Constitutionalism or Legal Theory: Comments on Gunther Teubner

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I. CONSTITUTIONALISATION OF AUTONOMOUS SUB-SYSTEMS OF WORLD SOCIETY

TEUBNER STARTS WITH the thesis that various ‘global sectors’ are simultaneously currently experiencing processes of juridification and constitutionalisation. This proposition has direct ties to earlier ideas concerning transnational legal pluralism.¹ The continental European positivist conception of legal validity being dependent on the will (and command) of a political body is replaced by a conception of self-reference. The legal system produces law not only by taking up irritations from state legislation but also by acting on impulses from non-political environments. In legal pluralism, the spontaneous emergence of law even becomes the rule, whereas legislation by state authorities appears to be an exception, an external intervention from outside the legal system. In other words, Teubner neglects the idea of a pre-eminence of state law and argues for recognising that the law can be self-producing and is paradoxically founded in itself. This is not meant merely as a challenge to legal theory, for example as a challenge to Hart’s theory of the ultimate rule of recognition.² Rather, Teubner shares the view that the legal system solves its foundational paradox pragmatically and has already developed to the point where one can meaningfully speak of a ‘world legal system’.³ In other words, the idea is that an autonomous network of legal communications has arisen that produces

³ H Coing, Zur Geschichte des Privatrechtsystems, (Frankfurt am Main, Suhrkamp, 1962), at 28; see, more generally, N Luhmann, Das Recht der Gesellschaft, (Frankfurt am Main, Suhrkamp, 1993), at 571–86.
Vesting

its inventory of norms primarily from a plurality of transnational processes of rule-making. The legal system refers to various processes of self-organisation and self-coordination on the global level, for example the incremental forming of conventions (e.g., lex mercatoria), the reception of internal standards set by networks of companies, organisations and regulatory agencies (e.g., world-wide standardisation processes), rules emerging out of market relations (e.g., contracts between global players) and so on. However, Teubner’s paper discussed here not only wants to demonstrate that such rules enjoy de jure ‘normative’ quality; a situation along the lines of a constitutional pluralism beyond the nation-state is moving forward. The thesis is that we are witnessing ‘the constitutionalisation of a multiplicity of autonomous subsystems of world society’, the emergence of a ‘multiplicity of civil constitutions’.

II. THE WEAK CONCEPTION OF SOCIETAL CONSTITUTIONALISM

Teubner touches on an ambiguous usage of constitutionalism. In the final analysis it operates with two different conceptions of ‘societal constitutionalism’, which I call the strong and weak conceptions. In its weak version, the paper observes factual processes of institutionalising ‘constitutional elements’ in ‘global sectors’; it appeals to the fact that ‘every process of juridification also contains latent constitutional normings’. Teubner argues that the internet may serve as an example for such a constitutionalising process. Similar to Lawrence Lessig,4 he understands most of the legal questions that the internet gives rise to as constitutional questions. Thus he sees the project of answering these questions as processes concerning the construction of constitutional norms and institutions. To illustrate this thesis, Teubner uses Cubby v Compuserve and claims that this case could be interpreted as an example where different political groups argue about access to Compuserve’s websites. Underlying this case, it is said, is the ‘more fundamental question of a universal political right of access to digital communication’.

If one interprets Teubner’s considerations within the framework of a weak conception of societal constitutionalism one can by and large agree with his thesis of simultaneous juridification and constitutionalisation. Recourse to arguments of various national constitutional cultures, which represent ‘a stock of historical experience, of procedures, terms, principles, and norms’, is productive even for a new global law that relies more heavily than state law on mechanisms of spontaneous law-making. In this case, the new phenomena do not so much touch on the constitution as

such, but rather take recourse to individual politico-institutional and legal elements of the various national constitutional orders. From this perspective, the national constitutions would be tapped to solve legal problems at the transnational level by applying national constitutional elements to the new phenomena in a way appropriate to transnational network like structures. For example, most observers agree on the increasing importance of technical standards and thus the related forms of standardisation and rule-making being produced by the internet (‘lex informatica’). The increasing importance of technical standards produces new types of path dependencies for technological developments that cannot be accepted in view of the public interest in a technologically open internet. The normative idea that the permissible areas of interaction between ‘digital communication structures’ and their environments must be limited by ‘fundamental legal norms’ is justified against this background. The development of secondary norms, of meta-rules of rule-making, can also contribute to this. Certain legal questions concerning access to the internet, as they arose in the Cubby v Compuserve case, for instance, may also be better structured by recourse to the national constitutional elements, for example by recourse to differences evolved in print media (eg publishing v distributing) or to components of the American Supreme Court’s ‘fairness doctrine’.

III. THE STRONG CONCEPTION OF SOCIETAL CONSTITUTIONALISM

I am much more sceptical of the strong version of societal constitutionalism. The strong version wants to give the constitutional concept in the areas of global phenomena a similarly prominent rank as it had once occupied in the nation-state context. The goal of this concept is to put social organisations under a ‘constitutionalising pressure’ and secure the ‘the multiplicity of social differentiation against swamping tendencies.’ Teubner believes that modern society is characterised by an increasing tendency toward ‘instrumental calculation’ and ‘bureaucratic organisation’. This justifies overlapping the constitution with a self-reflexive property. Against this background societal constitutionalism is given the task of preserving ‘the chances of articulating so-called non-rational logics of action against the dominant social rationalisation trend’. A critique of this

A strong version of societal constitutionalism assumes certain fundamental considerations and reflections regarding the modern conception of a constitution which I can only outline here.

As Teubner himself admits, it is extremely difficult to separate the concept of a constitution from its close relationship with certain characteristics of the nation-state. Yet the project is predicated precisely on the possibility of separating both aspects. The idea of a constitution, which has its origins in Roman and canonical law, has been tied to the nation-state since the 18th century insofar as it takes as its basis the creation of a stable political order through a positive act of will, that is, a will that severs itself from the fetters and limitations of tradition and becomes effective in a ‘revolutionary’ way. As James Tully puts it:

‘A modern constitution is an act whereby a people frees itself (or themselves) from custom and imposes a new form of association on itself by an act of will, reason and agreement.’

Even if the radical voluntarism of the modern constitutional concept, deriving the constitution from a single will of a sovereign nation, is basically a product of the French revolution (in particular: the radical wing of the French constitutional movement influenced by Rousseau), it is beyond question that some notion of political unity belongs to the modern concept of a constitution. This is even the case in the liberal tradition of modern political thought, as a quick glance at the theory of representation, a core component of modern constitutionalism, may show. ‘A Multitude of men made One Person,’ Thomas Hobbes states,

‘when they are by one man, or one Person, Represented; so that it be done with the consent of every one of that Multitude in particular. For it is the Unity of the Representer, not the Unity of the Represented, that maketh the Person One.’

After the consolidation of the sovereign state and the Westphalian system, the reference point of this political conception of unity is shifting from the unity of Hobbes’ artificial person to the unity of representing a territory with clear and well-defined borders. In the French revolution this conception of political unity within a defined geographic region served as the constitutional basis for the political form of existence of a group of people. The latter are conceived less as individual people, but rather as

members of a population, as bearers of natural and cultural commonalities. As bearers of natural and cultural communities, a nation, for example, is able to constitute a political body and its representation by one ‘representer’ (for example, the will of a parliamentary majority). Seen from the perspective of sociology or system theory, the constitutional concept assumes a political or regional concept of society. In this the modern constitutional concept continues in the Aristotelian ‘politeia’ tradition, yet also transforms the assumption of a natural, god-given order through the idea of a transparent, controllable and politically viable order. This means that the ‘modern’ constitutional concept is in reality only half modern: from the beginning it oscillated between the political system as a spatial order and society as a trans-spatial concept. For this reason constitutionalism has never been able to find a stable basis for its identity beyond its self-given role as a constitutional document.10

The notion of political unity within the constitutional concept has led many authors to accentuate the close relationship between constitutional and religious thought. Particularly in more or less free floating theories of the politically constituted community, as one finds for example with Rousseau or later with Carl Schmitt, one must speak of a religious nature of the politico-legal authorisation of sovereignty. Nevertheless, an explanation that presents the modern constitutional concept as a secular variant of a religious community is only satisfactory if it takes into consideration the fact that both the idea of a common territory as well as the idea of a single political (founding) will have their origins in the Enlightenment’s formal natural law. Yet social philosophy’s rule of reason, in turn, is itself unthinkable without the rationalism of modernity, and modern rationality is in the first instance the result of a break with the heteronymous ordering and rationality principles of ancient Europe, which was replaced by the autonomous geometric world view of the modern mathematical natural sciences of Galileo, Descartes, Hobbes and Newton.11 Thus the world of theory and also the world of constitutional philosophy and constitutional theory become the object of a ‘mathematical blueprint’.12 Constitutional thought is therefore bound by a deductive-axiomatic system of thought. One can now only speak of a constitution if one speaks of a system, and a system is only given

‘when the relationship between the individual pieces of knowledge is without gaps and can be presented in the form of deductions from certain

10See N Luhmann, Die Politik der Gesellschaft, (Frankfurt am Main, Suhrkamp, 1993), at 392.
12M Heidegger, Die Frage nach dem Ding (1935/36), 3rd edn (Tübingen, Mohr Siebeck, 1987), at 42–92 & 69; on the relationships, see, also, above n.11 at 255.
axioms, in other words, the individual statements are able to be deductively
derived as logical results from certain basic assumptions’.13

In my view, this is the reason why the constitutional concept gets caught
in the mire of a logic of identity even if the moment of foundation, the
generation of sovereignty, is not accentuated. This is true for its liberal
reading, focusing, as does English constitutionalism, on a balance
between tradition (monarchy) and reason (parliament). But it is also true
for any systematic approach: The balance between political and social
forces always poses the question of commonalities of all forces relating
to the political unity. In any case, social philosophy assumes, at least in
some liberal variant, the unity of politics and law. It applies this unity to
a politically defined authority, to an artificial person who rules a
commonwealth. ‘Security’ and ‘Freedom’ no longer exist in this com-
monwealth as they do in the state of nature, but must be created. In
Thomas Hobbes’ Leviathan this conception of unity manifests itself in an
authorisation of a sovereign will by law, but, as Hobbes stresses, can be
represented only by one will, the sovereign will of the common power,
embodied in the king.14 Although somewhat simplified, one can
nonetheless say that the constitutional concept since the French revolu-
tion, as seen from the perspective of the legal system, is to bind the social
construction of order to the principles, rules and conventions of a
national area of law. With the coming of age of the print medium this
implies a successively increasing importance of constitutional rules and
institutions in American, English, French and German texts on constitu-
tionalism, in (constitutional) documents and other forms of publications.
Finally, beyond publications, the constitutional concept can exercise
different degrees of pressure on politics, law and other communication
networks. For example, this influence is seen early on in the English
political system,15 but not in the legal system because the influence of
social philosophy remained weak16 as other communications media, the
oral (local) tradition of common law dominated.

This discrepancy between the logic of identity, which the constitutional
concept assumes for its idea of political unity, and the differences to the
real world, which the constitution recognises in its section on civil rights

13 H Coing, Zur Geschichte des Privatrechtsystems, (Frankfurt am Main, Suhrkamp, 1962), at 9.
14 ‘The only way to erect … a Common Power … is, to confer all their power and strength
upon one Man, or upon one Assembly of men, that may reduce all their Wills, by plurality of
voices, unto one Will.’ T Hobbes, Leviathan (1651), R Tuck (ed), (Cambridge, Cambridge
University Press, 1996), at 120.
15 D Grimm, Die Zukunft der Verfassung, (Frankfurt am Main, Suhrkamp, 1991), at 51, 52, 104
& 105.
16 GJ Postema, Bentham and the Common Law Tradition, (Oxford, Oxford University Press,
and liberties, led to the failure of the French revolution. The tension between the advantages of trade and human rights, on the one hand, and a single political will, on the other, resolved in the radical constitutional movement in favour of an alleged homogenous civic virtue, ended in a reign of terror legitimated by messianism. The divergence between unity and diversity in constitutionalism became even greater with the emergence of parties, associations and social organisations since the industrialisation of the 19th century. In course of the 20th century this discrepancy changed the constitution into a politico-strategic manoeuvring instrument by very different social and political groups. On the threshold of the 21st century constitutions are still exported all over the world, but their binding force has become more dubious than ever in the Western countries, as can be perceived, for instance, from the fact that constitutional questions overwhelmingly tend to become virulent in connection with media events (presidential elections, EU-constitutional conventions, staged constitutional conflicts for political ‘existential questions’, etc). In recent French political philosophy the symbolic and religious value of the idea of political unity in the modern constitutional concept is once again emphasised. Accordingly, an important function of the constitutional concept is to symbolise a simplified, compact order in a world that, in reality, is complex and amorphous. The constitutional concept as a simplified ‘unity formula’ would then have an independent meaning, but would also only represent only a mediated reality, so to speak. It would no longer be about a ‘representation of the real’, but rather about ‘the reality of a representation, its effectiveness and efficiency’. Yet even if one argues in this manner one cannot escape the fact that the embodiment of identity, the reality of a representation, has so far only been effectual in the nation-state and its various myths of unity. The 20th century experiences with this ‘unity myth’ hardly suggest a continuation of this mythology. Consequently, a liberal reading of the constitutional concept’s mythos of the unity of the constitution has to be rejected: instead a spontaneous self-coordination of individual interests must be chosen as the starting point, legally anchored in individual liberties (human rights) and the cognitive ‘social capital’ contained therein. The constitutional concept then remains as an (imaginary) reference point for a nation-state-like past, retained in texts on constitutional theory and the various attempts to

17 See above n.8 at 918 & 919; see, also, F Furet, Das Ende der Illusion, (München/Zürich, Piper, 1995), at 49.
20 For such a perspective, see KH Ladeur, Negative Freiheitsrechte und gesellschaftliche Selbstorganisation, (Tübingen, Mohr Siebeck, 2000), at 21–46.
harmonise civil law forms of self-coordination (civil rights) and public interest (politics), material to which a weak conception of societal constitutionalism could and should turn.

Teubner himself indicates such a perspective and he even claims that the ‘oscillation between the political and the social’ is problematic for traditional constitutionalism. However, instead of assigning the constitutional concept a peripheral role in a weak conception for the new phenomena of global networking, he opts for the construction of ‘structural coupling’, a theoretical component of systems theory. By this operation Teubner hopes to be able to free constitutionalism from the ‘fascination of the nation-state architecture’, the state-cantering of all constitutionalism, and generalise the constitutional concept by adding the term ‘civil’. Yet this cannot work even as a theoretical operation and is therefore also doomed to failure in practice. Again, I can only outline my objections.

For Luhmann the rise of constitutions expresses a very specific coupling, namely the link between law and politics since the American Declaration of Independence. The constitutional concept forces systems theory to qualify its starting point ‘system’. The notion of the legal system’s autonomy must be expanded by politics (and vice versa) via the concept of ‘structural coupling’. According to this conception, however, both functional systems remain autonomous, operatively closed, continuously self-producing and reproducing different systems. They function exclusively within their own system, whereas the information exchange between law and politics is only possible within a very narrow band where reciprocal irritations may occur. This does not exclude, but instead includes the fact that reciprocal irritations can have enormous consequences for the dynamics of the respective system: the ‘coupling mechanisms’ can create a ‘structural drift’ that leads to a memory of a unique history of constitutionalism in each of the different systems which can only be explained by the coupling mechanism between the systems. Teubner himself cites constitutional review of legislation as an example for the causal effects of such a connection: on the one hand, political decisions are partially neutralised in favour of legal principles and consistency, on the other hand, the legal system is forced to take over the language of politics in its results-oriented weighing of interests. This is in fact the case in the jurisdiction of the German Constitutional court (Bundesverfassungsgericht); another example for this would be the jurisdiction of the ECJ. However, despite structural couplings, it is clear that from the perspective of systems theory, modern society is no longer conceivable — as for example the Greek polis — as a political unity. Unity can now only be conceived (formally) as a communicatively

21 N Luhmann, Das Recht der Gesellschaft, (Frankfurt am Main, Suhrkamp, 1993), at 470.
networked global society and (substantively) as an ensemble of functionally differentiated autonomous global systems. This also has consequences for the self-description of law and its boundaries: only the law can produce and reproduce its own boundaries. System theory thus adopts (and modifies) the idea, developed by the jurisprudence around 1800, of a completely positive and philosophically systematic law, in other words, a law that, independently from non-legal, external influences, is able to produce and renew its own unity as a ‘system’ (even if, at first, this is within the framework of the nation-state).

Teubner’s ideas on transnational constitutional pluralism are built upon this model of autonomous global communications systems. There are, to be sure, some differences in the accents regarding the possibility of a ‘globalisation of the political system’, but otherwise Teubners own theoretical considerations are consistent with the Luhmannian theory of differentiation. And this is the point where a lack of consistency in the idea of societal constitutionalism occurs. Teubner wants to separate the constitutional concept from its traditional moorings in politics — to free the constitutional concept from its focus on ‘seeing the constitution as tied to state-political action’ — precisely because the notion of a ‘world constitutional law’ has limited effectiveness. However, he remains unclear how modern constitutionalism can be detached from its nation-state moorings without robbing it of its uniqueness and, therefore, making it impossible to establish an agreement on the content of the concept.

The first objection can be formulated within the framework of system theory itself: if the constitution is the product of a specific coupling since the second half of the 18th century, the constitutional concept cannot simply be detached from its counterpart politics and reattached to other subsystems such as the economy, science or the internet. If politics is deleted from the structural coupling ‘constitution’, there remains only law. How various coupling effects with other systems is to once again create the constitution is mysterious, for example how law and economics becomes an economic constitution, law and science a scientific constitution, or law and the internet a digital constitution. The already precarious unity of the constitutional concept in system theory would finally dissolve into a myriad of ‘structural couplings’ and the constitutional concept would mutate from a specific structural coupling (the coupling of law and politics) into a highly variable relational concept of different possibilities of couplings. Of course, it is conceivable that world society is moving towards this direction. But the objection remains, however, that it is not conceivable within system theory that ‘structural couplings’ sometimes spring up

here, sometimes there. From the perspective of system theory, a ‘multiplicity of civil constitutions’ is simply not possible; at any rate, not without a loss of internal consistency. A plurality of couplings would make it impossible to determine which ‘autonomous global subsystem’ the constitution’s autonomy is anchored in: instead of politics and the economy, the law and the internet, or everywhere or only in the law?

Nor can a more precise determination of ‘civil constitutions’ be won by the addition of such descriptions as ‘structural coupling subsystem/law’, ‘norm hierarchy’, ‘judicial review’ or ‘dual constitution of organised and spontaneous spheres’. Above all, such a procedure cannot resolve the question of what constitutes the unity of these criteria. According to the traditional constitutional concept, the common basis of all the components of a constitution — civil rights, democratic procedures, political institutions — lies in the relation between these components and the nation-state. The constitutional concept can function under this condition: in the context of the nation-state, the difference, for example, between the constitutional characteristics of federal judicial power (government structure) and civil rights (society) can be traced back to the unity of a single constitutional concept. This ‘unity’ is, of course, a self-produced context, a myth, in the medium of language/writing. Yet this self-description has been able to make itself plausible as a real or at least symbolically real concept for over two hundred years. It must be recalled, however, that the environment was congenial: the existence and ‘dominion’ of the nation-state. The more the nation-state’s contours were eroded internally by its transformation into the welfare state in the 20th century and the more its importance is further relativised externally by ‘globalisation’ in the 21st century, the less clear and relevant the concepts tied to the nation-state become. This applies also and particularly to the constitutional concept; in any case, Teubner needs to demonstrate that the ‘global sectors’ which are to serve as the new point of reference for a ‘multiplicity of civil constitutions’ have similarly stable, unity inducing qualities as the nation-state once did. There may be an example for this, but the internet is not it. The internet is not an ‘autonomous communications system’ (12), that is, a form with clear boundaries, but rather a new type of communications medium based on a digital code by means of which all other communications media (language, pictures and sound) can be integrated. The internet is thus a new ‘trans-medium’ which, in principle,

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has no boundaries. That is what makes the internet such an interesting object of study. It is likely that the internet will restructure the functional systems’ media characteristics and thus also change the modern society’s concept of differentiation. From this insight the thesis that there will not be a ‘digital constitution’, just as there has never been a legally relevant ‘language constitution’, can be developed. More generally formulated: the network of networks which will arise as a result of the internet takes the rug out from under the assumption of autonomous subsystems; a strong conception of ‘civil constitutions’ has nothing to latch onto.

If this analysis is correct, then the consistency of societal constitutionalism can only be founded on the basis of political philosophy. Its basis would then be the good intention to mobilise the constitutional concept for the institutionalisation of self-enlightening potential. With Teubner, the motive of reducing the constitutional concept to its self-reflexive ‘political’ characteristics with the help of the term ‘civil’ is not as prominent as it is with certain adherents of the ‘civil society’ or as it is in Jürgen Habermas’ political philosophy. Yet similarly to Habermas, where the vigilant citizenry, under the protection of the ‘autonomous public’ lays siege to state power, Teubner’s concern is for a world-wide protection of ‘autonomy spaces’ that secure the opportunities of expression for so-called non-rational logics against the dominant social trend towards rationalism. This consideration is also explicitly associated with a post-Rawlsian approach to a theory of ‘deliberative democracy’ that is not limited to politics. Yet already the concept of the societal constitutionalism is revealing in this context: its meaning feeds, in the end, from a negative fixation on the myths of the nation-state. The use of the term ‘constitution’ permits ascribing a normative ‘added value’ to the new phenomena of global networks, but in reality this alleged ‘added value’ only conceals the high volatility and vagueness of such concepts as ‘the digital constitution’. In the end, the constitutional concept only functions as a store to keep a transfigured memory of democracy’s creation myths alive. All this indicates that the constitution today can only be maintained — if at all — as a weak concept. For the new phenomena beyond the nation-state, the alternative to a state-centred constitutional theory can only lie in rejecting constitutional theory and replacing it with legal theory.
