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The Politics of Global Legal Pluralism

Marco Goldoni

Abstract Pluralism has made its way into European law literature already a long time ago. Some of its main tenets have proved to be apt for describing several forms of supranational constitutionalism (EU, ECHR, WTO). In the first two sections, this article reconstructs the two main pluralist interpretations of supranational constitutionalism: on the one side, McCormick's neo-institutional take on the nature of the EU and, on the other side, Mattias Kumm's constitutional pluralism. The third section illustrates why while they both present sounding descriptive elements, they should be both rejected because they are not normatively appealing. The fourth section elaborates the idea that a certain understanding of pluralism makes supranational constitutionalism politically shallow. Overall, instead of opening up new possibilities for constitutional transformation, pluralism serves the function of entrenching certain interests.

Keywords Global legal pluralism, ordinary politics, constituent power, public autonomy, constitutional fragmentation

The Context of Global Legal Pluralism

This article does not intend to criticize pluralism as a general theory of law, but rather focus on the use of pluralism at the supranational and global level and on its impact on political action as conceived by the recent wave of new publications on this topic. This application of legal pluralism to the domains of the relations between international legal regimes, stemming from various domains, that is, from the WTO to NAFTA and the European Union, and to the relations between regional or subnational domains, represents an application of legal pluralism.¹ In fact, legal pluralism has become one of the main theoretical frameworks open to international lawyers to grapple with the realities of the international and transnational legal orders.² The debate on the coherence and identity of international law, known as the 'fragmentation' debate, unsurprisingly elicited

¹ For a relatively optimistic introduction to these issues see S. Cassese, *Diritto globale*, Torino, Einaudi, 2008.

² For an overview, see R. Michaels, "Global Legal Pluralism", *Annual Review of Law and Social Science*, 5 (2009), pp. 243-262.



much interest from legal pluralists.³ In this sense, there are important differences between those whose starting point is the recognition of the ‘fact’ of legal pluralism (qua descriptive statement) and those who actually celebrate and embrace legal pluralism. This article tackles only with the latest cohort of pluralists for two reasons: the first one is that among these authors there are outspoken supporters of original forms of global legal pluralism; the second one is that in these works, and despite their pretensions, the suppression of the political aspect of constitutionalism is at its peak, to the point of actually debunking political constitutionalism *tout court*. The core criticism put forward in this article is an invitation to resist the celebration of global legal pluralism as an emancipatory move, and to see it as a direct attempt at depleting the resources of meaningful political action. This is the case despite the fact that in global legal pluralism a lot of emphasis is put on the role of contestation among different sites claiming authority on the same conduct. Dialogic exchanges among different layers of governance on one hand, and interactions between institutional and non-institutional subjects on the other hand, make global law increasingly more tolerant and rich. Even more, global legal pluralism makes legal interactions open to severe contestation by a multiplicity of subjects. As such, this form of legal pluralism would open new avenues of conflicts rather than limiting them. However, as we shall see in the following paragraphs, global legal pluralism cannot deliver what it promises. In particular, the framework adopted by legal pluralists cannot accommodate (it actually undercuts the possibility of) the two main features of a political kind of constitutionalism, that is, the possibility of exercising constituent power⁴ and the staging of ordinary political conflict.⁵ The writings of global legal pluralists extol the virtues of social groups and agents and

³ To roughly sum up there has been two major responses to the question of transnational law: one, as already mentioned, is the pluralist approach. The other one has been the constitutionalist answer. For an overview of the latter, see C.E.J. Schwöbel, “The Appeal of the Project of Global Constitutionalism to Public International Lawyers”, *German Law Journal*, 13 (2012), pp. 1-22.

⁴ Constituent power expresses the idea that politics should be fully reflexive. See J. Rancière, *Disagreement*, London, Verso, 2006.

⁵ For the importance of a space of appearance for political action see H. Arendt, *The Human Condition*, Chicago, 1958, ch. V.



plead for opening up the space to such forces. The logic of the argument is simple: releasing previously constrained social forces produces beneficial effects to the legitimacy of transnational law. In this respect, globalization has offered a new chance for making visible claims which were previously not recognized. But global legal pluralists postulate that this promise can be redeemed only if politics is not allowed to impact on other systems or if it is displaced by new forums which are supposed to illuminate aspects of social reality previously neglected. In a nutshell, global legal pluralism challenges directly the capacity of the political constitution to recognise, shape and address political conflict.

Embracing Normative Hybridity

A standard recent account of global legal pluralism is the one proposed by Paul Schiff Berman.⁶ It presents some of the classic tenets of legal pluralism and apply them to supranational law. Berman's methodology is rooted in the tradition of socio-legal studies and adopts a cultural analysis of law.⁷ Within this framework, law is part and parcel of the construction of social reality and its analysis cannot be detached from this aspect. The aim of this kind of enterprise is to retrieve how legal meaning is produced (and the condition of legal intelligibility) rather than to test legal validity. The second tenet is a direct consequence of the former: legal pluralism is neither State-centered nor fully cosmopolitan (at least not in the universalist version of cosmopolitanism). The ideas of an ultimate legal authority and of State sovereignty (at every level, national or international) have to be abandoned precisely because they cannot be supported neither by legal fictions nor by factual monopoly of power.⁸ Berman's starting point is the recognition that legal orders in a globalized age cannot exhaust the phenomenology of legal activities taking place across and beyond jurisdictions. At the beginning of his

⁶ See his monograph *Global Legal Pluralism: A Jurisprudence beyond Borders*, Cambridge, Cambridge University Press, 2012; see, also, "The Globalization of Jurisdiction", *University of Pennsylvania Law Review*, 2002, pp. 311-529; "A Pluralist Approach to International Law", *Yale Journal of International Law*, 2007, pp. 301- 322.

⁷ See P. Kahn, *The Cultural Study of Law*, Chicago, Chicago University Press, 1999; R. Cover, "Nomos and Narrative", *Harvard Law Review*, 1983, pp. 1-68.

⁸ For a recent take on this issue and the development of the idea of relative authority see N. Roughan, *Authorities*, Oxford, Oxford University Press, 2013.



monograph it is indeed stated that “we live in a world of multiple overlapping normative communities”.⁹ This entails that different legal orders might claim the right to regulate the same social field or the same activity. He defines this condition as normative hybridity. No definition is provided for that idea, but it can be loosely reconstructed as the phenomenon of “the relationship among multiple communities and their decision makers”.¹⁰ The examples offered by Berman are conspicuous: from state versus state conflict to state versus international norms and state versus non-state law. It remains an open question whether normative hybridity is a peculiar phenomenon of the age of globalization which requires a new approach to law. Nonetheless, for the sake of the argument, we can even concede to Berman that this is the case. Legal hybridity is first a *de facto* reality with which it is necessary to become familiar. The point is that global legal pluralism is a more ambitious theory and it advances stronger claims than just descriptive ones. It is indeed a normative theory because it praises the virtues of a pluralist understanding of legal interactions. What are the virtues of this form of global legal pluralism? The first one is indeed epistemic: recognising the multiplicity of sources of law beyond the States means respecting social groups as autonomous creators of law and recognising their legal impact. The second main virtue is that according to Berman this form of pluralism is empowering because it creates new opportunities for contestation and creative adaptation.¹¹ Berman believes that pluralism should cope with the phenomenon of hybridity with procedural and not substantive means. Because normativity is pervasive, and the production of legal meanings relentless, substantive principles have to yield to normative proceduralism.¹² No agreement on the content of substantive principles is indeed possible. The recognition of this state of affairs is part and parcel of how the response to legal hybridity takes shape: “to create or preserve spaces for productive interaction among multiple, overlapping legal systems by developing

⁹ P. Schiff Berman, *Global Legal Pluralism*, cit., p. 3.

¹⁰ *Ibid.*, p. 117.

¹¹ *Ibid.*, p. 118.

¹² A. Galán, D. Patterson, “The Limits of Normative Legal Pluralism”, *International Journal of Constitutional Law*, 2013, p. 786.



procedural mechanisms, institutions, and practices that aim to manage, without eliminating, the legal pluralism we see around us”.¹³ The purpose of global legal pluralism is to manage legal hybridity by devising procedures in which the voices of different communities can be heard. Berman believes that this approach can tame conflict between staunchly different and contrasting views of the law and also reply to the democratic objection to the legitimacy of such a pluralist framework. The first point concerns the capacity of procedural forms to channel and eventually tame conflict between opposing normative commitments by building a common social space through the expansion of the range of voices heard or considered.¹⁴ In this way, relations of enmity would be turned into adversarial relationships.¹⁵ As for the second point, the democratic objection, Berman replies by adopting an array of tools for coping with pluralism without suppressing it and at the same time giving voice to all those affected by decisions: procedural mechanism, institutional designs, and discursive practices. These mechanisms provide the framework for enabling and at the same time constraining legal pluralism at the global level. Berman concedes also that these procedures are not completely formal, but they cannot decide any issue by introducing substantive reasons. As rightly noted by Galán and Patterson, this requirement makes Berman’s pluralism mild and basically grounded in a liberal political philosophy.¹⁶ Not every new voice is legitimate, but only those who put forward reasonable arguments. In the end, the purpose of these mechanisms lies in being “sites for continuing debates about pluralism, legal conflicts, and mutual accommodation”.¹⁷ The examples of instantiations of continuing debates put forward by Berman are quite telling. They all point to interactions between different sites of authority or institutional power and rarely discuss informal (meaning social but not institutional) movements. The use of the margin of

¹³ Berman, *Global Legal Pluralism*, cit., p. 10.

¹⁴ Berman, *Global Legal Pluralism*, cit., p. 18.

¹⁵ Berman here adapts to his theory an argument formerly put forward by C. Mouffe, *On the Political*, London, Verso, 2005.

¹⁶ A. Galán, D. Patterson, “The Limits of Normative Legal Pluralism”, cit., p. 787.

¹⁷ Berman, *Global Legal Pluralism*, cit., p. 153.



appreciation is understood as a form of communication between the Strasbourg court and the constitutional courts of member States. It can be used as a way to signal dissatisfaction with current decisions but it is also a way to calibrate the protection of fundamental rights among different layers. Another example concerns the relationship between NAFTA panels and US state courts in cases¹⁸ which generated new trilateral relations between them and federal institutions. What is valuable in these cases, according to Berman, is the reciprocal influence among different bodies based not on coercion or the threat of sanctions, but on dialogue and criticism among these institutions. Of course, interactions are not limited to institutions but can also occur between informal agents and formal bodies. We are even informed by Berman that this informality can be stretched as far as to the point where “the decisions of arbitral panels may, over time, exert influence on the decisions of more formal state or international bodies, and vice versa”.¹⁹ Given the problematic status of arbitral panels, in particular in the case of investment treaty law (which is certainly affecting the supranational level), one wonders how these ‘dialectical interactions’ can instantiate any form of political conflict or even contestation at the supranational level.²⁰ In fact, most of the examples provided by Berman do not actually make visible any form of political conflict. To the contrary, they usually are ways of coping with potential conflict ‘by stealth’, that is, by avoiding the staging of disagreement.

In light of these remarks, the overall upbeat tone deployed by Berman is unwarranted. The containment of pluralism by a series of liberal constraints is not given proper consideration despite the fact that this framework is essential for making global legal pluralism operative.²¹ Berman seems to postulate a public reason as a framework for the development of global legal pluralism. Yet, even if

¹⁸ Loewen Group v. United States, ICSID case No. Arb(Af), 98/3, 42 ILM 811 (2003).

¹⁹ Berman, *Global Legal Pluralism*, cit., p. 160.

²⁰ As known, in certain cases, there is no duty to make the motivations of panels’ decisions public, a feature which makes treaty investment law impolitical. For a strong criticism of investment treaty law along these lines see D. Schneiderman, *Constitutionalizing Economic Globalization*, Cambridge University Press, Cambridge, 2008.

²¹ See Berman’s reply to Galán and Patterson, “How Legal Pluralism Is and Is not Different from Liberalism”, *International Journal of Constitutional Law*, 2013, pp. 801-808.



one were to consider appropriate the thin requirements for the validity of reasons exchanged in public reasoning, it would still be difficult to understand how these reasons came into being in the first place. In other words, Berman takes these requirements of public reasoning as a given, a structural feature of certain practices which, in the end, turn out to be already inscribed within a liberal horizon. It is not possible to put into question this framework and therefore the kind of politics envisaged by global legal pluralism is not fully reflexive. In the end, the political added value of this version of global legal pluralism can be summed up in the idea that ‘the more, the merrier’.²² A proliferation of viewpoints, once channelled through certain devices, will improve the representativity and quality (in terms of its contents) of law. Yet, this claim just replicates the logic of competition as a system for enhancing knowledge which is usually applied to the rationality of system markets.

Radical Pluralism?

While Berman’s proposal is still attached to some form of liberal constitutionalism, the case of Nico Krisch’s work on pluralism appears as partially different. At a certain level, Krisch’s understanding of pluralism is definitely more radical than Berman’s. He embraces and supports a normative perspective on systemic pluralism. Institutional pluralism is a form of plurality of institutions: different parts of one order operate on a basis of coordination, in the framework of common rules but without a clearly defined hierarchy.²³ Berman’s pluralism, in the end, would be just another version of institutional pluralism because it recognises a common framework. Systemic pluralism eschews a common framework in favour of a decentred management of diversity. In this kind of

²² E. Melissaris, “The More the Merrier? A New Take on Legal Pluralism”, *Social & Legal Studies*, 13 (2004), pp. 57-79.

²³ According to Krisch, this is another version of the weak kind of legal pluralism identified in J. Griffiths, “What is Legal Pluralism?”, *Journal of Legal Pluralism*, 1 (1986), pp. 4-5. In the debate on supranational law this position is powerfully represented by M. Kumm, “The Cosmopolitan turn in Constitutionalism: In the Relationship between Constitutionalism in and beyond the State”, in Dunoff, Trachtman, *Ruling the World*, Cambridge, Cambridge University Press, 2009, pp. 258-324.



pluralism there are no common rules of recognition,²⁴ but only competing rules coming from a number of different layers.

Krisch's starting point is the new regulatory reality of transnational law. Regulations have become the main legal source for governing supranational or transnational phenomena. One aspect of this landscape is that the State has become much less important as the main site both of legal and political authority.²⁵ Another essential feature (at least, for the solidity of Krisch's argument) is the proliferation of global regulatory bodies such as international courts, international organisations and supranational regulatory agencies. This point seems to be rather uncontroversial: just to mention one example, according to Karen Alter, eighty-five percent of the total number of international decisions, opinions and rulings have been issued in the last two decades.²⁶ At the descriptive level, Krisch is basically starting from the thesis of the fragmentation of international law. At the normative level, he is fundamentally advocating the superiority of systemic pluralism to hierarchical and foundational constitutional systems, interstate system, and forms of institutional pluralist law which rest upon general legal rules and/or principles.²⁷ Once abandoned any reference to a common language or framework, it becomes necessary to provide an alternative explanation for enlightening the interactions among different legal claims. Two normative principles are conjured up by Krisch in order to support his global legal pluralism. The first one is *toleration* and it is directly linked to the epistemic status of systemic pluralism. According to this principle, "regulatory bodies

²⁴ According to Krisch, this version of pluralism is closer to the one proposed by B. de Sousa Santos, *Toward a New Legal Common Sense*, London, Butterworths, 2002.

²⁵ It has to be noted that Krisch's treatment of the role of the State is very superficial and inaccurate. He basically accepts the common but shallow interpretation of the decline of the State without really engaging with the topic of the restructuring of the State. For an insightful and still relevant analysis of the State within supranational orders see N. Poulantzas, "Internationalization of Capitalist Relations and the Nation-State", *Economy and Society*, 3 (1974), pp. 145-179.

²⁶ K. Alter, "The Multiple Roles of International Courts and Tribunals", in J. Dunoff, M. Pollack (eds), *International Law and International Relations*, Cambridge, Cambridge University Press, 2014 (forthcoming).

²⁷ As noted previously, the reference goes mostly to the literature on constitutional pluralism (Mattias Kumm, Miguel Maduro and the writings by Neil McCormick): see, for an overview, M. Avbelj, J. Komarek (eds), *Constitutional Pluralism in the European Union and Beyond*, Oxford, Hart, 2012.



should tolerate, and respect, the standards and decisions of other bodies”.²⁸ This is a standard prescription for many versions of legal pluralism. In order to operate (and as we shall see later, to flourish), pluralism needs reciprocal and conditional recognition of at least the *prima facie* value of the legal orders and institutions involved in a transnational legal conflict.

The second principle pertains to the normative justification of systemic pluralism. Here, what is most relevant for the economy of this article is that this justification comes wrapped in a political language. Pluralism, in contrast to constitutionalism, is related to ‘political deliberation’ because it is supposed to augment the openness to and hence the inclusiveness of many voices. This is how Krisch sums up his position in contrast to the constitutional approach: “constitutionalism and pluralism are distinguished ... by the different extent to which [each] formally link[s] the various sphere of law and politics. While pluralism regards them as separate in their foundations, global constitutionalism, properly understood, is a monist conception that integrates those spheres into one. As a result, rules about the relationship of national, regional, and global norms are immediately applicable in all spheres, and neither political nor judicial actors can justify non-compliance on legal grounds”.²⁹ Global legal pluralism, by respecting the separation between different domains, is allegedly political because it promotes the value of *public autonomy*. Much of the argument in support of systemic pluralism revolves around this ideal. Yet, it is striking how poorly this ideal is developed. The argument follows this line of reasoning: social practices alone are not a sufficient ground for the legitimacy of a postnational order. It is necessary to introduce an added value, which is provided, in this case, by the ideal of public autonomy, which among other things has to be compatible with the principle of toleration. But at this stage, Krisch’s argument becomes vague and too thin to meet the expectations that radical pluralism has generated in the first place. Social practices are instantiations of public autonomy when “they concretize the discursive requirements that allow all to be the authors of the rules

²⁸ P. Capps, “The Problem of Global Law”, *Modern Law Review*, 74 (2011), p. 798.

²⁹ N. Krisch, *Beyond Constitutionalism*, cit., p. 242.



to which they are subject”.³⁰ Therefore, social practices realise public autonomy when they are substantiated by a particular kind of political deliberation. In other terms, social practices instantiate public autonomy when they are the specification of the idea of self-legislation.³¹

This is a demanding claim but it should be recognised that Krisch confronts directly the objection of democratic accountability which is immediately raised when a heavy normative principle like public autonomy is conjured up. Global legal pluralism is supposed not to translate standard conceptions of democracy (i.e., representative democracy within the framework of the nation State) to the transnational sphere, but to adapt democratic politics to a new context. In response to the difficulties of postnational democracy, Krisch advocates the virtues of systemic pluralism: revisability, contestation, and checks and balances. Revisability is ensured by the lack of ultimate authority, while checks and balances are operational through the proliferation of sites of authority. However, for the argument put forward in this article, contestation is the most interesting tenet among those three. Contestation is supposed to be the main political component of global legal pluralism and to ensure that accountability is properly in place in the interaction between different legal orders and institutions. Only through contestation it is possible to counter the lack of trust that is created by the absence of a direct representative link between agents and supranational institutions, that is, by the distance between the governing supranational institutions and those governed. To be fair, Krisch does not advocate pluralism’s virtues as valid in an absolute sense, but only as comparatively stronger when compared to the constitutionalist approach: “thus a pluralist structure does not, in and of itself, allow for more effective contestation than a constitutionalist one”.³² Note that it is accepted that most global regulation and standard setting in areas such as manufacturing, banking, taxation, bankruptcy, money laundering, air transport, is today generated through processes that connect the decision-making of

³⁰ *Ibidem*, p. 99.

³¹ Krisch follows and quotes Habermas on this point, but adding that ‘there is no need to limit this approach to the discourse within a pre-established association’: *ibidem*.

³² *Ibidem*, p. 85.



transnational actors, organizations and state actors, configuring a process which is may be pluralist but certainly not properly political. There is no public forum where positions are articulated, or disagreement becomes visible, but the effects of global legal pluralism are produced just through interactions between different actors and institutions. Bearing in mind this background picture, one might conclude that Krisch adopts a conflict of laws-perspective.³³ However, his allegiance to global legal pluralism commits him to an admittedly stronger stance. The Conflict-of-laws approach understands the relations between different legal claims as a conflict between autonomous orders with a neat distinction between inside and outside.³⁴ Global legal pluralism's starting point is categorically different because it is concerned with orders that are intermeshed and interconnected and which accept forms of common decision-making. This is reflected in the terminology chosen by Krisch: interactions at the supranational level are not regulated by collision between norms, but by "interface norms" which signal enmeshment and joint engagement in a common space. For courts, for example, this means to move from a self-perception of themselves as the guardians of their legal orders to the role of mediators or arbiters between orders as they start seeing themselves as increasingly belonging to many legal identities at the same time.

As such, the structure of a post-national order is likely to be complex and fluid, but it also lacks any constitutional mechanism to cope with and recognise the contestation which is pervasive throughout the regulatory landscape. In fact, Krisch's main point is that regulatory bodies disagree, compete or contest with each other within global legal pluralism. But what is the object of contestation? This is not immediately clear, but as noted by Patrick Capps, it seems that regulatory bodies, at the transnational level, do actually regulate types of activity

³³ The standard version of this approach is C. Joerges, "Sozialstaatlichkeit in Europe: A Conflict-of-Laws Approach to Law of the EU and the Proceduralisation of Constitutionalisation", *German Law Journal*, 2009, pp. 335-360.

³⁴ For an analysis of the EU as comprised of many autonomous legal systems see J. Dickson, "Toward a Theory of European Union Legal Systems", in J. Dickson, P. Eleftheriadis (eds), *Philosophical Foundations of EU Law*, Oxford, Oxford University Press, 2012, pp. 25-53.



rather than legal subjects.³⁵ Competition and contestation arise on a multiplicity of activities. It is this proliferation which secures global legal pluralism's efficacy. Regulatory bodies compete around what a particular legal subject should do or they do conflict in the attempt of imposing standards on each other. But Krisch believes that this is a great advantage for pluralism as it allows for greater flexibility and an improved capacity of adaptation.

In order to assess the virtues of this kind of legal pluralism two factors need to be taken into account. First, it is necessary to accurately describe what is the nature and the content of those interface norms which are supposed to regulate the conflicts ensuing from different legal standpoints. Krisch recognizes that interface norms are based on the principle of public autonomy: they “will also reflect other factors, such as the degree of prior formal acceptance of other norms (for example, through ratification), the proximity of values (for example, equivalence or identity in the interpretation of rights), or functional considerations, such as the utility of cooperation in a regime. Yet, these should be secondary factors, operating within the autonomy-based framework I have just outlined. If a polity has a strong autonomy pedigree, its norms are due respect even if they are based on distinct values or compliance with them does not have immediate benefits”.³⁶ How different claims from various legal standpoints are going to be adjudicated? Krisch's reliance on the principle of public autonomy reveals itself to be again a liberal answer to the question of pluralism. Conflict rules do not have an overarching legal character, but they are “normative, moral demands that find (potentially diverging) legal expressions only within the various sub-orders”. How these demands are put forward and then channelled is a question which is left completely unexplored.

Here the second issue kicks in: who is going to adjudicate these difficult cases and how. The answer is rather predictable and it gets Krisch's solution very close to the one proposed by global administrative law. Courts and regulatory bodies are the best suited agents for dealing with these conflicts for two reasons. The first

³⁵ P. Capps, “The Problems of Global Law”, cit., p. 801.

³⁶ N. Krisch, *Beyond Constitutionalism*, cit., p. 296.



one is a matter of institutional design: in the process of interpreting the law, courts often collect claims from different legal orders, something which usually does not happen to other kind of mostly political institutions. The idea is that courts provide in this way a common space which endows parties with a speaking position. In this way, contestation can take place and be articulated according to a common grammar. The second point is that legal reasoning provides a common language very well-suited to deal with contestation. Revealingly, Krisch admits that judicial minimalism is often the right attitude for dealing with issues of social and political conflict. Against teleological interpretation of the law, he suggests to take up a case by case evolutionary but minimalist approach to legal interpretation. Given that it is not always possible to easily reconcile conflicting claims, decisions should refrain from addressing principles and be restricted to the circumstances of the particular case without developing any wider theory of law. This is very similar to Cass Sunstein's judicial minimalism, based on the so-called 'incompletely theorised agreements', which may help shape a common solution even if disagreement over fundamental issues remains.³⁷ This approach is instantiated by the European human rights regime and in particular by the use of the margin of appreciation by the European Court of Human Rights. No grand theory of interpretation is employed by the Court, but constant adjustment sensitive to the context involved in a dispute. The dialogue between the Court and the member States is based on interface norms, but these do not function as rules. In fact, "legally, the relationship between the parts of the overall order in pluralism remains open – governed by the potentially competing rules of the various sub-orders, each with its own ultimate point of reference and supremacy claim, the relationship between them are left to be determined ultimately through political, not rule-based processes"³⁸. This is a form of balancing case by case

³⁷ C. Sunstein, *Legal Theory and Political Conflict*, Oxford, Oxford University Press, 1996; Id., *One Case at a Time: Judicial Minimalism on the Supreme Court*, Cambridge, Mass., Harvard University Press, 2001.

³⁸ N. Krisch, *Beyond Constitutionalism*, cit., p. 23.



which takes place in a judicial setting.³⁹ In the end, the political test for public autonomy is left to a kind of judicial and administrative politics which is performed on a case by case basis.⁴⁰ The idea is that in global law, the judicial channel opens up spaces for political action. The innovative aspect of this approach is that it creates new possibilities for actors in spheres from which they were previously excluded. However, nothing is said by Krisch on whether and how the judicial language colonises political action either in terms of offering a speaking position for disagreement⁴¹ or in allowing any room for the reflexivity of politics, *id est*, to the possibility of discussing the terms of the framework through which contestation takes place.⁴² A minimalist understanding of the judicial management of interface norms, even if coupled with rules which make sure that interactions are open to negotiation, seems to hardly be an efficient way to politicise global legal pluralism. It might create a multiplicity of channels open to strategic actions from various actors, but this dispersion does not enhance the visibility of political conflict.

Fragmented Constitutions

The last kind of global legal pluralism to be taken into account is the one celebrated by Gunther Teubner, in particular in his recent *Constitutional Fragments*.⁴³ Teubner's work is extremely ambitious because it merges legal pluralism and the sociology of constitutions in a highly innovative approach to law and globalization.⁴⁴ His starting point is rather different from the previous two theories. He adopts (but modifies) Luhman's theory of systems which puts an emphasis on the autopoiesis or self-generation of every functional system and on

³⁹ For the idea of "balancing *ad hoc*" see T. Aleinikoff, "Constitutional Law in the Age of Balancing", *Yale Law Journal*, 1984, pp. 979-980.

⁴⁰ A. Stone Sweet, *Governing with Judges*, Oxford, Oxford University Press, 2000, p. 78.

⁴¹ This point has been raised, among many others, by J. Rancière, *Disagreement*, cit., p. 77.

⁴² It is probably unfair to demand something to global pluralism that it does not promise. But it is important to note that the thesis undergirding this article makes the reflexivity of politics an essential feature for any political approach to the law.

⁴³ G. Teubner, *Constitutional Fragments*, Oxford, Oxford University Press, 2012.

⁴⁴ Cf. C. Thornhill, *A Sociology of Constitutions*, Cambridge, Cambridge University Press, 2011; M. Neves, *Transconstitutionalism*, Oxford, Hart, 2013.



the importance of communication for their stability.⁴⁵ As a consequence, law plays an essential role since, once coupled with other systems, it provides the stabilization of normative and communicative expectations and it also protects the autonomy of each system. Teubner links societal constitutions to the problem of double reflexivity. Societal constitutions are defined as “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”.⁴⁶ In practice, societal constitutions emerge when their reflexivity is supported by legal norms. Globalization has shown how productive the coupling of law and other systems can be beyond the horizon of the nation State. And in this way it has changed the experiences of the nation state itself. State-based constitutionalism is now threatened by a centrifugal force defined as the double fragmentation of world society. The first fragmentation coincides with the autonomy of global social sectors; the second fragmentation concerns the consolidation of regional cultures and it preempts any possibility of a unitary global constitution. Moreover, the development of global social subsystems has not been realised at the same pace. Social systems still tied to the national State level have not been globalised, creating an asymmetry between different media. However, according to Teubner, this gap is not negative in itself as it can actually enrich contemporary constitutionalism by containing the ambition of the nation State.

As it is evident, the main target of Teubner’s work is the political version of constitutionalism, and more specifically, the political constitution of the nation State. His main concern is to liberate the idea of the constitution from the grip of the State because only in this way it will be possible to redeem the promises of constitutionalism. According to him, the drawbacks of political constitutionalism are many: at the epistemic level, political constitutions obscure the role of other societal formations, distorting our knowledge of society; at the normative level, they empower only individuals through public law and in the best case scenario

⁴⁵ N. Luhman, *Law as a Social System*, Oxford, Oxford University Press, 2002.

⁴⁶ G. Teubner, *Constitutional Fragments*, cit., p. 105.



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social groups through norms of private law; theoretically, they are understood in a strictly formalist way to the detriment of the undergirding material constitution. Finally, political constitutionalism is always verging on the brink of a totalitarian turn, that is, a re-shaping of the constitution from a liberal one, where society is just left to the regulation of private law, to one where society is completely controlled by the state constitution. The conceptual underpinning of this position is that, as Teubner recognises, political constitutions do claim a double function: to constitute power and to limit it. But the methodology of constitutional sociology suggests that this double function cannot be limited to the constitution of the nation state. The main insight provided by a sociological study of constitutions is that societies are much more complex than what can be captured by formal constitutions and they contain multiple non-state social orders. The foundation of an autonomous order and its self-limitation are required for vast numbers of institutions. Note that according to Teubner this is actually the main difference between juridification and constitutionalisation. Juridification requires only first-order rules, that is, rules which regulate the behaviour of subjects. Constitutionalisation requires the creation of second-order rules (in H.L.A. Hart's sense) which serve as a containment of the power engendered by the first-order rule. Therefore, constitutionalisation brings about the full autonomy of the system. Teubner's fear is that the political constitutionalisation of social systems may engender new forms of totalitarianism because these claims of social autonomy would not be recognised. State-based constitutionalism is the only form of constitutional law which claims to be able to regulate, at least in principle, all aspects of life. And this is what Teubner fears and why he extols the virtue of global legal pluralism.

Despite its various merits, Teubner's proposal is quite troubling when it comes to his assessment of the role of politics in constraining the expansionist tendencies of social sub-systems. If the logic of functional differentiation is considered as absolute – something which cannot be excluded, given that it represents the logic undergirding each societal constitution – then what is left of politics? Teubner draws a distinction between external and internal politicisation of systems, clearly



lending his support to the latter. On top of that, Teubner disaggregates constitutions and political power at the supranational level, in the sense that the former does not generate the latter. No space is left for external re-politicisation. It is clear that the separation among different functional systems is an essential and sufficient condition for the operativity of the same systems. And this is why the kind of global legal pluralism advocated by Teubner is incompatible with political constitutions.

It is striking to see how much Teubner is underestimating the effects of this separation when it comes to assessing the functioning of politics within market systems. We are even told that “a strengthened politics of reflection is required within the economy, and this has to be supported by constitutional norms. Historically it was collective bargaining, co-determination and the right to strike which enabled new forms of societal dissensus. In today’s transnational organisations, ethical committees fulfil a similar role. Societal constitutionalism sees its point of application wherever it turns the existence of a variety of ‘reflections centres’ within society, and in particular within economic institutions, into the criterion of a democratic society”.⁴⁷ We are therefore reminded that politicisation can take place internally, i.e., within social subsystems, through politicizing consumer preferences, ecologizing corporations, and placing monetary policy in the public domain. It is apparent that internal politicisation cannot account for political reflexivity because it folds seamlessly back into the logic of the reproduction of the system.⁴⁸

Teubner argues that institutionalized politics has an innate tendency to suppress opportunities and impulses coming from within the social subsystems. In other terms, the political system receives and translates the external impulses into its own code, weakening, in this way, their (of the impulses) transformative potential. While Teubner is right in stressing the reductionist (and exclusionary) potential of constituted powers, he does not recognize the fact that by pleading for the

⁴⁷ G. Teubner, *Constitutional Fragments*, cit., p. 17.

⁴⁸ E. Christodoulidis, “The Politics of Societal Constitutionalism”, *Indiana Journal of Global Legal Studies*, 20 (2013), p. 659.



proliferation and decentralization of politics he is actually proposing to leave many areas outside the possibility of becoming politicised. His indictment of the political constitution does not leave any space for politics beyond the national state on the basis of sociological and normative arguments. It is better to leave to the social sub-system itself to signal when it is the moment of introducing limitations (usually in the forms of rights) through internal processes. The moment when this happens is described as the moment where the system ‘hits the bottom’. However, the idea of having hit the bottom is rather insidious. How is it possible to know *ex ante* what is the bottom? Is there anything in social systems that functions as a warning mechanism for avoiding to reach the bottom? Here, a certain unjustified optimism is at work when Teubner assures that “in the long run [...] the one-sided ‘neo-liberal’ reduction of global constitutionalism to its constitutive function cannot be sustained. It is only a matter of time before the systemic energies released trigger disastrous consequences [...] a fundamental readjustment of constitutional politics will be required to deal with the outburst of social conflicts”.⁴⁹ But even if one postulates the bottom being hit, the question whether there would be a basis left upon which building the countermovement of limitation would remain open.⁵⁰

What Global Legal Pluralism Does not Register

It is time to take stock of the remarks made in the previous three sections. As already noted, the strategy adopted by global legal pluralists is two-fold. But either the invitation to bring in new normative worlds⁵¹ or to keep functionally differentiated systems separated are functional to the destitution of traditional constitutionalism and of the characters of political law. Both are also undercutting the possibility of any meaningful and effective political constitutionalism. The kind of constitutionalism that is advocated by global legal pluralists is either

⁴⁹ G. Teubner, *Constitutional Fragments*, cit., p. 78.

⁵⁰ In another essay, Teubner remarks that a concern for catastrophe is part and parcel of societal constitutionalism: “Constitutionalizing Polycontextuality”, *Social & Legal Studies*, 2011, pp. 210-219. One is left wondering what social system would register the signals of an imminent catastrophe when strict functional differentiation is still in place.

⁵¹ R. Cover, “Nomos and Narrative”, cit., p. 68.



politically very thin or even paralysing for future political action. First, the possibility of making visible (staging) political disagreement is severely constrained, when not completely impeded. The circumstances of politics are either ignored or masked under the fact of pluralism. There is, in other words, a complete misunderstanding on the way the ‘perspective’ character of political action, which is denoted by plurality, is put into form through a common political space. Global legal pluralists believe that the opening to pluralism is by itself a sufficient enabling device for politicisation: this is either because of the opening up of channels for voices previously unheard or because the competition between different perspectives will generate the right kind of political conflict.⁵²

As a consequence of these remarks, a second important criticism emerges. Global legal pluralism hinders any kind of meaningful constituent power.⁵³ Within a pluralist understanding of law there is no traction for constituent power, but only the possibility of taking advantage of the normative interstices left open in the interactions between different sites of authority. It is no surprise, for example, that none of these theorists take into account the role played by economic rationality in global legal pluralism. In the end, the politics of global legal pluralism is shaped by the principles of competition and proliferation or, in the case of Teubner, by the politicisation of consumers’ behaviours. The rationality of markets cannot be put into question as an appropriate register for dealing with many issues. Full political reflexivity is occluded and cannot be obtained.⁵⁴

Finally, one cannot be reassured by the old belief that the political will somehow reappear under another form as an expression of an immanent conflict.⁵⁵ This is a consolatory narrative which is usually adopted by those who believe in

⁵² This is a market-oriented conception of politics.

⁵³ Teubner, for example, is explicit when he advocates the overcoming of the dichotomy between constituent power and constituted powers.

⁵⁴ Full reflexivity cannot be obtained because global legal pluralists do not deem possible any kind of metalevel thinking.

⁵⁵ Sometimes this seems to be the case for Schmitt and Schmittians. For a sober assessment see M. Croce, A. Salvatore, *The Legal Theory of Carl Schmitt*, London, Routledge, 2012.



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the political as an inescapable feature of the human condition.⁵⁶ However, even if this possibility were conceded, that is, that there might be a politics compatible with global legal pluralism, this would hardly be an appealing one.

⁵⁶ This is the case of Arendtians.