MAX PLANCK INSTITUTE
FOR COMPARATIVE PUBLIC LAW
AND INTERNATIONAL LAW

MPIL RESEARCH PAPER SERIES | No. 2021-08

SOCIETAL CONSTITUTIONALISM (THEORY OF)

Angelo Jr Golia, Gunther Teubner

ISSN 2702-9360

MAX PLANCK INSTITUTE
FOR COMPARATIVE PUBLIC LAW
AND INTERNATIONAL LAW

MPIL RESEARCH PAPER SERIES
No. 2021-08

SOCIETAL CONSTITUTIONALISM (THEORY OF)

AUTHORS

Angelo Jr. Golia, Gunther Teubner

ISSN 2702-9360

ABSTRACT

The entry provides a systematic overview of societal constitutionalism (SC), one of the main frameworks emerged in contemporary legal and political theory to analyse constitutional phenomena. After a general introduction in section A, section B summarises SC's theoretical background, namely the debates on the Economic Constitution (B.I), legal pluralism (B.II), systems theory (B.III), and the work of David Sciulli (B.IV). Section C explains SC's analytical limb, which on the one hand criticises some tenets of state-centred constitutionalism (C.I); and on the other hand identifies functions, arenas, processes, and structures of a constitutionalised social system (C.II). Section D turns to SC's normative limb, pointing to some constitutional strategies that increase social systems' capacities of self-limitation (D.I); and develop a law of inter-constitutional collisions (D.II). Section E addresses the main competing approaches and criticisms, which are based on state-centred constitutionalism (E.I); on international/global constitutionalism (E.II); and on contestatory/material constitutionalism (E.III).

KEYWORDS:

Legal pluralism, societal constitutionalism, global law, systems theory, democracy beyond the state

SOCIETAL CONSTITUTIONALISM (THEORY OF)

Angelo Jr Golia, Max Planck Institute for Comparative Public Law and International Law, Heidelberg – Gunther Teubner, Goethe-Universität Frankfurt am Main[1]

A. Introduction

Societal constitutionalism (SC) is a legal theory which identifies trends of constitutionalisation beyond the nation state in two different directions. Outside the limits of the nation state constitutions emerge in the institutions international politics and they emerge simultaneously outside the limits of politics in the "private" sectors of global society. SC analyses the conditions for the emergence, co-existence and further evolution of such constitutional processes. Thus, SC is a theory of legal and constitutional pluralism which, although it has been applied also in the context of the nation state, unfolds its full analytical and normative potential in transnational contexts. SC has been increasingly used as a framework to analyse constitutionality beyond the state which, notably in the transnational economy and in the digital sphere.

SC can be understood as a reaction to dilemmas of modernisation, with which constitutionalism has been confronted from the 19th century on. According to David Sciulli (Sciulli 1992, p. 40-53), the constitutionalisation not only of the political system but of all social sectors is a counterstrategy to Max Weber's "iron cage of future serfdom"; to processes of social differentiation; replacement of forms of informal coordination by bureaucratic organisation; instrumental rationality as the only one recognised in all social spheres; and authoritarian tendencies in several social fields (Weber 1968 [1914-1920], pp. 212-254, 926-938).

SC is also confronted with the so-called Böckenförde dilemma, whereby 'the liberal secularized state lives by prerequisites which it cannot guarantee itself' (Böckenförde 1976, p. 60), with the consequence that even modern constitutional states ultimately have to rely on transcendent or not strictly rational (in the Enlightenment sense) forms of legitimation in order to sustain themselves, following patterns famously described by Schmitt as "political theology" (Schmitt 1985). SC reformulates this problem arguing that under functional differentiation, no form of political legitimation – be it liberal-democratic or authoritarian – can impose its fundamental principles to social systems, which have developed their own sources of legitimacy (economy, science, education, religion, art). In processes of globalisation these own forms of normativity have emerged from the latency, to which they had been confined by modern legal theory and have gone through a process of (at least partial) emancipation from political systems and their law (Teubner 2012a).

However legitimised, political systems cannot govern the worlds of wealth, faith, knowledge, education within the functionally differentiated society (Teubner 1997a). If they nevertheless aim to have some influence on social processes, political systems need to be re-

[1] A shorter version of this entry is forthcoming in: J. Cremades and C. Hermida del Llano (eds.), Encyclopedia of Contemporary Constitutionalism (SpringerNature, 2021). The authors would like to thank the participants to the *Dienstagsrunde* of the research team of Prof. Anne Peters held on 16 February 2021 at the MPIL for their useful comments on earlier drafts. The usual disclaimers apply.

sponsive to the specific rationality of each functionally differentiated sphere, particularly to their respective normativity. Here, SC criticises not only the Schmittian 'unity of political decision' (Schmitt 2001 [1930]; Schmitt 1985), but also some cosmopolitan – broadly speaking Habermasian – approaches, which excessively rely on the procedures of institutionalised politics and their capacity to resolve social conflicts, and relegate private spheres to the role of only generating impulses on the political system. In this regard, SC is a *critical* theory, insofar as it points to the limits of some tenets of the modern constitutional tradition. Such tenets – SC argues – ultimately risk to be an obstacle to the normative aspirations of constitutionalism itself which aims at limiting the expansive dynamics of communicative media (in particular, power) through law. 'Thus, the only viable option is to recognise a multiplicity of societal constitutions, which are neither wholly public nor private. They emerge in the various spheres, into which contemporary society is differentiated: economy, science, technology, media, medicine, instructions, transports etc' (Esposito 2021, p. 67, our translation).

In terms of constitutional strategy, SC explores potential solutions to the "regulatory trilemma" of the welfare state. It starts from the assumption that the social fragmentation of contemporary societies – accelerated by globalisation – has contributed to the crisis of welfare state models of social regulation. In western societies direct state intervention in autonomous social spheres tends to give rise to either an 'incongruence' between law and society – leading to law's ineffectiveness in governing social processes; or to a 'hyper-legalisation' of society – what Habermas calls the 'colonisation of the life-world' (Habermas 1985, p. 211); or to a 'hyper-socialisation' of law, leading to its "capture" by politics or other regulated subsystems. As a consequence, state interventions would risk to produce either irrelevant or destructive effects for society or for law itself (Teubner 1985). The answer of SC is neither a sociologisation of legal theory, typical of most "law & …" approaches, nor the de-legalisation/deregulation advocated by neo-liberal approaches. Rather, it argues that policy- and law-makers should aim to external pressures on self-regulation. State power and external societal forces – that is, state legal norms and "civil society" counter-powers from other contexts – need to exert such massive pressure on the regulated field so that it will be forced to build up effective internal self-limitations. SC thus promotes the conditions to develop "civil constitutions" in different social systems, especially those that, following the processes of globalisation, have reached a global dimension.

SC poses several challenges to constitutional lawyers. Firstly, it is a variant of sociological jurisprudence, i.e. a legal theory which, while remaining in the field of jurisprudence, has its roots in sociological analyses, particularly systems theory (Teubner 2017, 2013). Therefore, it uses concepts and vocabulary far from those to which the constitutionalist is normally used. Secondly, SC has been developed in a series of articles and two major books (Teubner 2012a; Kjaer 2014), which makes it difficult to understand, apply, develop further, or criticise the theory. The lawyer approaching SC, then, is not only called to master a conceptual arsenal far from her own, but also to reconstruct the intellectual paths of various authors, who have dealt with specific issues in an a-systematic and evolutive manner. Thirdly, the phrase 'societal constitutionalism' is somehow misleading, as it may suggest that it "only" concerns constitutional issues. In fact, SC provides interpretative keys to the legal phenomenon in general, normative guidelines to (both legislative and judicial) lawmaking, and reconstructive parameters to jurisprudence. In this sense, SC features, at least potentially, the basic elements of a general theory of law.

B. Legal Theory Background

The sociological background of SC is constituted by general theories of social differentiation (Durkheim, Parsons, Luhmann), the recently developed constitutional sociology (Thornhill 2011), and the theory of private government (Selznick 1969). However, SC links historical and empirical analyses of constitutional phenomena to legal-normative perspectives. For this reason, with some simplification four theoretical precursors of SC are identified here: the debates on the 'economic constitution' (B.I.); pluralist theories of law (B.II.); Niklas Luhmann's theory of functional differentiation (B.III.); David Sciulli's constitutional theory (B.IV.).

I. The Economic Constitution

Between the 1920s and 1930s, German authors first elaborated the concept of economic constitution (*Wirtschaftsverfassung*). They include advocates of 'Ordo-liberalismus' of the Freiburg school (Böhm, Eucken, and Großmann-Doerth 1937), as well as social-democratic legal thinkers (Sinzheimer 1976 [1927]). Despite their different ideologies, these authors theorised that economic processes tend to develop fundamental normative structures of their own, forming a partial constitution (*Teilverfassung*), distinct from the political constitution in the narrow sense. At that time, however, the state had started assuming tasks of economic redistribution and social justice, through the extension of politically legitimated decision- and law-making to all social spheres in a given territory (Teubner 2012a, pp. 24-30). In this sense, it is only since the Weimar era that state (i.e. political) constitutions aspire to be "holistic".

Such developments brought out the parallel concept of economic constitution – understood as counterpart to the political constitution – as a normative framework external to yet continuously interacting with economic processes. The economic constitution developed fundamental principles for economic processes, which are not just a raw material to be regulated, but dispose of their own normativity (Böhm, Eucken, and Großmann-Doerth 1937, p. 57). As such, the economic constitution is 'a comprehensive decision (*Gesamtentscheidung*) concerning the nature and form of the process of socio-economic cooperation' (Böhm 1933, p. 107). The economic constitution, then, is neither the mere synthesis of some social regularities, nor a sort of spontaneous order (Teubner 1993a, p. 57), nor a de-politicised social space, as in some late strands of ordoliberal thought (Mestmäcker 1980). Rather, economy and markets are artificial orders, *also* constructed by legal norms, but the latter are not necessarily or even primarily state-based, in the sense that the legal norms that constrain and stabilise economic processes may be (co-)produced by actors and systems different from states. Even the partial constitution of the economy, then, expresses an 'ought-to-be', which may or may not align to the directives coming from the political constitution, but does not coincide with the latter.

The main difficulty posed by the notion of economic constitution comes from the need to conceptualise two distinct and parallel sources of normativity for the same social sphere, i.e. the economy. SC deals with this difficulty by resorting to concepts of systems theory, notably interference and structural coupling (see below B.III). Ultimately, SC conceives of (the debate over) the economic constitution as the paradigm for a multitude of autonomous partial constitutions. However, it rejects the idea to reduce all civil constitutions to the economic rationality. Rather, it insists on the diversity of different social rationalities that need even constitutional protection against the intrusion of the economy. Accordingly, SC criticises ordolib-

eral constitutionalism, insofar as it aims to limit the expansive tendencies of the state and more generally of politics, but never seeks protection against the no less problematic expansive tendencies of the economy into other social spheres (Teubner 2012a, p. 31).

II. Legal Pluralism

Coming to legal pluralism, one major point of reference for SC is Otto von Gierke's pluralist theory of associations (*Genossenschaftstheorie*) (Gierke 1934, 1977). Gierke acknowledged that the ties established within social groupings have an intrinsic, autonomous normative value, regardless of the monopoly of force exercised by the state; and that even when a distinct organisational structure such as the state superimposes on social groupings, the latter do not cease to make their own law. Gierke insisted on the social reality of collective actors as social connection of individuals as well as on the autonomous normativity of the "real collective personality". SC builds on Gierke's social pluralism but rejects his organicist premises. Associations are not human beings in their interconnectedness, but dynamic, self-organising and self-reproducing *communicative processes*, with their own mechanisms of selection and re-production. This means that, according to SC, individuals (the "flesh and blood" people) are necessary to keep communicative processes going, but as such they are part of their social environment (Teubner 1988, pp. 133-140).

Another point of reference is Eugen Ehrlich's theory of living law and legal pluralism (Teubner 1992b, 1997c, pp. 3-5). SC takes up the idea that law is not an assemblage of statutes, scholarship and jurisprudence – which can only capture a relatively small fraction of the legal phenomenon – but rather consists of a continuous social process, based on 'legal facts' (customs, power relationships, contracts) produced and applied by the various associations of human beings present in a given community. While such process is self-sustaining to a certain extent, it is also supported by other overlapping normative systems, performing the same function of organising social life (Ehrlich 1936). Ehrlich's conception of "living law" questioned the main assumptions of modern legal theory, e.g. the subordination of the judge to (written) law, the state monopoly over lawmaking and the unity/coherence/completeness of the legal system (Ehrlich 1918). Just like Ehrlich, SC questions the capacity of state law to regulate society without taking into account the normative autonomy of different social spheres. However, Ehrlich blurred the boundary between law and society, while SC stresses the constitutive difference between autonomous law and other autonomous social systems (Luhmann 1992, pp. 145-185).

Institutionalist theories developed at the beginning of 20th century are a further point of reference. Such theories claimed that law is not produced by the will of a historically individuated sovereign (Hauriou 1986 [1933]; Romano 2017 [1918]). Rather, they focused on the institution, understood as 'an organization, a structure, a position of the very society in which it develops and that […] constitutes as a unity, as an entity in its own right' (Romano 2017 [1918], p. 13). By emphasising the institutional and collective dimension of law, and by recognising that the autonomy of the institution may have different degrees of development (Romano 2017 [1918], pp. 17-25), such theories anticipated systems theory's and SC's reflections on the degrees of "autopoietic closure" of legal systems (Teubner 1993a, 1987, pp. 25-46) (see below B.III). Just like SC, classic legal institutionalism also advanced *perspectival* techniques of inter-systemic conflict management, whereby the question of which system

prevails is to be assessed from the internal perspective of each of the conflicting systems (Romano 2017 [1918], pp. 69 ff.) (see below D.II). However, and despite the points of contact between Romano's institutionalism and systems theory approaches to law (Croce and Goldoni 2020, pp. 191 ff.), without a developed sociological theory and a constructivist epistemology, classic institutionalism was exposed to the critique of legal normativism which reduces the institution to nothing but a set of secondary norms *à la* Hart (Hart 1961, pp. 77 ff.). SC, on the contrary, does not see law (only) as a social structure, but as a dynamic process of self-reproducing communication. Further, while Hauriou's and Romano's theories could be used as legal pluralist models, both remained ideologically monist, as they were concerned with limiting the centrifugal social forces that threatened the 19th century administrative state.

It is also for this reason that among the exponents of legal pluralism the author closest to SC is perhaps Georges Gurvitch, who was both theoretically and ideologically a legal pluralist (Gurvitch 1947). In his mistrust towards state law, Gurvitch marked the passage from pluralism as a fact to pluralism as a value. The State is '(…) neither the only nor the main source of law, but is only one of these sources and not even the most important one'. Social law in its various forms of sociality 'can never be imposed from outside; it can only regulate from within, in an immanent manner'. Social law is always "autonomous law" reflecting the identity of the social group (Gurvitch 1947). For Gurvitch, 'the future of democracy lies in the universality and multiplicity of its faces, in its polyhedral character, (…) in its extension that continually occupies new regions of human relations, in the fact that it goes beyond the limits of political organisation' (Gurvitch 1935). Just like in SC, then, the analytical-descriptive dimension of legal pluralism turns into a normative programme.

SC builds on these varieties of legal pluralism and integrates them in a concept of constitutional pluralism. In particular, it distinguishes various types of constitutionality in relation to different forms of sociality; investigates the constitutional forms of social coordination (organisation; contract; network) (Teubner 2002, 1993b); assumes the plurality of ideas of justice (Teubner 2012a, pp. 148-149) (see below C.II.2 and E.III); highlights the interaction between spontaneous and organised sectors within each social system (Teubner 2003); stresses the crucial importance of external pressures from politics and other sectors toward the self-limitation of social systems (Teubner 2012a, pp. 85-101) (see below C.II.2); emphasises that "civil constitutions" of social groups are crucial for the effective guarantee of social rights; and, above all, strives to democratise autonomous spheres of a functionally differentiated society, beyond the institutions of state politics (Teubner 1997b, 2004) (see below C.II.2 and E.III).

III. Systems Theory

The main sociological background of SC is systems theory and, in particular, Niklas Luhmann's theory of functional differentiation (Luhmann 1995). Here we focus on the points relevant to understanding SC, and on some terminological clarifications.

For Luhmann, the basic element of every social system is *communication*. Conceived as a flow of communication, each social system is distinct from the others, as well as from biological-organic systems and psychic systems, and develops certain components: elements; structures; processes; identities; boundaries; environments; functions. Such components keep a system distinct and "operatively closed" to the others and help to determine its means of

communication (medium), understood as generalised symbols that make possible and regulate the transmission of selections from one communication to the other. In a functionally differentiated society, each social system has its own communicative medium and rationality, irreducible to the others: power for politics, money for the economy, knowledge for science, etc. Social systems are not only operatively closed but they work as circular communicative processes, whose elements are recursively linked to each other, and thus capable of autonomously reproducing their elementary components: put differently, they are autopoietic systems. This results into a situation of polycontexturality: the fragmentation of society into a multitude of social systems based on their exclusive binary coding requires a multitude of perspectives of self-description (Günther 1976).

In this framework, law arises from the uncertainty determined by the infinite set possibilities of experience and action. This leads to a distinction between cognitive expectations and normative expectations, to the establishment of communication systems specifically aimed at reducing uncertainty, and ultimately to law itself (Luhmann 1985, pp. 167 ff.). The latter is a social system with its own binary code (legal/illegal) (Luhmann 2004, pp. 93-94, 101-102, 171 ff.). Its fundamental function is the generalisation/stabilisation of normative expectations, avoiding the necessity to resort to other communicative media such as violence/power or money. As a social system, law has its own processes (legal procedures); elements (legal acts such as contracts, judgments, and normative acts); structures (legal norms); and identities (determined by dogmatics and the images of the world filtered through it) (Teubner 1993a, pp. 25-46; Vesting 2018b, pp. 66-74).

Conceiving of law as a social autopoietic system means recognising the paradox of the self-validation and circularity of law as necessary and unavoidable. Law does not have a point of origin, an 'immovable mover', and cannot directly 'import' validity from the environment. Rather, it generates its own validity (not *ex nihilo*, but) through internal translation/reinterpretation/misunderstanding – in the vocabulary of systems theory, processes of reentry (Spencer Brown 1972, pp. 56 ff.) – of communicative impulses coming from its environment. The latter are retrospectively recognised as legal acts, and thus initiate the flow of communication proper to a legal system. One may think of the paradoxical concepts of constituent power, sovereignty, right of resistance, which the legal system "uses" to internalise impulses coming from other systems, especially politics. In this regard, not only the self-foundation, but even the self-production, i.e. the "living law", is paradoxical in nature. Law "lives" and performs its function of regulating society by permanently re-regulating itself (Teubner 1993a, p. 65), through the creative use of "errors", paradoxes, doctrinal inventions, provoked (but not caused in a deterministic sense) by external communicative impulses. The latter push the legal system to its own re-generation, but in unpredictable, contingent ways, and in any case always within the possibilities allowed by the patterns already in place. According to the autopoietic conception, then, modern law is not simply a "responsive" system (Nonet and Selznick 1978, pp. 73-118), but rather a "reflexive" one (Teubner 1983). Significantly, such conception of law's self-referentiality is also shared by more recent strands of legal institutionalism (MacCormick 1998, p. 331 and nt. 22).

Another concept to recall is "structural coupling". Introduced to explain inter-systemic relationships, it indicates a situation where 'a system presupposes certain features of its environment on an ongoing basis and relies on them structurally (...) the forms of a structural coupling reduce and so facilitate influences of the environment on the system' (Luhmann 2004,

p. 382). In other words, the concept of structural coupling emphasises the constant possibility that systems have to link their respective structures in certain situations without, however, losing their identity. Structurally coupled systems thus share some structural elements or some bases of meaning from which, however, they derive different and independent information, entering their respectively different communicative processes. They resort only to certain parts of the environment and exclude much more than they include. The institution of contract, for example, establishes a structural coupling between law and the economy, insofar as it is both a legal act (and as such is read according to the legal/illegal code) and an economic transaction (and as such is read according to the cost-benefit code). A change in the political regulation of the contract, therefore, enters law, modifying its conditions of validity/invalidity, but at the same time allows it to influence the subsystem of the economy, as it intervenes in its self-reproducing processes. Similarly, the very concept of constitution was interpreted by Luhmann as a structural coupling between politics and law, which allows each of them to "hide" their respective paradoxes by "offloading" them onto the other. The constitution therefore is a political act that in secularised societies allows the paradoxical self-legitimation/self-foundation of power with a reference to law; and, and the same time, is a legal act that allows the paradoxical self-validation of the legal order with a reference to power-sovereignty.

Luhmann argued that, after segmentation and stratification, functional differentiation has become the basic mode of organisation of modern societies. The latter is not characterised by a stark divide between state and society anymore, rather by the overlap of several systems performing different societal functions. This produces a structural revolution, whereby it is not possible to establish a comprehensive and general "vision of the world", or a single idea of justice (Wittgenstein 1989; Lyotard 1987; Luhmann 2004, pp. 211 ff.). Rather, there are as many as there are sectorial points of view and communicative media. Especially following the processes of globalisation, state law is no longer able to keep up with functional differentiation, leading to a further increase in complexity, to a growing disappointment of normative expectations (Teubner 1992a; Prandini 2005), and to the autonomisation of functionally differentiated systems (Luhmann 2012-2013 [1997]). The latter 'resize the space occupied by politics and, because of its strong connection with the latter, also by law' (Zampino 2012, p. 79). Such acceleration of functional differentiation has two consequences on the legal system.

Firstly, law must necessarily accommodate its communicative processes, so that its structures absorb cognitive expectations and increase its capacity to learn from the environment. This explains, for example, the rise of forms of law-making based on principles, directives, programs, and templates; the increasing recourse to general clauses (e.g. good faith, due diligence, reasonableness) to give legal form to expectations coming from social systems other than politics; the spread, in legal scholarship, of social science approaches such as "law & economics" and "law & society"; the success of judicial reasoning based on balancing techniques and aiming to persuade lawmakers rather than invalidate laws. Such growing inclusion of cognitive expectations within law puts its very functional autonomy to the test, and entails a decrease in certainty and determinacy. However, according to systems theory, this is the price to pay so that it can continue to self-produce and does not collapse (Teubner 1993a, pp. 1-12).

Secondly, in order to continue to perform its functions law goes through a new type of fragmentation. The latter is no longer based on territorial spheres only, as in the Westphalian

order, but rather on sectoral/functional spheres. Such fragments, already present at a latent level within state systems, have fully emerged as a consequence of globalisation, and are increasingly evolving into normative systems of "partial societies", i.e. functionally differentiated transnational social spaces. This, according to systems theory, explains the development of the new *lex mercatoria* and of different forms of transnational law, especially in the international economy, as well as the success of self-regulation in functional areas (finance, research, sport, mass media, digital spaces) (Teubner 1997c).

However, according to SC these autonomous legal orders do not seem to limit the expansive tendencies of their underlying media, as state constitutional law did with the medium of power. The new legal pluralism calls for a proper constitutional pluralism. Indeed, similarly to what happened within state systems in early modernity, the emergence of autonomous legal systems of functionally differentiated social spaces raises the question of their constitutionalisation. In particular, for SC the questions are: how to extend to such social spheres the structural coupling between (their own) law and their communicative media (money, knowledge, etc.); how to replicate within the autonomous functionally differentiated spheres the same functions performed by fundamental rights, i.e. the guarantee for social differentiation against political expansionism?

IV. David Sciulli

The US sociologist David Sciulli can be considered as the founder of the contemporary SC. His starting point was the dilemma caused by processes of rationalisation typical of modernity, as analysed by Max Weber. Sciulli investigated institutions that can act as counterforces to the drift towards the "iron cage" of modernity (see above A), a problem concerning democratic and authoritarian systems alike. Sciulli – who considered SC as a 'non-Marxist critical theory' – was particularly critical towards the liberal-democratic constitutions of modernity: conceived as 'internal restraints' merely on political power of the state, they are blind to the power dynamics within intermediate social groups. Not only do they fail to limit the authoritarian drifts that characterise modern societies, but they cannot even legally "see" them (Sciulli 1992, p. 76). Even the societies of modern constitutional states, relatively egalitarian in formal terms, can gradually become manipulative and authoritarian.

Thus, he attempted to identify social structures capable of curbing authoritarian drifts in modern societies and, more generally, capable of supporting non-authoritarian change. As long as they operate with the instrumental rationality typical of modernity – Sciulli argued – internal limits within individual groups are of little use, whether they be strategic-substantial (competition between groups, patronage networks), strategic-procedural (elections, legal-rational basis of coercion), or normative-substantial (religious-traditional precepts or the principle of separation of powers). In secular societies even external substantive limits are ineffective, whether conceived in a normative sense (such as those deriving from natural law and national traditions), or in a strategic one (nationalism, state religion).

As a counterstrategy, Sciulli identified candidates for controlling authoritarian drifts in normative-procedural limits, both internal and external. The former are identified in a minimum threshold of interpretability of the law, able to guarantee the recognisability of shared social obligations; the latter in the presence and diffusion of "collegial formations" within civil society. The latter are defined as 'deliberative and professional bodies wherein heterogene-

ous actors and competing groups maintain the threshold of interpretability of shared social duties as they endeavour to describe and explain (or create and maintain) qualities in social life or in natural events' and are found 'not only within public and private research institutes, artistic and intellectual networks, and universities, but also within legislatures, courts and commissions, professional associations, and for that matter, the research divisions of private and public corporations, the rule-making bodies of non-profit organizations, and even the directorates of public and private corporations' (Sciulli 1992), p. 80).

From the perspective of SC, then the constitution is no longer only an instrument for the limitation/foundation/legitimation of political power, for the organisation of the state and the guarantee of rights. Rather, by generalising its functions to all social spheres, it consists in the guarantee of multiplicity, in the limitation of the expansive and colonising tendencies of the dominant instrumental (economic) rationality. Only the protection of multiple rationalities can counteract the regimentation, bureaucratisation, alienation and, ultimately, the authoritarianism to which modernity tends.

Sciulli's work marked a crucial step towards a more mature SC. Its value lies in the critical work of de-mystification of constitutional dogmatics, notably of representative-democratic constitutionalism. In this sense, the emphasis placed on the communicative potential of the autonomous sectors of civil society is of utmost importance. Sciulli showed how negative externalities and arbitrary exercise of social power can only be addressed through ecologically oriented, rather than strictly rational, procedural limitations. His work, however, almost completely ignored the consequences of functional differentiation of modern society, which call for a variety of constitutions of different social fields. Furthermore, he never really addressed the problems arising from the transnationalisation of communication as well as those arising from the organisational structures of collective actors.

C. Societal Constitutionalism as an Analytical Theory

I. Pars Destruens

SC turns against central tenets of state-centred constitutionalism. First, SC challenges the claim of state constitutions to assume a monopoly on all constitutionality. Based on historical and sociological analyses (Koselleck 2006; Selznick 1969), SC aims to demonstrate how the evolution of functional differentiation enabled several sectors of society to develop their own "civil constitutions." To be sure, this evolutionary account does not exclude that 'problems and functional needs are articulated by individuals and groups that choose the systems and organizations where to carry on their plans' (Vilaca 2015, p. 67). Just the opposite, the evolutionary theory is based on the micro-level of single communications ascribed to persons with concrete interests and goals, which are responsible for the variation mechanism in socio-legal evolution (Teubner 2002, p. 162 f.). Beyond the state's political constitution, there are – increasingly significant – sectorial constitutions in economic enterprises, markets, private universities, foundations, media companies, intermediaries on the internet, and other "private" institutions (Guibentif 2016; Esposito 2021, pp. 66 ff.)

SC criticises traditional constitutionalism for its narrow focus on constituting and limiting the political power of the state. Instead, it assigns all constitutions the function of formalising, stabilising, and limiting the communicative media of social systems: power in poli-

tics, knowledge in science, money in the economy, information in the mass media. Political constitutions are then nothing but the most relevant form of "societal constitutions", yet they are limited to the political system. Among the various societal constitutions common in the 19th and 20th century, political constitutions are central due to the great structural autonomy of their medium, namely power/coercion (Zampino 2012, p. 91). Only for a certain period of time did this structural autonomy allow states and their constitutions to postulate the non-existence or irrelevance of other normative orders within their territory. State law either instrumentalised such orders (as in authoritarian states) or tried to steer their evolution from outside (as in the welfare state) (Teubner 2012a, pp. 15 ff.).

Second, SC turns against the claim that constitutions are bound exclusively to the nation-state. In its critique of methodological statism, SC sheds light on processes of global constitutionalisation, identifying constitutional phenomena in transnational regimes both in the public and in the private sector (Viellechner 2012, pp. 612 ff.). As a result of globalisation, understood as the combination of the opening of economic markets and the info-telematic revolution, states have lost their monopoly on productive, financial and knowledge structures, and the very structural autonomy of power has been weakened (Strange 1994). By exponentially multiplying the possibilities and speed of global interconnections, globalisation has enabled the various communication media (especially money, knowledge, information) to gain autonomy from state power. Yet this has not led to the primacy of one and only one rationality. Globalisation 'does not mean simply global capitalism, but the worldwide realisation of functional differentiation' (Teubner 2004, p. 14). Ultimately, globalisation as such has not created but only brought to the surface the possibility of an effective constitutional pluralism.

Turning against both these tendencies of reducing constitutionality to the nation-state level and to the public sphere, SC identifies constitutional processes beyond the nation-state and beyond politics in different social sectors. As constitutions aim to limit the expansion of various media, the communicative media that cannot be traced back to power in the strict sense may produce the dynamics of expansion even in transnational social spheres (Teubner 2012a), pp. 124 ff.). Thus, not only the institutions of global governance directly or indirectly linked to state-political systems (UN, G8, G20) may develop constitutions, but also and above all the transnational private and hybrid regimes that have gained autonomy from political oversight as a result of globalisation. Against this argument it has been objected that 'it hides external/heteronomous constitutional agentive/political moments that change the space of possibilities that are available for systems operations' (Vilaca 2015, 65). This critique ignores, however, the interplay between the operative autonomy of these regimes and their structural coupling to external processes. External pressures are highly influential for constitutionalising private and hybrid institutions. But this does not impair their operative autonomy as against the operations of the political system.

The third target is the tendency to reduce the so-called horizontal effect of fundamental rights to duties of protection by the state or, at best, by the international community of states against non-state actors. According to this traditional approach, based on the idea that constitutions concern only political power, fundamental rights can only be invoked against the intervention of the state, as the ultimate holder of legitimate force. The state has a duty to protect from violations committed by non-state actors, but individuals and private collective actors cannot invoke their fundamental rights directly against non-state actors. Such a conception ultimately shifts responsibility for the conduct of private actors onto political actors, es-

pecially when they take place at a transnational level. Even when political actors are able to act effectively, a mere transfer of responsibility usually limits the horizontal effect to the dynamics of social power exercised by identifiable actors. Unsurprisingly, the horizontal effect has been applied most successfully in labour law. Yet this means neglecting all the subtler, non-personified social processes – the 'anonymous matrices' – which, while not constituting manifestations of power in the strict sense, lead to serious, widespread violations of fundamental rights (Teubner 2006). Examples include global warming or the phenomenon of violence unleashed through the Internet. Consequently, SC supports the development of civil constitutions, which would guarantee fundamental rights in the operations *within* each subsystem but also the integrity of other systems and so their mutual co-existence (Kampourakis 2019; Teubner 2012b). Put differently, SC promotes the development within each sub-system, by means of its own law, of an "ecological" outlook in its inner programme (Teubner 2011b, 2014).

According to SC, however, such development cannot occur by means of a global unitary constitution, as argued by some strands of the so-called global (or international) constitutionalism (see below E.II). On the contrary, the only conceivable constitutionalism for a globalised society would be a *fragmented* constitutionalism, comprised of the different subsystems' constantly interacting and colliding "partial constitutions" (see below E.II). Unsurprisingly, the author who has most emphasised the phenomenon of the fragmentation of international law approaches legal phenomena with the same epistemic framework as SC, especially when it comes to its indeterminacy (Koskenniemi 2005, p. 568 and nt. 7; Fischer-Lescano and Teubner 2004b, pp. 1068-1069). In this constellation of radical legal and constitutional pluralism, the most viable solution is outlining a meta-law of inter-systemic collisions. This meta-law, different for each of the conflicting orders, would be modelled on private international law schemes. However, the units in conflict will no longer limited to the states and their laws but will include al multiplicity of social sub-systems (see below D.II).

II. Pars Construens

Identifying the characteristics of societal constitutions is SC's most significant contribution to the general theory of law, as it attempts to analyse the elements necessary for a system – whether political or not – to be constitutionalised. Three introductory remarks are here necessary.

Firstly, SC does not adopt a formal concept of constitution, i.e. a mere normative hierarchy or 'a set of norms regulating the creation of secondary rules' (von Bogdandy and Dellavalle 2013), p. 80), nor does it maintain that constitutional phenomena arise simply because functionally differentiated sub-systems become autonomous or establish their own normative systems. The autonomisation of social systems and their juridification are necessary but not sufficient conditions for their constitutionalisation. In this sense, SC is a theory of the possible, not the necessary. Here, the formula "ubi societas, ibi facultas constitutionalis" best summarises SC.

Secondly, SC can be applied not only to state systems (political constitutions) but also to private and/or hybrid systems (civil constitutions), especially transnational ones. The latter, in turn, may be either identifiable/personified collective actors, capable of acting legally (e.g. corporations); or non-personified regimes and processes without legal personality, or in any

case incapable of acting unitarily from a legal point of view (e.g. transnational investment and trade regimes).

Thirdly, SC argues that civil constitutions, especially those of transnational systems, tend to follow patterns typical of common law constitutionalism (Teubner 2012d). This emerges particularly in the central role of courts and legal scholarship, in the positivisation of legal and constitutional norms, the general absence of super-primary norms (at least in formal terms), and the flexibility that prevails over rigidity. These characteristics do not render the concept of civil constitution merely descriptive. On the contrary, just like common law constitutions, civil constitutions are properly normative.

According to SC a social system can be called constitutionalised once it develops its own constitutional functions (C.II.1), arenas (C.II.2), processes (C.II.3), and structures (C.II.4).

1. Functions

Constitutionalisation first requires ascertaining that a sub-system's legal order performs specific functions, namely the constitutive – including both the integrative and symbolic – and the limiting one.

The constitutive function consists in formalising/autonomising the medium of a given social sub-system by legal means, which do not necessarily coincide with state law, but can belong to the inner normativity of the given sub-system itself. In early modernity, political constitutions and the formalisation of state law helped to protect the autonomy of political power from religious or economic rationalities (Thornhill 2008, pp. 161 ff.). Likewise, the constitutions of the various social sub-systems – especially transnational ones – preserve their autonomy from political power and define their identity. This function emerges also in the development of procedures, competences and organisational rules, which support their inner communication and self-reproduction (Thornhill 2008, pp. 169 ff.). The constitutive function of constitutions thus consists in the construction of a "we" (not necessarily linked to a territory), distinct from its environment and the media of other social systems.

This constitutive function includes the integrative function, i.e. the reduction and potential reconciliation of conflicts among different social groups by establishing a common orientation. But in a time of globalisation and transnational systems, constitutional integration diverges from classic models of integration. Indeed, SC rejects the idea of a unitary cosmopolitan constitution which would perform the same integration functions at the global level that political constitutions have assumed at the national level. Civil constitutions do not embrace all the functionally differentiated spheres of society, and so, unlike state constitutions, are not 'holistic'. Instead, they achieve integration at the global level by coupling the constitutional structures in question. In other words, in the system of SC, the continuous interaction, mediated by law, between systems' rationalities brings about their integration (Teubner 2017).

The symbolic function, in turn, consists in the reflection and perpetuation of a given system's founding myths, possibly linked to cultural, territorial, historical or linguistic elements. Importantly, though, such symbolic function does not necessarily imply a constitution's holistic nature, i.e. the extension, however fictitious, of its normative principles to soci-

ety as a whole or, rather, to all its functional sectors. The latter, with their respective civil constitutions, may have their own specific symbolic dimensions, albeit limited to functionally differentiated, partial spheres of society (Teubner 2017).

As concerns the limiting function, constitutions limit the expansive dynamics of a given social sub-system, which threaten the environment, other social systems and ultimately its own existence. It is the limiting function that makes it possible for different social systems to coexist, preventing them from endangering their own integrity and that of society. Here, it must be stressed that according to SC, civil constitutions do not always and only aim to limit social power dynamics but also the communicative mediums of specific systems, with their potential negative effects on other social and psychological systems, as well as themselves. For example, even when the intention is not to accumulate power in the narrower sense, the uncontrolled accumulation of knowledge by the social sub-system of science, if not constrained by norms protecting human (and animal) dignity, may lead to massive violations of living subjects' psycho-physical integrity.

2. Arenas

Within a social system, constitutional functions require the development of differentiated arenas or spheres. The latter are institutions and instances which guarantee possibilities of dissent and pluralism by means of a division of labour. Put differently, according to SC civil constitutions emerge only if the various sub-systems develop – duly re-specified – the pluralism typical of democratic societies, as well as their capacity to institutionalise dissent. In particular, at least two arenas should emerge (Teubner 2012a, pp. 88-102; Teubner 2018).

The first is the organised professional sphere, which features highly developed competences for a given functionally differentiated sector of society but lacks incentives to self-limitation. The second is the spontaneous sphere, which should not be understood in Hayekian terms, but as the one which, while lacking specialised competences, channels external impulses and pressures into the system, thus controlling the organised/decisional sphere. From this perspective, both political and civil constitutions are always *dual* constitutions, as they manage to involve individuals, groups and social formations in the decision-making processes that, in one way or another, are (or feel) affected by the operational and communicative processes of that system. If such actors together are able to exert sufficient pressure on the organised sphere to steer its decisions in a certain direction, in particular by limiting its expansive dynamics, the sub-system can be re-politicised, a process that may be formalised in codes of conduct or other documents (Teubner 1997c, 2012b). Here, SC relies also on empirical evidence, suggesting that within complex organisations the effectiveness of legitimacy structures such as codes of conduct is linked to systems of certification of management system standards and to having workers' unions (Bird, Short, and Toffel 2019).

In this context, SC argues that a system can be considered closer to having a constitution the more it establishes and stabilises mechanisms of involvement, contestation and decision-making through legal norms – legal, of course, according to the parameters of the system's internal order. Put differently, and even though democratisation and constitutionalisation are two distinct processes at the analytical level, the chances of a system becoming constitutionalised increase if it legally institutionalises possibilities of self-contestation, which in turn implies forms of democratisation. In this respect, while it is true that actors in spontane-

ous spheres are 'stakeholders' in the system's operational mechanisms, they do not act *only* as stakeholders (see below E.I). Contrary to the reading of some authors (Günther 2020, pp. 95-96), SC argues that the external impulses, re-elaborated by the spontaneous sphere using the same code of the sub-system involved (e.g. the cost-benefit code of the economy), can be re-oriented towards rationalities different from those specific to the system, possibly departing from programmes aimed at the sole intensification of its own medium (Karavas and Teubner 2005; Teubner 2018).

The dialectic between spontaneous and organised spheres, between insiders and affected outsiders, make processes of self-contestation and internal re-politicisation possible, and potentially rebuilds within each system the public/private distinction that globalisation has blurred in the context of the state/political constitutions. In this sense, in the civil constitutions of transnational systems, the public dimension is not lost but rather re-specified in relation to their own features (Esposito 2021, p. 67).

Such inner re-politicisation is particularly important, as it significantly impacts the legitimacy of the legal production of the system itself. However, this does not mean that constitutionalised systems are generally oriented towards an objective common good, external to their own rationality. In the functionally differentiated society typical of modernity, a single objective notion of the common good is not attainable. Further, such a generalised orientation would undermine the functional autonomy of systems, which would cease to exist as such. Instead, the only possible notions of common good and justice and of human rights themselves are the inner projections or reconstructions of inter-systemic conflicts, which permanently challenge the balance of each system, triggering an endless process of self-subversion and self-regeneration (Teubner 2012a, pp. 157-158, 171-173). In systems theory terms, the ideas of common good, (in-)justice, and human rights – incessantly re-hierarchised within each system – allow the re-entry of the political into the rationality of each single sub-system (Teubner 2009). Therefore, although civil constitutions are sectorial, paradoxically their aim is the legal limitation of the dynamics proper to their respective medium, also in order to protect the "other from oneself". In this sense, and considering that they also sustain themselves on the basis of (re)elaborations of external impulses, they nevertheless need to legitimise themselves at the level of society as a whole (Teubner 2012c, 2014).

Precisely this paradox allows SC to avoid conservative or reactionary drifts. Indeed, by accepting the possibility of extra-state constitutions, SC may contribute to legitimising the de facto power exercised by private and hybrid actors (Kampourakis 2021, p. 316). However, constitutionalisation and legitimisation only occur if the systems can model their own rationality to make it compatible with that of other sub-systems. The latter develop their own and different notions of the common good according to their own languages, but in such iterative, mutual contrast they end up legitimising and accommodating each other. Indeed, SC's 'pluralistic agenda (…) can also be understood as not having a linear normative impetus, thus resisting its reduction into specific institutional blueprints (…) and an open reading of societal constitutionalism place no predetermined limits on the content and form of the various, decentralized, social constitutions' (Kampourakis 2021, p. 317).

Here, SC thus points to the possibility of new kinds of polities. Their boundaries are mobile, not delimited by personal or territorial belonging (Thornhill 2018). They are not identified by an administratively assigned status of citizenship, nor do they coincide with an inter-

national community or a "global civil society". Within these polities, democratic legitimation processes do not necessarily take place according to representative schemes or the majority principle (Sciulli 1992, pp. 160-161). Rather, the principle of representation, necessary for a sub-system's inner democratisation, is generalised through the institutionalisation of self-contestation, which is in turn re-specified according to the specific rationality of the various functional systems (Teubner 2018). Participants or even subjects affected by the system's decisions and operations affirm the forms of substantive and often direct contestation and/or participation in its normative production. Various decision-making fora must mirror a plurality of democratic legitimation schemes, which no longer go only through classic political channels but also through transnational organisations, grassroot movements, trade unions, and NGOs. The 'political' (*le politique*) – understood as the set of reflections, conflicts, and decisions on social options diffused at the level of society as a whole, also outside the institutionalised fora of the state – is not limited to 'politics' (*la politique*) – understood as the set of states' institutionalised decision-making – and increasingly emerges in other arenas, either private or hybrid (Teubner 2012c). In this way, globalisation ultimately gives an unexpected opportunity: exploiting the democratic potential inherent in social processes that take place outside of states' institutional channels, thus allowing constitutionalism to expand into spheres where political constitutions have never really penetrated. Importantly, conceiving democratisation as the possibility of effective self-contestation does not involve a surrender of democratic normativity, to the extent that disappointed expectations are not held onto the face of different impulses or better knowledge (Christodoulidis 2020, p. 82). In fact, social systems' learning does not necessarily take place "in real time" but, precisely because it is reflexive rather than merely responsive (see above B.III), and just like in the traditional schemes of democratic representation, leaves room for "keeping the word", however dangerous it may be.

In SC's radically pluralist framework, then, state law and constitutions do not remain devoid of any role, as it has been argued (Santos 2003, pp. 94-95; Christodoulidis 2013). On the contrary, they remain central, as SC does not reject but rather assumes an important role for political constitutions (Teubner 2011c, p. 250). In fact, arenas of discussion and decision-making, as well as alternative forms of democratic legitimisation of non-state social spheres, complement rather than replace those of state politics, a point shared also by other strands of non-state constitutionalism (Peters 2009a) (see below E.II). SC's pluralism is 'stimulating processes of democratisation in distinct and multi-faceted spheres of technology, economy, education, medicine etc." (Esposito 2021, p. 70). Different forms of participation allow actors such as NGOs, social movements, and trade unions to participate in the processes of legal production that take place at a global level, i.e. where traditional schemes of representative democracy are inconceivable (see below E.I on the matter of constituent power at global level). At the normative-prescriptive level, this calls for the need to reconcile and productively use impulses coming from states and their constitutions, on the one hand, and the learning capacities of sectorial systems, on the other.

3. Processes

In addition to constitutional functions and arenas, a constitutionalised system must develop constitutional processes. This indicates a "double reflexivity" between the law and the specific medium of the system itself (Teubner 2012a, pp. 102-110). What does "double reflexivity" mean exactly?

According to SC, the juridification of a social system occurs when primary and secondary norms *à la* Hart emerge in a stable form (Teubner 1993, pp. 36 ff.; Teubner 2012a, p. 106). A properly legal system develops its own reflexivity ("legal reflexivity"), for law applies itself to itself, "thinks" itself through a binary code in addition to that of the legal/illegal, thus responding to the dichotomy of the constitutional/unconstitutional. In this sense, every phenomenon of juridification contains the premises for its own constitutionalisation. But this is not sufficient. The process of constitutionalisation requires the specific medium of the subsystem in question (be it power, money, knowledge, or other) to develop its own reflexivity. This means that the social system is subject to the operations it produces. The secondary norms of law support such reflexive processes. In the state system, for example, reflexivity is realised when the processes of power are used to direct and regulate the processes of power itself, through procedures, attribution of competences, division of powers, elections, and the formalisation of oppositional roles. In the economic system, such reflexivity occurs when monetary payment operations are used to control monetary flow itself, and so on. However, even this second type of reflexivity is not by itself sufficient for constitutionalisation. One can only speak of a constitution in the strict sense when the reflexivity of a social system, whether in the economic, political or other spheres, is supported by law, or more precisely: by the reflexivity of law. Constitutions only come into being when phenomena of double reflexivity emerge – reflexivity of the social system that constitutes itself and reflexivity of the law that supports this self-constitution.

What takes place in a constitutional order, then, is a structural coupling between law and the specific medium of the various social systems. Only at this point it is possible to appreciate the dual nature, both legal and social, of any properly constitutional process. Indeed, in order to verify the constitutional nature of a given system, it is necessary to grasp the social *processes* taking place within it, beyond its static structures, be they institutions or norms. This makes the concept of constitution underlying SC "material", as it contributes to (re-)producing the unity of the single social system in which is it embedded, which, however, is not necessarily that of politics (see below E.III).

4. Structures

In order to give rise to stable processes of constitutionalisation, structural couplings cannot be occasional. Instead, they must be stabilised by "linkage institutions", i.e. by constitutional structures, which are at the same time part of the legal system and the social system with which the law is coupled sometimes. In this sense, structures and institutions linking social and legal reflexivity always have a hybrid nature, as they occupy a place between social systems with different rationalities. Through these structural couplings and hybrid structures, the social system in question and the law normalise their respective paradoxes, externalising them into each other. In the case of law, the paradox is validity, i.e. in the necessary a-legality of the foundational norms of any legal system. In constitutional states, the paradox consists in the self-foundation of political sovereignty or, in more traditional terms, in the problem of the legitimation of political power (Luhmann 1990; Derrida 1990). In the economy, the paradox consists in the problem of scarcity (of resources and money) in the face of the necessary and continuous expansive thrusts that the system needs in order to reproduce itself. The structural coupling, then, is functional (not to solve, but) to neutralise the respective paradoxes. In the relations between politics and law, the *Grundnorm* is valid because it is founded by political

power (in the form of a constituent power), and political power legitimises itself through (secondary) legal norms. The same applies to the relationship between law and economy. On the one hand, economic needs co-validate the constitutional norms of economic institutions. On the other hand, law sustains – by legitimising and stabilising – the artificial creation or diminution of money; the greater or lesser protection afforded to the appropriation of resources and to the institutions of capitalism, up to and including expropriation; and, more generally, the power exercised by economic actors, be they private, public or hybrid.

There is a wide variety of hybrid linkage institutions, allowing for the stabilisation of structural couplings. In the case of state systems, constitutional courts are a classic example. They have a dual nature, for, in addition to applying the constitutional/unconstitutional code to primary legal norms, they effectively regulate the attribution of powers exercised by state organs, the scope of the separation of powers, and the extension and balancing of rights. In the case of the economy, one may refer to the role of the central banks but also to the independent administrative authorities and regulatory agencies of the states. The latter represent "hybrid" institutions at the centre of both economic reflexivity (applying the same code, based on the medium of money, to the flow of payments) and political reflexivity (in relation to the exercise of monetary sovereignty), without being exclusively integrated into either of them. In the most recent global practice, a glaring example is Facebook's Oversight Board, the private independent adjudicator established to rule on disputed takedowns of single posts or comments. Despite the relative silence of FB's Community Standards and OB's bylaws, in its first decisions the OB gave relevance to human rights law. In this way, it acted as a "linkage institution" in SC's sense, showing the constitutionalising potential of the interaction between "public" and "private" codes of conduct, emerging in the internalisation of Ruggie's 2011 UN Guiding Principles on Business and Human Rights into the OB's Rulebook (Gradoni 2021; Golia 2021).

D. Societal Constitutionalism as a Normative Theory

In its analytical-descriptive part, SC outlines a general theory of the conditions of a constitution's possibility. However, based on its analytical framework, it also presents a prescriptive part, i.e. parameters to suggest and evaluate legal policies broadly understood, i.e. at both the legislative and jurisprudential level (Francot-Timmermans and Christodoulidis 2011).

I. Increase of External Pressures and Openness to Learning

SC suggests increasing external pressures for the inner self-limitations and their stabilisation within each system. Indeed, the reflexivity of functional systems and regimes may be increased both by applying external pressure (possibly channelled by state law) and by setting up learning institutions, thus enhancing systems' capacity to reconstruct external impulses on the basis of their own rationality (Teubner 2011b; Fischer-Lescano 2016, p. 167). Put differently, in normative terms SC promotes the enhancement by legal means of self-reflective capacities and the promotion of the self-limitation of social systems. In this context, SC offers a rather complex representation of constitutional time (Prandini 2013, p. 748). It relies not so much on general, stable and predictable norms but rather uses new forms of law, much more

flexible, dynamic – such as in the case of soft law. As a result, judicial activity becomes more creative and less focused on legal precedents (Fichera 2021, p. 173).

In this context, some scholars view the need for external interventions – in particular from politics – in the inner learning structures of functional systems as a sign of SC's theoretical incoherence (Schneiderman 2011). To be clear, by arguing that every constitutional phenomenon is necessarily configured as self-constitutionalisation, SC does not suggest that this happens spontaneously. Rather, external impulses, in order to be effective, must necessarily be reconstructed according to the inner rationality of each system. In this reflexive process, the degree of openness allowed by the inner structures of the system itself plays a fundamental role (Teubner and Beckers 2013, p. 527). Ultimately, constitutional processes cannot be based solely on external impulses (legal, social, or political sanctions) or solely on inner operations, given the intrinsically expansive tendencies of each medium. SC thus promotes a sort of reflexive regulation of social systems, which, while remaining functionally autonomous, are modified to push themselves to their limits and be compatible with their social environment. Therefore, SC does not claim that social systems are 'sealed off' in relation to one another, nor does it place its bets on *exclusively* spontaneous interactions (von Bogdandy, Goldmann, and Venzke 2017, pp. 120-121).

This approach also explains why some regulatory techniques are more successful than others. Furthermore, it illuminates the relative capacity of the welfare model of northern European constitutionalism (democratic corporatism, social market economy) to resist the colonising tendencies of the neo-liberal model (Teubner 2015, pp. 219 ff.). Similarly, this explains why there are different types of economic constitutions. Indeed, the economic system's fundamental norms can vary depending on the production regime with which that system is structurally coupled. The distinction between code and programme is relevant here: while a system's code remains the same and defines its basic rationality, its programmes may vary according to their internal and external capacity for self-limitation.

In this context, SC develops several policy proposals. In order to limit the global economy's excessive growth compulsion, which has led to its uncontrolled financialisation, SC supports legal instruments such as the Tobin tax, intended to prevent the financial economy from prevailing over the "real" one, and radical monetary reforms, which aim to limit or even eliminate the possibility of private financial institutions creating money on the basis of sight deposits (Teubner 2012a, pp. 96-102). These mechanisms, while preserving the structural autonomy of money as a medium, would link it more closely to political decisions, thus limiting self-destructive growth compulsions and creating incentives to divert investment from the financial economy to the "real" one. Other examples concern the colonisation of science by other rationalities, for example in the forms of the so-called publication bias (manipulation and systematic errors in data publication), publish-or-perish, and ghostwriting. Here, SC emphasises the importance of diversifying the funding sources for scientific research and of legislative interventions imposing trial registration (Hensel and Teubner 2016; Augsberg 2012). These mechanisms are distinct from the still necessary sanctions on pharmaceutical companies and research institutes (external pressure), which have often proved ineffective, precisely because transparency and openness of operational processes make it easier for spontaneous arenas of the scientific community to exert pressure and to push for the (self-)constitutionalisation of science.

More generally, SC supports forms of participatory democracy (Perez 2011; Teubner 2012a, pp. 122-123), provided that they are generalised and redefined in each case according to the characteristics of the individual system. Put differently, such forms should not simply replicate the procedures established in political systems (elections, representation, institutionalisation of opposition). Rather, they should increase the inner irritation of the specific functional system. The goal is to foster the mutual hybridisation of discourses within each system (Teubner 1997a). Therefore, to cite an example from science, SC promotes the establishment of ethics committees not only at the national and international level, where general rules are drawn up, but also and above all within clinics, universities and pharmaceutical companies, where the actual operational processes of this system take place.

Turning to external pressures, beyond models of command and control, SC seeks to strengthen constituent energies within each system. For example, it supports transnational human rights and public interest litigation, i.e. judicial practices put in place by victims of fundamental rights violations or by activist groups. Such practices, which strategically exploit the institutions and procedures available at the domestic and international level, possibly by offering alternative interpretations of existing law, do not so much aim to win cases as to bring out truths and historical responsibilities or to raise debate and scandal, thus generating significant learning pressures on political and functional systems, especially those most vulnerable to the *colère publique* (Teubner and Beckers 2013, pp. 532-533). At a prescriptive level, this means expanding venues of scandal and *colère publique*, widening the possibilities and the number of possible challenges, even in unconventional fora.

Further, SC encourages state judicial bodies to make use of the legal bases available, be they in commercial, social, civil, labour, criminal or constitutional law (Beckers 2015; Bifulco and Golia 2018), for a twofold purpose. The first is to give relevance to the legal production of functional systems, possibly after a review of constitutionality (in a broad sense). The second purpose is to encourage effective forms of co- and self-regulation. Here, SC assigns courts and jurisprudential law a central role. Indeed, with the collapse of rigid hierarchies and normative pyramids in post-modern legal systems, judges and arbitrators become the main driving force of lawmaking. In this sense, following the processes of globalisation, the once rigid distinctions between normativity and validity, between claims and rights, are blurring, though not disappearing. It is precisely in the blurred periphery of each system, especially through general clauses such as good faith and due diligence, that the various systems intersect, weld, and integrate heterarchically. Such productive use of heterarchical solutions is one of SC's main prescriptive tenets, leading to the development of a law of inter-systemic collisions.

II. Development of a Law of Inter-systemic Collisions

To manage normative conflicts between state systems and functional regimes as well as between the functional regimes themselves, where third instances are absent, SC proposes the development of a law of inter-systemic and inter-cultural collisions (Teubner 1993a, pp. 100-122). This idea of "in-between" law, comparable to the general category of interlegality (Santos 2003; Teubner and Korth 2011, pp. 28-29; Kjaer 2019) and explored in peripheral societies and the Global South especially by Marcelo Neves' strand of "transconstitutionalism" (Neves 2013; Nogueira de Brito, Calabria, and Portela L. Almeida 2021), is still developing,

although several authors are beginning to codify its basic rules (Delmas Marty 2009; Berman 2012, pp. 152 ff.; Peters 2017; Muir Watt 2018, 2016; Hakimi 2020). SC argues that it should follow the patterns of private international law, adapted to the specific features of systems that are no longer only territorially but also and above all functionally differentiated (Michaels 2020). The development of such a law of collisions would be based on three steps: 1) giving relevance to forms of social normative production; 2) identifying a "primary coverage", i.e. the legal system that can be considered competent in a given dispute on the basis of its functional characteristics; 3) possibly applying the rules of (self-)protection, bearing in mind the effects that such an application has on the systems in conflict. Importantly, such steps are not carried out by third parties. Rather, they all take place simultaneously within the conflicting systems. In fact, each system develops its own law of collision, which may or may not coincide with that of the others, but any coincidence will always be the result of an internal, "holographic" reconstruction (Teubner 2012a, pp. 150-173).

As concerns the first step – already mentioned in the previous section – it suffices here to stress that for SC, the norms of the various systems and regimes belong to different orders, in the sense that the validity of the norms of one order does not depend on the norms of the other. However, this does not exclude mutual referrals and linkages in a broad sense, possibly also through the provisions of each system referring to general principles and/or clauses. This is particularly evident when, for example, the rules of state law refer to codes of conduct or contractual agreements between private parties; or when, conversely, the *lex mercatoria* or the internal codes of conduct of companies refer to or applied in the light of state law or human rights law, often even against the original will of their drafters, as showed by the already mentioned example of the Oversight Board established by Facebook (Gradoni 2021) (see above C.II.4).

The second step consists in finding the primary coverage, i.e. individuating the applicable jurisdiction according to functional criteria. The rule of the legal system that, on the basis of functional criteria, has the closest connection shall apply to the dispute. Such a criterion thus plays the same role as the so-called connecting factor in private international law.

The third step consists in the potential application of internal "safeguard" rules. In applying the rules of the competent legal system, a judicial or arbitral body should verify the effects that such an application has on the rationality and functional autonomy of the conflicting systems. If it affects the functional autonomy of its own system, the judicial body would reject the application of the external system, expelling its norms even outside the periphery of its own. Conversely, if the application of the internal norm proves to be intolerable to the rationality of the external system, the judge should seek to ensure the greatest possible "tolerance". Thus, legal categories or doctrines such as *ordre public*, peremptory norms, and public morals (in private law); as well as the *Solange*-like doctrines in Europe and the Calvo doctrine in Latin America (in constitutional law) become "safeguard instruments" necessary to preserve the functional autonomy of conflicting systems, both in inter-regime and in intercultural collisions (e.g. between modern law and indigenous rights or between secular law and religious law).

From the perspective of SC, then, without giving legal relevance to the normative systems of the functional regimes, it would not even be possible to apply such safeguards and,

given their effectivity, this blindness of state law would result in damage to the latter and not to the former. Further, SC supports judicial interpretive consequentialism, i.e. taking into consideration the effects of judicial rulings on society. From this perspective, it has several points in common with the "transformative constitutionalism", a strand of constitutional thought promoting judicial activism and affirmative action in the field of social and economic rights in contexts of systemic inequality and marginalisation, mainly elaborated by Global South scholars, and in most recent years especially by Ximena Soley (Klare 1998; von Bogdandy, Ferrer Mac-Gregor, Morales Antoniazzi, Piovesan, and Soley 2017). Such consequentialism, however, should not look at the causal chains in the strict sense, which are never fully accessible to judges, especially through the limited tools of the judicial procedure. Rather, it should take into account the translations and reconstructions by the respective rationality of each system, i.e. the potentially negative, disintegrative, or destructive effects in other language games and concrete social processes. Such approach to law and lawmaking – especially promising in the age of Anthropocene (Ellis 2020) – aims to protect not only personal fundamental rights, conceived as spaces of autonomy within society (or its partial sectors), ascribed to legal persons understood as social artefacts; nor only human rights as such (which protect psychophysical integrity from the encroachments of communicative matrices), but also fundamental institutional rights, conceived as guarantees of the autonomy of collective social processes as such.

Furthermore, the "defensive" value of internal safeguards should not be an end in itself. Rather, it should constitute – for the system that is refused "entry" – a pressure to learn and an impetus to reflexively develop mechanisms of adaptation and self-control or even to self-constitutionalise. Put differently, just like the process of European integration has shown over time, "legal defence" mechanisms can have a significant jurisgenerative value, allowing conflicting systems to communicate indirectly (Martinico 2015; Prosser 2017), co-evolve, and adapt to each other according to heterarchical relations, i.e. without necessarily resolving once and for all the question of the "last word" (the *Kompetenz-Kompetenz*) (Berman 2013). Ultimately, SC proposes to generalise a principle of constitutional tolerance (Weiler 2000) at the global level, even beyond the intention of some of its original proponents (Weiler 2011) thus making it possible to co-ordinate and adapt different legal systems without any one of them necessarily prevailing over the others.

E. Competing approaches and criticisms

I. State-centred Constitutionalism

The following analysis of the competing approaches and criticisms of SC turns first to those strands that see the constitution as a phenomenon necessarily linked to the state. In particular, such strands argue that non-state systems (be they corporations, private or hybrid actors, or transnational regimes) lack the essential relationship that the state has with its territory. In fact, the latter should not only constitute the sphere of application of a regulatory system but also, and above all, a symbolic space of power (as well as economic, scientific, artistic) relations, which goes beyond the mere authoritative relationship with individuals. They claim that the state, understood as a political subject, *is* (and does not simply *have*) a territory. It would be such a primarily symbolic dimension, which is at the same time reflected in and nourished by the monopoly on legitimate physical coercion, that makes the constitutional

phenomenon possible. In other words, only the monopoly on force by a relatively centralised organisation (public-private distinction), exercised by the modern state within a defined territory (internal-external distinction), would allow that concentration of power necessary for the legal system to evolve in a constitutional sense, that is, to set itself up as a limit or foundation of power. Consequently, since non-state orders (including the international system) are structurally coupled with social systems that are only functionally differentiated, they would be intrinsically incapable of constitutionalisation (Grimm 2010; Wahl 2010; Loughlin 2010; Champeil-Desplats 2016).

Although it might be argued that in the age of globalisation state spatial sovereignty may be metamorphosing (Hirschl and Shachar 2019), SC is called upon to demonstrate the possibility of non-territorial constitutional orders. To do this, it resorts to an operation of generalisation and re-specification, arguing that every constitution is first and foremost a constitution of the specific social system with which it is connected. In other words, a state constitution needs a territory, since the latter is an essential and founding element of the social system to which that constitution is linked: one cannot exercise political power or impose a centralised system of legitimate coercion without some territorial dimension (Lindahl 2010). However, this does not prevent other systems, which do not need a territory to deploy their medium (and, more generally, do not have the specific characteristics of the social system of the state), from developing constitutional orders. For SC, then, it is necessary to understand what function territory performs in the state order. This function consists in the demarcation of the internal/external division, in the manifestation of the system's own existence with respect to its environment, that is, in giving a limit to the 'state' system as a whole and therefore to its legal system. Consequently, while SC shares the idea that the limit is necessary and foundational with respect to any constitutional order, this does not mean that the limit must necessarily be territorial nor that the internal-external demarcation cannot be established in other ways. After this generalisation operation, through a second operation of re-specification, SC argues that the orders of functional systems and, more generally, of transnational regimes mark their internal/external division through the chain of operations characterised by their own specific code. For example, in the case of the economy, based on the medium of money, the operations "read" through the code of economic cost/benefit fall within such a system.

On the basis of such criteria, SC deems it possible to identify the limit of the order of functionally differentiated systems. The fact that such boundaries are mobile and partly permeable does not mean that it is not possible to determine, at a given time and in a given case, whether the latter is within or outside the "jurisdiction" of a system (Backer 2012). Ultimately, constitutions, and the constitutional phenomenon in general, are not instruments for limiting the dynamics of power in a collective formation already constituted in a given territory. Rather, the constitution, as both a legal and social phenomenon, contributes to the formation and progressive self-construction of a social system as a collective unit. Constitutions do not intervene from the outside on an already perfectly established "we" but rather contribute to the construction and formalisation of a social system. In other words, they participate in the establishment and self-reproduction of the communicative processes of a social system, regardless of whether the people, structures and institutions through which these processes take place are permanently located in a territory or not. In fact, constitutional phenomena weaken the exclusive (simply bilateral) link between power and territory and strengthen the bond between power and the people, understood as a community that identifies as unitary. It is for this reason that the constitutional state is typically characterised by popular sovereignty and not

merely by territorial sovereignty. Generally speaking, in a constitutionalised system – be it territorial or functional – the community submits to rules, institutions and legal procedures, and not to power (or the medium of that system) as such, just because it monopolises a certain sphere. Through this constitutive/integrative function, the constitution "founds" authority (Pribán 2018).

Other criticisms from the state-centred perspective insist on the absence, in functional systems, of the dialectic between constituent power and constituted power, seen as necessary for the formation and permanence of a constitutional order. Such absence would force SC to adopt a merely formal and descriptive notion of constitution, reduced to two elements: structural coupling between a legal system and a social system and the presence of normative hierarchies (Grimm 2005; Kuo 2014). SC does not reject the concept of constituent power and acknowledges the necessity of this dialectic but here again first generalises its functions, abstracting them from the experience of the state form, and then re-specifies them, adapting them to partial social systems. In this way, the concept of constituent power (*pouvoir constituant*) is understood as a 'communicative potential, a type of social energy, literally as a 'power' which, via constitutional norms, is transformed into a *pouvoir constitué*, but which remains as a permanent irritant to the constituted power' (Teubner 2012a, p. 62). Constituent power is not necessarily voluntaristic but rather a 'communicative energy' that arises from the reciprocal interactions ("irritations") between society and individuals, between individual consciousness and social communication (Krisch 2016). As a continuous, "pulsating" process, proceeding from flesh-and-blood people, from spontaneous spheres and affected outsiders towards the centre of systems (the organised and decision-making spheres), constituent power prevents the dehumanisation of social processes (Teubner 2012a, pp. 62 ff.; Möller 2018). Moreover, once exercised, it is not exhausted but remains in the fabric of a given system as a latent element. This means that it is decisive both for a constitution's self-foundation and its self-contestation and so for potential effective democratisation (Teubner 2018). This conception of constituent power puts SC in a better position to theoretically frame, on the one hand, (un)intended *informal* changes to written constitutions, a phenomenon that constitutional theory still struggles to address (Passchier 2017); on the other hand, constituent power in the context of global constitutionalism (Niesen 2017, p. 230).

Indeed, from such re-conceptualisation it follows that each functional system can have its own specific *pouvoir constituant* and can come to constitutionalise itself (Teubner 2014). Not only the state has this power – so do transnational processes, actors, and regimes of the economy, science, medicine, sport and the mass media. To be sure, in functional systems, the *pouvoir constituant* is not exercised by territorially defined political communities (*polities*). Rather, it is exercised by a multitude of subjects and actors who come into contact in various ways (even episodically) with the systems' communicative processes and media.

According to SC, the collective entitlement and exercise of constituent power does not derive from belonging to a given political community but is shaped by how involved certain subjects or groups are (or perceive themselves to be) with the system and its communicative processes (Somek 2012). This specification is important, as SC, contrary to some formulations of the stakeholder theory as a form of democratic governance (Christodoulidis 2020, pp. 82-86), does not require the *stake* to be recognised by the organised and decision-making sphere of each system. In this sense, SC is also and above all "constitutionalism from below" (Anderson 2013; Blokker 2018). The actors involved have in common the fact that their ac-

tions and protests are not only directed towards state institutions but also towards private actors and the institutions of transnational regimes. In this way, they exercise significant social pressure on decision-making arenas, where they believe the causes of the violations and, more generally, the possibilities of policy changes to be higher. The extreme diversity of constituent subjects does not prevent them from drawing on a "pool of legitimacy", e.g. that of human rights, which, by passing through the communications specific to the various social systems, functions as a "reservoir of communicative energy" and potentially opens spaces of contestation and subversion (Besson 2017) to competing actors for their practices of (de-)legitimation (Mende 2021). By continuously renewing itself, this reservoir alleviates the need to always resort to external or purely voluntaristic sources of legitimation to justify the exercise of constituent power. Only in this narrow sense – SC argues – can the protection of human rights be conceptualised as a "universal law" or a "global constitution". Indeed, each system "sees" this pool of legitimacy and continuously re-arranges it according to its own internal rationality. This makes it clear how it is possible to refer to human rights and notions of justice (see below E.III) without necessarily assuming an all-encompassing unitary rationality, i.e. without contradicting either the plurality and self-referentiality of systems (von Bogdandy and Dellavalle 2013, pp. 78-79) or the absence of an authentically intersubjective understanding of community (Goldmann 2016, pp. 65 ff., 81 and nt. 170). Indeed, for SC 'there is no uniform shared meaning, no merging of horizons between the minds involved, but rather a series of separate but intersecting consciousness and communication processes' (Teubner 2012a, p. 63).

Moreover, transnational regimes are also potential constituent subjects. Indeed, it is (also) in the conflict, in the clash between regimes and discourses, that the dynamics of their internal constitutionalisation takes place, as a process of incessant mutual adaptation. Furthermore, for the establishment of a constitutional order, the constituted power must not always and necessarily be embodied in a unitary corporate actor, organised and capable of acting legally, such as the state apparatus. The greater or lesser necessity of such a corporate actor depends on the expansive potential of the specific medium of a given social system. The typical medium of the state, namely political power, necessarily needs a more or less centralised collective actor (the state-apparatus) in order to express itself, insofar as it is monopolistically exercised in a certain territory. Yet this is not necessarily true for systems based on mediums such as money or knowledge, which by their very nature, and especially in the age of globalisation, spread without a single subject acting as the ultimate holder.

Some authors argue that SC erases the symbolic dimension related to the founding myths and "constitutional moments" of political communities. In fact, in this case too, SC generalises and re-specifies such elements, according to the characteristics of the given systems. Indeed, private orders and transnational regimes also possess foundational, symbolic narratives, which – just like in political orders – are constructed and at the same time (self-)nourished by fictions and myths of origin that arise as social-cultural artefacts only retrospectively rendered legal. This is evident in the field of *lex mercatoria* and the transnational economic regime, but also in that of science, built around relatively narrow and functionally differentiated transnational communities characterised by a specific ethos and interests. The contracts concluded between transnational corporations under the *lex mercatoria*, or the codes of conduct, in the field of science and research often do not refer to any source of state law. Their legal status is derived retrospectively, especially through the activity of dispute-settlement bodies, which in turn refer to transnational customs, practices and trade, in a circle

that, once established, reproduces itself. In fact, the very rulings of such bodies, although not intended *ab origine* as legally binding precedents and theoretically inspired by principles of mere equity, become points of reference for subsequent decisions and for the conduct of the transnational actors themselves. Therefore, what is originally a fiction or an abstraction becomes a legal reality, which develops, consolidates and stratifies the rights of the various subjects of transnational regimes. Such rights become established and intangible practices: in other words, they also acquire a symbolic nature for the community that adopts them. In this sense, they are progressively constitutionalised.

The founding myths, therefore, do not necessarily need a *deus ex machina* to authoritatively establish the constitution but can also result from processes of social and legal stratification in systems where a central authority is absent or weak. As already mentioned, these processes closely recall the patterns of common law constitutionalism. Of course, this does not mean that in civil constitutions there cannot be texts or documents that have constitutional force or otherwise constitutional functions. Indeed, they also result from acts that, while not of a super-primary nature or even not formally of any legal value, contribute to the establishment of fundamental rights specific to a certain system and, a posteriori, acquire constitutional value. This is evident, for example, in the context of the international human rights regime: It, too, is based on and fed by sources that are not binding in nature or by treaties that formally do not prevail over other sources of international law, but which progressively and on the whole have gained a special status in the international public order, if not that of a constitution (Gardbaum 2008). With regard to the transnational regime of the economy, such a dynamic can be observed in the function played by codes of conduct, the structures attached to them, and the interaction between different forms of so-called soft law, i.e. between "private" and "public" codes of conduct, now also with empirical evidence (Perez and Stegmann 2018). The latter, although lacking binding force, are adopted at the international level by institutions such as the UN, the ILO or the OECD. Again, as regards the scientific research regime, it is worth pointing out the role played by the 1947 Nuremberg Code and the 1964 Declaration of Helsinki on human experimentation in influencing the adoption of the 1997 Oviedo Convention and the implementation practices of domestic bodies. In the field of global sport, the point of reference is the Olympic Charter.

The dynamics just described raise another question: at what point are the learning pressures so effective as to force not only legalisation but the very constitutionalisation of functional systems and transnational regimes? Put differently, what are the "constitutional moments" of civil constitutions? SC responds by reiterating that constitutive and integrative (broadly speaking foundational) and limiting rules must coexist in order for a constitutionalisation process to take place. This means that the orders of functional systems are constitutionalised only when they perform a limiting function in addition to their constitutive and integrative function – i.e. when they not only contribute to the construction of the system's identity but furthermore limit and impose themselves on the destructive growth dynamics of a given sub-system. Indeed, thanks to globalisation, growth compulsions have further accelerated in contemporary social systems. These dynamics can lead to disastrous consequences both for the environment of each social system and for the social systems themselves, as their capacity for self-limitation when confronting total disaster has been particularly reduced. Thus, for example, SC explains how the almost totalitarian global affirmation of economic rationality and its growth compulsions – of which uncontrolled financialisation is only the latest manifestation – can lead to disastrous outcomes for global society and, in the light of the 2007-2008 fi-

nancial crisis, even to the risk of self-destruction. In other words, a given social system can be said to be constitutionalised if it is able to reduce the intensity of its own performance in the face of catastrophe, thus initiating a process of self-limitation. This, above all, is what SC refers to when it speaks of "constitutional moments" (Teubner 2011a).

To conclude with state-centred constitutionalism, SC does not deny that the potential establishment of civil constitutions in functional systems *also* depends on states, their monopoly on legitimate force, their law, and therefore on political constitutions: The constitutionalisation of functional systems cannot do without the medium of power. However, this fact nevertheless seems partial and, for the defenders of state-centred constitutionalism, gives rise to risks of self-indulgence. State-centred constitutionalism does not "see", in terms of legal theory, that the relationship between political constitutions and civil constitutions is in fact one of mutual dependence: not unilateral and parasitic but rather bilateral, almost symbiotic. Despite its relatively greater structural autonomy, political power also needs the other mediums of functionally differentiated society in order to formalise and stabilise itself. To be truly effective, political constitutions need the symbolic-communicative resources derived from economy, science, religion and other functional systems. In fact, the contemporary secular state depends on the symbolic and communicative resources of functional systems such as science, religion and, above all, economy. This emerges not only from the fact that, in the early modern era, the organisation of the state originally developed as a military-bureaucratic apparatus instrumental to the extraction of economic value from social processes, but also from the apparent dependence of contemporary constitutional states on economic processes and the vulnerability of political constitutions, resulting from the de-constitutionalised processes of economic globalisation. From this point of view, once it is acknowledged that the guarantee of social rights – especially the economic entitlements and the legal instruments functional to broaden them – by the state (co-)constitutes the basis of the legitimation of its constitution, it does not seem possible to question that political constitutions are as dependent on the economy and money-based exchanges as civil and economic constitutions are on political power. In fact, being open to look at extra-institutional settings and non-state normative orders in properly constitutional terms gives SC an advantage compared to state-centred constitutionalism *also* in normative terms, as it can better frame legal policy proposals to tame power or other expansive dynamics where other approaches see only de facto or, at best, contractual relationships, as it emerges, for example, in the case of digital private actors (Golia 2021).

II. International/Global Constitutionalism

The phrase international (or global) constitutionalism refers here to various perspectives which, unlike state-centred constitutionalism, do not reject the idea that constitutions can arise in non-state contexts and systems (Lang and Wiener 2017). Although their positions vary, these authors share the idea that non-state constitutions are called upon to re-establish the unity of political decision-making, which the functional differentiation typical of modernity has undermined at the state level. Further, they argue that new forms of non-state or hybrid normativity ("global law") are developing, which cannot be traced back to classical international law (understood as inter-state law), and that they are undergoing a process of progressive constitutionalisation. This process occurs first at the structural level, through the affirmation of *jus cogens* norms, in principle valid *erga omnes*; the spread of participatory models, possibly extended also to non-state actors; the introduction of normative hierarchies; a shift

from strictly intergovernmental decision-making schemes to majority ones; judicialisation; qualified majorities for the amendment of certain treaties; and the expansion of the role of international organisations. This process also takes place at the functional level, with the progressive recognition and protection of rights as well as the extension of international regulation to areas that were previously the exclusive domain of national systems, such as the economy, environment, health, and security.

Against this background, some authors have affirmed a sort of constitutional neomonism, centred around the UN Charter as the core of a global constitution (Tomuschat 1997; Fassbender 1998, 2016). Others argue that a global or international constitutional law is emerging, which, while not replacing the national one, stands alongside it, performing compensatory functions, in certain sectors or areas, that national constitutions are no longer able to perform effectively (Frowein 2000; De Wet 2006; Peters 2006; Peters, Klabbers, and Ulfstein 2009; Peters 2009b; Kumm 2009; Walker 2009). With some simplification, it can be said that the latter strand extends the model of multilevel constitutionalism – which, at least until the early 2000s, was the dominant theoretical paradigm for interpreting European integration and constitutionalisation (Pernice 1999; Peters 2001) – to a global level. Even such approaches seem to be attempts at reductio ad unum, a sort of unitas multiplex that binds actors and legal systems in an intricate network of inter-systemic relations. This network, in which the sources of the legitimation of power are mainly formal, nevertheless ultimately finds its guiding star in a type of procedural reason in the sense of Habermas (Habermas 1996; Goldmann 2016). In this regard, proponents of international constitutionalism seem to share the belief that adequate institutional structures, with the "right" methods and degree of procedural involvement of the relevant actors, mostly tailored to western, liberal public law models, can produce a substantive constitutional – or at least public (von Bogdandy, Goldmann, and Venzke 2017) – law legitimised at a global level, in turn based on a set of universal commitments such as the principles of legality, subsidiarity, participation, human rights protection.

Such a broadly speaking Habermasian concept is shared by a third strand, so-called global administrative law (GAL), which, without resorting to (and indeed explicitly rejecting) constitutionalist terminology and aspirations, brings together public lawyers who believe it is possible to transfer the most generalisable principles and categories of the various national administrative laws to the organisation and functioning of international organisations and, in general, of the most recent forms of global organisation (Kingsbury, Krisch, and Stewart 2005; Cassese 2016). The proponents of GAL claim that not a constitutional law but rather a global administrative law – to some extent already established in practice and in the texts of relevant instruments of international law, in the relations between national and international administrative agencies – will perform the fundamental function of resolving inter-systemic conflicts. This global administrative law should codify certain principles of administrative action, such as fair procedure, reason-giving, notice and comment, the obligation to consult, the principle of proportionality, and respect for fundamental rights. Even the currents insisting on "judicial dialogue" and on the development of a so-called comitology represent a particular form of GAL, where judicial and para-judicial bodies are seen as specialised agencies without direct democratic legitimacy, linked in transnational networks.

SC argues that international constitutionalism and GAL share some limits. First, they still focus too narrowly on *political* processes of constitutionalisation (i.e. those linked direct-

ly or indirectly to state actors) taking place at the international and transnational level. Secondly, they mostly tend to rely only on formal/procedural notions of legitimacy. In other words, by ignoring functional differentiation at the transnational level, they deal with normative systems linked more or less directly to state legal production, remaining blind to private or hybrid systems or, at best, confining them to the role of generators of peripheral impulses. This stems from the double postulate, somehow still linked to the state-centred model, that 1) constitution is (and cannot but be) synonymous with unity and that 2) there is a sort of normative-constitutional vacuum at the transnational level, to be filled by political discourse. In this way, international constitutionalism remains trapped in its normative aspirations: to respond to the processes of de-constitutionalisation at the national level and to the so-called fragmentation of international law.

In contrast, SC is based on a radical pluralism also and above all in transnational spaces. Politics is only *one* of the functional systems at the global level. In this sense, an '"international constitution" (...) functions 'exclusively within international politics in the narrow sense', and it does not amount to 'a total constitution for the world or the many constitutions. (...) International constitutional law is not capable of achieving what the welfare states have managed in nation states, i.e. to create constitutions beyond politics'. Similarly, in the case of the GAL, 'due process in regulation, notice- and-comment rules, obligations to consult experts, the principle of proportionality, respect of fundamental rights, etc. – are themselves concerned ultimately with the internal constitutions of the regulatory agencies and cannot function as constitutional norms in the regulated spheres' (Teubner 2012a, pp. 50-51). Only in recent times have some exponents of global constitutionalism explicitly argued that it should be extended to cover the social question (Peters 2018).

Along the same lines, SC argues that functional fragmentation, of which the fragmentation/pluralisation of international law would be but one manifestation (Fischer-Lescano and Teubner 2004a; Mégret 2020, pp. 547-548), does not necessarily have to be brought back to unity by means of an (impossible) global constitution. Instead, it has to be managed and to some extent rendered harmless, as it were, by means of mutual collisions and the development of various forms of inter-legality (see above D.II). The latter occur not only between (national and international) politically based orders but also between political and functional orders, as well as between all of these and the law of cultural systems (indigenous and religious law above all). Significantly, as it becomes increasingly apparent that the European multi-level system will remain heterarchical, SC has been used as a theoretical framework to interpret EU integration (Baquero 2019). In the same vein, in more recent years a partial convergence has emerged between strands of global constitutionalism, on the one hand, and legal pluralism more or less influenced by SC, on the other hand (Viellechner 2012; Peters 2019). Finally, as seen above, SC takes seriously, and seeks to give substantive answers to, the issue of the effective democratisation of extra-state spheres raised by state-centred constitutionalism. This substantive approach to the problem of the democratic legitimation of civil constitutions further distinguishes SC from international constitutionalism, especially GAL.

To conclude, incorporating functional systems into the global constitutional discourse gives SC a both analytical and normative advantage, compared to the several strands of the international constitutionalism galaxy, insofar as it integrates into its conceptualisation the constitutional risks of un-limited social matrices not linked to politics, on the one hand; and it

aims to involve in the constituting and limiting functions their constitutionalising potential, on the other hand.

III. Contestatory/Material Constitutionalism

The phrase contestatory (or material) constitutionalism here refers to the positions which, although using different approaches, share a radical critique of liberal-democratic and state constitutionalism, often from the perspective of neo-Marxist or neo-Gramscian theories (Negri 2010; Santos 2003; Bailey and Mattei 2013) (Christodoulidis, Dukes, and Goldoni 2019). They see global constitutionalism as an instrument of perpetuating global neo-liberal hegemony and as an obstacle to the emancipatory potential of modern constitutionalism, increasingly absorbed into forms, procedures, and symbolic constructions produced and/or controlled by social *élites* (Oklopcic 2018). Such strands also express a keen interest in the strategic and instrumental use of law, in order to challenge the hegemonic structures established as a result of globalisation (Rajagopal 2005). Further, they generally criticise global constitutionalism for overlooking the material bases of constitutional legitimacy and the issue of how legal orderings, in conditions of rising pluralism, shape societal formations (Croce and Goldoni 2016; Kochi 2020). However, they often see globalisation as an opportunity to link movements that aim to democratise all social spheres (Rajagopal 2003). Contestatory/material constitutionalism has then several points in common with SC, especially if the latter is seen as a critical legal theory (Kjaer 2006, p. 77; Fischer-Lescano 2012) (see above A). However, some important differences are worth mentioning.

First of all, the positions of authors such as de Sousa Santos – also concerned with the "regulatory trilemma" of the welfare state (Santos 2003, pp. 51 ff.) (see above A) – are characterised by binary oppositions, which are too clear-cut in their mutual exclusion (regulation/emancipation; hegemonic globalisation/counterhegemonic globalisation). In fact, according to SC emancipation does not exclude but rather requires regulation by law. Social expectations and claims, while a starting point for establishing processes of self-reflection in functional systems, cannot by themselves create valid law, even within a pluralistic framework. Secondly, while recognising that law plays an important strategic role, and indeed welcoming the rise of a plurality of orders alternative to the state, de Sousa Santos underestimates the operational autonomy of law's inner dynamics and its universality as a condition of possibility, beyond particularistic emancipatory claims (Koskenniemi 2001, pp. 503-504). By underestimating the way in which law 'regulates society by regulating itself' (see above B.III) and, more generally, legal formalism, contestatory constitutionalism ultimately undermines its own strategic goal, namely the strategic use of law for the purposes of social emancipation.

The work of another author who can be traced back to contestatory constitutionalism, Toni Negri, also has several points of contact with SC, as it advances a somewhat similar notion of constituent power (Negri 1999 [1992]). In addition to this, both have explored the crisis of positive state law as a result of globalisation processes, as well as the crisis of the public/private distinction, at least within states. But precisely at this point the distance from SC increases. Negri argues that the private is a category to be abandoned, as it is consubstantial with the dynamics of social oppression and subjugation, and that the public/private distinction must be overcome, to be absorbed by the category of the "common". Constitutions, as long as they reproduce the public/private distinction, would always serve private property and the

worst dynamics deriving from capitalist processes. As such, they are incapable of freeing (and may even be obstacles to) the constituent energies of society. More generally, for Negri, SC underestimates the radical social transformation required by the abolition of private property, as it 'assumes, in fact, that all other meanings of "privacy" (outside property) are neutral with regard to the "private" of property – whereas (…) they are closely involved in it. (...) [I]t does not seem strange to us that the common could be constructed from those private virtues rather than by the strength of the public, of the state (always aimed at the protection of property). Teubner (…) does not realize how much the conditions of private property, in all contexts, endanger those language games that he wishes to preserve' (Negri 2010, p. 25).

In fact, for SC the public/private distinction is not to be overcome but rather generalised and re-specified within each functional system (Esposito 2021, p. 67). In this sense, and contrary to some readings (Goldmann 2016, p. 53), SC does not identify the distinction private/public law with state/society. It is not a question of underestimating the effects that private property has on society as a whole. While Negri believes that it is possible to continue to guarantee certain areas of freedom and autonomy by eliminating the concept of privacy, SC maintains that such an elimination would not guarantee the various systems' functional autonomy from reciprocal colonising tendencies. In contemporary society, functional differentiation is not lost by the mere fact of the removal of private property but instead depends on the autonomisation of discourses and rationalities allowed by globalisation. The risk for global society is not only in its economisation, but also in politicisation, scientification, computerisation and, more generally, in all phenomena of structural corruption/colonisation. Indeed, the public/private distinction, i.e. the dialectic between organised or decision-making spheres and spontaneous spheres, makes possible systems' self-contestation and self-subversion and ultimately serves to push them to self-control. Without it, constitutive functions may be possible but limiting ones are not. The "multitude" can play its constituent and irritant role but, as such, it does not really found/constitute rights, as long as their protection is entrusted only to the reaction of the multitude itself and not also to the autonomous operational processes of law in a given system. Here lies another subtle but important difference. For Negri, the constituent power of the multitude has an omnivorous character, as it absorbs every defence of the "common" and ultimately dissolves within itself any constituted power, configuring itself as a sort of permanent revolution. By contrast, for SC, the exercise of the *pouvoir constituant* remains functional to the permanent position/self-subversion of the law produced by the *pouvoir constitué* and of the various "private governments" of each system. Further, as seen above, a distinction remains between the *pouvoir constituant* as a permanent communicative energy within each system and the constitutional moment(s) – a distinction also overlooked by other strands of material constitutionalism (Goldoni and Wilkinson 2018, p. 588).

Here, it is possible to link SC to the theme of justice. Indeed, there is a link between SC's conception of constituent (or irritant) power, understood as communicative energy that permanently contributes to the self-renovation of a system and its law (see above E.I), and that of (in)justice, the "necessary parasite" of every legal system, which continuously forces "errors" and breaks in the chains of legal acts (Esposito, 2021, p. 68 ff.). SC does not reject but actually draws upon 'what Ernst Bloch called the "not yet" of justice, or what Jacques Derrida called the "impossibility" of a justice which is "yet to come"' and 'involves (…) an idea of struggle over the democratisation, reorganisation and transformation of current regional and transnational constitutional institutions, and the creation of new democratic constitutional intuitions alongside these' (Kochi 2020, p. 503). Constituent or irritating power and

justice are thus intimately connected and are at the core of the processes of subversion through which law transcends and returns to itself, influencing society while still remaining distinct from it (Teubner 2009).

Cross References

- Changing Nature of the British Constitution
- Climate change and Constitution
- Climate Change as a Challenge to Constitutional Values. Towards Climate Change Constitutionalism
- Concept of State as a Sovereign Entity
- Conflicts between National and Supranational Constitutional Systems and their Legal Solution
- Constitution as an Anthropological or Sociological Document
- Constitution, Overview and Definition
- Constitutional Amendments, Constitutionality
- Constitutional Hermeneutic Principles and Constitutional Interpretation
- Constitutional Norms from the Perspective of the Communicational Theory of Law
- Constitutionalism in Europe
- Culture of the Constitution and the Culture Constitution
- Dialogue on Democracy and Public Opinion
- Direct and Participatory Democracy Ideologies in Contemporary Constitutionalism
- Economic Factors and Constitution-Making: A Two-Way Relationship
- Elitist Theory as a Device of Constitutionalism
- Epistemic and Constitutional Limits on Democracy
- Ethics, Sustainability and Corporate Governance
- Foundation of Legitimacy in Constitutionalism
- Human Dignity and Fundamental Rights
- Human Dignity and Personality Rights
- Ideologies of Populism: History, Evolution and Present Constitutional Implications
- “Political” or “Legal” Constitution? Beyond the dichotomy
- Rule of Law - Concept
- Three Conceptions of Constitutional Legitimacy

References

Anderson, Gavin W. 2013. "Societal Constitutionalism, Social Movements and Constitutionalism from Below." *Indiana Journal of Global Legal Studies* 20: 881-906.

Augsberg, Ino. 2012. "Subjektive und objektive Dimensionen der Wissenschaftsfreiheit." In *Freiheit der Wissenschaft: Beiträge zu ihrer Bedeutung, Normativität und Funktion*, edited by Friedemann Voigt, 65-89. Berlin: De Gruyter.

Backer, Larry Catá. 2012. "The Structure Of Global Law: Fracture, Fluidity, Permeability, And Polycentricity." *CPE Working Paper No. 2012-7*. http://ssrn.com/abstract=2091456.

Bailey, Saki, and Ugo Mattei. 2013. "Social Movements as Constituent Power: The Italian struggle for the Commons." *Indiana Journal of Global Legal Studies* 20: 965-1014.

Baquero, Pablo M. 2019. "European Law from the Perspective of Societal Constitutionalism." *EUI Working Papers* 2019/10. https://cadmus.eui.eu/handle/1814/64686.
Beckers, Anna. 2015. *Enforcing Corporate Social Responsibility Codes: On Global Self-Regulation and National Private Law*. Oxford: Hart.
Berman, Paul Schiff. 2012. *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders*. Cambridge: Cambridge University Press.
---. 2013. "Jurisgenerative Constitutionalism: Procedural Principles for Managing Global Legal Pluralism." *Indiana Global Legal Studies* 20: 665-695.
Besson, Samantha. 2017. "Human Rights as Transnational Constitutional Law." In *Handbook on Global Constitutionalism*, edited by Anthony F. Lang and Antje Wiener, 234-263. Cheltenham: Elgar.
Bifulco, Daniela, and Angelo Jr Golia. 2018. "The Right of Resistance as a State Law Basis for Transnational Regimes Self-Contestation." *Journal of Law and Society* 45: 94-S113.
Bird, Yanhua, Short, Jodi L., and Michael W. Toffel. 2019. "Coupling Labor Codes of Conduct and Supplier Labor Practices: The Role of Internal Structural Conditions. Organization Science." *Organization Science*, 30: 647-667.
Blokker, Paul. 2018. "Constitutional Mobilization and Contestation in the Transnational Sphere." *Journal of Law and Society* 45: 52-S72.
Böckenförde, Ernst-Wolfgang. 1976. *Staat, Gesellschaft, Freiheit - Studien zur Staatstheorie und zum Verfassungsrecht*. Frankfurt: Surkhamp.
von Bogdandy, Armin, and Sergio Dellavalle. 2013. "The Lex Mercatoria of Systems Theory: Localisation, Reconstruction and Criticism from a Public Law Perspective." *Transnational Legal Theory* 4: 59-82.
von Bogdandy, Armin, Ferrer Mac-Gregor, Eduardo, Morales Antoniazzi, Mariela, Piovesan, Flavia, and Ximena Soley, eds. 2017. *Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune*. Oxford: Oxford University Press.
von Bogdandy, Armin, Matthias Goldmann, and Ingo Venzke. 2017. "From Public International to International Public Law: Translating World Public Opinion into International Public Authority." European Journal of International Law 28: 115-145.
Böhm, Franz. 1933. *Wettbewerb und Monopolkampf: Eine Untersuchung zur Frage des wirtschaftlichen Kampfrechts und zur Frage der rechtlichen Struktur der geltenden Wirtschaftsordnung*. Berlin: Heymanns.
Böhm, Franz, Walter Eucken, and Hans Großmann-Doerth, eds. 1937. *Die Ordnung der Wirtschaft als geschichtliche Aufgabe und rechtsschöpferische Leistung, Ordnung der Wirtschaft*. Stuttgart: Kohlhammer.
Cassese, Sabino, ed. 2016. *Research Handbook on Global Administrative Law*. Cheltenham: Elgar.
Champeil-Desplats, Véronique. 2016. "Constitutionalization Outside of the State? A Constitutionalist's Point of View." In *Multinationals and the Constitutionalization of the World Power System*, edited by Jean-Philippe Robe, Antoine Lyon-Caen and Stéphane Vernac, 157-169. London: Routledge.
Christodoulidis, Emilios A. 2013. "On the Politics of Societal Constitutionalism." *Indiana Journal of Global Legal Studies* 20: 629-664.
---. 2020. "The Myth of Democratic Governance." In *The Law of Political Economy: Transformation in the Function of Law*, edited by Paul F. Kjaer, 62-88. Cambridge: Cambridge University Press.
Christodoulidis, Emilios A., Ruth Dukes, and Marco Goldoni, eds. 2019. *Research Handbook on Critical Legal Theory*. Cheltenham: Elgar.

Croce, Mariano, and Marco Goldoni. 2016. "A Sense of Self-Suspicion: Global Legal Pluralism and the Authority of Law." *Ethics & Global Politics* 8: 1-20.
Croce, Mariano, and Marco Goldoni. 2020. *The Legacy of Pluralism. The Continental Jurisprudence of Santi Romano, Carl Schmitt, and Costantino Mortati*. Stanford: Stanford University Press.
De Wet, Erika. 2006. "The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order." *Leiden Journal of International Law* 19: 611-632.
Delmas Marty, Mireille. 2009. *Ordering Pluralism. A Conceptual Framework for Understanding the Transnational Legal World*. Oxford: Hart.
Derrida, Jacques. 1990. "Force of Law: The Mystical Foundation of Authority." *Cardozo Law Review* 11: 919-1046.
Ehrlich, Eugen. 1918. *Die juristische Logik*. Neudruck 1925, Nachdruck 1966.Tübingen: Mohr & Siebeck.
---. 1936. *Fundamental Principles of the Sociology of Law*. Translated by Walter L. Moll. Cambridge: Harvard University Press.
Ellis, Jaye. 2020. "'Social Nature'. Political Economy, Science, and Law in the Anthropocene." In *The Law of Political Economy*, edited by Paul F. Kjaer, 181-201. Cambridge: Cambridge University Press.
Esposito, Roberto. *Istituzione*. Bologna: Il Mulino.
Fassbender, Bardo. 1998. "The United Nations Charter as Constitution of the International Community." *Columbia Journal of Transnational Law* 37: 529-619.
---. 2016. "International Constitutional Law: Written or Unwritten?" *Chinese Journal of International Law* 15: 489-515.
Fichera, Massimo. 2021. "The Relevance of the Notion of Time for Constitutionalism Beyond the State: Towards Communal Constitutionalism?" *Athena* 1: 153-186.
Fischer-Lescano, Andreas. 2012. "Critical Systems Theory." *Philosophy and Social Criticism* 38: 3-23.
---. 2016. "Struggles for a Global Internet Constitution: Protecting Global Communication Structures Against Surveillance Measures." *Global Constitutionalism* 5: 145-172.
Fischer-Lescano, Andreas, and Gunther Teubner. 2004a. "Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law." *Michigan Journal of International Law* 25: 999-1045.
Fischer-Lescano, Andreas, and Gunther Teubner. 2004b. "Reply to Andreas L. Paulus Consensus as Fiction of Global Law." *Michigan Journal of International Law* 25: 1059-1074.
Francot-Timmermans, Lyana, and Emilios A. Christodoulidis. 2011. "The Normative Turn in Teubner's Systems Theory of Law." *Rechtsfilosofie & Rechtstheorie* 40: 187-190.
Frowein, Jochen A. 2000. "Konstitutionalisierung des Völkerrechts." In *Völkerrecht und internationales Privatrecht in einem sich globalisierenden internationalen System: Auswirkungen der Entstaatlichung transnationaler Rechtsbeziehungen*, edited by Klaus Dicke, Waldemar Hummer, Daniel Girsberger, Boele-Woelki, Christoph Engel and Jochen A. Frowein, 427-447. Heidelberg: Müller.
Gardbaum, Stephen. 2008. "Human Rights as International Constitutional Rights." *European Journal of International Law* 19: 749-768.
Gierke, Otto von. 1933. *Natural Law and the Theory of Society: 1500 to 1800*. Cambridge: Cambridge University Press.
---. 1977. *Associations and Law: The Classical and Early Christian Stages*. Toronto: University of Toronto Press.

Goldmann, Matthias. 2016. "A Matter of Perspective: Global Governance and the Distinction between Public and Private Authority (and not Law)." *Global Constitutionalism* 5: 48-84.

Goldoni, Marco, and Michael A. Wilkinson. 2018. "The Material Constitution." *Modern Law Review* 81: 567-597.

Golia, Angelo Jr. 2021. "Beyond Oversight. Advancing Societal Constitutionalism in the Age of Surveillance Capitalism." Int'l J. Const. L. Blog, 5 March 2021, www.iconnectblog.com/2021/03/beyond-oversight-advancing-societal-constitutionalism-in-the-age-of-surveillance-capitalism/

Gradoni, Lorenzo. 2021. "Constitutional Review via Facebook's Oversight Board. How platform governance had its Marbury v Madison." *Verfassungsblog* (blog). 10 February 2021. https://verfassungsblog.de/fob-marbury-v-madison/.

Grimm, Dieter. 2005. "The Constitution in the Process of Denationalization." *Constellations* 12: 447-463.

---. 2010. "The Achievement of Constitutionalism and Its Prospects in a Changed World." In *The Twilight of Constitutionalism?*, edited by Petra Dobner and Martin Loughlin, 3-22. Oxford: Oxford University Press.

Guibentif, Pierre. 2016. "Societal Conditions of Self-Constitution." In *Self-Constitution of European Society: Beyond EU Politics, Law and Governance*, edited by Jirí Pribán, 274-313. London: Routledge.

Günther, Gotthard. 1976. "Life as Poly-Contexturality." In *Beiträge zur Grundlegung einer operationsfähigen Dialektik*, edited by Gotthard Günther, 283-306. Hamburg: Meiner.

Günther, Klaus. 2020. "Normative Legal Pluralism: A Critique." In *Jurisprudence in a Globalized World*, edited by Jorge L. Fabra-Zamora, 84-99. Cheltenham: Elgar.

Gurvitch, Georges. 1935. *L'expérience juridique et la philosophie pluraliste du droit*. Paris: Pedone.

---. 1947. *The Sociology of Law*. London: K. Paul, Trench, Trubner & Co.

Habermas, Jürgen. 1985. "Law as Medium and Law as Institution." In *Dilemmas of Law in the Welfare State*, edited by G. Teubner, 203-220. Berlin: de Gruyter.

---. 1996. *Between Facts and Norms*. Cambridge: Cambridge University Press.

Hakimi, Monica. 2020. "The Integrative Effects of Global Legal Pluralism." In *Oxford Handbook of Global Legal Pluralism* edited by Paul Schiff Berman, 558-574. Oxford: Oxford University Press.

Hart, Herbert L. A. 1961. *The Concept of Law*. Oxford: Clarendon.

Hauriou, Maurice. 1933. "La Théorie de l'institution et de la fondation: Essai de vitalisme social." In *Aux sources du droit*, réimpr. coll. Bibliothèque de philosophie antique et juridique. Textes et documents, Caen, Centre de philosophie politique et juridique, 1986, 90-128.

Hensel, Isabell, and Gunther Teubner. 2016. "Horizontal Fundamental Rights as Conflict of Law Rules: How Transnational Pharma Groups Manipulate Scientific Publications." In *Contested Regime Collisions: Norm Fragmentation in World Society*, edited by Kerstin Blome, Andreas Fischer-Lescano, Hannah Franzki, Nora Markard and Stefan Oeter, 139-168. Cambridge: Cambridge University Press.

Hirschl, Ran, and Ayelet Shachar. 2019. "Spatial Statism." *International Journal of Constitutional Law* 17: 387–438.

Kampourakis, Ioannis. 2019. "CSR and Social Rights: Juxtaposing Societal Constitutionalism and Rights-Based Approaches Imposing Human Rights Obligations on Corporations." *Goettingen Journal of International Law* 9: 537-569.

---. 2021. "Bound by the Economic Constitution: Notes for "Law and Political Economy" in Europe." *Journal of Law and Political Economy* 1: 301-332.

Karavas, Vagios, and Gunther Teubner. 2005. "www.CompanyNameSucks.com: The Horizontal Effect of Fundamental Rights on 'Private Parties' within Autonomous Internet Law." *Constellations* 12: 262-282.
Kingsbury, Benedict, Nico Krisch, and Richard B. Stewart. 2005. "The Emergence of Global Administrative Law." *Law and Contemporary Problems* 68: 15-61.
Kjaer, Paul F. 2006. "Systems in Context: On the Outcome of the Habermas/Luhmann-Debate." *Ancilla Iuris* 1: 66-77.
Kjaer, Poul F. 2014. *Constitutionalism in the Global Realm: A Sociological Approach*. London: Routledge.
---. 2019. "Global Law as Inter-Contextuality and as Inter-Legality." In *The Challenge of Inter-Legality*, edited by Jan Klabbers and Gianluigi Palombella, 302-318. Cambridge: Cambridge University Press.
Klare, Karl E. 1998. "Legal Culture and Transformative Constitutionalism." *South African Journal of Human Rights* 14:146-188.
Kochi, Tarik. 2020. "The End of Global Constitutionalism and Rise of Antidemocratic Politics." *Global Society* 34: 487–506.
Koselleck, Reinhart. 2006. "Begriffsgeschichtliche Probleme der Verfassungsgeschichtsschreibung." In *Begriffsgeschichten: Studien zur Semantik und Pragmatik der politischen und sozialen Sprache*, edited by Reinhart Koselleck, 365-401. Frankfurt: Suhrkamp.
Koskenniemi, Martti. 2001. *The Gentle Civilizer of Nations : The Rise and Fall of International Law 1870–1960*. Cambridge: Cambridge University Press.
---. 2005. *From Apology To Utopia. The Structure of International Legal Argument*. 2nd ed. Cambridge: Cambridge University Press.
Krisch, Nico. 2016. "Pouvoir Constituant and Pouvoir Irritant in the Postnational Order." *International Journal of Constitutional Law* 14: 657-679.
Kumm, Mattias. 2009. "The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State." In *Ruling the World? Constitutionalism, International Law and Global Governance*, edited by Jeffrey L. Dunoff and Joel P. Trachtmann, 258-324. Cambridge: Cambridge University Press.
Kuo, Ming-Sung. 2014. "Semantic Constitutionalism at the Fin de Siècle: A Review Essay on Gunther Teubner, Constitutional Fragments: Societal Constitutionalism and Globalization (Oxford University Press, 2012)." *Transnational Legal Theory* 5: 158–175.
Lang, Anthony F., and A. Wiener, eds. 2017. *Handbook on Global Constitutionalism*. Cheltenham: Elgar.
Lindahl, Hans. 2010. "A-Legality: Postnationalism and the Question of Legal Boundaries." *Modern Law Review* 73: 30-56.
Loughlin, Martin. 2010. "What Is Constitutionalisation?" In *The Twilight of Constitutionalism?*, edited by Petra Dobner and Martin Loughlin, 47-72. Oxford: Oxford University Press.
Luhmann, Niklas. 1985. *A Sociological Theory of Law*. Translated by Elisabeth King-Utz and Martin Albrow. edited by Martin Albrow. London: Routledge.
---. 1990. "Two Sides of the State Founded on Law." In *Political Theory in the Welfare State*, edited by Niklas Luhmann, 187-202. Berlin: de Gruyter.
---. 1992. "The Coding of the Legal System." In *State, Law, and Economy as Autopoietic Systems: Regulation and Autonomy in a New Perspective*, edited by A. Febbrajo and G. Teubner, 145-185. Milano: Giuffrè.
---. 1995. *Social Systems*. Translated by John Bednarz, Jr. with Dirk Baecker. Stanford: Stanford University Press.

---. 2004. *Law as a Social System*. Oxford: Oxford University Press.
---. 2012-2013 [1997]. *Theory of Society Voll. 1-2*. Stanford: Stanford University Press.
Lyotard, Jean-François. 1987. *The Differend: Phrases in Dispute*. Translated by George Van Den Abbeele. Manchester: Manchester University Press.
MacCormick, Neil. 1998. "Norms, Institutions, and Institutional Facts." *Law and Philosophy* 17: 301-345.
Martinico, Giuseppe. 2015. "The "Polemical" Spirit of European Constitutional Law: On the Importance of Conflicts in EU Law." *German Law Journal* 16: 1343-1374.
Mégret, Frédéric 2020. "International Law as a System of Legal Pluralism." In *Oxford Handbook of Global Legal Pluralism*, edited by Paul Schiff Berman, 534-555. Oxford: Oxford University Press.
Mende, Janne. 2021. "Common Identities, Overlapping Authorities and Complexity. Practices of (De-)Legitimation in the United Nations." *MPIL Research Paper Series No. 2021-05*. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3790292.
Mestmäcker, Ernst Joachim, ed. 1980. *Freiheit und Ordnung in der Marktwirtschaft*. Baden-Baden: Nomos.
Michaels, Ralf. 2020. "Global Legal Pluralism and Conflict of Laws." In *Oxford Handbook of Global Legal Pluralism* edited by Paul Schiff Berman, 630-648. Oxford: Oxford University Press.
Möller, Kolja. 2018. "From Constituent to Destituent Power Beyond the State." *Transnational Legal Theory* 9: 32-55.
Muir Watt, Horatia. 2016. "Conflicts of Laws Unbounded: The Case for a Legal-Pluralist Revival." *Transnational Legal Theory* 7: 313-353.
---. 2018. "When Societal Constitutionalism Encounters Private International Law: Of Pluralism, Distribution, and `Chronotopes'." *Journal of Law And Society* 45: 185-203.
Negri, Antonio. 1999 [1992]. *Insurgencies: Constituent Power and the Modern State*. Minneapolis: University of Minnesota Press.
---. 2010. "The Law of the Common: Globalization, Property and New Horizons of Liberation." *Finnish Yearbook of International Law* 21: 1-25.
Neves, Marcelo. 1998. *Symbolische Konstitutionalisierung*. Berlin: Duncker & Humblot.
---. 2001. "From the Autopoiesis to the Allopoiesis of Law." *Journal of Law and Society* 28: 242-264.
---. 2013. *Transconstitutionalism*. London: Hart.
Niesen, Peter. 2017. "Constituent power in global constitutionalism." In *Handbook on Global Constitutionalism*, edited by Anthony F. Jr. Lang and Antje Wiener, 222-233. Cheltenham: Elgar.
Nogueira de Brito, Miguel, Carina, Calabria, and Fábio Portela L. Almeida, eds. 2021. *Law as Passion. Systems Theory and Constitutional Theory in Peripheral Modernity*. Cham: Springer.
Nonet, Philippe, and Philip Selznick. 1978. *Law and Society in Transition: Toward Responsive Law*. New York: Harper & Row.
Oklopcic, Zoran. 2018. *Beyond the People: Social Imaginary and Constituent Imagination*. Oxford: Oxford University Press.
Passchier, Reijer. 2017. "Quasi-Constitutional Change without Intent - A Response to Richard Albert." *Buffalo Law Review* 65: 1077-1100.
Perez, Oren. 2011. "Private Environmental Governance as Ensemble Regulation: A Critical Examination of Sustainable Business Indexes and the New Ensemble Politics." *Theoretical Inquiries in Law* 12: 543-579.
Perez, Oren, and Ofir Stegmann. 2018. "Transnational Networked Constitutionalism." *Journal of Law and Society* 45: S13-S162.

Pernice, Ingolf. 1999. "Multi-Level Constitutionalism and the Treaty of Amsterdam: Constitution-Making revisited." *Common Market Law Review* 36: 703-750.
Peters, Anne. 2001. *Elemente einer Theorie der Verfassung Europas*. Berlin: Duncker & Humblot.
---. 2006. "Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures." *Leiden Journal of International Law* 19: 579-610.
---. 2009a. "Dual Democracy." In *The Constitutionalization of International Law*, edited by Jan Klabbers, Anne Peters and Geir Ulfstein, 263-341. Oxford: Oxford University Press.
---. 2009b. "The Merits of Global Constitutionalism." *Indiana Journal of Global Legal Studies* 16: 397-411.
---. 2017. "The Refinement of International Law: From Fragmentation to Regime Interaction and Politicization." *International Journal of Constitutional Law* 15: 671-704.
---. 2018. "Global Constitutionalism: The Social Dimension." In *Global Constitutionalism from European and East Asian Perspectives*, edited by Takao Suami, Mattias Kumm, Anne Peters and Dimitri Vanoverbeke, 277-350. Cambridge: Cambridge University Press.
---. 2019. "Constitutionalization." In *Concepts for International Law. Contributions to Disciplinary Thought*, edited by Jean d'Aspremont and Sahib Singh, 141-153. Cheltenham: Elgar.
Peters, Anne, Jan Klabbers, and Geir Ulfstein, eds. 2009. *The Constitutionalization of International Law*. Oxford: Oxford University Press.
Prandini, Riccardo. 2005. "La 'costituzione' del diritto nell'epoca della globalizzazione: Struttura dell società-mondo e cultura del diritto nell'opera di Gunther Teubner." In *La cultura del diritto nell'epoca della globalizzazione: L'emergere dell costituzioni civili*, edited by Gunther Teubner, 191-225. Roma: Armando.
---. 2013. "The Future of Societal Constitutionalism in the Age of Acceleration." *Indiana Journal of Global Legal Studies* 20: 731-776.
Pribán, Jirí. 2018. "Constitutional Imaginaries and Legitimation: On Potentia, Potestas, and Auctoritas in Societal Constitutionalism." *Journal of Law and Society* 45: S30-S51.
Prosser, T. 2017. "Constitutions as Communication." *International Journal of Constitutional Law* 15: 1039-1065.
Rajagopal, Balakrishnan. 2003. "International Law and Social Movements: Challenges of Theorising Resistance." *Columbia Journal of Transnational Law* 41: 397-433.
---. 2005. "The Role of Law in Counter-Hegemonic Globalization and Global Legal Pluralism: Lessons from the Narmada Valley Struggle in India." *Leiden Journal of International Law* 18: 345-387.
Romano, Santi. 2017 [1918]. *The Legal Order*. London: Routledge.
Santos, Boaventura de Sousa. 2003. *Toward a New Legal Common Sense: Law, Globalization and Emancipation*. Evanston: Northwestern University Press.
Schmitt, Carl. 2001 [1930]. "State Ethics and the Pluralist State." In *Weimar. A Jurisprudence of Crisis*, edited by A. Jacobson and B. Schlink, 300-312. Berkeley: University of California Press.
---. 1985. *Political Theology: Four Chapters on the Concept of Sovereignty*. Translated by George Schwab. Cambridge, Mass.: MIT Press.
Schneiderman, David. 2011. "Legitimacy and Reflexivity in International Investment Arbitration: A New Self-Restraint?" *Journal of International Dispute Settlement* 2: 1-25.

Sciulli, David. 1992. *Theory of Societal Constitutionalism: Foundations of a Non-Marxist Critical Theory*. Cambridge: Cambridge University Press.
Selznick, Philip. 1969. *Law, Society and Industrial Justice*. New York: Russell Sage.
Sinzheimer, Hugo. 1976 [1927]. "Das Wesen des Arbeitsrechts." In *Arbeitsrecht und Rechtssoziologie,* edited by Otto Kahn-Freund and Thilo Ramm, 108-114. Frankfurt: Europäische Verlagsanstalt.
Somek, Alexander. 2012. "The Constituent Power in a National and in a Transnational Context." *Transnational Legal Theory* 3: 31-60.
Spencer Brown, George. 1972. *Laws of Form*. New York: Julian Press.
Strange, Susan. 1994. *States and Markets*. 2nd ed. London-New York: Pinter.
Teubner, Gunther. 1983. "Substantive and Reflexive Elements in Modern Law." *Law & Society Review* 17: 239-285 N3 - N4 - N5 -.
---. 1985. "After Legal Instrumentalism? Strategic Models of Post-Regulatory Law." In *Dilemmas of Law in the Welfare State*, edited by G. Teubner, 299-325 N3 - N4 - N5 -. Berlin: de Gruyter.
---. 1987. "Evolution of Autopoietic Law." In *Autopoietic Law: A New Approach to Law and Society*, edited by G. Teubner, 217-241. Berlin: de Gruyter.
---. 1988. "Enterprise Corporatism: New Industrial Policy and the 'Essence' of the Legal Person." *The American Journal of Comparative Law* 36: 130-155.
---. 1989. "And God Laughed...: Indeterminacy, Self-Reference and Paradox in Law." In *Critical Legal Thought: An American-German Debate*, edited by C. Joerges and D. Trubek, 399-434. Baden-Baden: Nomos.
---. 1992a. "Regulatory Law: Chronicle of a Death Foretold." *Social and Legal Studies* 1: 451-475.
---. 1992b. "The Two Faces of Janus: Rethinking Legal Pluralism." *Cardozo Law Review* 13: 1443-1462.
---. 1993a. *Law as an Autopoietic System*. edited by Zenon Bankowski. London: Blackwell.
---. 1993b. "The Many-Headed Hydra: Networks as Higher-Order Collective Actors." In *Corporate Control and Accountability*, edited by J. McCahery, S. Picciotto and C. Scott, 41-60. Oxford: Clarendon Press.
---. 1997a. "Altera Pars Audiatur: Law in the Collision of Discourses." In *Law, Society and Economy*, edited by Richard Rawlings, 149-176. Oxford: Clarendon.
---. 1997b. "Breaking Frames: The Golden Interplay of Legal and Social Systems." *The American Journal of Comparative Law* 45: 149-169.
---. 1997c. "Global Bukowina: Legal Pluralism in the World Society." In *Global Law without a State*, edited by Gunther Teubner, 3-28. Aldershot: Dartmouth Gower.
---. 2002. "Hybrid Laws: Constitutionalizing Private Governance Networks." In *Legality and Community: On the Intellectual Legacy of Philip Selznick*, edited by Robert A. Kagan, Martin Krygier and Kenneth Winston, 311-331. Berkeley: Berkeley Public Policy Press.
---. 2003. "Global Private Regimes: Neo-spontaneous Law and Dual Constitution of Autonomous Sectors?" In *Globalization and Public Governance*, edited by Karl-Heinz Ladeur, 71-87. Oxford: Oxford University Press.
---. 2004. "Societal Constitutionalism: Alternatives to State-centred Constitutional Theory?" In *Transnational Governance and Constitutionalism*, edited by Christian Joerges, Inger-Johanne Sand and Gunther Teubner, 3-28. Oxford: Hart.
---. 2006. "The Anonymous Matrix: Human Rights Violations by "Private" Transnational Actors." *Modern Law Review* 69: 327-346.
---. 2009. "Self-Subversive Justice: Contingency or Transcendence Formula of Law?" *Modern Law Review* 72: 1-23.

---. 2011a. "A Constitutional Moment? The Logics of “Hit the Bottom”." In *The Financial Crisis in Constitutional Perspective: The Dark Side of Functional Differentiation*, edited by Poul F. Kjaer, Gunther Teubner and Alberto Febbrajo, 4-42. Oxford: Hart.
---. 2011b. "Constitutionalising Polycontexturality." *Social & Legal Studies* 20: 209-252.
---. 2011c. "Societal Constitutionalism without Politics? A Rejoinder." *Social & Legal Studies* 20: 248-252.
---. 2012a. *Constitutional Fragments: Societal Constitutionalism and Globalization*. Oxford: Oxford University Press.
---. 2012b. "Self-constitutionalization of Transnational Corporations? On the Linkage of 'Private' and 'Public' Corporate Codes of Conduct." *Indiana Journal of Global Legal Studies* 19: 617-638.
---. 2012c. "Societal Constitutionalism and the Politics of the Commons." *Finnish Yearbook of International Law* 21: 2-15.
---. 2012d. "Transnational Fundamental Rights: Horizontal Effect?" *Netherlands Journal of Legal Philosophy* 40: 191-215.
---. 2013. "The Project of Constitutional Sociology: Irritating Nation State Constitutionalism." *Transnational Legal Theory* 4: 44–58.
---. 2014. "Exogenous Self-binding: How Social Systems Externalise Their Foundational Paradox." In *Sociology of Constitutions*, edited by Giancarlo Corsi and Alberto Febbrajo, 30-48. Abingdon: Routledge.
---. 2015. "Transnational Economic Constitutionalism in the Varieties of Capitalism." *Italian Law Journal* 1: 219-248.
---. 2017. "Societal Constitutionalism: Nine Variations on a Theme by David Sciulli." In *Sociological Constitutionalism*, edited by Paul Blokker and Chris Thornhill, 313-340. Cambridge: Cambridge University Press.
---. 2018. "*Quod omnes tangit*: Transnational Constitutions Without Democracy?" *Journal of Law and Society* 45: 5-29.
Teubner, Gunther, and Anna Beckers. 2013. "Expanding Constitutionalism." *Indiana Journal of Global Legal Studies*: 523-550.
Teubner, Gunther, and Peter Korth. 2011. "Two Kinds of Legal Pluralism: Collision of Transnational Regimes in the Double Fragmentation of World Society." In *Regime Interaction in International Law: Theoretical and Practical Challenges*, edited by Margaret Young, 23-54. Cambridge: Cambrige University Press.
Thornhill, Chris. 2008. "Towards a Historical Sociology of Constitutional Legitimacy." *Theory and Society* 37: 161-197.
---. 2011. *A Sociology of Constitutions: Constitutions and State Legitimacy in Historical-Sociological Perspective*. Cambridge: Cambridge University Press.
---. 2018. "The Citizen of Many Worlds: Societal Constitutionalism and the Antinomies of Democracy." *Journal of Law and Society* 45: 73-93.
Tomuschat, Christian. 1997. "International Law as the Constitution of Mankind." In *International Law on the Eve of the Twenty-first Century*, edited by United Nations, 37-51. New York: United Nations Publications.
Vesting, Thomas. 2018a. *Legal Theory and the Media of Law*. Cheltenham: Elgar.
---. 2018b. *Legal Theory*. Munchen-Oxford: Beck-Hart.
Viellechner, Lars. 2012. "Constitutionalism as a Cipher: On the Convergence of Constitutionalist and Pluralist Approaches to the Globalization of Law." *Goettingen Journal of International Law* 4: 599-623.
Vilaca, Guilherme. 2015. "Transnational Law, Functional Differentiation and Evolution." *E-Publica* 2: 41-83.

Wahl, Rainer. 2010. "In Defence of "Constitution." In *The Twilight of Constitutionalism?*, edited by Petra Dobner and Martin Loughlin, 220-244. Oxford: Oxford University Press.
Walker, Neil. 2009. "Taking Constitutionalism Beyond the State." In *Conflict of Laws and Laws of Conflict in Europe and Beyond - Patterns of Supranational and Transnational Juridification*, edited by Rainer Nickel. Oxford: Hart.
Weber, Max. 1968 [1914-1920]. *Economy and Society: An Outline of Interpretive Sociology*. New York: Bedminster Press.
Weiler, Joseph H.H. 2000. "Why Should Europe be a Democracy: The Corruption of Political Culture and the Principle of Toleration." In *The Europeanisation of Law: The Legal Effects of European Integration*, edited by F. Snyder, 213. Oxford: Hart.
---. 2011. "Prologue: global and pluralist constitutionalism – some doubts." In *The Worlds of European Constitutionalism*, edited by Gráinne de Búrca and Joseph H.H. Weiler, 8-18. Cambridge: Cambridge University Press.
Wittgenstein, Ludwig. 1989. *Philosophical Investigations*. Oxford: Blackwell.
Zampino, Ludovica. 2012. *Gunther Teubner e il costituzionalismo sociale. Diritto, globalizzazione, sistemi*. Torino: Giappichelli.

Further Readings

Since its first comprehensive formulations, SC has been applied or referred to in legal and political science literature, to frame different social fields, especially in global legal contexts. Besides the references already recalled above, the following is a list of essential readings.

Digital spaces

Bassini, Marco. 2018. "Fundamental Rights and Private Enforcement in the Digital Age." *European Law Journal* 25: 182–197.
Celeste, Edoardo. 2021. "Digital Punishment: Social Media Exclusion and the Constitutionalising Role of National Courts." *International Review of Law, Computers & Technology*.
Gill, Lex, Dennis Redeker, and Urs Gasser. 2015. "Towards Digital Constitutionalism? Mapping Attempts to Craft an Internet Bill of Rights." *Berkman Center Research Publication No. 2015-15*. http://ssrn.com/abstract=2687120.
Koulu, Riikka. 2019. *Law, Technology and Dispute Resolution. Privatisation of Coercion*. Abington: Routledge.
Pernice, Ingolf. 2020. *Staat und Verfassung in der digitalen Konstellation. Ausgewählte Schriften zym Wandel von Politik, Staat und Verfassung durch das Internet*. Tübingen: Mohr Siebeck.
Redeker, Dennis. 2019. "Exploring the Bottom-Up Constitutionalism of the 'Feminist Principles of the Internet'." *GigaNet: Global Internet Governance Academic Network*. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3490214.
Sheffi, Nofar. 2020. "We Accept: The Constitution of Airbnb." *Transnational Legal Theory* 11: 484-520.
Wielsch, Dan. 2019. "Private Law Regulation of Digital Intermediaries." *European Review of Private Law* 27: 197-220.
Yu, Wenguang. 2020. "Verlagerung von Normsetzungskompetenzen im Internet unter besonderer Berücksichtigung der Cybersecurity Standards." *Zeitschrift für öffentliches Recht und Verwaltungswissenschaft* 73: 161-172.

Economy

Beckers, Anne. forthcoming. “From Corporate Personality to Corporate Governance: The Transformation of International Human Rights Protection in Corporate Governance Structures.” In *Human Rights and Global Governance*, edited by Nehal Bhuta and Rodrigo Vallejo. Oxford: Oxford University Press.

Buchanan, Ruth. 2006. “Legitimating Global Trade Governance: Constitutional and Legal Pluralist Approaches.” *Northern Ireland Legal Quarterly* 57: 657-672.

Castellano, Giuliano, and Andrea Tosato. 2021. “Commercial Law Intersections.” *Hastings Law Journal* 72 (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3558378.

Christodoulidis, Emilios. 2021. *The Redress of Law: Globalisation, Constitutionalism and Market Capture*. Cambridge: Cambridge University Press.

Dukes, Ruth. 2014. *The Labour Constitution: The Enduring Idea of Labour Law*. Oxford: Oxford University Press.

Frerichs, Sabine. 2017. “The Rule of the Market: Economic Constitutionalism Understood Sociologically.” In *Sociological Constitutionalism*, edited by Paul Blokker and Chris Thornhill, 241-264. Cambridge: Cambridge University Press.

Golia, Angelo Jr. 2019. *Imprese transnazionali e vincoli costituzionali. Tra pluralismo e responsabilità*. Milan: FrancoAngeli.

Horst, Johan. 2015. “Lex Financiaria: Das transnationale Finanzmarktrecht der International Swaps and Derivatives Association (ISDA).” *Archiv des Völkerrechts* 53: 461–500.

Joerges, Christian, and Michelle Everson. 2020. “The Legal Proprium of the Economic Constitution.” In *The Law of Political Economy: Transformations of the Function of Law*, edited by Poul F. Kjaer, 33-61. Cambridge: Cambridge University Press.

Environment

Cardesa-Salzmann, Antonio, and Endrius Cocciolo. 2019. “Global Governance, Sustainability and the Earth System. Critical Reflections on the Role of Global Law.” *Transnational Environmental Law* 8: 437-461.

Giannino, Domenico. 2016. “The Virtual State: National Sovereignty and Constitutions Facing Globalization Processes.” *Panóptica* 11: 19-35.

Grätz, Jonas. 2006. “Kollision oder Komplement? Zur Kompatabilität von WTO-Recht mit umweltvölkerrechtlichen Regimen.” *Kritische Justiz*: 407-427.

Kotzé, Louis J. 2014. “Fragmentation Revisited in the Context of Global Environmental Law and Governance.” *South African Law Journal* 131: 548-582.

Health

Becerra, Ronald R. 2019. "Legal Pluralism as a Theory for the Challenges on Environmental Health." *Opinión Jurídica* 18: 233-256.

de Souza Delgado, Joedson, and Gabrielle Jacobi Kölling. 2018. "Contraffazione di medicinali e materie prime farmaceutiche." *Revista DIREITO UFMS* 4: 44-63.

Krajewska, Atina. 2015. "Bioethics and Human Rights in the Constitutional Formation of Global Health." *Laws* 4: 771–802.

Religion

Augsberg, Ino. 2018. "Canon Law as a Transnational Regime." *Journal of Law and Society* 45: 270-286.

Hirschl, Ran, and Ayelet Shachar. 2018. "Competing Orders? The Challenge of Religion to Modern Constitutionalism. " *University of Chicago Law Review* 85: 425-455.

Science

Augsberg, Ino. 2011. "Wissenschaftsverfassungsrecht." In *Der Eigenwert des Verfassungsrechts: Was bleibt von der Verfassung nach der Globalisierung?*, edited by Thomas Vesting and Stefan Korioth, 203-223. Tübingen: Mohr Siebeck.

Hensel, Isabell. 2021. *Grundrechtskonflikte in der Wissenschaft. Vertragsverfahrensrecht für die Kooperation von Hochschulen und Wirtschaft*. Baden-Baden: Nomos.

Sport

Bützler, Bodo P., and Lisa Schöddert. 2019. "FIFA and Human Rights FIFA's Eigen-constitutionalization and its limits." *Verfassungsblog* (blog). 5 July 2019. verfassungsblog.de/fifas-eigen-constitutionalization-and-its-limits/.

Duval, Antoine. 2018. "The Olympic Charter as Constitution: Faster, Higher, Stronger." *Journal of Law and Society* 45: 245-269.

Foster, Ken. 2019. "Global Sports Law Revisited." *Entertainment and Sports Law Journal* 17: 1-14.

Cover: Imbalanced World, 1996, Veronika Dell'Olio (photo: Miriam Aziz)

"Essential to our concept was the establishment of a connection to the work and objectives of the institute. In view of the diversity of the research tasks concerned, we have attempted to highlight an overarching idea that can be understood as the institute's mission. We see this as the ideal of peaceful relations between peoples on the basis of an internationally validated notion of justice…. The depicted sculpture…[symbolizes] an imbalanced world in which some peoples are oppressed while others lay claim to dominance and power. The honeycomb form of the circular disks denotes the [international] state structure. Glass parts … [represent] the individual states …. [The division] of the figure … into two parts [can] be interpreted as the separation of the earth into two unequal worlds. The scissors-shaped base, on the one hand, makes the gap between them clear, on the other hand, a converging movement of the disks is conceivable…. The sculpture [aims] at what is imagined – the possibility of the rapprochement of the two worlds." [transl. by S. Less]

Art in architecture, MPIL, Heidelberg

MAX PLANCK INSTITUTE
FOR COMPARATIVE PUBLIC LAW
AND INTERNATIONAL LAW

Im Neuenheimer Feld 535
D-69120 Heidelberg
Tel.: +49 (0)6221 482 - 1
Fax: +49 (0)6221 482 - 288

www.mpil.de
SSRN@mpil.de