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Societal Constitutionalism: Background, Theory, Debates

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Abstract: The article provides a systematic outline and refinement of societal constitutionalism (SC), one of the frameworks emerged in contemporary legal theory to analyse constitutional phenomena. After an introduction in Section 1, Section 2 summarises SC's theoretical background, namely the debates on the Economic Constitution (2.1), legal pluralism (2.2), systems theory (2.3), and the work of David Sciulli (2.4). Section 3 explains SC's analytical limb, which on the one hand criticises some tenets of state-centred constitutionalism (3.1); and on the other hand identifies functions, arenas, processes, and structures of a constitutionalised social system (3.2). Section 4 turns to SC's normative limb, pointing to some constitutional strategies that increase social systems' capacities of self-limitation (4.1); and develop a law of inter-constitutional collisions (4.2). Section 5 addresses the main competing approaches and criticisms, which are based on state-centred constitutionalism (5.1); on international/global constitutionalism (5.2); and on contestatory/material constitutionalism (5.3).

Keywords: democracy beyond the state, global law, legal pluralism, societal constitutionalism, systems theory

1 Introduction

In a world society more and more characterised by transnational private and hybrid actors with quasi-public authority, constitutional theorists can observe

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several trends that do not easily fit into the analytical and normative frameworks of modern, state-centred constitutionalism. National and international courts increasingly apply the once exceptional doctrine of horizontal effects of fundamental rights, often based on domestic private law provisions creatively interpreted through both binding and non-binding international law instruments, scientific findings, and codes of conduct of different nature.[1] Shareholders activism has proved effective – often more than public regulation – in putting significant pressures on some of the most relevant private actors of the global financial economy.[2] Global private actors establish their own internal dispute-settlement mechanisms with quasi-constitutional functions, applying human rights law.[3] More generally, the autonomisation of functionally differentiated systems at global level – in the varying forms of regimes, organisations, networks, and so on – has brought about growing conflicts among fragments of society based on mutually irreducible rationalities: international economic law collides with health law; modern, Western law with indigenous normativity; and so on.

These trends and, more generally, this *polycontexturality*[4] point at more general constitutional dynamics – caused or rather unveiled by globalisation – and call for more inclusive and elaborate theoretical frameworks. Starting from

1 Among many potential examples, see in the most recent judicial practice The Hague District Court, *Milieudefensie v Royal Dutch Shell*, 26 May 2021, ordering Royal Dutch Shell to reduce the CO_2 emissions of the Shell group by net 45% in 2030, compared to 2019 levels, through the Shell group's corporate policy. The decision was based on the Book 6 Section 162 Dutch Civil Code (duty of care), construed through international human rights law (ECHR and ICCPR) formally binding states only; and international soft law on business and human rights (UN Guiding Principles on Business and Human Rights). An English translation of the judgement is available at <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339> accessed 29 July 2021. For an analysis of the decision from the perspective of societal constitutionalism, see Ioannis Kampourakis, 'The Power of Open Norms. Milieudefensie et al. v Royal Dutch Shell' (*Verfassungsblog*, 15 June 2021) <https://verfassungsblog.de/the-power-of-open-norms/> accessed 29 July 2021.

2 See for example the recent 'Gamestop short squeeze' which took place in January 2021: see Rob Davies, 'GameStop: how Reddit amateurs took aim at Wall Street's short-sellers' *The Guardian* (London, 28 January 2021) <https://www.theguardian.com/business/2021/jan/28/gamestop-how-reddits-amateurs-tripped-wall-streets-short-sellers> accessed 29 July 2021.

3 The most relevant example is probably Facebook's Oversight Board: see <https://oversightboard.com/> accessed 29 July 2021. See Angelo Jr Golia, *Beyond Oversight. Advancing Societal Constitutionalism in the Age of Surveillance Capitalism* (2021).

4 That is, a situation characterised by a plurality of mutually irreducible social perspectives. They are not compatible with one another and can be overcome only by rejection of values, which in turn lead to different binary distinctions. See Gotthard Günther, 'Life as Poly-Contexturality' in Gotthard Günther (ed), *Beiträge zur Grundlegung einer operationsfähigen Dialektik* (Vol 1, Meiner 1976).

2003[5] and then more thoroughly in 2012,[6] an attempt in this direction was made in the form of 'societal constitutionalism' (SC). Since then, such approach has developed into a full-fledged theory, increasingly used as a framework to analyse constitutionality beyond the state, notably in the transnational economy and in the digital sphere. At the same time, it has been met with scepticism and open criticism by other schools of thought, both within the state-centred tradition and other strands more open to non-state constitutionality.

In the light of this, the purpose of the present article is threefold. Firstly, to briefly recall the main points of reference of SC's legal-theoretical background. This is aimed to better contextualise its theoretical toolkit and therefore to find a common discursive space with more traditional legal-theoretical approaches to (constitutional) law. Secondly, to provide a comprehensive outline and refinement of SC, both in analytical and in normative terms. Thirdly, to take stock and address some of the criticisms raised since its early formulations, notably during the last decade.

Already at this introductory stage, some preliminary points are in order. First, it is useful to provide a general definition. SC can be considered as a legal theory which identifies trends of constitutionalisation beyond the nation state in two different directions. It argues that outside the limits of the nation state constitutions emerge in the institutions of international politics and they emerge simultaneously outside the limits of politics in the 'private' sectors of global society. SC, then, analyses the conditions for the emergence, co-existence and further evolution of such constitutional processes. In this sense, 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 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,[7] 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

5 Gunther Teubner, 'Globale Zivilverfassungen: Alternativen zur staatszentrierten Verfassungstheorie' (2003) 63 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, 1, translated as Gunther Teubner, 'Societal Constitutionalism: Alternatives to State-centred Constitutional Theory?' in Christian Joerges, Inger-Johanne Sand and Gunther Teubner (eds), *Transnational Governance and Constitutionalism* (Hart 2004).

6 Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford University Press 2012).

7 David Sciulli, *Theory of Societal Constitutionalism: Foundations of a Non-Marxist Critical Theory* (Cambridge University Press 1992) 40–53.

by bureaucratic organisation; instrumental rationality as the only one recognised in all social spheres; and authoritarian tendencies in several social fields.[8]

SC is also confronted with the so-called Böckenförde dilemma, whereby 'the liberal secularized state lives by prerequisites which it cannot guarantee itself',[9] 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'.[10] 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.[11]

However legitimised, political systems cannot govern the worlds of wealth, faith, knowledge, education within the functionally differentiated society.[12] If they nevertheless aim to have some influence on social processes, political systems need to be responsive 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',[13] 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* legal theory, insofar as it points to the intrinsic limits of some tenets of modern constitutional tradition and to the way they cover or overlook different forms of societal

8 Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (Bedminster Press 1968 [1914–1920]) 212–254, 926–938.

9 Ernst-Wolfgang Böckenförde, *Staat, Gesellschaft, Freiheit – Studien zur Staatstheorie und zum Verfassungsrecht* (Surkhamp 1976) 60.

10 Schmitt 1985 [1922].

11 Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (n 6).

12 Gunther Teubner, 'Altera Pars Audiatur: Law in the Collision of Discourses' in Richard Rawlings (ed), *Law, Society and Economy* (Clarendon 1997).

13 See Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (MIT Press 1985 [1922]); and Carl Schmitt, 'State Ethics and the Pluralist State' in Arthur J Jacobson and Bernhard Schlink (eds), *Weimar A Jurisprudence of Crisis* (University of California Press 2001 [1930]).

power.[14] 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.'[15]

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';[16] or to a 'hyper-socialisation' of law, leading to its 'capture' by politics or other regulated subsystems. As a consequence, state interventions would risk producing either irrelevant or destructive effects for society or for law itself.[17] The answer of SC is neither a sociologisation of legal theory, typical of most 'law & …' approaches, nor the de-legalisation/de-regulation 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, ie a legal theory which, while remaining in the field of jurisprudence, has its roots in sociological analyses, particularly systems

14 For the relationship between SC and different (both European and American) strands of critical legal theory, see generally Gunther Teubner, *Critical Theory and Legal Autopoiesis. The Case for Societal Constitutionalism* (Manchester University Press 2019), spec 13–39; and Gunther Teubner, 'How the Law Thinks: Towards a Constructivist Epistemology of Law' (1989) 23 Law and Society Review 727. See also below 2.3, spec n 61 and n 73; 2.4, spec n 76; and 5.3, spec n 210.

15 Roberto Esposito, *Istituzione* (Il Mulino 2021) 67 (our translation).

16 Jürgen Habermas, 'Law as Medium and Law as Institution' in G Teubner (ed), *Dilemmas of Law in the Welfare State* (de Gruyter 1985) 211.

17 Gunther Teubner, 'After Legal Instrumentalism? Strategic Models of Post-Regulatory Law' in G Teubner (ed), *Dilemmas of Law in the Welfare State* (de Gruyter 1985).

theory.[18] Therefore, it uses concepts and vocabulary far from those to which the constitutionalist is normally used. Secondly, SC has been developed especially in the past decade in a series of articles and two major books,[19] 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.

The article proceeds as follows. After this introduction, section B summarises SC's theoretical background, namely the debates on the Economic Constitution (2.1), legal pluralism (2.2), systems theory (2.3), and the work of David Sciulli (2.4). Section 3 explains SC's analytical limb, which on the one hand criticises some tenets of state-centred constitutionalism (3.1); and on the other hand identifies functions, arenas, processes, and structures of a constitutionalised social system (3.2). Section 4 turns to SC's normative limb, pointing to some constitutional strategies that increase social systems' capacities of self-limitation (4.1); and develop a law of inter-constitutional collisions (4.2). Section 5 addresses the main competing approaches and criticisms, which are based on state-centred constitutionalism (5.1); on international/global constitutionalism (5.2); and on contestatory/material constitutionalism (5.3).

2 Legal Theory Background

The sociological background of SC is constituted by general theories of social differentiation (Durkheim, Parsons, Luhmann), the recently developed constitutional sociology,[20] and the theory of private government.[21] However, SC links

18 Gunther Teubner, 'The Project of Constitutional Sociology: Irritating Nation State Constitutionalism' (2013) 4 Transnational Legal Theory 44; and Gunther Teubner, 'Societal Constitutionalism: Nine Variations on a Theme by David Sciulli' in Paul Blokker and Chris Thornhill (eds), *Sociological Constitutionalism* (Cambridge University Press 2017).

19 Namely Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (n 6); and Poul F Kjaer, *Constitutionalism in the Global Realm: A Sociological Approach* (Routledge 2014).

20 Chris Thornhill, *A Sociology of Constitutions: Constitutions and State Legitimacy in Historical-Sociological Perspective* (Cambridge University Press 2011).

21 Philip Selznick, *Law, Society and Industrial Justice* (Russell Sage 1969).

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' (2.1); pluralist theories of law (2.2); Niklas Luhmann's theory of functional differentiation (2.3); David Sciulli's constitutional theory (2.4).

2.1 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,[22] as well as social-democratic legal thinkers.[23] 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.[24] In this sense, it is only since the Weimar era that state (ie 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.[25] As such, the economic constitution is 'a comprehensive decision (*Gesamtentscheidung*) concerning the nature and form of the process of socio-economic cooperation'.[26] The economic constitution, then, is neither the mere synthesis of some social regularities, nor a sort of spontaneous order,[27] nor a

22 Franz Böhm, Walter Eucken and Hans Großmann-Doerth (eds), *Die Ordnung der Wirtschaft als geschichtliche Aufgabe und rechtsschöpferische Leistung* (Ordnung der Wirtschaft, Kohlhammer 1937).

23 Hugo Sinzheimer, 'Das Wesen des Arbeitsrechts' in Otto Kahn-Freund and Thilo Ramm (eds), *Arbeitsrecht und Rechtssoziologie* (Europäische Verlagsanstalt 1976 [1927]).

24 Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (n 6) 24–30.

25 Böhm, Eucken and Großmann-Doerth (eds), *Die Ordnung der Wirtschaft als geschichtliche Aufgabe und rechtsschöpferische Leistung*, 57.

26 Franz Böhm, *Wettbewerb und Monopolkampf: Eine Untersuchung zur Frage des wirtschaftlichen Kampfrechts und zur Frage der rechtlichen Struktur der geltenden Wirtschaftsordnung* (Heymanns 1933) 107.

27 Gunther Teubner, *Law as an Autopoietic System* (Blackwell 1993) 57.

de-politicised social space, as in some late strands of ordoliberal thought.[28] 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, ie the economy. SC deals with this difficulty by resorting to concepts of systems theory, notably interference and structural coupling.[29] 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 ordoliberal 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.[30]

2.2 Legal Pluralism

Coming to legal pluralism, one major point of reference for SC is Otto von Gierke's pluralist theory of associations (*Genossenschaftstheorie*).[31] 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

28 Ernst Joachim Mestmäcker (ed), *Freiheit und Ordnung in der Marktwirtschaft* (Nomos 1980).
29 See below 2.3.
30 Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (n 6) 31.
31 Otto von Gierke, *Die Genossenschaftstheorie und die deutsche Rechtsprechung* (Weidmann 1863).

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.[32]

Another point of reference is Eugen Ehrlich's theory of living law and legal pluralism.[33] 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.[34] Ehrlich's conception of 'living law' questioned the main assumptions of modern legal theory, eg the subordination of the judge to (written) law, the state monopoly over lawmaking and the unity/coherence/completeness of the legal system.[35] 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.[36]

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.[37] 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'.[38] By emphasising the institutional and collective dimension of law, and by recognising that the autonomy of the institution may have different

32 Gunther Teubner, 'Enterprise Corporatism: New Industrial Policy and the "Essence" of the Legal Person' (1988) 36 The American Journal of Comparative Law 130, 133–140.

33 Gunther Teubner, 'The Two Faces of Janus: Rethinking Legal Pluralism' (1992) 13 Cardozo Law Review 1443; Gunther Teubner, 'Global Bukowina: Legal Pluralism in the World Society' in Gunther Teubner (ed), *Global Law without a State* (Dartmouth Gower 1997).

34 Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* (Harvard University Press 1936).

35 Eugen Ehrlich, *Die juristische Logik* (Mohr & Siebeck 1918).

36 Niklas Luhmann, 'The Coding of the Legal System' in A Febbrajo and G Teubner (eds), *State, Law, and Economy as Autopoietic Systems: Regulation and Autonomy in a New Perspective* (Giuffrè 1992) 145–185.

37 Maurice Hauriou, 'La Théorie de l'institution et de la fondation: Essai de vitalisme social' in Maurice Hauriou (ed), *Aux sources du droit* (Bloud & Gay 1986 [1933]); Santi Romano, *The Legal Order* (Routledge 2017 [1918]).

38 Romano, *The Legal Order*, 13.

degrees of development,[39] such theories anticipated systems theory's and SC's reflections on the degrees of 'autopoietic closure' of legal systems.[40] 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.[41] However, and despite the points of contact between Romano's institutionalism and systems theory approaches to law,[42] 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.[43] 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.[44]

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.[45] 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.[46] 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

39 Ibid, 17–25.

40 Teubner, *Law as an Autopoietic System* (n 27); Gunther Teubner, 'Evolution of Autopoietic Law' in G Teubner (ed), *Autopoietic Law: A New Approach to Law and Society* (de Gruyter 1987) 25–46. See below 2.3.

41 Romano, *The Legal Order*, 69 ff. See below 4.2.

42 Mariano Croce and Marco Goldoni, *The Legacy of Pluralism. The Continental Jurisprudence of Santi Romano, Carl Schmitt, and Costantino Mortati* (Stanford University Press 2020), 191 ff.

43 Herbert L A Hart, *The Concept of Law* (Clarendon 1961).

44 For a more detailed analysis of similarities and differences between SC and classic legal institutionalism, see Angelo Jr Golia, 'Legacy Lost(?): Investigating the Disappearance of Classic Legal Institutionalism' (2021) MPIL Research Paper Series No 2021-12 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3847762> accessed 29 July 2021.

45 Georges Gurvitch, *The Sociology of Law* (K Paul, Trench, Trubner & Co 1947).

46 Ibid.

beyond the limits of political organisation'.[47] 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);[48] assumes the plurality of ideas of justice;[49] highlights the interaction between spontaneous and organised sectors within each social system;[50] stresses the crucial importance of external pressures from politics and other sectors toward the self-limitation of social systems;[51] 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.[52]

2.3 Systems Theory

The main sociological background of SC is systems theory and, in particular, Niklas Luhmann's theory of functional differentiation.[53] 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;

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47 Georges Gurvitch, *L'expérience juridique et la philosophie pluraliste du droit* (Pedone 1935).

48 Gunther Teubner, 'The Many-Headed Hydra: Networks as Higher-Order Collective Actors' in J McCahery, S Picciotto and C Scott (eds), *Corporate Control and Accountability* (Clarendon Press 1993); Gunther Teubner, 'Hybrid Laws: Constitutionalizing Private Governance Networks' in Robert A Kagan, Martin Krygier and Kenneth Winston (eds), *Legality and Community: On the Intellectual Legacy of Philip Selznick* (Berkeley Public Policy Press 2002).

49 Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (n 6) 148–149. See below 3.2.2 and 5.3.

50 Gunther Teubner, 'Global Private Regimes: Neo-spontaneous Law and Dual Constitution of Autonomous Sectors?' in Karl-Heinz Ladeur (ed), *Globalization and Public Governance* (Oxford University Press 2003).

51 Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (n 6) 85–101. See below 3.2.2.

52 Gunther Teubner, 'Breaking Frames: The Global Interplay of Legal and Social Systems' (1997) 45 The American Journal of Comparative Law 149; Teubner, 'Societal Constitutionalism: Alternatives to State-centred Constitutional Theory?' (n 5). See below 3.2.2 and 5.3.

53 Niklas Luhmann, *Social Systems* (Stanford University Press 1995).

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.[54]

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.[55] The latter is a social system with its own binary code (legal/illegal).[56] 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).[57]

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 re-entry[58] – 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,

54 See again Günther, 'Life as Poly-Contexturality' (n 4).

55 Niklas Luhmann, *A Sociological Theory of Law* (Routledge 1985) 167 ff.

56 Niklas Luhmann, *Law as a Social System* (Oxford University Press 2004) 93–94, 101–102, 171 ff.

57 Teubner, *Law as an Autopoietic System* (n 27), 25–46; Thomas Vesting, *Legal Theory* (Beck-Hart 2018) 66–74.

58 George Spencer Brown, *Laws of Form* (Julian Press 1972) 56 ff.

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, ie the 'living law', is paradoxical in nature. Law 'lives' and performs its function of regulating society by permanently re-regulating itself,[59] 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,[60] and in any case always within the (indeterminate) possibilities allowed by the patterns already in place.[61] According to the autopoietic conception, then, modern law is not simply a 'responsive' system,[62] but rather a 'reflexive' one.[63] Significantly, such conception of law's self-referentiality is also shared by strands of legal institutionalism emerged in the last decades of the twentieth century.[64]

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'.[65] In other words, the concept of structural

59 Teubner, *Law as an Autopoietic System* (n 27) 65.

60 Luhmann defined the concept of contingency as simultaneously 'excluding necessity and impossibility. Something is contingent insofar as it is neither necessary nor impossible; it is just what it is (or was or will be) though it could also be otherwise' (Luhmann, *Social Systems*, 70). Luhmann dedicated to the relation between law and contingency a work left incomplete and published only posthumously (Niklas Luhmann, *Kontingenz und Recht* [Suhrkamp 2013]). See Klaus A Ziegert, 'Niklas Luhmann on Contingency and Law. The Theory Behind Systems Theory' (2015) 20 Soziale Systeme 421. In most recent international legal scholarship, the positions expressed by Roberto Unger (Roberto M Unger, *False Necessity* [2nd edn, Verso 2004]) and Susan Marks (Susan Marks, 'False Contingency' [2009] 62 Current Legal Problems 1) have sparked an interesting debate about the role and value of contingency in international law, but few authors have referred to systems theory approaches (see eg Felipe Dos Reis, 'Contingencies in International Legal Histories: Origins and Observers' in Ingo Venzke and Kevin J Heller (eds), *Contingency in International Law On the Possibility of Different Legal Histories* [Oxford University Press 2021]).

61 There are multiple points of contact between social systems theory applied to law and the thesis of legal indeterminacy developed especially by (the American strand of) critical legal theory: see generally Duncan Kennedy, *Legal Reasoning: Collected Essays* (Davies Group 2008). See also below n 73; 2.4, spec n 76; 3.1, spec n 95; and 5.3, spec n 210.

62 In the sense of Philippe Nonet and Philip Selznick, *Law and Society in Transition: Toward Responsive Law* (Harper & Row 1978) 73–118.

63 Gunther Teubner, 'Substantive and Reflexive Elements in Modern Law' (1983) 17 Law & Society Review 239.

64 Neil MacCormick, 'Norms, Institutions, and Institutional Facts' (1998) 17 Law and Philosophy 301, 331 and nt 22.

65 Luhmann, *Law as a Social System*, 382.

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',[66] or a single idea of justice.[67] 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,[68] and to the

66 See Ludwig Wittgenstein, *Philosophical Investigations* (Blackwell 1989); and Jean-François Lyotard, *The Differend: Phrases in Dispute* (Manchester University Press 1987).

67 In terms of systems theory, justice then becomes a formula for the contingency (Luhmann, *Law as a Social System*, 214 ff) or the self-transcendence (Gunther Teubner, 'Self-Subversive Justice: Contingency or Transcendence Formula of Law?' (2009) 72 Modern Law Review 1) of law. For the concept of contingency in systems theory see above (n 60).

68 See Gunther Teubner, 'Regulatory Law: Chronicle of a Death Foretold' (1992) 1 Social and Legal Studies 451; and Riccardo Prandini, 'La "costituzione" del diritto nell'epoca della globalizzazione: Struttura dell società-mondo e cultura del diritto nell'opera di Gunther Teubner' in Gunther Teubner (ed), *La cultura del diritto nell'epoca della globalizzazione: L'emergere dell costituzioni civili* (Armando 2005).

autonomisation of functionally differentiated systems.[69] The latter 'resize the space occupied by politics and, because of its strong connection with the latter, also by law'.[70] 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 (eg 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 often aimed to persuade lawmakers rather than invalidate laws; the tendencies towards proceduralisation[71] and experimental regulation[72] in modern legal systems. Such growing inclusion of cognitive expectations within law puts its very functional autonomy to the test and entails an increase in uncertainty and indeterminacy. However, according to systems theory, this is the price to pay so that it can continue to self-produce and does not collapse.[73]

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', ie 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

69 See generally Niklas Luhmann, *Die Gesellschaft der Gesellschaft* (Suhrkamp 1997).

70 Ludovica Zampino, *Gunther Teubner e il costituzionalismo sociale. Diritto, globalizzazione, sistemi* (Giappichelli 2012) 79.

71 See Rudolf Wiethölter, 'Materialization and Proceduralization in Modern Law' in G Teubner (ed), *Dilemmas of Law in the Welfare State* (de Gruyter 1985), framing proceduralisation as the result of the conflict between formality and materialisation of law. See more recently, in the specific field of international law, Anne Peters, Heike Krieger and Leonhard Kreuzer, 'Due diligence: the risky risk management tool in international law' (2020) 9 Cambridge International Law Journal 121.

72 See Karl-Heinz Ladeur, 'The Postmodern Condition of Law and Societal "Management of Rules": Norms and Facts Revisited' (2006) 27 Zeitschrift für Rechtssoziologie 87. See also below 4.1.

73 Gunther Teubner, 'And God Laughed … Indeterminacy, Self-Reference and Paradox in Law' in C Joerges and D Trubek (eds), *Critical Legal Thought: An American-German Debate* (Nomos 1989).

self-regulation in functional areas (finance, research, sport, mass media, digital spaces).[74]

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, ie the guarantee for social differentiation against political expansionism?

2.4 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,[75] a problem concerning democratic and authoritarian systems alike. Sciulli – who considered SC as a 'non-Marxist critical theory'[76] – 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.[77] 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

74 Teubner, 'Global Bukowina: Legal Pluralism in the World Society' (n 33).

75 See above 1.

76 In this sense, compare Sciulli's work and Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy. A Polemic Against the System* (New York University Press 2004 [1983]), spec 94–113. See also above 1 and n 14.

77 Sciulli, *Theory of Societal Constitutionalism: Foundations of a Non-Marxist Critical Theory* (n 7) 76.

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 heterogeneous 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'.[78]

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.

78 Ibid, 80.

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.

3 Societal Constitutionalism as an Analytical Theory

3.1 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,[79] 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'.[80] 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.[81] 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.[82]

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 politics, knowledge in science, money in the economy, information in the mass media. Political constitutions are then nothing but the

79 See Reinhart Koselleck, 'Begriffsgeschichtliche Probleme der Verfassungsgeschichtsschreibung' in Reinhart Koselleck (ed), *Begriffsgeschichten: Studien zur Semantik und Pragmatik der politischen und sozialen Sprache* (Suhrkamp 2006); and Selznick, *Law, Society and Industrial Justice*.

80 Guilherme Vilaca, 'Transnational Law, Functional Differentiation and Evolution' (2015) 2 E-Publica 41, 67.

81 Gunther Teubner, 'Hybrid Laws: Constitutionalizing Private Gvernance Networks' in Robert Kagan and Kenneth Winston (eds), *Legality and Community: On the Intellectual Legacy of Philip Selznick* (Rowman Littlefield 2002) 162 f.

82 Pierre Guibentif, 'Societal Conditions of Self-Constitution' in Jirí Pribán (ed), *Self-Constitution of European Society: Beyond EU Politics, Law and Governance* (Routledge 2016); and Esposito, *Istituzione* (n 15) 66 ff.

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.[83] 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).[84]

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.[85] 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.[86] 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'.[87] Ultimately, globalisation as such has not

83 Zampino, *Gunther Teubner e il costituzionalismo sociale. Diritto, globalizzazione, sistemi* (n 70), 91.

84 Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (n 6), 15 ff.

85 Lars Viellechner, 'Constitutionalism as a Cipher: On the Convergence of Constitutionalist and Pluralist Approaches to the Globalization of Law' (2012) 4 Goettingen Journal of International Law 599, 612 ff.

86 Susan Strange, *States and Markets* (2nd edn, Pinter 1994).

87 Teubner, 'Societal Constitutionalism: Alternatives to State-centred Constitutional Theory?' (n 5) 14, drawing on Niklas Luhmann, *Theory of Society 1/2* (Stanford University Press 2012/2013) ch 1 X and ch 4 XII. For the functional differentiation as the basic mode of social organisation in modern societies see above 2.3. Against criticism from postcolonial authors (see Lars Eckstein and Christoph Reinfandt, 'Luhmann in da Contact Zone. Towards a Postcolonial Critique of Sociological Systems Theory' in Martin Middeke and Christoph Reinfandt (eds), *Theory matters: the place of theory in literary and cultural studies today* (Palgrave MacMillan 2017)), one may observe that the Global South is partially and selectively excluded from functional differentiation but remains part of world society with stratified or segmented differentiation. Seen from the perspective of the Global North/Global South divide, world society is characterised by conflicts between distinct principles of differentiation: cf, although from a partially different perspective, Marcelo Neves, 'Del Transconstitucionalismo a la Transdemocracia' (2021) 21 Revista General de Derecho Público Comparado 1, 19.

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.[88] 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'.[89] 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, especially 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

88 Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (n 6) 124 ff.
89 Vilaca, 'Transnational Law, Functional Differentiation and Evolution' (n 80) 65.

sense, lead to serious, widespread violations of fundamental rights.[90] 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 sub-system but also the integrity of other systems and so their mutual co-existence.[91] Put differently, SC promotes the development within each sub-system, by means of its own law, of an 'ecological' outlook in its inner programme.[92]

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.[93] On the contrary, the only conceivable constitutionalism for a globalised society would be a *fragmented* constitutionalism, comprised of the different sub-systems' constantly interacting and colliding 'partial constitutions'.[94] 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.[95] 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.[96]

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90 Gunther Teubner, 'The Anonymous Matrix: Human Rights Violations by "Private" Transnational Actors' (2006) 69 Modern Law Review 327.

91 Gunther Teubner, 'Self-constitutionalization of Transnational Corporations? On the Linkage of 'Private' and 'Public' Corporate Codes of Conduct' (2012) 19 Indiana Journal of Global Legal Studies 617; and Ioannis Kampourakis, 'CSR and Social Rights: Juxtaposing Societal Constitutionalism and Rights-Based Approaches Imposing Human Rights Obligations on Corporations' (2019) 9 Goettingen Journal of International Law 537.

92 Gunther Teubner, 'Constitutionalising Polycontexturality' (2011) 20 Social & Legal Studies 209; and Gunther Teubner, 'Exogenous Self-binding: How Social Systems Externalise Their Foundational Paradox' in Giancarlo Corsi and Alberto Febbrajo (eds), *Sociology of Constitutions* (Routledge 2014).

93 See below 5.2.

94 See below 5.2.

95 Compare Fischer-Lescano and Gunther Teubner, 'Consensus as Fiction of Global Law: Reply to Andreas L Paulus' (2004) 25 Michigan Journal of International Law 1059, 1068–1069; and Martti Koskenniemi, *From Apology To Utopia. The Structure of International Legal Argument* (2nd edn, Cambridge University Press 2005), 568 and nt 7. See also above 2.3, spec n 61.

96 See below 4.2.

3.2 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, ie a mere normative hierarchy or 'a set of norms regulating the creation of secondary rules',[97] nor does it maintain that constitutional phenomena arise simply because functionally differentiated sub-systems become autonomous or establish their own normative systems. A constitution in the sense of SC does not emerge simply because law works as a medium for the efficiency of the respective regime or functional system.[98] 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.[99]

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 (eg corporations); or non-personified regimes and processes without legal personality, or in any case incapable of acting unitarily from a legal point of view (eg 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.[100] 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.

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97 Armin von Bogdandy and Sergio Dellavalle, 'The Lex Mercatoria of Systems Theory: Localisation, Reconstruction and Criticism from a Public Law Perspective' (2013) 4 Transnational Legal Theory 59, 80.

98 Contrary to the reading of Neves, 'Del Transconstitucionalismo a la Transdemocracia' (n 87).

99 This precision is important and refines the formulation in Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (n 6) 35.

100 Gunther Teubner, 'Transnational Fundamental Rights: Horizontal Effect?' (2012) 40 Netherlands Journal of Legal Philosophy 191.

According to SC a social system can be called constitutionalised once it develops its own constitutional functions (3.2.1), arenas (3.2.2), processes (3.2.3), and structures (3.2.4).

3.2.1 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.[101] 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.[102] 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, ie 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.[103]

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

101 Chris Thornhill, 'Towards a Historical Sociology of Constitutional Legitimacy' (2008) 37 Theory and Society 161, 161 ff.

102 Ibid, 169 ff.

103 Teubner, 'Societal Constitutionalism: Nine Variations on a Theme by David Sciulli'.

linguistic elements. Importantly, though, such symbolic function does not necessarily imply a constitution's holistic nature, ie the extension, however fictitious, of its normative principles to society 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.[104]

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.

3.2.2 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.[105]

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

104 Ibid.

105 Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (n 6) 88–102; Gunther Teubner, '*Quod omnes tangit*: Transnational Constitutions Without Democracy?' (2018) 45 Journal of Law and Society 5.

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.[106] 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.[107]

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.[108] Put differently, and even though at the analytical level democratisation and constitutionalisation are two distinct processes, the chances of a system becoming constitutionalised increase if it legally institutionalises possibilities of self-contestation, which in turn implies forms of democratisation.[109] In this respect, while it is true that actors in spontaneous spheres are 'stakeholders' in the system's operational mechanisms, they do not act *only* as stakeholders.[110] Contrary to some readings,[111] SC argues that the external impulses, re-elaborated by the spontaneous sphere using the same code of the sub-system involved (eg 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.[112]

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106 Teubner, 'Self-constitutionalization of Transnational Corporations? On the Linkage of 'Private' and 'Public' Corporate Codes of Conduct'.

107 Yanhua Bird, Jodi L Short and Michael W Toffel, 'Coupling Labor Codes of Conduct and Supplier Labor Practices: The Role of Internal Structural Conditions' (2019) 30 Organization Science 647.

108 Teubner, '*Quod omnes tangit*: Transnational Constitutions Without Democracy?' (n 105).

109 In this sense, from an international relations perspective, cf Antje Wiener, *A Theory of Contestation* (Springer 2014).

110 See also below 5.1.

111 Klaus Günther, 'Normative legal pluralism: a critique' in Jorge L Fabra-Zamora (ed), *Jurisprudence in a Globalized World* (Elgar 2020) 95–96.

112 Vagios Karavas and Gunther Teubner, 'www.CompanyNameSucks.com: The Horizontal Effect of Fundamental Rights on 'Private Parties' within Autonomous Internet Law' (2005) 12 Constellations 262; Teubner, '*Quod omnes tangit*: Transnational Constitutions Without Democracy?' (n 105).

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 distinctive public dimension is not lost but rather re-specified in relation to their own features.[113]

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.[114] 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.[115] 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.[116]

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113 Esposito, *Istituzione* (n 15) 67. Despite largely sharing the same starting point on the contestation of global governance institutions as a means to (re-)construct multiple authorities, international relations and global governance literature increasingly puts into question the very usefulness of the public-private dichotomy: see recently Janne Mende, 'The Contestation and Construction of Global Governance Authorities: A Study from the Global Business and Human Rights Regime' (2021) 10 Global Constitutionalism 1. See on this point in more detail below 5.3.

114 Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (n 6) 157–158, 171–173.

115 Teubner, 'Self-Subversive Justice: Contingency or Transcendence Formula of Law?' (n 67).

116 Gunther Teubner, 'Societal Constitutionalism and the Politics of the Commons' (2012) 21 Finnish Yearbook of International Law 2; and Teubner, 'Exogenous Self-binding: How Social Systems Externalise Their Foundational Paradox' (n 92).

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.[117] 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'.[118]

Here, SC thus points to the possibility of new kinds of polities. Their boundaries are mobile, not delimited by personal or territorial belonging.[119] They are not identified by an administratively assigned status of citizenship, nor do they coincide with an international 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.[120] 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.[121] 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 – is not limited to 'politics' (*la politique*) – understood as the system performing the function of formalised collective decision-making – and

117 Ioannis Kampourakis, 'Bound by the Economic Constitution: Notes for "Law and Political Economy" in Europe' (2021) 1 Journal of Law and Political Economy 301, 316.

118 Ibid, 317.

119 Chris Thornhill, 'The Citizen of Many Worlds: Societal Constitutionalism and the Antinomies of Democracy' (2018) 45 Journal of Law and Society 73.

120 Sciulli, *Theory of Societal Constitutionalism: Foundations of a Non-Marxist Critical Theory* (n 7) 160–161.

121 Teubner, '*Quod omnes tangit*: Transnational Constitutions Without Democracy?' (n 105).

increasingly emerges in other arenas, either private or hybrid.[122] In this way, globalisation ultimately gives an unexpected opportunity: exploiting the democratic potential inherent in social processes that take place outside of the institutional channels of state-centred politics, thus allowing constitutionalism to expand into spheres where political constitutions have never really penetrated.[123] Importantly, conceiving democratisation as the possibility of effective self-contestation does not involve a surrender of democratic normativity, if the latter is understood in the sense of fulfilling democratic commitments even in the face of subsequent different impulses or better knowledge.[124] In fact, social systems' learning does not necessarily take place 'in real time'. Precisely because it is reflexive rather than merely responsive,[125] and just like in the traditional schemes of representative democracy, it 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.[126] On the contrary, they remain central, as SC does not reject but rather assumes an important role for political constitutions.[127] 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.[128] SC's pluralism is 'stimulating processes of democratisation in distinct and multi-faceted spheres of technology, economy,

122 Teubner, 'Societal Constitutionalism and the Politics of the Commons' (n 116). In this sense, SC argues precisely that norm-generating discursive contestation (and related empirical research) should *not* be limited to formalised settings of state-centred politics: see Antje Wiener, 'Norm(a-tive) Change in International Relations: A Conceptual Framework' (2020) KFG Working Paper Series, No 44; Berlin Potsdam Research Group 'The International Rule of Law – Rise or Decline?', 12 ff <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3638205> accessed 29 July 2021.

123 Cf Gunther Teubner and Anna Beckers, 'Expanding Constitutionalism' (2013) Indiana Journal of Global Legal Studies 523.

124 Emilio A Christodoulidis, 'The Myth of Democratic Governance' in Paul F Kjaer (ed), *The Law of Political Economy: Transformation in the Function of Law* (Cambridge University Press 2020) 82.

125 See above 2.3.

126 See Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization and Emancipation* (2nd edn, Northwestern University Press 2002) 94–95; and Emilios A Christodoulidis, 'On the Politics of Societal Constitutionalism' (2013) 20 Indiana Journal of Global Legal Studies 629.

127 Gunther Teubner, 'Societal Constitutionalism without Politics? A Rejoinder' (2011) 20 Social & Legal Studies 248, 250. This is particularly true in an age when fragmentations within the global political system along old and new territorial lines (US and the EU v China and Russia, Global North v Global South, and so on) continue to emerge.

128 See Anne Peters, 'Dual Democracy' in Jan Klabbers, Anne Peters and Geir Ulfstein (eds), *The Constitutionalization of International Law* (Oxford University Press 2009). See also below 5.2.

education, medicine etc.'[129] 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, ie where traditional schemes of representative democracy are inconceivable.[130] 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.

3.2.3 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.[131] 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.[132] 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 sub-system 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

129 Esposito, *Istituzione* (n 15) 70.

130 See below 5.1 on the matter of constituent power at global level.

131 Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (n 6) 102–110.

132 Teubner, *Law as an Autopoietic System* (n 27) 36 ff; Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (n 6) 106.

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.[133]

3.2.4 Structures

In order to give rise to stable processes of constitutionalisation, structural couplings cannot be occasional. Instead, they must be stabilised by 'linkage institutions', ie 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, ie 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.[134] 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

133 See below 5.3.

134 Niklas Luhmann, 'Two Sides of the State Founded on Law' in Niklas Luhmann (ed), *Political Theory in the Welfare State* (de Gruyter 1990); and Jacques Derrida, 'Force of Law: The Mystical Foundation of Authority' (1990) 11 Cardozo Law Review 919.

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.[135]

4 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, ie parameters to suggest and evaluate legal policies broadly understood, ie at both the legislative and jurisprudential level.[136]

135 See Lorenzo Gradoni, *Constitutional Review via Facebook's Oversight Board. How platform governance had its Marbury v Madison* (2021); and Golia, *Beyond Oversight. Advancing Societal Constitutionalism in the Age of Surveillance Capitalism* (n 3).

136 Lyana Francot-Timmermans and Emilios A Christodoulidis, 'The Normative Turn in Teubner's Systems Theory of Law' (2011) 40 Rechtsilosofie & Rechtstheorie 187.

4.1 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.[137] 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.[138] It relies not so much on general, stable, and predictable norms but rather uses new forms of law and lawmaking, more flexible, dynamic – such as in the case of soft law instruments – and 'characterized by a strategic approach which takes into consideration the more experimental mode of a knowledge-based decision-making which cannot attain certainty, but which has to adapt to the continuous self-transformation of its own information basis into which it itself systematically infers.'[139] As a result, judicial activity becomes more creative and less focused on legal precedents.[140]

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.[141] 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.[142] Ultimately,

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137 Teubner, 'Constitutionalising Polycontexturality' (n 92); Andreas Fischer-Lescano, 'Struggles for a Global Internet Constitution: Protecting Global Communication Structures Against Surveillance Measures' (2016) 5 Global Constitutionalism 145, 167.

138 Riccardo Prandini, 'The Future of Societal Constitutionalism in the Age of Acceleration' (2013) 20 Indiana Journal of Global Legal Studies, 748.

139 Karl-Heinz Ladeur, 'Governance, Theory of' in Anne Peters (ed), *MPEPIL* (Oxford University Press 2010). See also Ladeur, 'The Postmodern Condition of Law and Societal "Management of Rules": Norms and Facts Revisited' (n 72).

140 Cf Massimo Fichera, 'The Relevance of the Notion of Time for Constitutionalism Beyond the State: Towards Communal Constitutionalism?' (2021) 1 Athena 153, 173; and, more generally for the notion of time in the context of a systems theory applied to law; Vesting, *Legal Theory* (n 57) 68–70. See also above 2.3.

141 See David Schneiderman, 'Legitimacy and Reflexivity in International Investment Arbitration: A New Self-Restraint?' (2011) 2 Journal of International Dispute Settlement 1.

142 Teubner and Beckers, 'Expanding Constitutionalism' (n 123) 527.

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 be compatible with their social environment. 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.[143]

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.[144] 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.[145] 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

143 Armin von Bogdandy, Matthias Goldmann and Ingo Venzke, 'From Public International to International Public Law: Translating World Public Opinion into International Public Authority' (2017) 28 European Journal of International Law 115, 120–121.

144 Gunther Teubner, 'Transnational Economic Constitutionalism in the Varieties of Capitalism' (2015) 1 Italian Law Journal 219, 219 ff.

145 Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (n 6) 96–102.

registration.[146] 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,[147] 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.[148] 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, ie 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*.[149] 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.

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146 Ino Augsberg, 'Subjektive und objektive Dimensionen der Wissenschaftsfreiheit' in Friedemann Voigt (ed), *Freiheit der Wissenschaft: Beiträge zu ihrer Bedeutung, Normativität und Funktion* (De Gruyter 2012); Isabell Hensel and Gunther Teubner, 'Horizontal Fundamental Rights as Conflict of Law Rules: How Transnational Pharma Groups Manipulate Scientific Publications' in Kerstin Blome and others (eds), *Contested Regime Collisions: Norm Fragmentation in World Society* (Cambridge University Press 2016).

147 Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (n 6) 122–123; Oren Perez, 'Private Environmental Governance as Ensemble Regulation: A Critical Examination of Sustainable Business Indexes and the New Ensemble Politics' (2011) 12 Theoretical Inquiries in Law 543.

148 Teubner, 'Altera Pars Audiatur: Law in the Collision of Discourses' (n 12).

149 Teubner and Beckers, 'Expanding Constitutionalism' (n 123) 532–533.

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,[150] 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.

4.2 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.[151] This idea of 'in-between' law, comparable to the general category of interlegality[152] and explored in peripheral societies and the Global South especially by Marcelo Neves' 'transconstitutionalism',[153] is still developing, although

150 Anna Beckers, *Enforcing Corporate Social Responsibility Codes: On Global Self-Regulation and National Private Law* (Hart 2015); Daniela Bifulco and Angelo Jr Golia, 'The Right of Resistance as a State Law Basis for Transnational Regimes Self-Contestation' (2018) 45 Journal of Law and Society S94.

151 Teubner, *Law as an Autopoietic System* (n 27) 100–122.

152 See Boaventura de Sousa Santos, 'Law: A Map of Misreading. Toward a Postmodern Conception of Law' (1987) 14 Journal of Law and Society 279; Gunther Teubner and Peter Korth, 'Two Kinds of Legal Pluralism: Collision of Transnational Regimes in the Double Fragmentation of World Society' in Margaret Young (ed), *Regime Interaction in International Law: Theoretical and Practical Challenges* (Cambrige University Press 2011) 28–29; Poul F Kjaer, 'Global Law as Inter-Contextuality and as Inter-Legality' in Jan Klabbers and Gianluigi Palombella (eds), *The Challenge of Inter-Legality* (Cambridge University Press 2019).

153 See Marcelo Neves, *Transconstitutionalism* (Hart 2013); Neves, 'Del Transconstitucionalismo a la Transdemocracia' (n 87).

several authors are beginning to codify its basic rules.[154] 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.[155] 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', ie 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.[156]

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

154 See Mireille Delmas Marty, *Ordering Pluralism. A Conceptual Framework for Understanding the Transnational Legal World* (Hart 2009); Anne Peters, 'The Refinement of International Law: From Fragmentation to Regime Interaction and Politicization' (2017) 15 International Journal of Constitutional Law 671; Horatia Muir Watt, 'When Societal Constitutionalism Encounters Private International Law: Of Pluralism, Distribution, and 'Chronotopes'' (2018) 45 Journal of Law And Society 185; Monica Hakimi, 'The Integrative Effects of Global Legal Pluralism' in Paul Schiff Berman (ed), *Oxford Handbook of Global Legal Pluralism* (Oxford University Press 2020).

155 See generally Ralf Michaels, 'Global Legal Pluralism and Conflict of Laws' in Paul Schiff Berman (ed), *Oxford Handbook of Global Legal Pluralism* (Oxford University Press 2020). Neves argues that the constitutionalising potential of inter-systemic and inter-regime conflicts in an asymmetric world society, increasingly characterised by 'conflicts of intolerance', is limited and that stable 'transconstitutional interlacings' have emerged only in very limited areas of a multicentric global legal system (see Neves, 'Del Transconstitucionalismo a la Transdemocracia' [n 87]). But precisely at this juncture the *normative* potential of SC emerges: the task of law- and policy-makers – as well as legal theory – is to imagine solutions to increase and stabilise those interlacings, to reduce 'mutual intolerance' and to use structural couplings and law's reflexivity to preserve the normativity of constitutions at the global level. Once again, SC is a theory of constitutional possibility, not of constitutional necessity. In this sense, in the most recent literature the exponents of 'material constitutionalism' show a growing interest in SC's model and proposals: see Emilios A Christodoulidis, *The Redress of Law: Globalisation, Constitutionalism and Market Capture* (Cambridge University Press 2021) ch 4.2.

156 Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (n 6) 150–173.

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.[157]

The second step consists in finding the primary coverage, ie 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 (eg 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, ie 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

157 Cf Gradoni, *Constitutional Review via Facebook's Oversight Board. How platform governance had its Marbury v Madison* (n 135). See above 3.2.4.

Soley.[158] Such consequentialism, however, should not look at the causal chains in the strict sense, 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, ie 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[159] – 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 psycho-physical integrity from the encroachments of communicative matrices); but also fundamental *institutional* rights, conceived as guarantees of the autonomy of collective social processes as such.[160]

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,[161] co-evolve, and adapt to each other according to heterarchical relations, ie without necessarily resolving once and for all the question of the 'last word' (the *Kompetenz-Kompetenz*).[162] Ultimately, SC proposes to generalise a principle of constitutional tolerance[163] at the global level, even beyond the intention of some of its original proponents[164] thus making it possible

158 Karl E Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 South African Journal of Human Rights 146; Armin von Bogdandy and others (eds), *Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune* (Oxford University Press 2017).

159 Jaye Ellis, '"Social Nature". Political Economy, Science, and Law in the Anthropocene' in Paul F Kjaer (ed), *The Law of Political Economy* (Cambridge University Press 2020).

160 Cf Gunther Teubner, 'Counter-Rights: On the Trans-Subjective Potential of Subjective Rights' in Paul F Kjaer (ed), *The Law of the Political Economy: Transformations in the Functions of Law* (Cambridge University Press 2020).

161 Cf T Prosser, 'Constitutions as Communication' (2017) 15 International Journal of Constitutional Law 1039.

162 Paul Schiff Berman, 'Jurisgenerative Constitutionalism: Procedural Principles for Managing Global Legal Pluralism' (2013) 20 Indiana Global Legal Studies 665.

163 Joseph HH Weiler, 'Why Should Europe be a Democracy: The Corruption of Political Culture and the Principle of Toleration' in Francis Snyder (ed), *The Europeanisation of Law: The Legal Effects of European Integration* (Hart 2000).

164 Joseph HH Weiler, 'Prologue: Global and Pluralist Constitutionalism – Some Doubts' in Grainne de Búrca and Joseph HH Weiler (eds), *The Worlds of European Constitutionalism* (Cambridge 2011).

to co-ordinate and adapt different legal systems without any one of them necessarily prevailing over the others.

5 Competing Approaches and Criticisms

5.1 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.[165]

Although it might be argued that in the age of globalisation state spatial sovereignty may be metamorphosing,[166] SC is called upon to demonstrate the

165 Dieter Grimm, 'The Achievement of Constitutionalism and Its Prospects in a Changed World' in Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism?* (Oxford University Press 2010); Rainer Wahl, 'In Defence of "Constitution"' in Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism?* (Oxford University Press 2010); Martin Loughlin, 'What Is Constitutionalisation?' in Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism?* (Oxford University Press 2010); Véronique Champeil-Desplats, 'Constitutionalization Outside of the State? A Constitutionalist's Point of View' in Jean-Philippe Robe, Antoine Lyon-Caen and Stéphane Vernac (eds), *Multinationals and the Constitutionalization of the World Power System* (Routledge 2016).

166 Ran Hirschl and Ayelet Shachar, 'Spatial Statism' (2019) 17 International Journal of Constitutional Law 387.

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.[167] 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.[168] 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

167 Hans Lindahl, 'A-Legality: Postnationalism and the Question of Legal Boundaries' (2010) 73 Modern Law Review 30.

168 Larry Catá Backer, 'The Structure Of Global Law: Fracture, Fluidity, Permeability, And Polycentricity' (2012) CPE Working Paper No 2012-7; Penn State Law Research Paper No 15-2012.

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.[169]

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.[170] 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'.[171] 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.[172] 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

169 Jirí Pribán, 'Constitutional Imaginaries and Legitimation: On Potentia, Potestas, and Auctoritas in Societal Constitutionalism' (2018) 45 Journal of Law and Society S30.

170 Dieter Grimm, 'The Constitution in the Process of Denationalization' (2005) 12 Constellations 447; Ming-Sung Kuo, 'Semantic Constitutionalism at the Fin de Siècle: A Review Essay on Gunther Teubner, Constitutional Fragments: Societal Constitutionalism and Globalization (Oxford University Press, 2012)' (2014) 5 Transnational Legal Theory 158.

171 Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (n 6), 62.

172 Nico Krisch, 'Pouvoir Constituant and Pouvoir Irritant in the Postnational Order' (2016) 14 International Journal of Constitutional Law 657.

dehumanisation of social processes.[173] 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.[174] 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;[175] on the other hand, constituent power in the context of global constitutionalism.[176]

Indeed, from such re-conceptualisation it follows that each functional system can have its own specific *pouvoir constituant* and can come to constitutionalise itself.[177] 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.[178] This specification is important, as SC, contrary to some formulations of the stakeholder theory as a form of democratic governance,[179] 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'.[180] The actors involved have in common the fact

173 Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (n 6) 62 ff; Kolja Möller, 'From Constituent to Destituent Power Beyond the State' (2018) 9 Transnational Legal Theory 32.

174 Teubner, '*Quod omnes tangit*: Transnational Constitutions Without Democracy?' (n 105).

175 Reijer Passchier, 'Quasi-Constitutional Change without Intent – A Response to Richard Albert' (2017) 65 Buffalo Law Review 1077.

176 Peter Niesen, 'Constituent power in global constitutionalism' in Anthony F Jr Lang and Antje Wiener (eds), *Handbook on Global Constitutionalism* (Elgar 2017) 230.

177 Teubner, 'Exogenous Self-binding: How Social Systems Externalise Their Foundational Paradox' (n 92).

178 Alexander Somek, 'The Constituent Power in a National and in a Transnational Context' (2012) 3 Transnational Legal Theory 31.

179 Christodoulidis, 'The Myth of Democratic Governance' (n 124) 82–86.

180 Gavin W Anderson, 'Societal Constitutionalism, Social Movements and Constitutionalism from Below' (2013) 20 Indiana Journal of Global Legal Studies 881; Paul Blokker, 'Constitutional Mobilization and Contestation in the Transnational Sphere' (2018) 45 Journal of Law and Society S52.

that their actions 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', eg 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[181] to competing actors for their practices of (de-)legitimation.[182] 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[183] without necessarily assuming an all-encompassing unitary rationality, ie without contradicting either the plurality and self-referentiality of systems[184] or the absence of an authentically intersubjective understanding of community.[185] 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'.[186]

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

181 Samantha Besson, 'Human rights as transnational constitutional law' in Anthony F Lang and Antje Wiener (eds), *Handbook on Global Constitutionalism* (Elgar 2017).

182 See Janne Mende, 'Common Identities, Overlapping Authorities and Complexity. Practices of (De-)Legitimation in the United Nations' (2021) MPIL Research Paper Series No 2021-05, 1 <https://papersssrncom/sol3/paperscfm?abstract_id=3790292> accessed 29 July 2021.

183 See below 5.3.

184 Bogdandy and Dellavalle, 'The Lex Mercatoria of Systems Theory: Localisation, Reconstruction and Criticism from a Public Law Perspective' (n 97), 78–79.

185 Matthias Goldmann, 'A Matter of Perspective: Global Governance and the Distinction between Public and Private Authority (and not Law)' (2016) 5 Global Constitutionalism 48, 65 ff, 81 and nt 170.

186 Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (n 6) 63.

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 overlooks 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.[187] 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, ie between 'private' and 'public' codes of conduct, now also with empirical evidence.[188] 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 may be individuated in 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 – ie 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

187 Stephen Gardbaum, 'Human Rights as International Constitutional Rights' (2008) 19 European Journal of International Law 749.

188 Oren Perez and Ofir Stegmann, 'Transnational Networked Constitutionalism' (2018) 45 Journal of Law and Society S135.

outcomes for global society and, in the light of the 2007–2008 financial 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'.[189]

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

189 See Gunther Teubner, 'A Constitutional Moment? The Logics of "Hit the Bottom"' in Poul F Kjaer, Gunther Teubner and Alberto Febbrajo (eds), *The Financial Crisis in Constitutional Perspective: The Dark Side of Functional Differentiation* (Hart 2011).

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.[190]

5.2 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.[191] 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 neo-monism, centred around the UN Charter as the core of a global constitution.[192] 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

190 Golia, *Beyond Oversight. Advancing Societal Constitutionalism in the Age of Surveillance Capitalism* (n 3).

191 Anthony F Lang and A Wiener (eds), *Handbook on Global Constitutionalism* (Elgar 2017).

192 Christian Tomuschat, 'International Law as the Constitution of Mankind' in United Nations (ed), *International Law on the Eve of the Twenty-first Century* (United Nations Publications 1997); Bardo Fassbender, 'The United Nations Charter as Constitution of the International Community' (1998) 37 Columbia Journal of Transnational Law 529; Bardo Fassbender, 'International Constitutional Law: Written or Unwritten?' (2016) 15 Chinese Journal of International Law 489.

able to perform effectively.[193] 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[194] – 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.[195] 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[196] – 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

193 Some of the main points of reference in a rich literature are Jochen A Frowein, 'Konstitutionalisierung des Völkerrechts' in Klaus Dicke and others (eds), *Völkerrecht und internationales Privatrecht in einem sich globalisierenden internationalen System: Auswirkungen der Entstaatlichung transnationaler Rechtsbeziehungen* (Müller 2000); Erika De Wet, 'The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order' (2006) 19 Leiden Journal of International Law 611; Anne Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures' (2006) 19 Leiden Journal of International Law 579; Anne Peters, Jan Klabbers and Geir Ulfstein (eds), *The Constitutionalization of International Law* (Oxford University Press 2009); Anne Peters, 'The Merits of Global Constitutionalism' (2009) 16 Indiana Journal of Global Legal Studies 397; Mattias Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State' in Jeffrey L Dunoff and Joel P Trachtmann (eds), *Ruling the World? Constitutionalism, International Law and Global Governance* (Cambridge University Press 2009); Neil Walker, 'Taking Constitutionalism Beyond the State' in Rainer Nickel (ed), *Conflict of Laws and Laws of Conflict in Europe and Beyond – Patterns of Supranational and Transnational Juridification* (Hart 2009).

194 See Ingolf Pernice, 'Multi-Level Constitutionalism and the Treaty of Amsterdam: Constitution-Making revisited' (1999) 36 Common Market Law Review 703; Anne Peters, *Elemente einer Theorie der Verfassung Europas* (Duncker & Humblot 2001).

195 Cf Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (MIT 1996); and Goldmann, 'A Matter of Perspective: Global Governance and the Distinction between Public and Private Authority (and not Law)' (n 185).

196 Von Bogdandy, Goldmann and Venzke, 'From Public International to International Public Law: Translating World Public Opinion into International Public Authority' (n 143).

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.[197] 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 (ie those linked directly 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.[198] Politics is only *one* of the functional systems at the global level. In this sense, an '"international constitution" (…) functions exclusively

197 Benedict Kingsbury, Nico Krisch and Richard B Stewart, 'The Emergence of Global Administrative Law' (2005) 68 Law and Contemporary Problems 15; Sabino Cassese (ed), *Research Handbook on Global Administrative Law* (Elgar 2016).

198 Although with a critical outlook, see for this point Ángel J Rodrigo, 'El pluralismo radical del constitucionalismo societal: La fragmentación constitucional' (2014) 27 Revista Electrónica de Estudios Internacionales 1.

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, ie 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'.[199] Only in recent times have some exponents of global constitutionalism explicitly argued that it should be extended to cover the social question.[200]

Along the same lines, SC argues that functional fragmentation, of which the fragmentation/pluralisation of international law would be but one manifestation,[201] 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.[202] 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.[203] 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

199 Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (n 6) 50–51.

200 Anne Peters, 'Global Constitutionalism: The Social Dimension' in Takao Suami and others (eds), *Global Constitutionalism from European and East Asian Perspectives* (Cambridge University Press 2018).

201 See Fischer-Lescano and Teubner, 'Consensus as Fiction of Global Law: Reply to Andreas L Paulus' (n 95); Frédéric Mégret, 'International Law as a System of Legal Pluralism' in Paul Schiff Berman (ed), *Oxford Handbook of Global Legal Pluralism* (Oxford University Press 2020) 547–548.

202 See above 4.2.

203 See Pablo M Baquero, 'European Law from the Perspective of Societal Constitutionalism' (2019) 2019/10 EUI Working Papers. On the specific issues of (economic) citizenship, see Lisa Mardikian, 'Economic Inactivity and Economic Citizenship in the EU' in Achilles Skordas, Gabor Halmai and Lisa Mardikian (eds), *Economic Constitutionalism in a Turbulent World* (Elgar forthcoming); on EU law as a means to democratise economy, see Giacomo Tagiuri, 'Can Supranational Law Enhance Democracy? EU Economic Law as a Market-Democratizing Project' (2021) 32 European Journal of International Law 57.

influenced by SC, on the other hand.[204] 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.

5.3 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.[205] They see global constitutionalism as an instrument of perpetuating global neo-liberal hegemony and as an obstacle to the emancipatory potential of constitutionalism, increasingly absorbed into forms, procedures, and symbolic constructions produced and/or controlled by social *élites*.[206] 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.[207] Further, they generally criticise global

204 Cf Viellechner, 'Constitutionalism as a Cipher: On the Convergence of Constitutionalist and Pluralist Approaches to the Globalization of Law' (n 85); and Anne Peters, 'Constitutionalization' in Jean d'Aspremont and Sahib Singh (eds), *Concepts for International Law Contributions to Disciplinary Thought* (Elgar 2019).

205 Antonio Negri, 'The Law of the Common: Globalization, Property and New Horizons of Liberation' (2010) 21 Finnish Yearbook of International Law 1; Santos, *Toward a New Legal Common Sense: Law, Globalization and Emancipation* (n 126); Saki Bailey and Ugo Mattei, 'Social Movements as Constituent Power: The Italian struggle for the Commons' (2013) 20 Indiana Journal of Global Legal Studies 965; Emilios A Christodoulidis, Ruth Dukes and Marco Goldoni (eds), *Research Handbook on Critical Legal Theory* (Elgar 2019).

206 Cf Zoran Oklopcic, *Beyond the People: Social Imaginary and Constituent Imagination* (Oxford University Press 2018).

207 Balakrishnan Rajagopal, 'The Role of Law in Counter-Hegemonic Globalization and Global Legal Pluralism: Lessons from the Narmada Valley Struggle in India' (2005) 18 Leiden Journal of International Law 345.

constitutionalism for overlooking the material bases of constitutional legitimacy and the issue of how legal orderings, in conditions of rising pluralism, shape societal formations.[208] However, they often see globalisation as an opportunity to link movements that aim to democratise all social spheres.[209] Contestatory/material constitutionalism has then several points in common with SC, especially if the latter is seen as a critical legal theory.[210] 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[211] – 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.[212] By underestimating the way in which law 'regulates society by regulating itself'[213] 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

208 Mariano Croce and Marco Goldoni, 'A Sense of Self-Suspicion: Global Legal Pluralism and the Authority of Law' (2016) 8 Ethics & Global Politics 1; Tarik Kochi, 'The End of Global Constitutionalism and Rise of Antidemocratic Politics' (2020) 34 Global Society 487.

209 See Balakrishnan Rajagopal, 'International Law and Social Movements: Challenges of Theorising Resistance' (2003) 41 Columbia Journal of Transnational Law 397.

210 For points of contact between systems theory approaches to law and the Frankfurt school of critical theory, see Fischer-Lescano, 'Critical Systems Theory' (2012) 38 Philosophy and Social Criticism 3; Gregory Shaffer, 'Law, Constitutionalism, and World Society: Kjaer, Kratochwil, and Global (Dis)Order' (2016) University of Irvine Legal Studies Research Paper Series No 2016-09. See also above 1, spec n 14; 2.3, spec n 61 and n 73; and 2.4, spec n 76.

211 Santos, *Toward a New Legal Common Sense: Law, Globalization and Emancipation* (n 126) 51 ff. See above 1.

212 Cf Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge University Press 2001) 503–504.

213 See above 2.3.

somewhat similar notion of constituent power.[214] 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'.[215]

In fact, for SC the public-private distinction is not to be overcome but rather generalised and re-specified within each functional system.[216] In this sense, and contrary to some readings,[217] SC does not identify the distinction private law-public law with the distinction 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, ie the

214 Antonio Negri, *Insurgencies: Constituent Power and the Modern State* (University of Minnesota Press 1999 [1992]).

215 Negri, 'The Law of the Common: Globalization, Property and New Horizons of Liberation' (n 205) 25.

216 Cf Esposito, *Istituzione* (n 15) 67.

217 For example Goldmann, 'A Matter of Perspective: Global Governance and the Distinction between Public and Private Authority (and not Law)' (n 185) 53.

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.[218]

Here, and to conclude, it is possible to link SC to the theme of justice and contingency.[219] 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,[220] and that of juridical justice, the 'necessary parasite' of every legal system, which continuously forces 'errors' and breaks in the chains of legal acts.[221] 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'.[222] Constituent or irritating power and justice are thus intimately connected

218 Marco Goldoni and Michael A Wilkinson, 'The Material Constitution' (2018) 81 Modern Law Review 567, 588. It is worth mentioning that, despite persisting differences, the 'Glasgow school' of material constitutionalism – mainly represented by Emilios Christodoulidis and Marco Goldoni – has in most recent times become more open to SC: see again Croce and Goldoni, *The Legacy of Pluralism. The Continental Jurisprudence of Santi Romano, Carl Schmitt, and Costantino Mortati* (n 41) 201–202 and nt 9; and Christodoulidis, *The Redress of Law: Globalisation, Constitutionalism and Market Capture* (n 155) ch 4.2. See also below n 223.

219 See above 2.3 (spec n 60) and 3.1.

220 See above 5.1.

221 Cf Esposito, *Istituzione* (n 15) 68 ff.

222 Kochi, 'The End of Global Constitutionalism and Rise of Antidemocratic Politics' (n 208) 503.

and are at the core of the processes of social (self-)subversion through which law transcends and returns to itself, influencing society while still remaining distinct from it.[223]

223 Cf Teubner, 'Self-Subversive Justice: Contingency or Transcendence Formula of Law?' (n 67). Despite his otherwise overall doubtful stance, Christodoulidis argues that systems theory and SC 'offers us a heuristic of profound strategic importance. It is useful not in terms of its offer to transcend the 'contingency' formula of justice, but to defend it. It is as a blocking device that the [systems theory] can offer us its most emancipatory gift, against the transcendence tendencies that collapse its formula of contingency, reorient away from justice and toward efficiency, in the process of undoing the achievement that is law by externalising its criteria.' (Christodoulidis, *The Redress of Law: Globalisation, Constitutionalism and Market Capture* [n 155]).