

# Horizontal Effects of Constitutional Rights in the Internet: A Legal Case on the Digital Constitution

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### Abstract

This article discusses whether websites criticizing the environmental policies of multinational enterprises are protected by horizontal effects of human rights and develops three theses:

(1) The third-party effect has so far been configured in an individualist perspective only, as balancing individual constitutional rights of private actors against each other. However, in order to deal with massive structural conflicts within society, constitutional rights in private relations have to be reformulated in their collective-institutional dimension. In the digital world, this means that not only individual rights of the users need to be protected but that, much more broadly, there needs to be an institutionalization of a digital public sphere.

(2) Instead of being limited to the protection against power in society, which is equivalent to the power of the state, constitutional rights must reach much further and need to be directed against all communications media with expansive tendencies. In the digital world this means that the dangers for constitutional rights do not stem only from the economic power of Internet intermediaries, such as Google, Facebook and Amazon, or from the Internet governance structures, but from the very digital operations themselves.

(3) Contextualising constitutional rights ought not to be limited to adapting these rights to the particularities of private law. It must go further and take into account the particular normative structures of the autonomous social institutions that are at risk. In the digital world this means that the attention should focus on the specific danger that the digital code itself produces for the public sphere.

### I. Introduction

Greenpeace Germany launched a political campaign with comments critical of the environmental policies of the French TotalFinaElf oil company.<sup>1</sup> Greenpeace opened a website with the domain name 'oil-of-elf.com'. In doing so, it followed a practice of protest websites like 'Shell.Sucks.com' or 'IBM.Sucks.com', generally 'CompanyNameSucks.com', which are used to attack the business policies of corporations. The oil company brought legal action demanding that the domain name be dissolved or transferred to them. It filed

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<sup>1</sup> Cf. for a comprehensive review of the history of the case: <http://tinyurl.com/y7gkxv9c> (last visited 15 June 2017).

suit not with a state court in either Germany, France or the US, which would have applied its national law. Instead, as often happens in disputes about worldwide websites, the company brought the case before a private Dispute Resolution Organisation, the World Intellectual Property Organization (WIPO)-Arbitration Center, which is accredited by the Internet Corporation for Assigned Names and Numbers (ICANN), a private association, and which is obliged to adjudicate according to the private rules of the so-called Uniform Dispute Resolution Policy (UDRP).

Under § 4a of the UDRP, TotalFinaElf would need to prove the following elements:<sup>2</sup>

- i. the domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights;
- ii. the respondent has no rights or legitimate interests in the domain name; and
- iii. the domain name has been registered and is being used in bad faith.

The technical legal questions are: (1) Do critical and protest sites fall under the jurisdiction of the UDRP?; and (2) Must ICANN panels pay due regard to fundamental free speech rights? This second question raises the fundamental issue whether constitutional rights that have been developed exclusively in the relation between citizens and nation states can be invoked against private actors on the Internet. More broadly, it raises the issue of the constitutionalization of the Internet, ie, the emergence of a digital constitution.<sup>3</sup>

Which fundamental rights and which national legal order will the ICANN panel in our case call upon? Although ICANN panels apply UDRP provisions rather than legal norms of the nation states, they often refer to US law. As a consequence, the First Amendment of the US Constitution would be relevant to this case. In other words, the issue would be one of the extraterritorial impacts of the US legal order upon the Internet. Following decades dominated by the real-world cultural imperialism of the ‘American way of life’, are we now witnessing a new expansion of the *lex americana* into the virtual world?<sup>4</sup> The horizontal effects of fundamental rights on private actors would then be governed by the ‘state action doctrine’ of the American Constitution.<sup>5</sup>

As an alternative, however, the ICANN panel might apply whichever national

<sup>2</sup> Uniform Domain Name Dispute Resolution Policy Adopted: 26 August 1999, available at <https://tinyurl.com/q7e27cq> (last visited 15 June 2017).

<sup>3</sup> G. Rona and L. Aarons, ‘Human Right: State Responsibility to Respect, Protect and Fulfill Human Rights Obligations in Cyberspace’ 8 *Journal of National Security Law & Policy*, 503 (2016).

<sup>4</sup> Cf S.P. Huntington, ‘Transnational Organizations in World Politics’ 25 *World Politics*, 333-368, 344 (1973): ‘Transnationalism is the American way of expansion’.

<sup>5</sup> Cf, for the general discussion of the application of the ‘state action doctrine’ to the Internet: P.S. Berman, ‘Cyberspace and the State Action Debate: The Cultural Value of Applying Constitutional Norms to “Private” Regulation’ 71 *University of Colorado Law Review*, 1263-1310 (2000).

law it determines to be appropriate in the light of all of the relevant circumstances, as stated in § 15 of the ICANN Rules.<sup>6</sup> In such a case, the question would be one of whether the German constitutional law doctrine of horizontal direct effect would apply. Since French constitutional law does not provide for a horizontal effect of constitutional rights, only French private law would apply.

There is also a third way, which might prove of particular interest with regard to the Internet: Are we seeing the development of an autonomous *lex digitalis* analogous to the *lex mercatoria*, with its own autonomous transnational *ordre public*?<sup>7</sup> Or are we even witnessing the development of an autonomous digital constitution, in line with which courts of arbitration would be required to develop uniform transnational fundamental rights and their horizontal effects within the Internet?<sup>8</sup>

The CompanyNameSucks cases already have a considerable history of case law in the ICANN panels.<sup>9</sup> In some cases, ICANN panels have made explicit recourse to the term ‘free speech’, albeit in vague and, legally speaking, ineffective form, and have declared the management of a domain name in the pursuit of political free speech to be legitimate. In other cases, however, they have nonetheless banned individual critical domains.

The case raises intriguing questions about state sovereignty and transnational societal constitutionalism. Due to the Internet’s global character and its effective regime of electronic regulation, sovereignty as the ability to make and implement norms has been *de facto* shifted from nation-states to the Internet institutions. What is the impact on constitutional rights when this shift takes place in two dimensions: public/private and national/transnational? And what does it mean that constitutional questions are globalized? Let me sketch three arguments:

(1) Sovereignty shift from public to private space: Constitutional rights such as free speech are no longer directed against the state but against private actors (not only Facebook, Google, Amazon and Apple, but also the Internet regime – ICANN and its subsidiaries) within the private space of the Internet. What does ‘indirect’ horizontal effect look like in such a context? I would argue that we are not merely concerned here with the transfer of fundamental rights of public law to private law. Instead, the issue is one of the autonomous reconstruction of constitutional rights within the social system of the Internet.<sup>10</sup>

<sup>6</sup> Available at <https://tinyurl.com/y8olypqm> (last visited 15 June 2017).

<sup>7</sup> M. Renner, ‘Towards a Hierarchy of Norms in Transnational Law?’ 26(4) *Journal of International Arbitration*, 533-555 (2009).

<sup>8</sup> L. Viellechner, *Transnationalisierung des Rechts* (Weilerswist: Velbrück, 2013).

<sup>9</sup> WIPO Overview of WIPO Panel Views on Selected UDRP Questions, available at <https://tinyurl.com/y94pa2sh> (last visited 15 June 2017); J. Schovsbo, ‘The Private Legal Governance of Domain Names’ *University of Copenhagen Faculty of Law Legal Studies, Research Paper Series*, 1-17 (2015).

<sup>10</sup> For more details, I. Hensel and G. Teubner, ‘Horizontal Fundamental Rights as Conflict of Law Rules: How Transnational Pharma Groups Manipulate Scientific Publications’, in K.

(2) Sovereignty transfer from nation-states to transnational regimes, and the protection of fundamental rights within autonomous Internet law. The question of whether the ICANN panels, which are established by private ordering, should also enforce fundamental rights within the realm of the semi-autonomous legal order of ICANN-policy is even more contested. I would argue ICANN panels concretize fundamental rights within cyberspace on the basis of a fiction. They draw upon the fiction of a 'common core' of globally applicable principles of law, which include human rights, and with their help actually create Internet-specific fundamental rights within the reaches of an autonomous 'common law' of the Internet.

(3) So much for sovereignty. But what about constitutionalism? Our case provokes the question: How is constitutional theory to respond to the challenge arising from three current major trends – digitisation, privatisation and globalisation – for the problem of inclusion/exclusion of whole segments of the population in the processes of global communication? That is how today's 'constitutional question' ought to be formulated, in contrast to the eighteenth and nineteenth century focus on the constitution of nation-states. While the old constitutions were simultaneously liberating the dynamics of democratic politics and disciplining repressive political power by law, the point today is to liberate and to discipline quite different social dynamics. The question is how constitutional theory will manage to generalise its nation-state tradition in contemporary terms and re-specify it. My third argument is that within global society a multiplicity of civil constitutions outside institutionalized politics is emerging. The constitution of world society is coming about not exclusively in the representative institutions of international politics, nor can it take place in a unitary global constitution overlying all areas of society, but will emerge incrementally in the constitutionalisation of a multiplicity of autonomous subsystems of world society.<sup>11</sup>

Of course, our case is limited to the protection of constitutional rights against ICANN, the private Internet governing authority. The constitutional question in the digital world is much larger and concerns as well violations of constitutional rights by private collective actors, especially by private intermediaries like Google, Facebook and Amazon.<sup>12</sup> Their quasi-monopoly, their questionable handling of users' private data and their massive expansionist tendencies into other sectors of the Internet raise not only political but also constitutional questions in the strict sense. However, which constitutional site is actually

Blome et al eds, *Contested Regime Collisions: Norm Fragmentation in World Society* (Cambridge: Cambridge University Press, 2016), 139-168.

<sup>11</sup> For details see G. Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford: Oxford University Press, 2012).

<sup>12</sup> R. Pollock, 'Is Google the Next Microsoft? Competition, Welfare and Regulation in Internet Search' 9(4) *Review of Network Economics*, 1-31 (2010); G.A. Manne and J.D. Wright, 'Google and the Limits of Antitrust: The Case against the Antitrust Case against Google' 34(1) *Harvard Journal of Law and Public Policy*, 171 (2011).

affected by the intermediaries' market power is not easy to determine. It can be said with certainty that, due to their territorial boundaries, nation state constitutions fall short. However, their digital power is not solely a problem of the global economic constitution. Their information monopoly becomes a problem for the constitution of the new media, which cannot be reduced to economic issues. Their worldwide digital networking activities, which have enabled massive intrusions into the rights to privacy, informational self-determination and freedom of communication, represent typical problems for the constitution of the global Internet which is emerging today. The lack of transparency in their internal governance structures points to constitutional questions of democracy and of public controls.

Can constitutional rights be invoked against private actors on the internet? What is the meaning of their 'indirect' horizontal effect in the Internet?

By comparison with the longstanding tradition of constitutional rights, which was based exclusively on the relationship between the individual and the state, the horizontal effect concept represents a significant change.<sup>13</sup> It responds to the emergence of non-state intermediary social forces with the transfer of public law norms into private law relationships. And the Internet is full of these non-state intermediary forces, from the digital intermediaries like Facebook, Google and Amazon to the governance structures of the ICANN, a private association, against which constitutional rights protection is needed. Yet it is precisely in the metaphor of a transfer that the problem lies. The differences between the sender's context and the recipient's context are so great as to make any transfer of norms in the strict sense impossible. Instead, what is needed is a separate re-construction of constitutional rights that is dependent on the recipient's context in the digital world.

The transfer metaphor may still be convincing as a kind of transitional semantic, whereby constitutional rights asserted against the state are 'transferred' to private law and acquire 'third party effect' *vis-à-vis* social actors. In the long term, however, constitutional rights within society can only be understood on the basis of their different origin of intra-societal conflicts. The digital world is full of such intra-societal conflicts, which are fundamentally different from state-society conflicts but also different from social conflicts in the real world.

<sup>13</sup> For the current discussion in Germany, W. Rübner, 'Grundrechtsadressaten', in J. Isensee and P. Kirchhof eds, *Handbuch des Staatsrechts der Bundesrepublik Deutschland* (Heidelberg: C.F. Müller, 2011), Rn. 83-125; in a historical perspective, M. Stolleis, *Geschichte des öffentlichen Rechts in Deutschland* (München: Beck, 1992), II, 216 et seq. Concerning the legal position in Europe, A. Clapham, *Human Rights Obligations of Non-State Actors* (New York: Oxford University Press, 2006). For international law, S. Gardbaum, 'The "Horizontal Effect" of Constitutional Rights' 102 *Michigan Law Review*, 387-459 (2003); J. Ruggie, 'Protect, Respect, and Remedy: A Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises' 3(2) *Innovations, Technology, Governance, Globalization*, 189-212 (2008).

They differ in the factual circumstances of the constitutional right violation and in their appropriate sanctions, so that the simple term ‘third party effect’ of constitutional rights originally asserted against the state is actually misleading.

In the following pages, I will develop three theses:

*Thesis 1.* The third party effect has so far been configured in an individualist perspective only, as balancing individual constitutional rights of private actors against each other. However, in order to deal with massive structural conflicts within society, constitutional rights in private relations have to be reformulated in their collective-institutional dimension. In the digital world, this means that not only individual rights of the users need to be protected but much more broadly it means the institutionalization of a digital public sphere.

*Thesis 2.* Instead of being limited to the protection against power in society, which is equivalent to the power of the state, constitutional rights must reach much further and need to be directed against all communications media with expansive tendencies. In the digital world this means that the dangers for constitutional rights stem not only from the economic power of the Internet intermediaries like Google, Facebook and Amazon or from the Internet governance structures, but from the very digital operations themselves.

*Thesis 3.* Contextualising constitutional rights ought not to be limited to adapting these rights to the particularities of private law only. It must go further and take into account the particular normative structures of the autonomous social institutions that are at risk. In the digital world this means that the attention should focus on the specific danger that the digital code itself produces for the public sphere.

## II. *Thesis 1. Constitutional Rights as Collective Institutions*

The doctrine of horizontal effect, which prevails today, is an exclusively individualistic approach. It is limited to weighing individual constitutional rights against each other.<sup>14</sup> If we see it only as a transfer of constitutional rights from public into private relationships, we turn a blind eye to the most dangerous violations of constitutional rights within society. While it has long been recognized in public law that constitutional rights serve to protect not only individual rights but also fragile social institutions, like art or science,<sup>15</sup> the third-party effect has so far generally focused only on individual protection and has neglected the protection of endangered institutions. The German Federal Constitutional Court

<sup>14</sup> K.-H. Ladeur, *Kritik der Abwägung in der Grundrechtsdogmatik* (Tübingen: Mohr Siebeck, 2004); A. Fischer-Lescano, ‘Kritik der praktischen Konkordanz’ *Kritische Justiz*, 166-177 (2008). A critique of the legal situation in the USA: J. Mathews and A.S. Sweet, ‘All Things in Proportion? American Rights Review and the Problem of Balancing’ 4 *Emory Law Journal*, 102-179, 116 (2011).

<sup>15</sup> In general H. Dreier, *Dimensionen der Grundrechte* (Hannover: Hennes und Zinkeisen, 1993), 27 et seq.

regards the conflict here as only between individual subjective rights of ‘equal-ranking holders of constitutional rights’, between ‘conflicting constitutional right positions’ ‘in their interdependency’.<sup>16</sup> In so doing, the court ignores the fact that the collective-institutional dimension of constitutional rights becomes viral when they are supposed to have effects within society.

In the conflict between collective institutions within society, however, lies the especially controversial problem of the horizontal effect. The term ‘collective-institutional’ distances itself from Carl Schmitt’s institutionalism and refers explicitly to Helmut Ridder’s theory of ‘non personal constitutional rights’, according to which ‘constitutional rights are aimed at the specific freedom of a social field through the organization of that field’ – freedom of science or freedom of art, for example,<sup>17</sup> and today freedom of the Internet. It should in particular be emphasized in that in contrast to politically conservative preconceptions, ‘institution’ is understood not as a legal guarantee for the permanent existence of social structures against tendencies of political change – in Carl Schmitt’s definition, to preserve ‘what is present, formally and organizationally exists and is at hand’<sup>18</sup> – but as a socio-legal dynamic process of normativization which is subject to constant change.

Our introductory case raises questions of fundamental rights protection within the Internet. If we stress the institutional dimension also in private law protection of constitutional rights then we are not only dealing with the individual rights of the protesting Internet users. Rather, we are asking how a public sphere can be created within the decentralized realm of the Internet, and how critiques of FinaTotalElf’s company policies can be transmitted to the appropriate audience. The search is on for Internet-specific equivalents to the traditional mass media, on the one hand, and to those local protest movements, on the other, that can enforce fundamental rights protection for their criticisms of a company’s trade practice. In principle, the company’s website is the equivalent of the company’s place of business in the real world, and the domain name, one of the determinative sites for the creation of a public sphere of political debate on the company. This is the primary argument in support of the extension of fundamental rights protection to parodies or critiques of the

<sup>16</sup> BVerfGE 89, 214 – Bürgerschaft.

<sup>17</sup> H. Ridder, *Die soziale Ordnung des Grundgesetzes* (Opladen: Springer, 1975), 90 et seq; Id, *Die Freiheit der Kunst nach dem Grundgesetz* (Berlin: Vahlen, 1963). Definition of the term by F. Steinhauer, ‘Das Grundrecht der Kunstfreiheit’, in T. Vesting, S. Koriath and I. Augsberg eds, *Grundrechte als Phänomene kollektiver Ordnung Zur Wiedergewinnung des Gesellschaftlichen in der Grundrechtstheorie und Grundrechtsdogmatik* (Tübingen: Mohr Siebeck, 2014), 247-282, who for reasons of clarity introduced the term ‘collective-institutional’ and used it to describe Ridder’s concept in contradistinction to Carl Schmitt’s ‘institutional’ constitutional rights theory.

<sup>18</sup> C. Schmitt, ‘Freiheitsrechte und institutionelle Garantien der Reichsverfassung’, in Id, *Verfassungsrechtliche Aufsätze aus den Jahren 1924-1954* (Berlin: Duncker & Humblot, 2<sup>nd</sup> ed, 1973), 155.

company's trademark.

It needs to be stressed that the collective-institutional dimension plays a part on both sides of the horizontal constitutional rights relationship – perpetrators of rights violations as well as victims. If the victim side includes institutions as well as individuals, then on the perpetrators' side it is not only persons, but in particular anonymous social processes that must be held responsible for the violation of constitutional rights. This two-sided aspect of the collective-institutional relationship is often overlooked. However, the discussion in criminal law concerning the so-called macro-criminality and the criminality of formal organizations, which has as its background the sociological debate on 'structural violence',<sup>19</sup> has developed such a collective-institutional perspective for the perpetrators' side also.

In such cases, violations of constitutional rights are ultimately attributable to non-personal social processes, which use human actors as their agents.<sup>20</sup> Structural violence assumes an 'anonymous matrix', ie, not only 'collective actors', which tend to be more visible (states, political parties, commercial companies, groups of companies, associations), but also (with an equal if not greater intensity) anonymous communicative processes (institutions, functional systems, networks), which are difficult to address because they are not personified as collective actors.<sup>21</sup> The hazards that emanate from the digital processes of the Internet are a particularly striking example. There is a clash between irreconcilable rationalities: action that is economically rational has a structurally corrupting effect on the particular rationalities of endangered social institutions. And a particular feature of the clash is its asymmetry. Constitutional rights have to be protected in such asymmetrical situations, in which the expanding economic dynamic weakens the internal structures of fragile institutions.

Treating constitutional rights as a collective institution means, therefore, a two-sided relationship in which social processes receive guarantees of autonomy to prevent them from being overwhelmed by the totalizing tendencies of other social processes. In this collective-institutional dimension, constitutional rights function as conflict-of-laws rules that operate within the conflict between the opposing rationalities of different parts of society. They seek to protect the integrity of art, of the family, and of religion in the face of the totalizing tendencies at work in society, eg, technology, the media and industry. And today, it is

<sup>19</sup> *Locus classicus* on structural violence, J. Galtung, 'Institutionalized Conflict Resolution: A Theoretical Paradigm' 2(4) *Journal of Peace Research*, 348-397 (1965), for macro-criminality, H. Jäger, *Makrokriminalität. Studien zur Kriminologie kollektiver Gewalt* (Frankfurt am Main: Suhrkamp Verlag, 1989).

<sup>20</sup> For clarity it should be stressed that this does not mean that individual responsibility is eclipsed by collective responsibility, but rather that both exist side by side at all times, although they are subject to different preconditions.

<sup>21</sup> More details in G. Teubner, 'The Anonymous Matrix: Human Rights Violations by "Private" Transnational Actors' 69 *Modern Law Review*, 327-346 (2006). For the transnational arena, L. Vellechner, n 8 above, 217.



digital totalitarianism that creates new threats to both individual freedom and institutional autonomy.

Instead, the horizontal protection of constitutional rights must be consistently transmuted into organization and process. Institutional protection for areas of social autonomy has been implemented for some time in public law, particularly in media law.<sup>22</sup> In the field of the mass media, freedom of opinion cannot be effectively protected by means of subjective rights, but only through organization and process.<sup>23</sup> This insight needs to be applied more generally and implemented and reproduced in regard to the horizontal effect of constitutional rights in different social areas, particularly in the Internet.

### **III. Thesis 2. Expansionary Tendencies of the Communications Media**

A second weak point of traditional horizontal-effect doctrines is that they concentrate exclusively on protection from social power.<sup>24</sup> This is made particularly clear by the influential state-action doctrine of US constitutional law.<sup>25</sup> Horizontal effects of constitutional rights are recognized by analogy to the vertical state constitutional rights, if private actors exert socio-economic power equivalent to state power.

Indisputably, legal protection in the face of social power is an important part of the third-party effect, but here again the weakness of the transfer principle is noticeable. For only if the issue were to relate to the transfer of state-directed constitutional rights to intra-societal conflicts would it be plausible to restrict protection of constitutional rights to cases in which private power of an intensity comparable to state power has arisen in society. For this reason the third-party effect has also been uncommonly successful in labour law, since private ownership is transformed here into organisational power of the private government, which has at least as great an impact as the exercise of state power.

Yet if we focus exclusively on social power we fail to see other, subtler causes of collective-institutional constitutional rights violations. While in the sphere of the state it is appropriate for constitutional rights to be aimed against power phenomena, in different spheres of society it is not at all appropriate to limit constitutional rights to the communications media exercising social power. In principle, constitutional rights are put at risk from all communicative media as soon as autonomous subsystems develop expansionary dynamics of their

<sup>22</sup> BVerfGE 57, 295, 320 – 3. Rundfunkentscheidung.

<sup>23</sup> T. Vesting Die, “Tagesschau-App und die Notwendigkeit der Schaffung eines ‘Intermedienkollisionsrechts’”, in I. Spiecker ed, *Karlsruher Dialog zum Informationsrecht* (Karlsruhe: KIT Scientific Publishing, 2013), 1 et seq.

<sup>24</sup> A survey in J. Schwabe, *Die sogenannte Drittwirkung der Grundrechte. Zur Einwirkung der Grundrechte auf den Privatrechtsverkehr* (München: Goldmann, 1971), 12 et seq.

<sup>25</sup> Cf *Civil Rights Cases* 109 US 3 (1883).

own. In today's world, that means primarily the expansionary tendencies of the economy, technology, medicine and (of particular relevance at the present time) of the digital world. Social power is thus only part of the danger to which constitutional rights are exposed within society. The main differences that exist between social and political constitutional rights result from the internal reproduction conditions of the affected sphere of society. In politics, constitutional rights are primarily directed against power. In other social systems constitutional rights are directed against dangers that are created by the specific communications media for the social system in question, eg, from payment operations in the economy, from cognitive-technical operations in science and technology, and from digital information flows in cyberspace.<sup>26</sup> Often, these risks appear as phenomena of social power which necessitates the protection of constitutional rights against them. But this protection is needed whenever these operations violate constitutional rights, even in cases where no social power is involved at all.

#### **IV. Thesis 3. Contextualising Constitutional Rights in Cyberspace**

For any such collective-institutional protection of constitutional rights to be contextually adequate,<sup>27</sup> organization and process must be oriented to the specific contexts on both sides of the violation – the violators as much as the violated. In the case of CompanyNameSucks, the question by which we should be guided is, therefore, under what conditions does the practice of domain-name apportionment violate the core area of free speech on the Internet? The search for criteria must then proceed in two different directions: (1) What constitutes the specific risk potential of processes that violate constitutional rights? (2) How, in this connection, are we to define the core area of free speech? Only when these two questions have been answered with sufficient precision can we determine how organization and process have to be structured so as to be capable of restoring the violated integrity of freedom of opinion in the so-called private sector.

The Internet's most conspicuous component is the (in)famous 'code', the digital incorporation of behavioural norms in the architecture of cyberspace.<sup>28</sup> Digital signals replace regulation by rules of conduct. Initially, the question is one of the specific risks inherent to fundamental rights within the Internet: Which particular dangers do the code's regulation of conduct pose to individual autonomy? Further, how does the code perceive the autonomy of economic

<sup>26</sup> As emphasized by G. Verschraegen, 'Differentiation and Inclusion: A Neglected Sociological Approach to Fundamental Rights', in M. Rask Madsen and G. Verschraegen eds, *Making Human Rights Intelligible: Towards a Sociology of Human Rights* (Oxford: Hart, 2013), 61-80.

<sup>27</sup> For the question how constitutional rights should be adapted to the unique features of the Internet, see G. Rona and L. Aarons, n 3 above.

<sup>28</sup> *Locus classicus* L. Lessig, *Code and Other Laws of Cyberspace* (New York: Basic Books, 1999).

institutions? Then comes the question of how best to reconstruct fundamental rights in a manner appropriate to the Internet: What subject matter and which procedural codes must be read into the code in order to ensure that individual fundamental rights and institutional spheres of autonomy are adequately protected against digital regulation?

What specific dangers does the 'code' entail for individual autonomy? How does the code impact the autonomy of social institutions? It is not primarily a matter of abuse of digital power; rather, it concerns the constitutional consequences of the structural differences between the digital 'code' and the law of the offline world. Within its reach of application, the 'code' transforms fundamentally the normative order of the cyberspace. It is no longer the appellative character of legal rules, but electronic constraints that regulate directly the communication on the Internet. The 'code' represents the crucial problem for a digital constitution.

The first relevant issue is the 'code's' self-enforcing character. In the predominantly instrumentalist perspective of Internet lawyers,<sup>29</sup> this seems to be the great advantage of the 'code'; however, in a constitutional perspective it becomes the nightmare for fundamental principles of legality. Traditionally, constitutional law is based on an institutional, procedural and personal separation of law making, law application and law enforcement. This separation is even inscribed for law making in the private sector. The strange effect of digitalisation, however, is a kind of nuclear fusion of these three elements, which means the loss of an important constitutional separation of powers.

A second issue is the triad of regulation of conduct, construction of expectations, and resolution of conflict.<sup>30</sup> Traditional law cannot be reduced to one of these aspects but realises them all; however, it realises them within separate institutions, normative cultures and principles of legality. There is a (hidden) constitutional dimension in this separation. Again, the digital embodiment of normativity in the 'code' reduces these different aspects to just one: the electronic regulation of conduct. This entails a considerable loss of spaces of autonomy and of a system of checks and balances.

The third issue is calculability of normativity. In traditional law, the degree of formalisation was rather limited. The (in)famous effects of legal formalism have been relatively harmless as compared with the effects of the digital 'code', which allows for a hitherto unknown severe formalization of rules. In the real world, the strict binary relation between legal and illegal had been limited to the legal code. Now that binary relationship is extended in the virtual world to the legal programs, to the whole ensemble of substantive and procedural structures

<sup>29</sup> Seen from this instrumentalist point of view, the differences between the two protagonists of the Internet constitution are few indeed: L. Lessig, n 28 above; D. Post, 'Anarchy, State, and the Internet: An Essay on Law-Making in Cyberspace' *Journal of Online Law*, 1-44 (1995).

<sup>30</sup> For this legal functional triad, cf N. Luhmann, *Law as a Social System* (Oxford: Oxford University Press, 2004), 167 et seq.

that condition the application of the binary code. This excludes any space for interpretation. Have you ever tried to discuss with your computer the interpretation of its commands? To click or not to click – that is the question when it comes to accepting the standard contracts in the digital world. Normative expectations, which traditionally could be manipulated, adapted and changed, are now transformed into rigid cognitive expectations of inclusion or exclusion. In its day-to-day application, the Internet code lacks all the subtle learning abilities of law. Any informal micro-variation of rules through new facts and new values is excluded. Arguments do not play any role in the range of code-application. They play their role, of course, in the programming of the code, but lose their power in the permanent activities of rule application, implementation and enforcement. Thus, informality, as an important countervailing force to the formality of law, is reduced to zero. The digital ‘code’ knows of no exception to the rules, no principles of equity, no way to ignore the rules, no informal change from rule-bound communication to political bargaining or everyday life abolition of rules. No wonder that such a loss of ‘reasonable illegality’ in the cyberworld nurtures the myth of the hacker, who with his power to break the code becomes the Robin Hood of cyberspace.

If this is a true impression of the dangers that the code poses to autonomy, then the constitutional character of various legal policy demands made of the code is undeniable. The Open-Source Movement, which demands publication of the source code in software marketing materials so that programme control structures can always be checked, should not simply be dismissed as a bunch of ‘nice’ idealists. Equally, the demand that the code’s digitalised conduct control mechanisms be subject to the principle of ‘narrow tailoring’ entails a parallel demand for intensified application of the principle of constitutional proportionality to the code, in order to bring it in line with legal norms that must also be respected by private actors. In this context, judicial control, as well as other forms of public control over the meta-norms of the code, are far more important than comparable oversight of standard contract terms or the terms used by private associations in the real world. The same holds true for Internet competition law, which not only secures open markets, but also impacts the continued openness of alternative code regulations. Human rights for the Internet has become a powerful political movement. More extensive are calls for an authentic constitution of the Internet, as a central part of societal transnational constitutionalism.

Apart from those political demands, which are translated in national and transnational legislative activities, judicial review of standard contracts with Internet providers as well as with institutions of the private Internet governance are gaining ever greater importance for constitutional rights.<sup>31</sup> Our case involving

<sup>31</sup> A recent excellent analysis of judicial control of standard contracts is P. Femia, ‘Desire for Text: Bridling the Divisional Strategy of Contract’ 76 *Law and Contemporary Problems*, 150-168 (2013).

CompanyNameSucks is just one example of a standard contract between Internet users and Internet governance institutions that needs to be governed by principles of constitutional law. Under the guise of contracting, the intermediaries of the cyberworld have developed authoritative private regulations that no longer can be qualified as individual contractual relationships, but have practically all the characteristics of general legislation. There is no genuine contractual consensus any more; instead, enterprises and business associations as well as the ICANN institutions establish norms unilaterally, on the basis of asymmetric power relations, comparable to those between state and citizens. The famous click has become nothing but a demand for entrance into one of myriad digital regimes.

For decades, in the offline world, judge-made law has reacted to standard contracts and their privately imposed norms by taking on a dual constitutional role. And it has begun to do the same in the online world. On the one hand, it legitimates digital standard contracts by downplaying problems of asymmetrical norm production backed by economic power. It labels such norm production ‘contractual’, and uses some secondary rules to regulate it. The political legislature then does no more than incorporate the norms drawn up by judge-made law into the civil code.

On the other hand – and this is the decisive move toward constitutionalisation of the digital world – the courts intervene wholesale with strict judicial review in the digital self-made law, whose intensity is on a par with the constitutional review exercised on political legislation. Shielded by such traditional formulae as ‘good faith’ and ‘*boni mores*’, judge-made law has pieced together a new constitutional control hierarchy, in which the lower-ranking norms of the digital standard contracts are controlled by higher-ranking constitutional norms. Yet these higher-ranking norms are produced by principles not of the political constitution, but of the emerging transnational digital constitution, which needs to legitimize itself via principles of public responsibility. And it becomes the public responsibility of the courts, national and transnational, ordinary and constitutional, to develop with relentless energy the constitutional rights implicated by the asymmetric forms of private ordering in the digital world. It would be unfortunate if they were to apply one of the many national constitutional laws when they have to establish digital constitutional rights. Doing so would create a bewildering confusion of human rights standards within the worldwide Internet. Via the review of standard contracts, the courts will have to establish digital constitutional rights on a transnational plane. It is the courts that will play the decisive role for the emergence of a transnational digital constitution that deserves its name.