so giving its provisions a normative reality. But their task is by no means only a mechanic one. In implementing their judicial function, they also have to develop the law in a creative manner, establish and develop general principles of law.[100] The European Court of Justice is an excellent example for this creative function that is crucial for the functioning of the European Union. It is part of the democratically established constitutional system of the EU.

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[96] Ibid., p. 103-105.
[97] Armin von Bogdandy and Ingo Venzke, "In wessen Namen. Internationale Gerichte in Zeiten globalen Regierens" (Suhrkamp 2014).
[98] Ibid., p. 290.
[99] Ibid., p. 291-2.
[100] For their role in a "constitutional approach" to international law see Kadelbach/Kleinlein, note 76, p. 324, 337-347.

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Yet, these institutional and functional provisions alone would not suffice for establishing the legitimacy of judge-made law, neither at the national nor at the European, nor at the global level. Courts do not act in isolation, they cannot take their decisions "in the name of the people" – or of the citizens of the Union, or "of the peoples and the citizens" at a global scale, if their work is not embedded in a dialogue with the public: Colleagues, other courts, media, academia, the public sphere at large may applaud, consent or react critically, decisions may be subject to intense scrutiny in seminars and even in the political discourse – if the (constitutional) legislator does not correct the decision by an authoritative act. Judges cannot ignore this public reaction that triggers reconsideration of the courts' arguments or even of the rule established by a judgment in the next convenient case. In a longer perspective, "responsive jurisdiction" is a dialogue with the citizen, the legal and scientific communities and other stakeholders, a process of trial and error in search of solutions accepted as legitimate.[101]

3. The Internet: Empowerment of the Citizens

What is new in the present context is the analysis of the exchange of views, cooperation and dialogue among constitutional and other courts not only at the European level,[102] but similarly at the global level. And it is the Internet that can play a crucial role in not only facilitating the dialogue among courts but also in empowering the individual to participate actively in this conversation, so adding to the legitimacy of the judicial contribution in the making of a global rule:

- What Anne-Marie Slaughter describes as networks of constitutional courts[103] may develop to play a much more important role with the

[101] For the judge-made law as the result of a communicative process in this sense see already Ingolf Pernice, Die Dritte Gewalt im europäischen Verfassungsverbund, 31 Europarecht (1996), p. 27, 38-42.

[102] See Andreas Voßkuhle, Multilevel Cooperation of the European Constitutional Courts. Der Europäische Verfassungsgerichtsverbund, 6 European Constitutional Law Review (2010), pp. 175-198; see also Ingolf Pernice, La Rete Europea di Costituzionalità, Der Europäische Verfassungsverbund und die Netzwerktheorie, 70 ZaöRV (2010), pp. 51-71.

[103] For the increasing readiness of courts to refer to judgments of courts in foreign countries or international courts see Ayal Benvenisti, Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts, Tel Aviv University Law Faculty Papers, 59 (2008), available at: http://law.bepress.com/taulwps/art59/, who establishes particularly the legitimacy of such references, ibid., pp. 44-47; Anne-Marie Slaughter, The New World Order (Princeton University Press, 2004), pp. 65-103: "Judges: Constructing a Global Legal System", with particular emphasis on the role of networks of courts (ibid., summary, pp. 100-103).

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Internet allowing to find most of the jurisprudence of other courts as well as comments and accounts of the follow-up, within seconds at any place in the world. This includes the communication with foreign and international judges directly, as appropriate, to exchange documents, to discuss in groups and have seminars without travelling. Easy access to comparative law and analysis, facilitated by the Internet, will particularly promote the emergence of common principles in accordance with human rights recognised in international conventions, elements of a *ius commune globale* as a common reference, orientation and criterion also for legitimate exercise of executive and legislative powers at all levels.

- With the Internet, this dialogue is not limited to professional participants, not limited to powerful media and academics, but people generally are empowered to take stake and make their voice heard. Social networks, blogging, even twitter allow individual or massive reaction, where deemed appropriate, and this reaction is not limited to local or national issues but, as the effects of a ruling may cross borders or have even a global impact, point to court decisions that are taken anywhere in the world. Though in an uncoordinated way, common principles and, if so, a *ius commune globale* will emerge through the jurisprudence of the global network of courts communicating, through the Internet, not only among each-other but also with – and under the control of – all relevant stakeholders including the general public.

Courts and their networks, after all, can play an important role in developing and giving effect to principles and rules having a global application in a legitimate way, if they are considered as a part of a system of global governance and open not only for the dialogue among each other but also for the comments of the stakeholders and the general public. This seems to give the individuals, as global citizens, a stake in the development of a general global law by courts. This may include that, under the control of the global citizenry, courts take account – as appropriate in a given case – of principles emerging from discussions at global public forums such as the IGF, the NETmundial or the proposed Global Governance Forum.

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V. Enabling Global Constitutionalism

As the examples given above seem to indicate, the Internet has the potential to provide better conditions for constructing legitimacy for normative processes and regulation at the global level. It enhances the legitimising power of the individual as necessary in order to *take people seriously*. Seven constitutive elements of an Internet-driven global constitutional framework will be identified and developed hereafter for further discussion: The "enabling" *basis* for meaningful participation in political processes at the global level is a free and open worldwide interoperable Internet giving people equal access to "humankind's knowledge and information" (infra 1.). It presents an open *space* as needed to develop a public sphere with free access to communication, networks and platforms allowing a transnational public discourse and effective participation of people in global political forums (infra 2.). This sphere would not emerge without an *institutional framework* at the "operative" level, where diverse opinions and interests are channelled and transformed into manageable normative propositions (infra 3.) following the *method* of a consensus-based multi-stakeholder standard-setting process leading to a still non-binding normative framework that serves as a reference for the policies of states, undertakings, civil society as well as for private enterprises and individuals (infra 4.). Such standards may, if appropriate, be *validated* as binding law through references in binding international agreements, in decisions of international organisations, in European or national legislation or the judiciary (infra 5.). Oversight through a *judicial* institution would ensure compliance, the settlement of disputes and the protection of individual rights as a matter of effectiveness and confidence of people (infra 6.). Extensive monitoring of the functioning and effects should, finally, be the basis of an inclusive *review* process providing people control and the opportunity to initiate reform, if deemed necessary, and adaptation to new developments (infra 7.).

1. The Basis: Knowledge, Information, Education

In an ever-shrinking world, where geographic and political borders have lost their categorical meaning and interpersonal relationships worldwide have reached a formerly unknown density, people in one part of the world are increasingly concerned by, and interested in legal systems, political processes

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and the conditions of life in other parts of the world. Reasons are not only the externalities of their respective policies, but also the security, humanitarian and economic issues there are becoming relevant here. Knowledge and dialogue about these conditions are of value. Having developed during the last twenty years the most dynamic and efficient tool for communication, information and social networking at a global scale, the Internet became the prominent tool for gathering information and exchanging experiences with people from other countries, and so adds to the merger of the fragmented national societies into one global society.

The Internet gives people quasi unlimited access to news from all parts of the world, books, scientific insights and culture through electronic libraries, newspapers, blogs, education including massive open online courses etc., and it gives access also to the texts of constitutions, legislation, jurisprudence of highest courts worldwide. By means of the Internet, the promise of access to information and the transparency of public authorities can be made effective.[104] If knowledge is power, open access to information and knowledge resources from anywhere for everybody worldwide, thus, is about to transform the society, power structures and politics[105] and even the concept of "constitution" as a legal instrument of the society for organising itself politically, within and beyond national borders.[106]

The tradition of liberal constitutionalism suggests that individuals are ultimately the source of any legitimate public authority at any level. If the questions of accessibility in terms of hardware and software are successfully addressed, the Internet, thus, may empower people in all parts of the world to have the information and tools necessary for defining themselves as global citizens, and it can be developed as the transmission mechanism in the formation of the political will in a society "constituting" itself at the global level.

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[104] See more in detail Ingolf Pernice, Verfassungs- und europarechtliche Aspekte der Transparenz staatlichen Handelns, 2. IFG-Tagung Berlin am 6./7. September 2012, in: Alexander Dix et al. (eds.), Informationsfreiheit und Informationsrecht. Jahrbuch 2013 (Lexxion, Berlin 2014), p. 17-34.

[105] Ingolf Pernice, Informationsgesellschaft und Politik. Vom neuen Strukturwandel der Öffentlichkeit zur Global Privacy Governance (Information Society and Politics: From the Structural Transformation of the Public Sphere to Global Privacy Governance), 2012, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2222046.

[106] Ingolf Pernice, Die Verfassung der Internetgesellschaft, in: Alexander Blankenagel (Hrsg.), Den Verfassungsstaat nachdenken. Eine Geburtstagsgabe (Duncker & Humblot, Berlin 2014), pp. 171, 179-182, 199-208.

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To do this in a democratic and, thus, legitimate manner, a global public space is needed.

2. The "Space": Public Sphere and Political Participation

As a "digital market place" the Internet has deeply changed the media-landscape and the public sphere, it has opened it potentially to everybody: The result is a global public space with no relevant barriers to access. While in former times the public sphere was characterised by a one-to-many communication through print media, radio or television, the Internet provides "a new unbounded space for communicative interaction", as James Bohman notes, "as a *many-to-many* mode of communication", that has "lowered the costs of interaction with an indefinite and potentially large audience".[107] Contrary to times of aristocratic government, but also to national democratic arrangements, today with the Internet "participation in a democratic public is fundamentally open". Bohman describes, however, the particularity of what can be called "a global public":

> "...the only way to create a public sphere across a differentiated social space is through multiple communicative networks rather that an encompassing mass media, then the global public sphere should not be expected to mirror the cultural unity and spatial congruence of the national public sphere: as a public of publics, it permits a decentred public sphere with many different levels".[108]

This is not necessarily what Anne Peters says is "preconditional for global democracy, a uniform space of communication". But even if it is only possible to conceive a "distributive public sphere" composed of diverse more specific public spheres related to special issues,[109] and if communicators, agents or institutions are needed to create them, the Internet offers a communicative space in which discourses can take place, and so creates opportunities for people to engage by understanding themselves as agents and not as mere "users".

[107] Bohman (note 23), p. 73-74.
[108] Ibid., p. 75.
[109] Ibid., p. 77, 82, with the example of the Multilateral Agreement on Investment (MAI).

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The question is how to organise this space so to effectively allow democratic participation in the articulation of the global public interest, and in decision-making processes established for action on global challenges accordingly. This is the key question of global constitutionalism. If it is true that there are "countless public spheres", as Tully puts it,[110] a thematic public sphere with regard to global issues identified as matters of common concern is not impossible to be considered. It is not comparable to what we believe to exist within a nation-state, it will necessarily be fragmented and not representative for the entire world population, but the Internet seems to make it possible for all desiring and able to participate.

Granted, a public sphere in and of itself, even if transnational in nature, does not make for democratic legitimacy per se. Truly democratic government rests on the mutual promise of individuals to recognize each other as free and equal comrades in a polity, a promise that must be institutionalized through procedures based on the principle of equal liberty. Truly democratic government on a global scale therefore calls for the participation of individuals in such procedures on the basis of equal (positive) liberty. Transnational public spheres are not elected and do not represent a "global people" in the strict sense.[111] They nevertheless may generate democratic legitimacy through their inclusiveness and openness, as forums for deliberation and contestation that engage individuals to get together on common issues to discuss, learn about differences, find common ground but also achieve to (peacefully) agree or accept disagreement. Public spheres thus may provide for a breeding ground for an emerging sense of global citizenship as a first step to closing the gap between the status of the individual as rights-bearer and a participant in a community at the global level, based upon the right to equal concern and respect.[112]

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[110] Tully (note 26), p. 19.
[111] Cf. Brunkhorst (note 22), p. 158-9.
[112] To conceive this as a democratic process, the description of Tully (note 26), p. 23, – though more general – seems to be most attractive: "In summary, in each of the previous cases - of questioning, dialogue, negotiation and cooperation - citizens are engaged in radically democratising the webs of relationships in which they are engaged from the ground up. They refuse to be governed in the way given to them. They treat the constrained freedom of participation within modern governance relationships as an opening to challenge, negotiate and transform them into partnerships under the shared democratic authority of all subject to them. They 'co-operate' the relationships. By bringing all those subject to a relationship into an ongoing dialogue and negotiation over it relative to public goods, and thus treating each other

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It may be questioned if the Internet can provide for conditions of a public sphere similar to what we use to know as the room for democratic political processes, for a common discourse on shared concerns within a political community able to ensure integration and effective government. Does it not reflect just fragmented interests, is it not rather a virtual public of actors with a hidden agendas and unforeseeable, rather random impact on public opinion? To be sure, what "the public" really is, remains an open question. Is the public opinion, as we know it traditionally within the national context, not dominated by one or some opinion-leaders, newspapers, broadcasting companies etc.? Does the Internet not, at least, offer alternative channels to participate in the discourses, give easier access to a broader range of newspapers and television chains, allow to consult alternative sources of information. It certainly broadens the sources and participatory tools for those who are interested in certain issues to have a voice through blogs, social networks or individual websites.[113] It also facilitates direct communication between political leaders and people, organising political movements and demonstrations, inclusion and involvement of those who otherwise would stay aside.

The Internet presents, in particular, new tools for discourses across borders, without limits also to the number of participants. The model of the IGF, to which NETmundial was meant to give new dynamics,[114] seem to be particularly appropriate for not only organising the public space regarding global Internet governance, 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. Sure, new power structures are emerging within the IGF, contrary to the idea of equal participation. The model should, thus, be further developed to ensure openness and equal access to all for the debate and

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with democratic respect and reciprocity over time, they gradually make themselves into good interdependent governors and citizens. This is one of the oldest meanings of 'democracy'. It is the grass-roots form of democratisation of cooperative citizenship from below."

[113] An – yet debatable – example may be the Internet campaigns against the SOPA and PIPA legislation in 2010, as analysed by Yochai Benkler, Hal Roberts, Robert Faris, Alicia Solow-Niederman, Bruce Etling, Social Mobilization and the Networked Public Sphere: Mapping the SOPA-PIPA Debate, Berkman Center Research Publication No. 2013-16, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2295953.

[114] See the account of Jeanette Hofmann, Inside NETmundial – Wie in Brasilien über die Zukunft des Internets diskutiert wird, HIIG Blog, 28 April 2014, available at: http://www.hiig.de/inside-netmundial-wie-in-brasilien-uber-die-zukunft-des-internet-diskutiert-wird/.

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elaboration of principles. It should be further developed to also cover other global issues, like climate change or the regulation of the global financial markets, so to inject new dynamics into political processes, which seem to have come to a halt. This could lead to the establishment of an inclusive Global Governance Forum with various sections for specific issues to be established by the UN General Assembly, for channelling and structuring a global public discourse on matters having global priority.

3. Institutions: a Framework for Global Rule-Making

A parliament in a traditional sense, representing the world citizens (and peoples?) at the global level, taking decisions upon the global public interest and acting as a global legislator is difficult to imagine, for the size it would need, for the modes of functioning and, in particular, for the powers to be conferred on it. Such an institution may be understood as a threat to the sovereignty of the nation-states. Yet, the experience of global Internet governance, namely of ICANN, IGF and others,[115] may help developing an alternative institutional framework for public spheres and political will formation that, finally, supports processes of democratically legitimate rule-making at the global level. Global Internet governance[116] has developed as a multifaceted and multilevel multi-stakeholder process encompassing – in addition to the "hardware"-side of the net-transmission and -routing systems, lines, knots and computers – the setting up of technical codes and standards, of the system for domain names and IP-address distribution and management. But this initial range of subjects dealt is broadening so to include deliberation upon more general public policy issues like cybersecurity, net neutrality, the protection of intellectual property or personal data and privacy, end even the protection of human rights in the Internet and through the Internet generally.[117] It is open-ended, explorative and has no systematic institutional

[115] See supra III.5.

[116] For a comprehensive account see the contributions in: Roxana Radu, Jean-Marie Chenou, Rolf H. Weber (eds.), The Evolution of Global Internet Governance. Principles and Policies in the Making (Springer 2013).

[117] See e.g. the Council of Europe Report (Monika Zalnieriute and Thomas Schneider) on: "ICANN's procedures and policies in the light of human rights, fundamental freedoms and democratic values", presented to the IGF 2014 in Istanbul, available at: http://www.coe.int/t/informationsociety/icann-and-human-rights.asp. See on the other hand the criticism of Josefina Salomon, in LIVEWIRE, Amnesty's global human rights blog: "Internet Governance Forum: A missed opportunity for human rights", September 5, 2014, available at:

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framework. Some of its elements, however, indicate not only that it is very different from traditional constitutional settings, but also that, nonetheless, it is neither ineffective nor undemocratic.

Particularly ICANN is an example for how a privately incorporated company has been accepted to evolve to a worldwide operation system for the Internet without decisive involvement of states. Lars Viellechner has brilliantly analysed this development conceptualizing ICANN and, in particular, its Domain Name Dispute Resolution Policy (UDRP) as a case of "self-constitution" in a multi-stakeholder process.[118] In addition, the American government has announced that it will give up its regulatory and supervising rights regarding ICANN in favour of a multi-stakeholder solution. The first paragraph of the announcement of the NTIA in the US Department of Commerce in March 14, 2014 reads as follows:

> "To support and enhance the multistakeholder model of Internet policymaking and governance, the U.S. Commerce Department's National Telecommunications and Information Administration (NTIA) today announces its intent to transition key Internet domain name functions to the global multistakeholder community. As the first step, NTIA is asking the Internet Corporation for Assigned Names and Numbers (ICANN) to convene global stakeholders to develop a proposal to transition the current role played by NTIA in the coordination of the Internet's domain name system (DNS)".[119]

This can be understood as a clear acknowledgment of the proper functioning of the system, in particular because the announcement further insists on the multi-stakeholder approach in emphasising, that "NTIA will not accept a proposal that replaces the NTIA role with a government-led or an inter-governmental organization solution".[120] Proposals to bring Internet governance

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http://livewire.amnesty.org/2014/09/05/internet-governance-forum-a-missed-opportunity-for-human-rights/. The regional IGF-US forum addressed the questions in June 2014, see: Natalie Green, Reflecting on Human Rights and the Internet Governance Forum-USA, July 28, 2014, available at: https://www.publicknowledge.org/news-blog/blogs/reflecting-on-human-rights-and-the-internet-governance-forum-usa.

[118] Viellechner, Transnationalisierung (note 54), p. 257-264: "Eigenkonstitutionalisierung".

[119] NTIA Announces Intent to Transition Key Internet Domain Name Functions, available at: http://www.ntia.doc.gov/press-release/2014/ntia-announces-intent-transition-key-internet-domain-name-functions.

[120] Ibid.

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under the control of the International Telecommunications Union ITU,[121] thus, seem to be settled.[122]

The question how to organise appropriate oversight in future was on the agenda of the 2014 IGF in Istanbul, the place where the multi-stakeholder community has its broadest gathering.[123] What has been discussed here will inform the work of ICANN when the stakeholders are convened for developing a proposal for the transition, as requested. It is important to note that ICANN is an example for a broad acceptance of a regulatory regime of highest importance as an infrastructure for communication and political life at large, to be not governed or controlled by public authorities. Its specific history from the origin explains not more than how it developed. It does not explain why governments accept it as such in spite of the crucial role the Internet has taken early this century. The reason may be that governments simply would not reach agreement on the diverse technical codes and other regulations needed to make the system running as it does, at the global scale.

Public authorities, however, are not totally absent in the system. Regarding the development of the Internet and so of ICANN the US government played a role, for the IGF it was the UN General Assembly to take the initial decisions and so to be the authority under which the IGF is working. Regarding NETmundial it is the government of Brazil that has organised this important event. And also in the operation of these institutions governments are stakeholders and participate side by side with other stakeholders and the general public.

The institutions mentioned are established not only for different missions in substance but also different in working methods and the form of outcome. It is possible to distinguish at least two characteristics: more deliberative and more action-oriented. While the IGF operates as an institution providing a public space for debates on Internet governance in general, other bodies like ICANN,

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[121] See Justin Kaufmann, What is the ITU? The Struggle for Internet Governance, Public Knowledge Blogs, June 4, 2012; see also Viellechner, Transnationalisierung (note 54), p. 137.
[122] See also Resolution Plen/3 (Dubai, 2012)
[123] See the report by ICANN, available at: https://www.icann.org/news/announcement-3-2014-08-25-en: "One of the most well-attended sessions of the week at the Internet Governance Forum in Istanbul was a joint discussion on the IANA functions stewardship transition and the parallel process reviewing ICANN's accountability, in light of the anticipated end of ICANN's current contractual relationship with the US Government to administer the IANA functions."

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W3C and IETF are taking decision on concrete action like the setting of standards or defining the scope and operation of the domain name system.

For all, however, the multi-stakeholder approach has found broad acceptance for being both effective and sufficient inclusive and have a democratic function, though the procedures vary from case to case.

4. The Method: Multistakeholderism and Democracy

Multistakeholderism implies the participation of all interest groups, interested organisations, civil society and, in some cases, the public in the deliberation and decision-making processes on matters of common interest.[124] Richard Hill has recently described the various models.[125] At the 2005 World Summit on the Information Society (WSIS) the Tunis Agenda was adopted and regarding the principles of Internet governance the Agenda states:

> "that the Internet has evolved into a global facility available to the public and its governance should constitute a core issue of the Information Society agenda. The international management of the Internet should be multilateral, transparent and democratic, with the full involvement of governments, the private sector, civil society and international organizations. It should ensure an equitable distribution of resources, facilitate access for all and ensure a stable and secure functioning of the Internet, taking into account multilingualism".[126]

Paragraph 35 of the Agenda reaffirms that "the Internet encompasses both technical and public policy issues and should involve all stakeholders and relevant intergovernmental and international organisations"; insofar it recognises that:

> "a) Policy authority for Internet-related public policy issues is the sovereign right of States. They have rights and responsibilities for international internet-related public policy issues.
>
> b) The private sector has had, and should continue to have, an important role in the development of the Internet, both in the technical and economic fields.

[124] See generally Terry MacDonald, Global Stakeholder Democracy – Power and Representation beyond Liberal States (Oxford University Press 2008), p. 85 ff., with a discussion about the broader and narrower strands of democratic stakeholderism.
[125] Richard Hill, The internet, its governance, and the multi-stakeholder model, in: 16 Emerald Insight Info (2014), pp. 16, 27-28.
[126] Tunis Agenda for the Information Society, in: WSIS Documents ITU 2005, p. 75 (para. 29), available at: http://www.itu.int/wsis/outcome/booklet.pdf.

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c) Civil society has also played an important role on Internet matters, especially at community level, and should continue to play such a role.

d) Intergovernmental organizations have had, and should continue to have, a facilitating role in the coordination of Internet-related public policy issues.

e) International organizations have also had, and should continue to have, an important role in the development of Internet-related technical standards and relevant policies".[127]

The Agenda also recognises the contribution of the technical and academic communities with these stakeholder groups, and it concludes in paragraph 37 that "a multi-stakeholder approach should be adopted, as far as possible, at all levels". Yet, the Agenda does not detail out how this approach should work in practice. Also with regard to the IGF paragraph 73 states that "the Internet Governance Forum, in its working and function, will be multilateral, multi-stakeholder, democratic and transparent."[128]

These statements leave room for a creative implementation and design of the processes of deliberation and decision-making. The question is, to what extent democratic principles prevail in the concrete bodies governed by the multi-stakeholder approach. As neither all governments, nor private companies, civil society organisations, all intergovernmental or international organisations, universities and technical communities can be called democratic, Hill concludes in his analysis that "it cannot be said that key current Internet governance institutions are democratic in the conventional sense of the term".[129] This applies even if the term "democratic" would be applied not to each participant but to the multi-stakeholder model as a whole, so he comes to a negative result.[130]

Yet, neither the IGF nor other bodies of Internet governance are states. So the question needs to be asked – more so even as for the EU – whether the idea of democracy developed for states can be transposed to these institutions. "Self-rule of the people" would imply that there be a people, and that there is a rule. Democracy in the sense of ideals of Rousseau is not what we talk about here.

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[127] Ibid.
[128] On this see also Jeremy Malcolm, Multi-stakeholder Governance and the Internet Governance Forum (Terminus Press, Perth 2008), p. 332 ff., 340 ff., 443.
[129] Hill (note 125).
[130] Ibid., p. 30.

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Internet governance is different, and probably any analogy to the classical democratic nation state would be inappropriate insofar, as for any other body of global governance. Nevertheless, certain elements of a democratic system are relevant also for a legitimate constitutional setting of multi-stakeholder arrangements beyond the state: Equal and open access to the deliberation and decision-making for all interested and potentially affected groups and people, non-discrimination of and equal respect for stakeholders, freedom of expression, decision by consensus or majority with a meaningful protection of the minorities, respect of the rule of law as well as the protection of individual rights. So, even if there is no *demos*, to the extent that people understand themselves to be global citizens interested in common global concerns and forming, with a view to put forward and pursue some regulatory goals striving to deal with the questions at stake, institutional arrangements and procedures could be used or established to achieve these goals, if the conditions mentioned above are met, in a way that can be called more democratic than the present system of unbounded powers imposing the world their "laws" as facts.

It would be for another study to examine to what extent these and other requirements are met in the existing bodies of Internet governance. Open access and inclusiveness, transparency, open deliberation, non-discrimination etc. seem to be common features, though in certain cases, like W3C, membership is required and only members have the right to submit initiatives for recommendations.[131]

Regarding other areas of global governance new bodies or institutions established would not be vested, at the present stage, with powers to make decisions or to legislate with legally binding effect. Whatever may be the outcome of their proceedings, such as common principles or recommendations for all stakeholders, would need to be validated by other democratically legitimated institutions in order to become legally binding. The practical effect

[131] See para. 11 of the proposed World Wide Web Constortium Process Document of August 1, 2014, available at: http://www.w3.org/2014/Process-20140801/#first-wd. Regarding participation the website (http://www.w3.org/participate/) announces: "W3C invites the public to participate in W3C via discussion lists, events, blogs, translations, and other means described below. Participation in Community and Business Groups is open to all. Participation in W3C Working Groups (and other types) is open to W3C Members and other invited parties. W3C groups work with the public through specification reviews as well as contributions of use cases, tests, and implementation feedback."

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of non-binding recommendations issued in a multi-stakeholder process after extensive debate and verification, however, should not be underestimated. Like in the area of technical normalisation, industry and consumers are used just to apply the norms that have been elaborated, without the public authorities being involved, and this system seems to work well.

5. Validation: Giving Legal Effect to Principles and Standards

If non-binding recommendations, standards and principles are the outcome of a multi-stakeholder process, whatever forum or body has produced them, there may be a need to give them legally binding effect. As long as there is no legislative body at the global level, it will be difficult to ensure global coverage of any of such rules. Nevertheless, there are a number of ways allowing the validation of the non-binding rules and norms so to make them binding law. One technique is the reference in national legislation to such norms incorporating them into national law. Another technique would be, likewise, to refer to them in international agreements or decisions of supra- or international organisations. The "new approach", adopted in the EU for the completion of the internal market, is an example for how such a system could work. A third way seems to be the effect national and international courts could give to principles and rules having found broad acceptance in global forums.[132]

There is room, however, for being more innovative with a view to establishing institutions at the global level vested with the power to validate rules that have been consented by multi-stakeholder bodies. Such institutions could be composed of representatives of governments or have a mixed composition so to include also members of national parliaments. They may decide by consensus or even in a majority mode, and the binding effect of such validation may be recognised having global reach, even if some governments did not vote in favour. EU experience with opt-out provisions or "emergency breaks" may serve as models for flexible solutions.

With regard to democratic legitimacy, the fact that such rules had gone beforehand through deliberation and approval in open, public and inclusive

[132] On the line of the reasoning developed supra, IV.2.

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multi-stakeholder processes with broad online- und offline participation could be regarded as widely compensating a lack of parliamentary consent at the national level. Such conditions, however, would need to be spelled out in the "constitution" of the decision-making institutions competent to validate the rules in question. And different conditions may be relevant to norms of a more technical and administrative kind and other that are legislative and have an impact upon the liberties and rights of the individuals.

6. Judiciary: Dispute Settlement and Individual Rights

Whether or not results of multi-stakeholder processes are validated or would find recognition to produce normative effects without validation, oversight on compliance, the settlement of disputes as well as the protection of individual rights through judiciary bodies would not only make the system more effective but also support voluntary acceptance and confidence of people in its proper functioning.

The principles established by global forums such like the IGF or the proposed Global Governance Forum may guide the work of this judiciary, and the general instruments of international law for the protection of human rights will have to be applied in any case. If the procedures are transparent and open for comments by stakeholders and the public, the jurisprudence of such courts could ultimately contribute to the emergence of a common global law that includes also the relevant constitutional elements.

7. Review: Monitoring and Revisiting-Processes

Monitoring and review-processes for the standards and rules established in the proposed system of multi-stakeholder-driven global norm-setting, based upon the Internet and the experiences with Internet governance, help to keep any regulation once achieved up to the dynamic developments of technology and society. More importantly, however, regular feedback and continuous political control also of the effects of the regulation by the multi-stakeholder bodies which are at the origin of the standards and have established their guiding principles also may add to the (output-) legitimacy of the entire system. The

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system, thus, is a dynamically evolving system, it is a process, not a frozen structure set-up once for ever.

The review should be organised as a transparent and public process, with the Internet as a tool for worldwide information and dialogue. It might be for the proposed Global Governance Forum to discuss whether or not the actual measures taken by standardisation bodies or even a by global legislative institution are complying with the principles identified at earlier stages, and whether certain policies have to be revised, and in what direction. The Global Governance Forum should be given the power to adopt – by broad consensus – not only principles and guidelines on matters of global common interest, but also recommendations to the other bodies to undertake the revision accordingly.

The Global Governance Forum or similar bodies are the place where stakeholders and people can discuss individually and also engage as participants with equal rights in a continuously renewed consideration of the rules to be finally laid down with a view to deal effectively with global challenges. The Internet allows that people do not need to elect representatives, but can participate directly in an open discourse and come to conclusions which, if followed by the norm-setting bodies, provide them with a special kind of legitimacy rooted in the will of "the" people taking responsibility as global citizens.

VI. Conclusions

The seven elements of the "constitution" of norm-setting at the global level outlined above remain necessarily vague and need further consideration and concretisation. And the present proposal is far from what is known as a constitution of a state. To invent this cannot be the goal, striving for a global state would not serve the self-determination of people. The present model is more modest, but guided by the values and principles of global constitutionalism rooted in the legitimising power of the individual. The respect of the other as equal participant in the process of regulation and of the others dignity as human being and holder of equal fundamental rights and freedoms is the fundament for designing and establishing a system that allows to locate decision-making power on matters of common global interest at the

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global level. Policies decided at that level have no externalities, by definition, instead they are a remedy avoiding externalities that would otherwise affect people who have no voice. Common regulation for all people concerned, by ensuring that all who are possibly affected can actually participate in the process of decision-making on equal terms, means self-rule of these people and, thus, *taking people seriously*.

As far as the principle of subsidiarity is respected, the regulatory powers conferred to global institutions would, therefore, not take away sovereignty or room for democratic self-determination from states, but add to the sovereign rights of the peoples in shaping their common future, if needed because of the global dimension of the problem, as a matter of common global public interest.

Some features of such a system are not unknown in European and international constitutional practice, but the present proposal combines experiences from the different supranational, international and governance-related models. Multistakeholderism is practiced, as shown, at the global level already in contexts like the Rio-process.[133] It is the underlying concept of the Aarhus-concept altogether. Yet Internet governance is the area where it is practiced more extensively and systematically.[134] Multistakeholderism has a great democratic potential thanks to the opportunities offered by the Internet, though this potential needs further consideration and development. It seems to be the appropriate mode for global standard-setting, namely on technical codes and requirements. Institutional arrangements for decision-making and validation by global institutions may rather follow the examples of the Council of the European Union, while the UN Security Council has a limited and differentiated membership and is less attractive as a model. Examples for oversight and monitoring are the secretariats and compliance mechanisms of international regimes or the European Commission, while for dispute settlement and the protection of individual rights the WTO bodies or the European Court of Justice offer plenty of experience. In each case transparency, dialogue and public participation in the proceedings through the Internet would enhance the legitimacy of their decision-making.

[133] See supra III.3.
[134] See supra III.5.

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Global constitutionalism and the Internet, after all, can be related to each-other and be mutually supportive in various ways. On the one side, 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. On the other side global constitutionalism, for the global level of what has been described as multilevel constitutionalism, provides the principles and conditions for the development of a "constitution" of Internet governance. 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 protection 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.

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