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Transnational Constitutional Pluralism, its Promises and Pitfalls

O Pluralismo Constitucional Transnacional de Gunther Teubner: suas promessas e limites

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Abstract: In today's world society, constitutional theories converge in assigning an emerging role to legal forms of regulation not bound by national political systems and authorities. Several approaches try to grasp the diversity and multiplicity of layers, levels and stake-holders which constitute the post-national constellation of regulatory structures. One of the most prominent of these approaches is the idea of a transnational constitutional pluralism. This piece presents the framework of a plurality of transnational constitutional structures as conceived by authors like Gunther Teubner, to critically address the possibility of a global constitutionalization of law based on post-democratic structures in different domains of social regulation. In the end, the piece argues that, although pluralist approaches offer a useful description of current relations between law and power on the transnational level, there are functional limits to the constitutional claim emerging from the pluralist approaches. Such limits are, most importantly, pluralist approaches' incapability of offering democratic mechanisms of legitimization for decision-making processes.

Keywords: Gunther Teubner. Constitutional Pluralism. Globalization. Transnational Legal Orders.

Resumo: Uma miríade de novas teorias constitucionais converge em atribuir um papel emergente para as formas de regulação social não submetidas aos sistemas políticos e autoridades dos Estados nacionais. Diversas abordagens tentam entender a diversidade e a multiplicidade de camadas, níveis e atores que constituem a constelação pós-nacional das estruturas regulatórias. Uma das propostas teóricas mais proeminentes é a ideia de um constitucionalismo pluralista transnacional de Gunther Teubner. Este artigo apresenta a proposta de Teubner e propõe uma crítica do conceito de constitucionalização para além do Estado. Ao final, o artigo argumenta que, embora a abordagem pluralista de Teubner ofereça uma descrição interessante sobre as relações entre poder e direito no nível transnacional, há limites funcionais à sua pretensão de que essas constituições sejam equivalentes e funcionais das constituições políticas.

Palavras-chave: Gunther Teubner. Constitutional Pluralism. Globalization. Transnational Legal Orders.

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1 Introduction: transnational constitutional questions

There is an evident paradigmatic shift in contemporary *constitutional theory*. The proliferation of transnational – and global[1] – legal regimes beyond the territorial boundaries of national constitutional frames has already shaped a new legal and political theoretical vocabulary that acknowledges the evolving dynamics of normative orders beyond the state (KENNEDY, 2009; KJAER, 2014; NEVES, 2013; PREUSS, 2010; SAND, 2013; SHAFFER, 2016; TEUBNER, 2012; WALKER, 2008). These normative structures can barely be described with the semantics of national constitutionalism, and even less by the tradition of classic public international law (SOMEK, 2012; WALKER, 2013).

In this context, different authors, in the legal field and beyond, have been trying to make use of *constitutional* language to describe new forms of ruling (BLACK, 1996; FISCHER-LESCANO, 2007; HOLMES, 2013; KJAER, 2014; MÖLLER, 2015; NEVES, 2013; PRIEN, 2010; RENNER, 2011; TRACHTMAN, 2006; WAI, 2005; WALKER, 2002). Some of these theories claim that evolving regimes of global and transnational governance may develop social structures that resemble the constitutional structures of modern democratic arrangements based on public law (RENNER, 2011; TEUBNER, 2004; WILLKE, 2003). Thus, as *quasi*-functional equivalents of democratic constitutional structures, they foster an increasing responsiveness of the ruling structures of global governance towards the demands of affected subjects (TEUBNER, 2009, p. 21; TEUBNER, 2012, p. 119-23). Problems of social inclusion and rights violations could thus become the focus inside regimes triggering active "constitutional processes" of institutional creativity and social improvement of governance mechanisms.

In this piece, I will address the challenge of theoretically conceiving the changing landscape of global constitutional theory following the theoretical thread of transnational constitutional pluralism as it has been proposed by different authors, but mainly as formulated

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by Gunther Teubner (TEUBNER, 2004; 2010; 2012). I take Teubner's argumentative thread mainly because it is an outstanding theoretical endeavor to understand the evolving forms of global governance through *constitutional language*. Moreover, it offers enlightening legal empirical insights that have been partially confirmed by interdisciplinary research. Nevertheless, I believe that some aspects of Teubner's description have shortcomings. These limitations are not only his limitations, but perhaps the limits of the attempt of conceiving democracy beyond the nation state. By insisting on the idea that there are "transnational constitutions" as a sort of functional equivalent to democratic (national) constitutions, transnational constitutional pluralism seems to miss some important features of the evolving forms of global social ordering, which make them radically different from the forms shaped by modern (national) constitutionalism.

After presenting the basic assumptions of a theory of transnational constitutional pluralism and its claims about the promotion of responsiveness within transnational governance, I will address some crucial differences between transnational governance and political forms of constitutionalization.

2 The Transnationalization of Law and Power: a pluralistic world order

Different sectors of modern society have always had their own internal constitutive process of normativity. The modern market economy, for instance, has always depended on some normative definitions directly evolving from the economic practices not only to exist but also to affirm itself as a relatively autonomous sphere of social interaction (becoming eventually subject to external "political regulation") (RENNER, 2011, p. 40-41). These were the classical concepts of private law, such as *freedom of contract*, *property* or *prohibition of unjust enrichment* (GORDLEY, 2006, 25-31; RENNER, 2011, p. 40-41). Similarly, modern science could only advance relying on normative expectations such as the idea of *academic freedom*, that existed within the European universities long

before their complete acceptance by the structures of political power, thereby becoming a fundamental right in many constitutional regimes (STICHWEH, 2013, p. 295-315). And the same can be said of other social sectors, such as sports, arts, health, transports, mass communication and even (romantic) love.

This phenomenon has only been aggravated by the transnationalization of social life, specially through the driving force of the globalization of organizations, which began to operate beyond and beneath the territorial lines of the state-based political system (WILLKE, 2003, p. 80-90).[2] In this increasingly *a-topical world society,* social integration must rely more on rapid and flexible communication media such as money, scientific knowledge and corresponding forms of *soft law* than on the hierarchical and territorially defined structures of state authority (TEUBNER, 2012, p. 1-21; WILLKE, 2001, p. 123-44). Consequently, in the last decades, non-state (societal) actors have begun to work side by side with international, supranational and national political organizations – made up by states – in the task of global social ordering. And since legality has gradually become an artifact of transnational social life (ABBOTT *et al.*, 2000; HALLIDAY, 2009), we must also conceive the structures that *regulate the production of law* beyond the state. The strong thesis underlying the idea of an emerging transnational constitutionalism states the following: "the constitution of world society" would emerge "incrementally in the constitutionalisation of a multiplicity of autonomous sub-systems of world society", it would thus assume the form of a "multiplicity of civil constitutions" (TEUBNER, 2004, p. 8).

As understood by Teubner and other observers of transnational legal pluralism, the concept of legal constitutions must be decoupled from its political roots and extended to the global realm, where not only states, but also private, hybrid and semi-public actors constitute normative orders endowed with "authority"[3] and operating as constitutionalizing

[2] For this point, see: Ahrne e Brunsson (2006), Meyer (2000), Stichweh (2003) e Willke (2003, p. 80-90.

[3] On the idea of private authority (CUTLER, 2002; HALL; BIERSTEKER, 2002). And critical of the public/private distinction for describing global governance (SAND, 2013; ZUMBANSEN, 2010).

self-contained regimes (WALKER, 2002). Alongside the still existing national constitutions and the mainly public global constitutionalism of international and supranational organizations such as the World Trade Organization (WTO), the International Monetary Fund (IMF), the World Bank, the United Nations (UN), the Organization of the American States (OAS), the European Union (EU) and the African Union (AU), there would be constitutional orders emerging from the social sectors of economy, science, culture, technology, mass media and also from transnational corporations and organizations (such as universities, NGOs, etc.) (TEUBNER, 2012, p. 42-58).

Sure, transnational constitutional pluralism seems to push the *concept of constitution* too far. And it has been criticized for that. By extending the concept of constitution to any legal arrangement invested of some autonomous intent (such as the *lex sportiva* or the *lex mercatoria*), one runs the risk of being unable to tell what a constitution is at all (VESTING, 2009). The concept may turn useless, since it becomes tantamount to any idea of order, no matter how contingent this order might be. A corporation, an association, a family or even a group of friends can be said to have a constitution. Moreover, societal constitutionalism breaks down the distinction between public and private law, conceiving of legal norms as a social construct emerging from the spontaneity of social life and understands constitutions as a social "civil" phenomenon, thus offering no clear equivalent to ideas such as 'common good' or 'public interest' (MÖLLERS, 2004). There are for sure constitutional problems on the global and transnational levels, such as rights violations perpetrated by transnational actors or legitimation problems regarding transnational regulation. But the existence of "typical constitutional problems" could be insufficient to authorize the discourse about *constitutions* (NEVES, 2013, p. 2).

There are notwithstanding also some good arguments for making the case for a transnational constitutionalism "in the making". Indeed, there is a clear spreading of legal or quasi-legal forms of regulation on the global and transnational level that cannot be described with the concepts of classic state-based legal theory. Besides the international regimes of states, which have gone through a strong process of *legalization* since

the late 1980s (ABBOTT, *et al.*, 2000), there is a new set of regimes emerging from specific policy domains, where the states, whose legal orders are often confronted, remain only one kind of actors among others. Commercial and investment arbitration, internet courts or sports courts are good examples where one can find a prolific case law challenging state jurisdiction (NEVES, 2013, p. 118-36). Also regimes that were initially based on the international *law of the states* developed an increasing process of reflexive and autonomous legalization, with their own rules of adjudication, courts and *case law* (HALLIDAY, 2009, p. 282-285).

In fact, remembering a long legal-sociological tradition which reaches from Weber to Habermas and from Durkheim to Luhmann, we must bear in mind that the emergence of legal constitutions can only be understood as a consequence of the differentiation of law as a recursive system (LUHMANN, 1990, p. 184-93).[4] Legal recursivity means that, in modern society, law can only be produced and reproduced by the means of law itself (LUHMANN, 2004, p. 105-20). In other words, there are no criteria to decide about the "legality" of a legal norm besides another legal norm. Accordingly, legality must be evaluated only in the face of legal norms, whose legality can also only be decided on the basis of further legal norms. This self-referent circle of "recursive legal validity" may become problematic, since there are in principle no legal norms endowed with intrinsic legality (a last resort of foundation).[5] And in a complex, highly individualized and differentiated society, it would be very unlikely – to say the least – that one could ground legality on common moral or religious beliefs, without running the risk of breaking down the authority of the whole legal system.

Despite this paradox, the law does not collapse. Indeed, in the course of modern legal evolution, the legal system was provided with an interesting way to deal with its logical self-implosion; namely, through the

[4] From a different perspective, but agreeing with the point that the differentiation of the legal sphere is a condition for the emergence of public law as a rational reflexive dimension of the legal system (HABERMAS, 1984, 243-72).

[5] This led authors like Hans Kelsen, Carl Schmitt or Herbert Hart to their different versions of "founding legal rules", such as the *Grundnorm*, the "State of Exception" or the "rules of recognition".

emergence of a second level of recursive legality, which became known as "constitutionality". So, besides the "basic legal rules" directed to human behavior, there are second level rules – established as a reflexive level of recursivity, namely *reflexivity* – able to decide whether a law is lawful (*constitutional*) or unlawful (*unconstitutional*) for the legal system itself (LUHMANN, 1990, p. 2.004). Of course, the problem of the paradoxical recursivity of the law does not disappear so easy, being only transferred to the level constitutional norms. Are there, for example, unconstitutional constitutional norms? How does one decide on the constitutionality of the constitution? On this level, however, the problem is "outsourced" to a further social structure. The question about the legality of constitutional norms is shifted to the political system, where it ceases to be seen as a "legal problem" and is converted into a legitimization problem.[6]

3 Transnational Constitutions: concepts, problems, structures

The question whether we should (or not) name these structures as "constitutions" may be of theoretical value. And I will attempt to address this question later in this article. More important, however, is the analysis of the transnational processes of production of power, law and regulation as they effectively take place. By means of a careful analysis of these structural processes, the question of how to "name" the production of social norms within transnational governance can be largely de-dramatized. Certainly, there are no "transnational constitutions" in the literal sense; and any use of the term would depend on a strong re-specification. As I understand, though, it may help to use a constitutional vocabulary at least as an attempt to grasp how power and authority are produced on this level, since "constitutions" deal exactly with the legitimate relationship between power and regulation.

According to Teubner, if we want to talk about some sort of transnational process of constitutionalization, some conditions must be

[6] The problem of the "legal" or "political" character of the constitution made a long career in constitutional theory in the formulation of authors like Lassalle, Schmitt, Kelsen and Hart etc., reaching until our days.

met. Firstly, (i) a theory of transnational constitutional pluralism must explain whether and how transnational legal regimes develop their own level of reflexive recursivity (*reflexivity*). Second, (ii) it has to clarify how these normative orders deal with the problems of "legitimacy" (FISCHER-LESCANO, 2007, p. 102-106). In his theoretical endeavor, Teubner attempts to address both problems.

(i) If the national constitutions were based on a relationship between the political system and the law that solved the foundational problem of the legal system, the "constitutions of the transnational" result from the heteronomous reference between the law and the autonomous social sectors and their processes of reproduction, which may have some equivalent characteristics. As societal constitutions, they are defined as a "structural coupling between the reflexive mechanisms of the law (that is, secondary legal norm creation in which norms are applied to norms) and the reflexive mechanisms of the social sector concerned" (TEUBNER, 2012, p. 105). Although in very different and varied intensities and according to their specific conditions, transnational regimes are increasingly producing norms for regulating the identification, establishment and modification of norms as well as of competences for issuing and delegating primary norms that are essential for the generality and predictability of decision making processes (WALKER, 2002, p. 527-529). From the standpoint of the law, the emerging partial constitutions consist of the production of legal norms structuring the self-reflection of a social sphere. They are legitimated through the benefits brought to society by the specific social dynamics being regulated. From the standpoint of the social sphere, its constitution consists of a normative self-reflection, in legal language, which is an unavoidable condition for its stable self-reproduction (TEUBNER, 2004, p. 20; TEUBNER, 2012, p. 106).

Accordingly, societal international and transnational orders produce their own version of the meta-code constitutional/unconstitutional, building specific forms of intern normative hierarchy. These internal rules become the basic criteria *deciding on how to decide* on the primary rules of the regime. Again, looking at the instance of economic governance regimes, the basic norms of the market economy, such as the freedom of contract, fundamental rights of corporations, the protection of property

rights and of competitive mechanisms, but also rules regarding the social obligations of property, corporate social responsibility and ecological sustainability may become the rules materially informing the decisions on the "legality" of primary norms in concrete cases (TEUBNER, 2012, p. 112-113). And the organizational rules, the rules of adjudication, may vary depending on how these regimes formalize. They all present however different levels of legalization, different functions for the professionals performing regulatory and adjucating functions and different relationships to relevant stakeholders.

(ii) The constitutionalization of international and transnational regimes would express the fact that globalization sets free other social dynamics besides the political community as constituting legal mechanisms. According to Teubner, "not just politics, but other social systems, too, establish themselves through self-referential processes by which, *ex nihilo*, they constitute their own autonomy" (TEUBNER, 2012, p. 65). Drawing on assumptions of social systems theory, the author points out that it is a mistake to understand constitutional structures as the expression of a collective identity that would found the legal system. Instead, he claims that the *pouvoir constituent* should be sought at the communication processes that constitute the social life, a sort of "communicative power" understood as an impersonal process of societal reproduction (TEUBNER, 2012, p. 63). The modern national legal system makes reference to the operational structures of the political system to hide its own self-foundation, just as the political system needs constitutional legal norms to hide the fact that the "real people", in fact, never really *wrote* any constitution (maybe being even created by it). As formulated by Müller, in a constitutional democracy, the "people" (*Volk*) becomes a "constitutional people" (MÜLLER, 1997).

The lack of a substantial people, a constitutional community, must therefore not be a problem, since it has been not less problematic in national constitutionalism. In fact, as put by Hans Lindahl (2007), the "self" acting as a self-constitutional people is not given before the constitutional process. Rather, it "can only be established retrospectively, from within the unity of a legal order: political unity does not admit of a pre-legal existential judgement" (LINDAHL, 2007, p. 20). The

constituent power does not emanate from a pure decision, it can only exist as it produces the processes to which it itself reacts: it is a result of the mediation between the legally produced politics and the law that is also procedurally constituted. Hence, the collective self of the constituent power "exists in the modes of questionability and, by way of its acts, of *responsiveness"* (LINDAHL, 2007, p. 21).

4 Transnational Constitutionalism and Power: producing legitimacy without politics?

Referring to Koskenniemi, Teubner remembers however that on the transnational level the foundation and legitimization of normative orders do not seem to happen through the principles of "public" (political) international law, but

> [t]hrough specialization – that is to say, through the creation of special regimes of knowledge and expertise in areas such as 'trade law', 'human rights law', 'environmental law', 'security law', 'international criminal law', 'European law', and so on – the world of legal practice is being sliced up in institutional projects that cater for special audiences with special interests and special ethos. (KOSKENNIEMI, 2009, p. 9)

The politics of transnational law becomes more and more a problem of deciding according to which rules a specific case will be decided and by whom (KOSKENNIEMI, 2009, p. 12-14). If under the structures of national politics it was possible for one constitutional court to decide according to the principles and rules of one and only normative order in case of a collision of rights, it seems that on the transnational level different courts and regimes have different takes on the same issue.[7] The "fragmented constitutional subjects" of the world society therefore face a crucial challenge: the quest for the responsiveness of their transnational

[7] For an extensive investigation of different examples (FISCHER-LESCANO; TEUBNER, 2004; NEVES, 2013).

constitutional processes to a complex social environment with which society itself can barely cope.

In fact, the stubborn reproduction of modern social processes is an old concern within the social sciences. Classic authors as distinct as Karl Marx, Emile Durkheim, Karl Polanyi and Max Weber used different concepts (such as *alienation*, *anomia*, *disembedment* or the *iron cage*) to describe the destructive effects of the modern expansive reproduction of self-referent blind social spheres such as the market economy, law, science or technology over the human, social and natural environments. Indeed, modern political constitutions, with their all-encompassing *bills of rights,* can also be understood as a self-protection of society against the expansive tendencies of the political (LUHMANN, 1965) and, later, the economic system (POLANYI, 1944, p. 210-218).

If these tendencies have been relatively tamed through the means of legal constitutionalization of the political system, how could this process be reproduced on the global level, where the emergence of a world state is not more than a – maybe dystopian – distant idea? In this context, the "blind stubbornness" of self-reflective social sectors is further strengthened, since they are organized as self-contained regimes, describing social conflicts through their own respective lenses.

International sports arbitration, for instance, looks at social conflicts through the lens of the competitive standards of sportive practices, for which competitive equality is a major value, sometimes disregarding other rights, such as the freedom of profession, that could be also taken into account in hard cases by constitutional courts.[8] The same happens

[8] In a controversial case, the *Union Cyclist Internationale* (UCI) decided, after a positive result in doping test, for the exclusion of a Spanish athlete of any official cycling competition. The athlete contested the decision before national sports authorities, then filing an appeal to the Spanish courts, which have overhauled the UCI decision on grounds of due process and protection of fundamental rights, forcing the Spanish Cycling Association to allow the claimant to take part in national competitions. The UCI then appealed to the Court for Arbitration of Sports (CAS), which sustained the original UCI decision, arguing that only international authorities of sports could legally manage their competitions, since they would treat all athletes equally, not leaving room for local variations regarding regulations on doping, what would make impossible equal

in other areas, such as investment arbitration, where decisions are made on the basis of the principle of "fair and equal treatment of investors" and "security of investments", or commercial arbitration, where decisions are made always taking into account the basic principle of freedom of contract (also regarding the freedom to choose the forum and the applicable law)[9].

These regimes can nevertheless internalize through their own language social demands coming from a "public" or from other social sectors. Legally, it can be done, for instance, through the existing doctrines of the "horizontal effects of fundamental rights", which claim that human rights are not only addressed to states, but also to private actors (TEUBNER, 2006). Examples can be found in the field of economic governance (*e.g.* corporate social responsibility and sustainable governance), in the scientific system (bioethics) etc. The argument goes that any attempt to address the critical questions regarding the *responsiveness* of post-national global regimes towards their social, human and natural environment must arise from these regimes themselves, namely through their processes of constitutionalization (TEUBNER, 2012, p. 86-88).

Social responsiveness does not fall from heaven. For Teubner, it depends on the social dynamics steering the constitutionalization process, which emerges from the "internal differentiation" of governance regimes "into an organized-professional sphere and a spontaneous sphere" of social actors and operations reproducing the regulated social sphere (TEUBNER, 2004, p. 27; TEUBNER, 2012, p. 89).

On the transnational level, the spontaneous sector corresponds to the public of individuals and organizations that are somehow affected by regulatory decisions or depend on the benefits of a certain social sphere

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conditions of competition in the world sports. Indeed, if the Spanish National Cycling Association would comply with the decision of Spanish Courts, it would run the risk of excluding all Spanish athletes of any international competition. For this and many other cases, see NEGOCIO (2014).

[9] For an extensive and careful research of case law in private arbitration, see RENNER (2011).

(such as world finance or world high education), but do not perform any direct function in the regulation of the sector's reproduction. Taking commercial transnational governance as an example, one can understand as part of the spontaneous sector every individual who depends on the goods provided by transnational corporations, the employees working across the diversified – and unequal – production chains, communities whose natural environment may be affected by the processes of production and circulation of goods, NGOs fighting the consequences of corporate operations through shaming processes or through social mobilization.

The organized sectors of transnational (and global) governance regimes consist of the actors that directly manage the decision-making processes, be it the setting of rules, adjudication, or the more informal processes of supervision, the mechanisms of compliance and production of regulatory knowledge. Given the heterogeneity and polycentricity of governance structures, this *participation* may assume very specific forms, varying in intensity and in quality. It may be related, for example, to the production of indicators, a very powerful instrument for governance in some areas (such as human rights), which is often seen as the role of experts in some central organizations like the OECD, the World Bank or the UN.[10] It can assume the form of standard setting procedures for the exercise of a key profession by a private non-profit organization (such as accounting standards) or other sorts of standard setting (BOTZEM, 2008; PETERS; KOECHLIN; ZINKERNAGEL, 2009). It may still be the meta-regulation of public or private regulators through some membership structure of a transnational organization, such as certification associations (CAFAGGI, 2016). These managing individuals can also participate in loose informal networks setting advisory rules that are then internalized by public or private actors, through policy diffusion or institutional isomorphism. Or it can assume the form of more rigid legally structured participation.

Since actors often appear in more than one regime, sometimes also shifting from one to another in pursue of their interests (keyword *forum*

[10] For an overview of the use of indicators in global governance, see DAVIS *et al.*, (2012)

shopping), the positions as part of the regulatory "organized" core of a constitutional arrangement or as part of its spontaneous social periphery may also change over time. These regimes may also change their constitutive rules for membership, what makes it difficult to identify a rigid and definitive distinction between a constituency and a government in the complexity of transnational governance. In fact, as pointed out by Claus Offe, the idea of governance seems at times to blur – or at least make invisible – the power relations between the governed and the governing authorities (OFFE, 2009, p. 551).

Central for the management of transnational regulation, on the "organized" side of regime operations, is the production of knowledge (DRORI; MEYER, 2006; MERRY, 2011). As a consequence of the difficulty of coordinating social action without the support of an overarching central authority, there seems to be a shift in the processes of regulation, which has been also observed within states (BLACK, 1996; 2001). Rigid normative expectations imposed by a hierarchical authority seems to be replaced, or at least mixed, with forms of flexible adaption and cognitive learning (LUHMANN, 2004, p. 464-469; TEUBNER, 2012, p. 94). Accordingly, the central actors of a specific regime may adapt their reciprocal expectations according to changes in perceptions and beliefs about how the future behavior of the social sector will evolve. Moreover, the complexity of regime pluralism makes difficult any kind of harmonization of expectations, often forcing states and non-state actors to make use of very specialized knowledge in trying to cope with such complexity (ALTER; MEUNIER, 2009, p. 18-19). This may undoubtedly empower the position of experts and specialized professionals. And the struggle over "governance authority" often assumes the form of a struggle for "epistemic authority" in a given issue area (QUACK, 2016, p. 364-366).

For Teubner, any form of approximate comparison between the transnational processes of constitutional formation and the idea of "democratization" depends thus on a contingent balance that may (or may not) take place within this "dualism of a formally organized rationality" (the equivalent of formally organized parties and state administrative structures) and the "informal spontaneity" of society (that could be

compared to the electorate, interest groups and public opinion in general) (TEUBNER, 2004, p. 27). This balance would mean that none of the two sectors could affirm a primacy vis-à-vis the other. "Societal constitutions ought therefore to direct their attention towards safeguarding the internal politicization of the spontaneous sphere against the dominance of the organized professionalized sphere" (TEUBNER, 2012, p. 91). And transnational constitutionalization would imply the establishment of mechanisms, by which the spontaneous sector could constrain the organized sector formed by decision-makers, judges, arbiters, experts, lawyers and professionals to become responsive to the social, human and natural environment of the fragmented domain of social life they would be responsible to regulate (TEUBNER, 2015).

This can be made through different mechanisms, such as protest social movements that could re-politicize regulatory processes making it more sensitive to exclusionary problems created by the regime reproduction. Teubner identifies important developments in this direction in phenomena like *naming and shaming* initiatives*,* by which social movements denounce bad practices of transnational corporations; in whistleblowers that trigger global processes of *scandalization* by releasing information that otherwise would never become public; in organizations like *Wikileaks* which force access to information about corrupt and unethical practices and the increasing networks of NGOs specialized in protesting transnational governance (TEUBNER, 2012, p. 89-92; TEUBNER, 2015, p. 75-76). One may think moreover of the increasing reorientation of NGOs and think tanks for the production of alternative knowledge to dispute the processes of regulation within the regimes through the contestation of expert domination (QUACK, 2016, p. 374-376). Importantly, any process of irritation of these "constitutionalizing" regimes has to take place in their own language, since they can either learn from the observation of changing expectations in their environment or be destroyed by their lack of adaptability and capacity to coordinate action. (TEUBNER, 2012, p. 94-96). The transnational *constitutional moments* assume thus the form of a cognitive learning process, often carried out by experts acting as surrogates of social groups whose

demands are translated to the theoretical specialized language of the respective governance regimes.[11]

5 Constitutionalization without Democracy? The Functional Limits of Post-Political Constitutionalism

As I understand, it is not so relevant to discuss whether Teubner's (and others') insistence in using the terminology of transnational *constitutions*, *constitutionalism* or transnational *democracy* is really justified (GRIMM, 2009; NEVES, 2013; VESTING, 2009). For me, it is clear that calling "constitutions" the institutional arrangements evolving around transnational regimes can only be understood as metaphoric exercise, making sense only as theoretical reflection. Notwithstanding, stating that "there is no constitution of the transnational" may be absolutely right. But it can be not much more than a comfortable observation by those who – feeling like semantic sentinels of the good old traditions – do not want to admit that things have really changed when it comes to the exercise of power and authority in a transnationalized world society. Traditionalist semantical caution does not really change the facts being observed.

Moreover, the use of old names for describing new phenomena is not problematic in itself. Indeed, the term democracy as used in modern societies, although based in Ancient Greek terminology, is highly unlikely to bare much familiarity with its original Athenian meaning.[12] By the way, French and American revolutionaries used many old concepts – such as constitution, republic, democracy – to name radically new

[11] There has been an interesting debate over the concept of "recursivity" in the sociological institutionalist tradition that has many points of convergence with this argument. In this tradition, there has been also a prolific production of empirical material about the concrete mechanisms of these processes. See, for example, Malets e Quack (2017).

[12] For the simple fact that the Ancient Greek political system was based on ontological distinctions concerning different types of human beings. Hence, it was a structurally hierarchical stratified society, whose processes of collective decision making were not about how to decide on an open future concerning every citizen, but how to preserve the glory of the past. For this point, see KOSELLECK (1972).

institutions, just because they lacked better options as they tried to make sense of the events they were witnessing. The fundamental problem may lie rather in the structural differences between diverse social processes. A sociologically sensitive comparison may easily show not only these differences, but can also raise some hypothesis about how they might unfold.

Accordingly, the "constitutional" structures of transnational governance may produce new forms of reproduction of law and power in the world society of our days, diverging in important ways of the democratic arrangement of political constitutionalism. Here lies one of the important limitations of the pluralist approach. Although it surely identifies important factual developments in the functioning of law and regulation in a transnationalizing world society, it sometimes seems to miss the point, promising a positive scenario for a future that can be not much more than illusory; perhaps a rich phantasy inspired by the creativity of its own theoretical efforts.

First, one needs to remember that normative political inclusion was, indeed, a structural condition for the arrangement between law and politics within modern constitutionalism, relying on strong expectations towards decision-making procedures based on inclusionary suffrage. For modern politics, each individual is normatively equal when it comes to the exercise of power (LUHMANN 2000, p. 90-95; THORNHILL, 2011, p. 153-157).

The constitutionalization of the political system means, on the one hand, that power as a social medium assumes a legal form and its social reproduction depends on its legalized circulation according to the procedures of the constitutional system. On the other hand, law becomes dependent on the differentiation of the political system for its own reproduction (LUHMANN, 1990): the last foundation of the law receives constitutional form as a kind of special law given for the people by the people (GRIMM, 2010, p. 9). Indeed, the legal form can only achieve a relative level of autonomy via-a-vis other social processes (such as religion or economy) – thus making law the only way to produce new law –, if power has been legally bound to processes of constitutional

reproduction, namely electoral, legislative and judicial procedures. Otherwise, legal rules may be exposed to exploitations by particularistic conjunctions of interests and status. Corrupt law – and by that I mean law reproduced on the basis of particularistic conjunctions of power or interests – remains actually a latent possibility as shown in empirical circumstances of extreme social exclusion (NEVES, 1999; 2007; 2017).

This process of differentiation and establishment of reciprocal dependency institutionalizes a self-legitimization dynamic according to which political power has to produce its own means for acquiring authority. Public authority must result from a functional political "provision of the social capacity of binding collective decision-making" (LUHMANN, 2000, p. 93) and not from external sources such as religious beliefs or morality. Moreover, the process of constitutionalization, where and if it comes about, sets free an expansive inclusionary pressure, since any kind of political exclusion must be justified under grounds that are increasingly unlikely to be accepted (THORNHILL, 2011, p. 168-180). This does not mean that modern political constitutionalism is a necessarily egalitarian system. In fact, there are many forms of political exclusion in the constitutionalized states of the Global North, which are barely compatible with the social structures of political constitutionalism. One may only think of the political exclusion of individuals who were born and socialized in some Western European democracies and have no voting rights. Yet, the differentiation of a political system triggers profuse processes of politicization that may work as inclusionary pressures. One might remember here the long (and still ongoing) politicization of sexual, gender and racial inequalities as well as in the access to economic resources. These struggles have given place to new forms of social inclusion that, in turn, have been integrated in many constitutional orders according to a well-known narrative about "the expansion of citizenship" (MARSHALL, 1950, p. 27-75).

Differently as it is in the case of normative democratic theories, a functional sociology of the political system cannot understand political inclusion as a normative demand of associated free individuals seeking to express their common collective will. The collectivity that is the addressee of political decisions cannot be understood as having any form

of pre-political existence (NASSEHI, 2003, p. 149). Rather it must be created by the very concrete inclusive (electoral, legislative and judicial) procedures they claim to access in a constitutional system (LUHMANN, 1983, p. 27-32). And if these procedures are absent, structural political exclusion (and inequality) will be inevitable, giving place to further forms of social exclusion in a cumulative process. Accordingly, it is not hard to think how powerful elites may claim to be the direct representative of the whole collectivity, replacing inclusive constitutional procedures by processes of constitutionalization that are weak or have only symbolic character. This is the reason why a political philosopher like Claude Lefort wrote that, in a political democracy, "the locus of power becomes an empty place" and "the exercise of power is subject to procedures of periodical redistribution" (LEFORT, 1988b, p. 19). For him, any kind of paralyzation or restriction of these procedures will always have exclusionary implications, since it invisibilizes the production of the social collectivity as a contingent process and, therefore, the contingent reproduction of power, which can thus become available to private appropriation. As Lefort puts it, "inequality and invisibility [of power] go hand in hand" (LEFORT, 1988a, p. 51).

Along these lines, we may summarize our functional comparison with the following questions: How do the "constitutional" structures and processes of transnational governance perform their functions? And what are the differences between them and the social structures of political constitutionalism?

6 Conclusion

For sure, many transnational governance regimes have developed structures of deliberation that may improve inclusion and participation (MALETS; QUACK, 2017). Yet, there are structural functional differences that rely on their high specialization and which have consequences for their mechanisms of "political inclusion". Only those that internally count as "voters" may have access to the decision-making processes. And these are, per definition, only those who have

sufficient knowledge of the specialized language to engage in meaningful deliberative processes. Even social movements organized by affected individuals can often only make sense of their condition with the help of transnational alliances with experts, NGOs or think tanks, which often use their knowledge to perform transnational advocacy and mobilization.

One further problem concerns the fact that transnational governance regimes have different relative capacities of social reproduction and enforcement of their regulations (NEVES, 2009). This is because they must derive their "social strength" from the social area they are cast to regulate. Thus, the economic governance of investment is certainly more robust than some regional human rights regimes or regulatory dynamics of health and environmental protection. This is a consequence of structural asymmetries between the possibilities of action available to the organizations of some functional systems (such as transnational corporations, transnational accounting firms or even universities) vis-à-vis individuals, indigenous communities, health or environmental activists. Indeed, money is easier to move and reproduce than normative expectations.[13] This makes transversal forms of responsiveness between different regimes more unlikely, while also making difficult the politicization of a conflict by communities that are often not used to understand social problems according to the specialized regulatory languages in play. A conflict regarding the destructive consequences of massive economic investments to the livelihood of indigenous populations in Ecuador may be problematized with small chance of victory in the Ecuadorian domestic constitutional system or at the Inter-American Court of Human Rights. These communities can barely reach out of the circle of allies consisting of human rights activists and environmentalists in order to translate a right claim into a language that economic actors "understand" and through political action that could

[13] In the language of systems theory, one could say that, while the reproduction of the economic system relies basically on its code (money), politics and "democratic law" depend largely on their reflexive programs (norms, constitutional rules) for their respective reproduction. It makes them dependent on very unlikely processes of coordination of expectations, what makes them also quite weak forms of communication in the face of processes of societal transnationalization.

hurt their profitability (such as economic boycotts by consumers or legal action by public prosecutors in the global north).

Empirical research has nevertheless provided convincing evidence that regulatory rules and the (constitutional) rules regulating the decision-making processes can be adapted and altered according to demands coming from the disorganized periphery of the regimes (MALETS; QUACK, 2017) engaged in processes of contestation. This would resemble "transnational constitutional moments", when transnational regimes can learn how to become more inclusive and responsive to their social and human environment.

Transnational contestation may assume the form of social mobilization as rooted in national civil societies, now adapted through the building of transnational alliances and other mechanisms of transversal mobilization across and beyond territorial borders (KECK; SIKKINK, 1999, p. 1-38). This strategies may work well in some areas that are more international such as trade negotiations, where nation-states play a prominent role (BÜLOW, 2010, p. 67-80). The reason is that states remain largely sensitive to usual forms of political protest coming from their own national public spheres. This network may then produce the so-called *boomerang effect*, by which an advocacy network force a particular nation state to observe rights claims as a consequence of international pressure activated through transnational alliances (KECK; SIKKINK, 1999, p. 12-13). Yet, this kind of mobilization often reproduces the asymmetries of resources in favor of the organizations of richer states, which may shape the mobilization networks and internationally frame the conflicts according to their own views and interests (BÜLOW, 2010, p. 193-196). Moreover, states responses in the international arena also vary across international inequalities of political and economic power, what can further strengthen existing hegemonic geopolitical relations.

A different kind of contestation takes place in governance regimes where state actors are less important. It often assumes the form of a struggle over *epistemic authority* about the correct descriptions of regulatory problems and challenges faced by the regime. Counter-hegemonic actors can thus use "scientific and professional knowledge

as a resource for counter-claims and public comparisons", which may enhance the possibilities of resource-poor actors to reframe certain problems within a given regime (QUACK, 2016, p. 375). Here, new descriptions of the subject matter or new hegemonic epistemological conceptions of how to organize available knowledge for professionals may reshape the functioning of a specific regime. Disputes over how to conceive corporate accounting rules or how to conceive of corruption in transnational arbitration of investment contract disputes can gain whole new meanings depending on how they are described.

It is not difficult to notice the structural differences between the constitutional form of political democracy and the transnational structures of governance when it comes to the processes of shaping and changing societal normative structures. In every way possible, the high fragmentation and specialization of transnational governance regimes favors the accumulation of power and formation of social asymmetries that can be only indirectly bypassed by outsiders. This might contribute to the formation of transnational networks of highly included individuals and groups that, despite their best intentions, might have only very limited cognitive capacity to produce internal responsiveness to those who are in remote social environment of these structures. As pointed out by sociological research, social inclusion and social exclusion often develop a cumulative dynamic. Those who are excluded from one functional system of modern society often run the risk of being excluded of further social systems (NASSEHI, 1999; NEVES, 1999; 2017). The one who has no valid ID or residence permit might lose access to the formal job market. Without a formal job, she might have less or no money; and without money, no access to education, health care etc.

Active social inclusion through the welfare state has been the result of intense processes of politicization within modern political structures of constitutionalization. Another cycle, a vicious one, may also occur as a consequence of selective social exclusion: selective and exclusive inclusion in the transnational economic system may lead to the accumulation of power, rights and knowledge. And it might become difficult to realize that an easy and direct access to the processes of regulatory decision-making is the result of the accumulation of

inclusionary chances. If society misses the constitutional mechanisms for the factual inclusion in decision-making processes (at least as members of a political community with voting rights) or the means for making sense of experiences of individual or collective suffering as a trigger to organized political action with constitutional intent, there might be some structural changes in the way it reproduces itself on the transnational level. Power might become increasingly invisible, such as its relations to the reproduction of inequalities. And networks of transnational inclusion may arise as the invisible rulers over politically excluded transnational masses that have only very limited ways to access the processes that regulate their lives.

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