From Transconstitutionalism to Transdemocracy

Marcelo Neves[*]

Introduction

The increasing interplay of legal orders around common constitutional cases or problems, without any of them being the overlord of the ultima ratio, is a matter of course. These constitutional problems intertwined on a regional and a global scale are not covered, however, by a comprehensive global constitution or by specific constitutions. They arise and are addressed in transconstitutional networks. These indisputable facts of the emergence of transconstitutional problems without a corresponding constitution have not been adequately processed at the normative plane.

In this article, I will first presente a brief review of the transconstitutional approach (I), pointing out that it is not a European issue (I.1) and distinguishing it from the models of a unitary global constitution and a pluralism pushed to the extreme in the notion of constitutional fragments (I.2). Next I shall point to the ambivalence and the normative limits of transconstitutionalism in an asymmetric world society (I.3). After, I will deal with two alternatives for transconstitutionalism (II): the first, which aims to overcome it, is post-constitutionalism (II.1); The second, which rather intends to complement it, is transdemocracy (II.2). As this article is the starting point of a broader research project, instead of presenting a conclusion, I will close it making a brief critical comment on "we the people" as expression of democracy's self-understanding (III).

I. Constitutionalism without the Constitution beyond the State and Pluralism: Limits and Possibilities of Transconstitutionalism in an Asymmetric World Society

1. Constitutionalism beyond the state

In the late twentieth century a relatively wide consensus emerged regarding the "transnational" breadth and scope of a good deal of constitutional problems. What once were regarded as national issues were now revealed to involve different legal orders and social contexts, orders and contexts which escaped control from states acting single-handedly (and thus could not be

[*] Professor of Public Law and Legal Theory at the University of Brasilia Law School. STIAS Visiting Fellow in July/August 2017.

effectively dealt with through purely national decisions, not even national constitutional decisions). The 'insufficiency' of national constitutions tended to be said to result, in one way or the other, from the intensive development of different forms of "transnational" communicational processes, which were said to point to the strengthening of systemic integration at the level of the world society[1]. This did not mean that state constitutions became suddenly irrelevant, but rather that the limits of national constitutions could no longer be ignored. Issues such as the protection of fundamental rights (of human rights more widely) could not be solved, it was claimed, under a 'parochial'[2] or 'autarchic' constitutionalism. It was usually concluded that while the state might not be withering away, it was no longer neither an overlord on all constitutional matters (having lost the capacity to confine constitutional issues within its borders, and thus, the capacity to act efficiently and promptly to solve them) nor a "local" hero, drawing strength from its relatively small size and proximity.

EU law scholars may be inclined to think that the transformation of the state was very peculiarly felt in Europe as the bite of EU law became increasingly felt. The fact of the matter is, however, that the limits of national constitutional power was always wider and larger than Europe. The most acute "national" constitutional lawyers, even those writing within traditions with a strong self-sufficient when not chauvinistic constitutional traditions, felt these tensions early on. Paradigmatic in that regard is the case of the United States of America. Several scholars, including Mark Tushnet pointed to the 'the inevitable globalization of constitutional law'.[3] Others, including Bruce Ackerman referred to the 'rise of world constitutionalism',[4] admitting that that 'American practice and theory have moved in the direction of emphatic provincialism', and stressing that 'we should resist the temptations of a provincial particularism'.[5]

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[1] I use "world society" to characterise the modern society from its beginning in the sense of Luhmann's system theory: Niklas Luhmann, *Soziologische Aufklärung 2: Aufsätze zur Theorie der Gesellschaft* (Westdeutscher Verlag 1975) 51; *id.*, *Die Gesellschaft der Gesellschaft* (Suhrkamp 1997) vol 1, 145-171 [Engl. trans. *Theory of Society* (Stanford University Press 2012) vol. 1, 83-99]. According to this perspective, Brunkhorst (1999, 374) emphasises on one hand that it is possible to define 'modern society from the beginning as a world society', stressing on the other hand: 'Only at the end of our century has globalisation . . . become so evident that society can recognise itself as a world society in its description' (Hauke Brunkhorst, 'Heterarchie und Demokratie' in H. Brunkhorst and P. Niesen (eds), *Das Recht der Republik* (Suhrkamp 1999), 374. See also Marcelo Neves *Transconstitutionalism*, (Kevin Mundy tr, first published 2009, Hart 2013) 20 ff.

[2] Anne-Marie Slaughter, 'Judicial Globalization' (2000), 40 Virginia Journal of International Law 1103, 1117-1118.

[3] Mark Tushnet, 'The Inevitable Globalization of Constitutional Law' (2009) 49 Virginia Journal of International Law 985.

[4] Bruce Ackerman, 'The Rise of World Constitutionalism' (1997) 83 Virginia Law Review 771.

[5] *Ibid.*, 773, 794.

2. What constitutional theory for a "post-national" constitutionalism?

The recognition of a new global framework for constitutionalism did not lead in any way to either uniform or harmonic responses in cognitive or normative terms. Two main theoretical "responses" can be discerned.[6]

The first is a return to a form of internationalism that affirms the unity of the 'law of nations', and, consequently, the primacy of the international law over national law, including national constitutional law. The direct and immediate precedent can be found in the interwar period. Alfred Verdross was but one of the scholars who claimed that a 'Constitution of the international legal community' could be flashed out of the Covenant and practice of the League of Nations.[7] Such "monistic" theorisation of the relationships between international and national law was to play decades later a key role in the configuration of the theoretical basis of EU law,[8] even if the actual theory ended up being extremely convoluted. More generally, reference to a unitary international constitution has become frequent in the last decades. Its advocates either attribute such a function to the UN Charter itself,[9] or draw it from international institutional practice and politics.[10] More normatively grounded are the reflections on the "global constitution" of authors

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[6] For details see Marcelo Neves, *Transconstitutionalism* (above, n. 1) 55 ff.

[7] Alfred Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (Springer 1926). A little later, in the 1930s, the expression 'international constitutional law' makes a few scattered appearances (see Celso de Albuquerque Mello, *Direito constitucional internacional – Introdução* (2nd edn, Renovar 2000) 3 ff, noting the ambiguity of the phrase).

[8] Anne Boerger and Morten Rasmussen, 'Transforming European Law: The Establishment of the Constitutional Discourse from 1950 to 1993' (2014) 10 EuConst 199.

[9] Bardo Fassbender, 'The United Nations Charter as Constitution of the International Community' (1998) 36 Columbia Journal of Transnational Law 529; *id.*, '"We the Peoples of the United Nations": Constituent Power and Constitutional Form in International Law' in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (OUP 2007) 269, 281 ff; Pierre-Marie Dupuy, 'The Constitutional Dimension of the Charter of the United Nations Revisited' (1997) 1 Max Planck Yearbook of United Nations Law 1. On this topic, Giegerich says 'the U.N. Charter is currently the only world constitution capable of consensus' (Thomas Giegerich, *Europäische Verfassung und deutsche Verfassung im transnationalen Konstitutionalisierungsprozess: Wechselseitige Rezeption, konstitutionelle Evolution und föderale Verflechtung* [Springer 2003] 11). Much earlier, Ross already referred to the 'Constitution of the United Nations' (Alf Ross, *Constitution of United Nations: Analysis of Structure and Function* [Ejnar Munksgaard 1950]). Verdross and Simma also use this expression (Alfred Verdross and Bruno Simma, *Universelles Völkerrecht: Theorie und Praxis* [3rd edn, Duncker & Humblot 1984] 69 ff).

[10] See for example Christian Tomuschat, 'Die internationale Gemeinschaft' (1995) 33 Archiv des Völkerrechts 1, 7. He also refers to 'international law as the Constitution of mankind' (*id.*, 'International Law as the Constitution of Mankind' in United Nations [ed], *International Law on the Eve of the Twenty-first Century: Views from the International Law Commission* [United Nations 1997] 37). With certain restrictions, Kadelbach and Kleinlein propose a model based on constitutional principles from international law (Stefan Kadelbach and Thomas Kleinlein, 'International Law – a Constitution for Mankind? An Attempt at a Re-appraisal with an Analysis of Constitutional Principles' [2008] 50 German Yearbook of International Law 303). Verdross and Simma (above, n. 9, 59 ff) refer to the 'Constitution of the non-organized community of states' and 'constitutional principles of the community of states'. Others prefer to speak of 'international constitutional law' (see Robert Uerpmann, 'Internationales

such as Habermas. The German philosopher favoured first a 'world domestic politics without a world government',[11] which would be grounded on a 'world citizenship' coming hand in hand with 'consciousness of an obligatory/compulsory cosmopolitan solidarity'[12] and a 'global welfare regime'[13] as well as on the establishment of institutional structures and decision-making processes that would legitimise interventions in what used to be regarded as "internal affairs" of the Member States with a view to uphold human rights (the so-called 'humanitarian interventions').[14] The implicit constitutional character and dimension of the project was then turn

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Verfassungsrecht' [2001] 56 Juristenzeitung – JZ 565; Mello, above, n. 7), although the use of this expression is highly ambiguous. Some treat the constitutionalization of international public law, more cautiously, as a process (Rainer Wahl, 'Konstitutionalisierung – Leitbegriff oder Allerweltsbegriff?' in Carl Eugen Eberle, Martin Ibler and Dieter Lorenz (eds), *Der Wandel des Staates vor den Herausforderungen der Gegenwart: Festschrift für Winfried Brohm zum 70. Geburtstag* [Beck 2002] 191, 192, 199 ff; Giovanni Biaggini, 'Die Idee der Verfassung – Neuausrichtung im Zeitalter der Globalisierung?' [2000] 141 [119 in the new series] Zeitschrift für Schweizerisches Recht 445, 470 ff; Jochen A. Frowein, 'Konstitutionalisierung des Völkerrechts' [2000] 39 *Berichte der Deutschen Gesellschaft für Völkerrecht* 427; Giegerich [above, n. 9] 2-3). Von Bogdandy acknowledges the fragility of 'international constitutionalism', but stresses its potential compared with other options (Armin von Bogdandy, 'Constitution in International Law: Comment on a Proposal from Germany' [2004] 47 Harvard International Law Journal 223, 242). Peters rejects a model based on affirmation of a constitutionalization of international law, preferring 'international constitutionalism' to compensate for deconstitutionalization in the domestic sphere, but strictly speaking her thesis points to the development of 'multilevel' global constitutionalism (Anne Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures' [2006] 19 Leiden Journal of International Law 579, 610). While referring to 'indicators of the constitutionalization of international law, at least within Europe', Stone Sweet sketches 'a perspective that considers the international system's pluralist and constitutionalist features simultaneously' (Alec Stone Sweet, 'Constitutionalism, Legal Pluralism, and International Relations' (2009) 16 Indiana Journal of Global Legal Studies 621, 632, 643). In turn, Koskenniemi, discussing the problem of hegemony in international law, argues that 'something like the constitutionalization of international law could not resemble the formation of a constitution in the domestic space, not only for lack of a constituent power in the international sphere, but also because 'the constitution it would enact would not be one of an international but an imperial realm' (Martti Koskenniemi, 'International Law and Hegemony: A Reconfiguration' [2004] 17 Cambridge Review of International Affairs 197, 206).

[11] Jürgen Habermas, *Die postnationale Konstellation: Politische Essays* (Suhrkamp 1998) 156, 165 [Engl. trans. *Post-National Constellation: Political Essays* (Polity Press/Blackwell 2001) 104, 110]; *id.*, 'Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?' in J. Habermas, *Der gespaltene Westen: Kleine Politische Schriften X* (Suhrkamp 2004) 113, 133-134; *id.*, 'Kommunikative Rationalität und grenzüberschreitende Politik: eine Replik' in Pieter Niesen and Benjamin Herborth (eds), *Anarchie der kommunikativen Freiheit: Jürgen Habermas und die Theorie der internationalen Politik* (Suhrkamp 2007) 406, 452. For an analogous formulation, see Luigi Ferrajoli, (1997), *La sovranità nel mondo moderno. Nascita e crisi dello Stato nazionale* (Editori Laterza 1997) 51-2.

[12] Jürgen Habermas, *Die postnationale Konstellation* (above, n. 11) 88-9, 168 [Engl. trans. 55-6, 112]; *id*., 'Jenseits des Nationalstaats? Bemerkungen zu Folgeproblemen der wirtschaftlichen Globalisierung' in Ulrich Beck (ed), *Politik der Globalisierung* (Suhrkamp 1998) 67, 77-8.

[13] Jürgen Habermas, 'Jenseits des Nationalstaats?' (above, n. 12), 75, 80; *id.*, *Die postnationale Konstellation* (above, n. 11) 86 [Eng. trans. 54].

[14] Jürgen Habermas, (1996), *Die Einbeziehung des Anderen: Studien zur politischen Theorie* (Suhrkamp 1996) 225-226; *id.*, 'Bestialität und Humanität: Ein Krieg an der Grenze zwischen Recht und Moral' in Reihard Merkel (ed), *Der Kosovo-Krieg und das Völkerrecht* (Suhrkamp 2000) 51.

explicit, with a direct reference to the 'constitutionalisation of international public law'[15], which, along with the normative model of a 'political constitution for the pluralist world society'[16], was intended to secure a 'cosmopolitan constitution without a world republic'[17] or a 'democratic constitution of world society'[18]. The obvious Achilles' heel of Habermas' theory is that such a "world" constitution is not related to an ethical community, but remains grounded on an abstract rational morality whose authority depends exclusively on the underlying claim to universality.[19] Leaving that aside, and whatever the assessment of the theory, Habermas' reflections on the matter constitute good evidence of the search for a comprehensive constitutional grounding for "global society".

The alternative to the "monistic" theorising of new international and transnational realities is constituted by different variants of a world pluralistic, when not fragmented, constitutionalism, which are said to find support in the emergence of constitutional practices in transnational, supranational and international organizations, and global and regional institutions and regimes. Perhaps the most extreme pluralistic variant is that put forward by Gunther Teubner, according to whom we can distinguish different international and supranational public constitutional regimes, but also transnational constitutional private (or half-public half-private) regimes.[20] Teubner places emphasis on the autonomy of each fragmented system, while stressing the

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[15] Jürgen Habermas, 'Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?' (above, n. 11); *id.*, *Zur Verfassung Europas: Ein Essay* (Suhrkamp 2011).

[16] Jürgen Habermas, 'Eine politische Verfassung für die pluralistische Weltgesellschaft?' in J. Habermas, *Zwischen Naturismus und Religion: Philosophische Aufsätze* (Suhrkamp 2005) 324 [Engl. trans. 'A Political Constitution for the Pluralist World Society?' in J. Habermas, *Between Naturalism and Religion: Philosophical Essays* (Polity Press 2008) 312].

[17] Jürgen Habermas, 'Kommunikative Rationalität und grenzüberschreitende Politik' (above, n. 11), 447 ff.

[18] Jürgen Habermas, *Zur Verfassung Europas* (above, n. 15) 86 ff.

[19] See Jürgen Habermas 'Jenseits des Nationalstaats? (above, n. 12), 163.

[20] See Gunther Teubner, *Verfassungsfragmente: gesellschaftlicher Konstitutionalismus in der Globalisierung* (Suhrkamp 2012) especially 159 ff [Engl. trans. *Constitutional Fragments: Societal Constitutionalism and Globalization* (OUP 2012) 102 ff]; *id.*, 'Privatregimes: Neo-Spontanes Recht und duale Sozialverfassungen in der Weltgesellschaft' in Dieter Simon and Manfred Weiss (eds), *Zur Autonomie des Individuums. Liber Amicorum Spiro Simitis* (Nomos 2000) 437, 446 ff [Engl. trans. 'Global private regimes: Neo-spontaneous Law and Dual Constitution of Autonomous Sectors in World Society?' in Karl-Heinz Ladeur (ed), *Public Governance in the Age of Globalization* (Ashgate 2004) 71, 82 ff; *id.*, 'Globale Zivilverfassungen: Alternativen zur staatszentrierten Verfassungstheorie' (2003) 63 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 1, especially 17-26 [Engl. trans. 'Societal Constitutionalism: Alternatives to State-centred Constitutional theory?' in Chrsitian Joerges, Inger-Johanne Sand, and Gunther Teubner (eds), *Transnational Governance and Constitititionalism* (Hart 2004) 3, 18-28]; *id.*, 'Exogenous Self-Binding: How Social Systems Externalise their Foundational Paradoxes in the Process of Constitutionalisation' in Alberto Febbrajo and Giancarlo Corsi (eds), *Sociology of Constitutions. A Paradoxical Perspective* (Routledge 2016) 30; Andreas Fischer-Lescano and Gunther Teubner, *Regime-Kollisionen: Zur Fragmentierung des globalen Rechts* (Suhrkamp 2006) 53 ff; Gunther Teubner and Anna Beckers, 'Expanding Constitutionalism' (2013) 20 *Indiana Journal of Global Legal Studies* 523.

dangers implicit in the overreach at the expense of others (which would be tantamount to a form of imperial overstretch).[21] So he introduces the concept of civil or societal constitutions of the world society.[22] It means the structural couplings between law and other social systems at the global level, such as between *lex mercastoria* and economy, *lex sportiva* and sport, and *lex digitalis* and internet, which build transnational regimes. For him they play key role in facing the mentioned dangers[23].

While both alternatives seem to capture some essential elements of the constellation of law, power and society, two interim conclusions seem due:

Firstly, the structural conditions that made possible the affirmation of modern constitutions on (at the same time) political and legal bases simply do not accrue at the international level. In that regard, Luhmann was right when claiming that 'the structural coupling of the political system and the legal system through constitutions does not have an equivalent at the level of global society".[24] True, the number of claims made on the basis of individual and collective "rights" acknowledged in international legal documents has risen in the last decades. However, such a practice is insufficient in itself to ground the conclusion that law and politics have been coupled at the international level. As a result, strategic, manipulative and rhetorical uses of international law are not infrequent. The 'arbitrary', 'paternalistic' and 'selective' character of interventions for the protection of human rights has been highlighted not only by social theorists,[25] but also by

[21] See Gunther Teubner, 'Selbstsubversive Gerechtigkeit: Kontingenz- oder Transzendenzformel des Rechts' (2008) 29 *Zeitschrift für Rechtssoziologie* 9 [Engl. trans. 'Self-subversive Justice: Contingency or Transcendence Formula of Law?' (2009) 72 *Modern Law Review* 1].

[22] Despite another theoretical starting point and other implications, Teubner resorts to Sciulli's 'theory of societal constitutionalism' (Sciulli 1992) in developing his own concept of civil or societal constitution. See Gunther Teubner, *Verfassungsfragmente* (above, n. 20) 14, 67; *id.*, 'Globale Zivilverfassungen' (above, n. 20), 8-9 [Engl. trans., 10-11]; David Sciulli, *Theory of Societal Constitutionalism: Foundations of a Non-Marxist Critical Theory* (CUP 1992).

[23] See Andreas Fischer-Lescano and Gunther Teubner (above, n. 20) 25-33; Gunther Teubner, *Verfassungsfragmente* (above, n. 20) 129-132 [Engl. trans. 81-83].

[24] Niklas Luhmann, *Das Recht der Gesellschaft* (Suhrkamp 1993) 582 [Engl. trans. *Law as a Social System* (OUP 2004) 487-488]. Teubner 1996b: 248) invokes this passage to give it an opposite sense, that is, as Luhamnn would be referring to the possibility of constitution without the structural coupling of law and politics on the global plane. Indeed, Luhmann was speaking of absence of constitution on the global level. Cf. Gunther Teubner, 'Globale Bukowina: Zur Emergenz eines transnationalen Rechtspluralismus' (1996) 15 Rechtshistorisches Journal 255, 260 [Engl. trans. 'Global Bukowina: Legal Pluralism in the World Society' in G. Teubner (ed), *Global Law without a State* (Dartmouth 1997) 3, 6]; *id.*, 'Des Königs viele Leiber: Die Selbstdekonstruktion der Hierarchie des Rechts' (1996) 2 Soziale Systeme: Zeitschrift für soziologische Theorie 229, 248.

[25] Hauke Brunkhorst, 'Heterarchie und Demokratie' (above, n. 1), 373, 382; Ingeborg Maus, 'Staatssouveränität als Volkssouveränität. Überlegungen zum Friedensprojekt Immanuel Kants', in Wilfried Loth (ed), *Jahrbuch 1996 des Kulturwissenschaftlichen Instituts im Wissenschaftszentrum NRW* (Altes Rathaus 1997) 167, 168, 190. Indeed, while

international legal scholars with extensive experience in international legal practice, such as markedly Koskenniemi.[26] The track record of the European Union and of its Member States, that once was regarded as providing solid bases for an alternative understanding of the politics of international law, has become hardly distinguishable from that of other "power" actors in the last decade.[27] The extremely asymmetrical geopolitics of international relations, which involves the essential imperialism of human rights through its symbolic use,[28] makes a unitary global or international constitutional regime highly unlikely. In this context, the conditions for a widespread support for legal and political procedures able to absorb the structural dissent in world society are, most evidently, absent – these are the conditions that made the emergence of the constitution of constitutionalism possible.

Secondly, pluralistic theories tend to downplay the functional and normative roles of state constitutions. While there may be a liberatory element in the form of pan-constitutional catharsis implied in radical constitutional pluralism ('not just *ubi societas, ibi ius*, as Grotius once said, but *ubi societas, ibi constitutio*'[29]), it is also the case that there is no guarantee that such plurality of constitutions could undertake the necessary tasks performed by classical state constitutions. [30]. For years it was argued that the European Union experienced a happy form of "constitutional pluralism". Such optimism is perhaps misplaced even in the European case; at least it has to be recalibrated given the ongoing crises of the European Union and of European law as a means of integration. To put it differently. The inflationationary use of the concept of "constitution" may

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Brunkhorst supports a normative project oriented towards a democratic constitutionalism at the global level (Hauke Brunkhortst *Legitimationskrisen: Verfassungsprobleme der Weltgesellschaft* [Nomos 2012] 137 ff, 229 ff, 307 ff; *id.*, *Critical Theory of Legal Revolutions: Evolutionary Perspectives* [Bloomsbury 2014]; see also Pablo Holmes, *Verfassungsrevolution in der Weltgesellschaft: Differenzierungsprobleme des Rechts und der Politik im Zeitalter der Global Governance* [Nomos 2013]), Maus criticizes strongly any idea or conception of a global constitutionalism or democracy (Ingeborg Maus, *Menschenrechte, Demokratie und Frieden: Perspektiven globaler Organisation* [Suhrkamp 2015] 122-191; *id.*, *Über Volkssouveränität: Elemente einer Demokratietheorie* [Suhrkamp 2011] 375-406)

[26] Koskenniemi, 'The Police in the Temple – Order, Justice and the UN: A Dialectical View' (1995) 6 European Journal of International Law 325, especially 325-326.

[27] The attitude of the European states and the European Union to the intervention in Libya and to the present war in Syria as well as to the refugee crisis are emblematic expressions of an isolationistic and imperial bias. See before the recent crisis Sonja Buckel,*"Welcome to Europe" - Die Grenzen des europäischen Migrationsrechts: Juridische Auseinandersetzungen um das "Staatsprojekt Europa"* (Transkript 2013); Andreas Fischer-Lescano, Tillmann Löhr and Timo Tohidipur, 'Border Controls at Sea: Requirements under International Human Rights and Refugee Law' (2009) 21 Int J Refugee Law 256. For a comprehensive critical approach to the migration problem see Saskia Sassen, 'A Massive Loss of Habitat: New Drivers for Migration' (2016) 2 Sociology of Development 204.

[28] Marcelo Neves, 'The symbolic force of human rights' (2007) 33 Philosophy & Social Criticism 411, 432, 436.

[29] Gunther Teubner, *Verfassungsfragmente* (above, n. 20) 63 [Engl. trans. 35]. The reference to Grotius appears only in the English translation.

[30] Marcelo Neves (above, n. 1) 55 ff.

well result in the loss of the historical and functional significance of the term.[31] Moreover, in far too many cases, "constitution" and "constitutionalisation" are being instrumentalised at the service of ends hardly compatible when not frontally opposed to those of constitutionalism. Law clothed in constitutional garments may well render more efficient or functional a legal or quasi-legal regime, but that may come at a heavy (normative) price regarding rights. In this respect, the *lex mercatoria* is a good example. In this private legal order, law works primarily as means of economy, not to protect basic rights as one usually expects of a constitutional arrangement[32]. A similar train of reasoning could be followed regarding other "constitutional orders", such as the law of the World Trade Organization, being an example the WTO settlement against the EU ban on imports of US beef produced with the aid of growth hormones[33]. In these cases, what we find is not a structural (horizontal) coupling between law and politics or any other functional system, but the structural subordination of the law to a certain systemic logic, which in its turn structurally favours certain societal interests to the detriment of others. This does not necessarily mean systemic corruption, for these legal forms are designed in principle, not to ensure inclusion (social integration), but to ensure system integration.[34] And the constitution of constitutionalism requires a certain 'system disintegration' (less dependence on functional systems), so that 'social integration', especially in the form of political and legal inclusion, can be increased.[35]

3. The ambivalence of transconstitutionalism

The trend to panconstitutionalism, together with the dichotomous oscillation between international "monism" and "radical pluralism", could not adequately deal with the emergence of

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[31] In regard to 'citizenship', see in the same sense Danilo Zolo, 'Democratic Citizenship in a Post-communist Era' in David Held (ed), *Prospect for Democracy: North, South, East, West* (Polity Press 1993) 254, 259; concerning to human rights, see Norberto Bobbio, *The Age of Rights* (Allan Cameron tr, Polity Press 1996) xi.

[32] For a radical criticism, see Yves Dezalay and Brian Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press 1996) especially 10, 33 ff.

[33] WT/DS26/AB/R, WT/DS48/AB/R (1998), WT/DS26/ARB (1999).

[34] I do not use system integration and social integration here as terms denoting the difference between system and life-world according to Jürgen Habermas, *Theorie des Kommunikativen Handelns* (2nd edn, Suhrkamp 1982) vol 2, 173 ff [Engl. trans. *The Theory of Communicative Action* (Beacon Press 1987) vol 2, 113 ff]. Rather, I use them as terms referring to the degree of dependency of social systems on each another (system integration) and to the extent to which persons have access to the benefits of social systems (social integration). In this respect, 'social integration' refers to the difference 'inclusion/exclusion', close to the implication in Niklas Luhmann, *Die Gesellschaft der Gesellschaft* (Suhrkamp 1997) vol 2, 618 [Engl. trans. *Theory of Society* (Stanford University Press 2013) vol. 2, 16-17].

[35] See Niklas Luhmann (above, n. 34) 618, 631-632 [Engl. trans. 16, 25]; *id.* (above, n. 24) 584 [Engl. trans. 489]; *id.*, 'Inklusion und Exklusion' in N. Luhmann, *Soziologische Aufklärung 6: Die Soziologie und der Mensch* (Westdeutscher Verlag 1995) 237, 259-260.

constitutional problems in the interface of legal orders, giving rise to situations in which two or more legal orders (national, international, supranational or transnational, involving public, quasi-public or private actors, or non-state normative orders—for example those based on the customary practices of indigenous communities) engage with and raise a claim to provide the legal solution to concrete constitutional problems without involving the emergence of new constitutions. This is what I have elsewhere proposed to characterise as *transconstitutionalism*.[36]

While EU law and ECHR law tend to involve such constitutional overlaps[37], the phenomenon clearly extends beyond Europe. Intense problems of constitutional transversality characterise the American Human Rights System, for example.[38] International trade law is also a field in which intense entanglements can be observed.[39] Acute collisions have occurred and keep on occurring between on the one hand national and international law and on the other hand the customary law of aboriginal inhabitants. Especially complex are the controversies regarding and the practice of killing new-born children, leading to huge paradoxes related to the characterization of human rights as rights of integrity of body and mind.[40] Would it, for example, be appropriate to convict and to arrest all adults belonging to Ianommami communities who practise acts of killing newborns according to certain core beliefs? (Were the death penalty in force in Brazil like in most U.S. states, it would likely imply the death of all convicted adults.) This means that a linear reading of fundamental or human rights in terms of the Eurocentric and Western cosmopolitanism is highly controversial.[41] The transconstitutionalism related to human rights involves a transversal network of normative expectations, which refers both to claims for generalized legal *inclusion* in the global society and claims for *isolation* and immunization of

[36] Marcelo Neves (above, n. 1).

[37] J. J. Gomes Canotilho, *'Brancosos' e interconstitucionalidade: Itinerários dos discursos sobre a historicidade constitucional* (Almedina 2006) 265 ff; Francisco Lucas Pires, *Introdução ao direito constitucional europeu (seu sentido, problemas e limites)* (Almedina 1997) 101 ff.

[38] See, for instance Marcelo Torelly, *Governança Transversal dos Direitos Fundamentais* (Lumen Juris 2016).

[39] For instance, the dispute concerning the case of imports of retreaded tyres by Brazil, in which there was a constitutional question involving WTO, Brazil and Mercosur: WT/DS332/R (2007), WT/DS332/ABR (2007), WT/DS332/16 (2008); Mercosur, Award 1/2005; Award 1/2007; Award 1/2008; Supreme Court of Brazil, ADPF (Claim of Non-Compliance with a Fundamental Precept) 101/DF, judgment of 24 June 2009, DJe (official publication) 4 June 2012.

[40] As defined by Gunther Teubner, 'Die Anonyme Matrix: Zu Menschenrechtsverletzungen durch "private" transnationale Akteure' (2006) 45 *Der Staat* 161, 175, 180 [Engl. trans. 'The Anonymous Matrix: Human Rights Violations by "Private" Transnational Actors' (2006) 69 *Modern Law Review* 327, 338, 341].

[41] For an anthropological analysis of this case, see Rita Laura Segato, 'Que cada pueblo teja los hilos de su historia. El pluralismo jurídico en diálogo didáctico con legisladores' in V. Chenaut, M. Gómez, H. Ortiz and M. T. Sierra (eds), *Justicia y diversidad en América Latina. Pueblos indígenas ante la globalización* (CIESAS/FLACSO 2011) 357; for a constitutional approach, see Neves (above, n. 1) 139 ff.

native communities in the face of their contamination by world society, especially in the form of the imperialism of human rights. Finally, cross-reference to the solutions established in other legal orders is also part of the range of issues that can be characterised as part of transconstitutionalism.[42]

Although the judges and courts assume a key and leading role in transconstitutional relations, these also involve the legislator, the executive power and civil society actors as well as, in some settings, members of tribal communities.

Transconstitutional situations can result in the effective and normatively sound interplay of a plurality of potentially conflicting legal orders provided that there is a widespread commitment to learning (and a companion readiness to rebuild *identity based on alterity*, i.e. on a constant process of learning from the other). This entails that conflicts should not be solved through resort to proportionality review oriented to the *optimizing* weighing, as that is likely to result in a bias in favour of one's own vantage-points.[43] Instead, self-containment and openness to consider the arguments on the other side are required. In other terms, the transconstitutional argument is underpinned by the assumption that 'the other can see your blind spot'.[44] Something that is, I take leave to add, incompatible with either a Eurocentric or Western cosmopolitanism, or for that matter, a post-colonialism approach that vindicates pure cultural identities, "uncontaminated" by the influence of foreign (Western or not) constitutional ideas.

Still, what may look at first sight as 'dialogical relations between legal orders'[45] may well turn out to be open (or latent) conflicts. The empirical intertwinment of legal orders results, more often than not, in normative entanglements between heterogeneous normative rationalities. The normative underpinnings of say, lex mercatoria, may well not be the same as those of say the Italian constitution. In fact, transconstitutional entanglements rarely occur in normatively idealized terms in the deeply asymmetric world society in which we live. To put it differently, its Janus faced. On the one hand, transconstitutionalism creates the conditions that render possible

[42] See Marcelo Neves (above, n. 1) 106-118.
[43] Neves (above, n. 1) 171 ff.
[44] *ibid.*, 184.
[45] 'Dialogue' in the sense implied here might have an analogous meaning to that formulated by Feyerabend (164-5): 'It can show the effect of arguments on outsiders or on experts from a different school', as well as 'demonstrate the chimaerical nature of what we believe to be the most solid parts of our lives' (Paul K. Feyerabend, *Three Dialogues on Knowledge* (Basil Blackwell 1991) 164-165.

the development of a transversal rationality[46] *across* legal orders. On the other hand, and by the same token, transconstitutionalism can easily result in blocking and destructive relations between legal orders.[47] In particular, power asymmetries may result in one legal system de facto ignoring or downplaying the claims and demands made by the other or the other legal systems. This form of asymmetrical heterogeneity does not result in a hierarchical order in the sense of a traditional or pre-modern society, but it involves diffuse mechanisms of oppression or negation of the autonomy of others. International relations provide relevant evidence in this regard. "Great powers" have indeed not infrequently instrumentalised legal form and put it at the service of their economic, military and symbolic power, turning international legal discourse and international legal practice into means through which ensure the primacy of their own interests. Not only the machinery of implementation of international law (think about the impotence of international organisations vis-à-vis great powers) but the very content of international law have been regularly prey to power games among great powers.[48] As far as judicial competence is concerned, for example, US-American courts are unwilling to acknowledge the competence of international courts to judge cases in which public international law claims are brought against the USA and, in exceptional cases, against US-American official bodies, organisations or citizens. The Guantanamo Bay Detention Camp is exemplary in this regard. The US-American judiciary has categorically refused to consider the relevance of the decisions and opinions of international institutions on the matter, even though it seems difficult to deny that what is at stake is not only the eventual breach of the US Constitution, but also the integrity of international law.[49]

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[46] Wolfgang Welsch, *Vernunft: Die zeitgenössische Vernunftkritik und das Konzept der transversalen Vernunft* (2nd edn, Suhrkamp 1996) 748 ff.

[47] Marcelo Neves (above, n. 1) 175 ff contains more detailed discussion of the content of this and the following paragraphs.

[48] Luhmann paid considerable attention to the matter: 'It will become unacceptable that an individual state, even if it is the United States, conducts itself as judge and sanctioning power (when it has itself refused to be subjected to the Inter-American Court of Human Rights' (Niklas Luhmann [above, n. 24] 580 [Engl. trans. 486]). Against this background, he argues that 'it is no longer enough to refer to the positive law of states (for instance, in the form of constitutions) because positive law can also be used to cover up violations of human rights or to make kidnapping and breaches of international law possible, as for instance in the decision of US Supreme Court in the case of Álvarez Marchain (1992)' (*ibid.*, 579 [Engl. trans. 486]).

[49] Rüdiger Wolfrum, 'The Attack of September 11, 2001, the Wars Against Taliban and Iraq: Is there a Need to Reconsider International Law on the Recourse to Force and the Rules of Armed Conflict' (2003) 7 Max Planck Yearbook of United Nations Law 1, especially 52-62, 77-78; Hartmut Hillgenberg, 'Incommunicado in Guantanamo' in J. Bröhmer, R. Bieber and C. Callies (eds), *Internationale Gemeinschaft und Menschenrechte: Festschrift für Georg Ress zum 70. Geburtstag am 21. Januar 2005* (Heymanns 2005) 133; Diane Marie Amann, 'Guantánamo'

Consequently, anti-constitutional practices develop in the interior of constitutional states and their 'migration'[50] undermines the normative claim for transconstitutional case solutions.

By the same token, the relations of private regimes with forms of law in peripheral countries are distant from the transconstitutional model in most cases. Systematic corruption of the forms of law in fragile states via private self-regulation on the transnational plane, benefiting large, multinational corporations, is not something to be considered only from the perspective of a left-wing critique of capitalism. Paradigmatic is the "selling" of sovereignty of tax havens.[51] This problem should also be taken seriously with a view to recognising or strengthening the discursive autonomy of the plural spheres of world society. Transnational private legal orders, in which the law is a 'medium' for the economy, develop a type of instrumental rationality in the legal sphere according to which all emergent normative claims of the forms of law in weaker countries tend to be judged as disruptions of their expansionary dynamics. In this regard, Christodoulidis[52] points out that '[r]elations between core and peripheral states are a vital part of the 'rationalization' of the transnational, an edifice which is premised on power asymmetries.' This is why such orders tend to ignore the claims in question, with destructive effects for the respective forms of law. In the field of patent protection, this problem is evidenced by the example of bio-piracy.[53] In this case, the developmentalist argument may be merely a cover for forms of misappropriation of material and immaterial assets by transnational groups, to the detriment of the citizens of the respective states and also of members of the corresponding native communities.

In connection with this problem, it is also important to stress that the central instances of the state are often unwilling to support or collaborate with local forms of law. This results in oppression

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(2004) 42 Columbia Journal of Transnational Law 263; Derek Jinks and David Sloss, 'Is the President Bound by the Geneva Conventions' (2004) 90 Cornell Law Review 97; Angelika Siehr, 'Derogation Measures under Article 4 ICCPR with Special Consideration of the "war Against International Terrorism"' (2004) 47 German Yearbook of International Law 545.

[50] Kim Lane Scheppele, 'The Migration of Anti-constitutional Ideas: the Post-9/11 Globalization of Public Law and the International State of Emergency' in Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (CUP 2006) 347; Kent Roach, 'The Post-9/11 Migration of Britain's Terrorism Act 2000' in Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (CUP 2006) 374.

[51] Ronen Palan, *The Offshore World: Sovereign Markets, Virtual Places, and Nomad Millionaires* (Cornell University Press 2003).

[52] Emilios Christodoulidis, 'On the Politics of Societal Constitutionalism' (2013) 20 Indiana Journal of Global Legal Studies 629, 642.

[53] See Gunther Teubner and Andreas Fishcher-Lescano, 'Cannibalizing Epistemes: Will Modern Law Protect Traditional Cultural Expressions?' in Christoph Beat Graber and Mira Burri-Nenova (eds), *Traditional Cultural Expressions in a Digital Environment* (Edward Elgar 2008) 17.

of local legal claims in the name of state unity. The opposite is not unusual: blind separatism on the part of local communities that are unwilling to coexist with the heterogeneity of a people and the plurality of the public sphere in a constitutional state. Destructive reciprocal effects often derive from conflicts between the unity claim of a federal, regional, or unitary state and the autonomy claims of their respective Member States, regions, provinces, or departments. However, unofficial forms of law are also making increasingly strong claims to legal autonomy, often associated with oppressive measures by the state, as well as non-negotiable conflicts originating in local demands for autonomy. In this case, it is rather a question of negative entanglements, because no room is left for reciprocal learning in terms of transconstitutionalism. On the contrary, the situation is dominated by conflicts of intolerance, which ultimately cannot be treated or resolved by means of legal forms and in the last instance may lead to armed violence and a refusal of the rule of law.

From what has been expounded above, it can be inferred that transconstitutionalism is a scarce resource in world society. Stable transconstitutional intertwinements among legal orders have so far occurred only in very limited portions of the 'multicentric' world system, either in territorial or functional terms. The outlook remains unfavourable to positive developments. Nothing could be more illusory than the idea that experiences of transversal rationality in transconstitutionalism among legal orders are generalised or in a position to become so in the short or medium term. These experiences are part of the privileges of some legal spheres in an acutely asymmetrical world society.

Transconstitutionalism is part of the functional requirements and hence of the normative claims of world society. Nevertheless, from an empirical standpoint the persistent *exploitations* of legal discourses in the context of asymmetrical forms of law impose themselves very solidly against such requirements and claims. These *exploitations* of law drive growth of the excluded in world society, a development at odds, and incompatible, with the normative claim of transconstitutionalism itself.

II. Two Alternatives to the Limits of Transconstitutionalism

The limits of the transconstitutionalism, deformed by the enormous asymmetry of power in today's world society, seem to lead us into an impasse. To get out from it, we need to be capable

of imagining new forms of dealing with constitutional problems. Two alternatives in particular should be considered: post-constitutionalism and trans-democracy.

1. The First Alternative: Post-Constitutionalism

A first possible alternative would consist in the transcendence of constitutionalism, into the engagement of a form of post-constitutionalism.

That post-constitutionalism could not be a 'post-national pluralism' that would go 'beyond constitutionalism', since that peculiar form of 'pluralism' would more likely than not end up mirroring the prevailing global legal and political status quo (and thus the power equation). In this way, while claiming for a new perspective 'beyond constitutionalism' and with the focus on 'the pluralist structure of post-national law', Krisch falls back on challenging the traditional dualistic '*distinction between domestic and international law*' in order to emphasize 'the problematic nature of both *cosmopolitan and nationalist visions* of institutional development'.[54] In fact, however, the issue of post-constitutionalism goes far beyond cosmopolitan and nationalist mainstream visions. This would be so because the normative claims at the core of constitutionalism, namely political and legal inclusion, would still be anchored to economic and technical-scientific structures (and thus ultimately to cognitive expectations[55]) that structurally limit social inclusion to a few regions organised as states, promoting broad exclusion in large areas of the globe. Any constitutionalism aimed at the systemic autonomy of law and politics and at legal and political inclusion becomes a symbolic facade or a mere expression of 'good intentions' if it is structurally linked to persistent exclusion of large part of population from its rights and remedies. Significant in that regard is the idea and discourse on human rights, which has been "captured",[56] becoming largely a symbolic mechanism that not only undermines its

[54] Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (OUP 2010) 302-303.
[55] I follow in this path an early thesis of Luhmann, according to which the modern society as a world society develops primarily on the basis of cognitive expectations (economics, science, and technics), only secondarily on normative expectations (law, morality, and in part politics) (Niklas Luhmann, *Soziologische Aufklärung 2* [above, n. 1] especially 55, 57-58). He later moves away from this position to emphasise the horizontality of autopoietic systems, thus proposing a radicalisation of the thesis of autopoiesis (*id.* [above, n. 34], especially 747-748, 762-763 [Engl. trans. 90, 99). In respect of systems theory, Fischer-Lescano and Teubner have recently returned to the former position (Andreas Fischer-Lescano and Gunther Teubner [above, n. 20] 7).
[56] Martti Koskenniemi, 'Human Rights Mainstreaming as a Strategy for Institutional Power' (2010) 1 Humanity: An International Journal of Human Rights, Humanitarianism, and Development 47.

normative force, but is usually placed at the service of aims at odds with the proclaimed normative ethos of the concept.[57]

By the same token, the path towards the new political and legal imagination cannot be a post-colonial quest for expansion of alleged authentic cultural identities in the so-called 'Global South', which tend to reduce the problem to a *semantic* question of domination by a language inducing imposed, deformed and heteronomous understandings, and to cover up the *structural* asymmetries through the euphemistic distinction between "Global North' and 'Global South'[58]. Such a view, especially in the formulation of some scholars from 'Global South' who flock to the universities in 'Global North', covers up also forms of exclusionary domination prevalent in the peripheries of the global society.

It seems to me that the emergence of a post-constitutional perspective within the world society would imply a shift in focus, zooming in the economic structures that undermine the autonomy of law and politics as social systems and, consequently, are and cannot but remain incompatible with political and legal inclusion. It is important to keep in mind that such structures ("disembedded" capitalism)[59] have only found an effective counterbalance in the restricted domain of the national constitutional state belonging to the dominating centre of world society, very particularly in some of the mature European welfare states. This entails that any constitutional or legal transformation would have to be preceded by a deep transformation of the economic system, transcending the specific configurations of "capitalism" that have blocked the widespread entrenchment of fundamental rights in a viable and sustainable world society (at the limit a "revolutionary" supersession of "capitalism" may be at stake). A legal "revolution" resulting from a worldwide "evolutionary" process[60] could not act as replacement for the deep economic transformation.

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[57] In Moyn's critical perspective It means: "Born in the assertion of the "power of the powerless", human rights became bound up with the power of the powerful" (Samuel Moyn, *The Last Utopia: Human Rights in History* [Harvard University Press 2010] 227).

[58] See with some qualifications Balakrishnan Rajagopal, 'International Law and Its Discontents: Rethinking the Global South' (2012) 106 American Society of International Law Proceedings 176; Christiana Ochoa and Shane Greene, 'Introduction: Human Rights and Legal Systems Across the Global South' (2011) 18 Indiana Journal of Global Legal Studies 1-6.

[59] I bring to our context the notion of (dis)embedded economy launched by Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (first published 1944, Beacon Press 2001) especially 60, 135. To an explanation on this subject see Fred Block, 'Introduction' (*ibid.*) xviii, xxiii ff.

[60] Hauke Brunkhorst *Critical Theory of Legal Revolutions* (above, n. 25).

No doubt all this goes far beyond a sociological explanation, but still should be reflected in a critical "systems theory" perspective.[61] It is not only about 'the dark side of functional differentiation' in face of the recent crisis that has affected USA and Europa[62], but also the lack or deficit of functional differentiation – specially the autonomy of law against economy and of law and politics against economy – in the majority of countries and social contexts of the world society that are peripheral to the dominating centres of money and power[63]. It would likely demand a turn from the focus on autonomy and functional differentiation, which supported the relation between politics and law in classic constitutionalism, to an emphasis on the difference 'inclusion/exclusion',[64] which implies a normative problem of world society[65] involving not only 'human rights as the rights of strangers'[66] but also the hitherto unaccomplished realization of the constitutionalism for universal inclusion.

2. The second alternative: Transdemocracy

The second alternative, transdemocracy, is an immanent perspective directed to a criticism of the self-understanding of democracy in the western countries. And it is not against transconstitutionalism, but complementary to it.

One of the most relevant contributions of Luhmann's systems theory to the understanding of social phenomena was the difference of system and environment as a key concept in the social

[61] This is meant precisely not in the sense of the 'critical systems theory' proposed by Andreas Fischer-Lescano, 'Systemtheorie als kritische Gesellschaftstheorie' in A. Fischer-Lescano (ed), *Kritische Systemtheorie: Zur Evolution einer normativen Theorie* (Transcript Verlag 2013) 13. Fischer-Lescano's outlook, on the one hand, insists on an unquestionable worldwide primacy of functional differentiation. On the other hand, he controversially tries to reconcile Theodor Adorno's negative dialectics concerning the relation between human being and society (Theodor W. Adorno, 'Individuum und Organisation: Einleitungsvortag zum Darmstädter Gespräch 1953' in T. W. Adorno, *Gesammelte Schriften*, vol 8, *Soziologische Schriften* 1 [Suhrkamp 2003] 440) with Niklas Luhmann's reflexive theorization regarding the paradoxical difference society/human beings expressed in the concept of person.
[62] Poul Kjaer, Gunther Teubner and Alberto Febbrajo (eds), *The Financial Crisis in Constitutional Perspective: The Dark Side of Functional Differentiation* (Hart 2011).
[63] Marcelo Neves, *Verfassung und Positivität des Rechts in der peripheren Moderne: Eine theoretische Betrachtung und eine Interpretation des Falls Brasilien* (Duncker & Humblot 1992).
[64] This is meta-difference or a meta-code of world society as suggested by Niklas Luhmann (above, n. 34) 632 [Engl. trans. 25]; *id.* (above, n. 24) 583 [Engl. trans. 489]. See, with qualifications, Marcelo Neves, *Zwischen Themis und Leviathan: Eine Schwierige Beziehung – Eine Rekonstruktion des demokratischen Rechtsstaats in Auseinandersetzung mit Luhmann und Habermas* (Nomos 2000) 188 ff.
[65] See Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (OUP 2010) 222 ff; Marcelo Neves (above n. 1) 180 ff.
[66] Hans Lindahl (above, n. 65) 239 ff.

sciences.[67] He posited that the notion of environment refers to dimensions of society as well as natural and physical environments, and that social systems in fact tend to be confronted by their social environment.[68] Moreover, Luhmann noticed that social systems have the tendency to overburden their environment with garbage that they find difficult to process internally. This may lead to reactions within environments insofar as they are not capable of bearing and processing this garbage ('ecological hazards').[69]

From that perspective, democracy has to be understood as a characteristically modern political system. Among other things, democracy claims functional differentiation from other social systems and also segmentary differentiation from other political systems organized as states.[70] Despite the terminological continuity, our conception of democracy (as well as contemporary practice of democracy) has relatively few to do with the so-called ancient democracies, including classical Athenian democracy.

Leaving aside the far from irrelevant fact that democracy [*δημοκρατία*/*dēmokratía*] was regarded as Aristotle[71] as one of the corrupted or perverted forms of government, even classical Athens as a polity [πολιτεία/*politeía*][72] was founded on exclusionary concepts and practices. Full political membership was restricted to the heads of households (*οικιαι* or *οικοι*)[73]. As a matter of fact, the majority of the population does not participate in decision-making bodies (boule, ekklesia, dikasteria), but are part of relations of dependence, as wives or slaves.[74] And it was related to the normative structure of the *polis*.[75] In contrast to this, modern democracy emerged as a new

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[67] Niklas Luhmann, *Soziale Systeme: Grundriß einer allgemeinen Theorie* (Suhrkamp 1984) 242 ff [Engl. trans. *Social Systems* (Stanford University Press 1995) 176 ff]; *id.*, *Die Gesellschaft der Gesellschaft* (above, n. 1) 60 ff [Engl. trans. 28 ff].

[68] Niklas Luhmann, *Ökologische Kommunikation: Kann die moderne Gesellschaft sich auf ökologische Gefährdungen einstellen?* (3rd edn, Westdeutscher Verlag 1990); *id.*, 'Die Einheit des Rechtssystems' (1983) 14 Rechtstheorie 129, 137-138; id. *Soziale Systeme* (above, n. 67) 243 [Engl. trans. 177]

[69] See Niklas Luhmann *Ökologische Kommunikation* (above, n. 68) especially 221-224.

[70] Niklas Luhmann, 'Der Staat des politischen Systems: Geschichte und Stellung in der Weltgesellschaft' in Ulrich Beck (ed), *Perspektiven der Weltgesellschaft* (Suhrkamp 1998) 345.

[71] Aristotle, *Politics* (bilingual, H. Rackham tr, HUP 1944) 207 [III. V. 4, 1279a].

[72] *Ibid.* [III. V. 2, 1279a].

[73] It is worth noting that οίκος (pl. *οικοι*) had a broader meaning than οικία (pl. *οικιαι*), in that it included the property owned by the head of household outside the home as a physical domestic space. See Douglas M. MacDowell, 'The Oikos in Athenian Law' (1989) 39 The Classical Quarterly (New Series) 10.

[74] P. J. Rhodes, *The Athenian Boule* (OUP 1972) 4 ff; Robin Osborne, *Demos: The Discovery of Classical Attica* (CUP 1985) 65 ff; John Thorley, *Athenian Democracy* (2nd ed, Routledge 2004) 79-81. See with qualifications Philip Brook Manville, *The Origins of Citizenship in Ancient Athens* (Princeton University Press 1990) 17 ff.

[75] Cf. J. P. Rohdes, *A Commentary of the Aristotelian* Athenaion Politeia (CUP 1981), 495 ff; G. E. M. de Ste. Croix, 'The Athenian Citizenship Law' in G. E. M. de Ste Croix, *Athenian Democratic Origins and Other Essays* (David

semantics incorporating normative structures aimed at the universal inclusion of all persons as rights holders, notwithstanding of course the well-known socio-structural limits to its accomplishment and development. Furthermore, and perhaps even more decisively, ancient Greek polities leaned towards the notion of autarchy [*αὐτάρκεια*], favouring self-sufficiency. Democracy in the modern sense emerged in a world society, implying that it had to consider a complex social environment both inside and outside of the state territory.

The crucial point to make is that, however, while the theory of democracy, and the very semantics of actual democratic practice[76] point to the political inclusion of the people[77] and to the constitutional differentiation of politics from other social domains on reference to the very same people,[78] no actual effort has been made to take the idea of world society seriously. In particular, the concept of sovereignty as a legitimating and normative model has been developed based on a stringent idea of autonomy, which is close to ancient autarchy. Maybe it stems from an anachronism that was taken up by the revolutionary semantics of the XVIIIth century, an 'Enlightenment anachronism'[79]. Anyway, the idea that society became world society, and thus the democratically organised state has not only a functional but also a segmented, territorial, political environment, has been overlooked.

In the eighteenth, nineteenth and early twentieth centuries, world society was not dense enough to allow for a significant reflux of the problems accruing in the surrounding political environments into the territory of the democracies, at least not of those in the dominating centers. Political territoriality remained a key aspect of the political organization of democracy. Peoples remained physically apart. Moreover, and fundamentally, "systemic garbage" was thrown from centers to peripheries in the forms of slavery, invasion, war, support of dictatorship, multinational corporate corruption of officers and governments, etc. But there was a limited

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Harvey and Robert Parker eds, OUP 2004) 233; Philip Brook Manville, (above, n. 74) 7 ff. In turn, Pacheco emphasise that "some re-embedment of food and political entitlements […] underlined the exclusive nature of the Athenian citizenship" (Fernando Notario Pacheco, 'Politics, Wealth and Food in Democratic Athens. Rethinking Aristocratic Patronage and Democratic Empowerment in the Urban World' (2016) 34 Gerión 17, 27.

[76] Claude Lefort, 'Droit de l'homme et politique' in C. Lefort*, L'invention démocratique: Les limites de la domination totalitaire* (Fayard 1981) 45.

[77] Niklas Luhmann, *Die Politik der Gesellschaft* (Suhrkamp 2000) 97.

[78] *Ibid.*, 265.

[79] This is an expression used in another context by Koselleck, who refers to 'pure anachronism' as 'the egocentric destruction of the intersubjectively experienced world', associating it with 'schizophrenia': Reinhart Koselleck, *Vergangene Zukunft: Zur Semantik geschichtlicher Zeiten* (Suhrkamp 1989) 180, 291 [Engl. trans. *Futures Past: On the Semantics of Historical Time* (Columbia University Press 2004) 131, 215.

reflux from the periphery to the center, paramountly because the centre dominated the periphery through different variants of imperialism (outright colonialism, neo-colonialism, post-colonialism), which are incompatible with modern idea of democracy, but could be factually compatible with domestic political inclusion (and thus with a form of "isolated democracy"). This was and to a large extent remains the "dark side" of the enlightenment, whose legacy is far from having been overcome. This does not seem to be a matter only of peripheral countries. The societies of the "centre" have been once and at the same time beacons irradiating constitutional and democratic ideas *and* the exporters of practices of legal and political exclusion, including the support of authoritarian regimes when fitting their interests. This ambivalence is starkly described by Sala-Molins[80] in his analysis of the 'Black Code', which not only defined slavery as a legal institution, but also defined the legal statuses of the inhabitants of French colonies. The rather explicit political and economic goal was that of supporting the plantation system, from which considerable wealth flowed into France. The *Code* was expressly intended to apply in the colonies.[81] From our perspective, it is interesting to notice that the Code remained in force until 1843, and in particular, was not questioned either during the French Revolution nor after it. Montesquieu, Rosseau, Diderot or for that matter Voltaire were silent or complicit.[82] It is hard to avoid the conclusion that constitutionalism and democracy were intended as a set of provisions for the legal and political inclusion of some (white Europeans, later also US colonists of European extraction) and not all, despite the fact that the wealth of the happy few depended on the toil and (semi-slave or enslaved) labour of the restless many. Certainly there were local elites that also benefitted from the entrenchment of exclusion; but the system of exclusion was the intellectual product of the European centre, the very same centre that produced the Enlightenment. It should be added that this situation was not restricted to the colonial period itself. In the 'neo-colonial' and 'post-colonial' setting, the 'march forward' of constitutionalism and democracy, resulting in legal and political inclusion in the "centre" came hand in hand with

[80] Louis Sala-Molins, *Le Code noir ou le calvaire de Canaan* (PUF 1987); *id.*, *Dark Side of the Light: Slavery and the French Enlightenment* (J. Conteh-Morgan tr, Minnesota University Press 2006).

[81] The text is in https://archive.org/stream/lecodenoirouedi00fran#page/n5/mode/2up. In this regard, see Louis Sala-Molins, *Le Code noir …* (above, n. 80); Dominique-Aimé Mignot, 'La matrice romaine de l'Édit de Mars 1865, dit le Code Noir' in Jean-François Niort (ed), *Du Code Noir au Code Civil: Jalons pour l'histoire du droit en Guadeloupe. Perspectives comparées avec Martinique, la Guyane et la République d'Haïti* (L'Harmattan 2007) 87; Jérémy Richard, 'Du Code Noir de 1685 au Projet de 1829: de la semi-réification à l'humanisation de l'esclave noir' in T. le Marc'Hadour and M. Carius, *Esclavage et droit: du Code noir à nos jours* (Artois Presses Université 2010) 53.

[82] Louis Sala Molins, *Le Code noir …* (above, n. 80) 206 ff; *id.*, *Dark Side of the Light* (above, n. 80)

geopolitical conflicts which resulted in the "centre" favouring the establishment of authoritarian dictatorships in the periphery. 'Rational imperialism turned out to be a façade for cynical imperialism,"[83] indeed a form of imperialism characteristic of constitutional democracy[84] at the semantic level. Under a structural and operative viewpoint, both the foreign policies of the United States in Latin America in the 1960s and 1970s which supported dictatorships and Western foreign policies in the Near East nowadays are impressive examples.

For instance, in 1963, the very same year in which Congress endorse affirmative action in the USA, the democratic government of Lyndon Johnson was busy preparing, in conjunction with the Brazilian military, a coup to overthrow a democratically elected civilian government, which favoured political and social reforms to achieve inclusion. The alleged danger to the "protection of rights" (meaning the property rights of some, historically resulting in many cases from outright acts of confiscation) emerging from "communism" was taken to justify a USA-sponsored dictatorship, including the dispatch of US-American warships to an area close to the Port of Santos, which would have intervened in the event of the failure of the operation of the Brazilian military.[85] USA's support was not limited to the coup, but remained vital in ensuring the stability of the new regime. For instance, more than 300 Brazilians went to the United States Army School of the Americas, located then in Panama (moved in 1984 to Fort Benning, Georgia), to learn more efficient methods for torture and for other serious violations of human rights with their US counterparts, as announced in December 2014 in the final report of the Truth Commission established by the Brazilian government.[86]

With the strengthening of world society at the end of the twentieth century and the beginning of the twenty first century, the convenient auto-illusion of isolation and independency from the political environment was undermined. More and more the reflux of garbage came back without any recycling. One throws bombs, imposes corrupt rulers, blocks economic development in weak countries and disrupts international relations, but one cannot avoid the human and social pollution that results therefrom. Not only in the form of the wave of terrorism and global

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[83] Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (CUP 2002) 500.
[84] James Tully, 'The Imperialism of Modern Constitutional Democracy' in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (OUP 2007) 315, 328 ff.
[85] Cf. Marcos Sá Corrêa. *1964 visto e comentado pela Casa Branca* (L & PM 1977).
[86] Brasil – Comissão Nacional da Verdade, *Relatório* (CNV 2014) vol 1, 330 ff. Brazilian Army Officials were also sent to England to learn methods of torture with their British counterparts (see *ibid.*, 333 ff).

criminality does the garbage come back, but also, and above all else, through the uncontrollable refugee flows caused by war, hunger, and oppression.

We have seen attempts at new novel forms of isolationism such as rigid foreigner entry control and, in extreme case, the building of walls. But it is no longer possible to prevent the reflux. Now it is not only commodities, money and information that circulate word-wide regardless of all political borders, but also human bodies. Let us imagine one, two, or three hundred million Chinese trying to enter West Europe or the United States after a political and economic collapse resulting from the fall of that political regime. It would be pointless to try to obstruct refugee flows by means of border police, or even through the US Army or NATO forces. Dominating democracies *must* develop a new imagination in order to adequately address the social and human environment constructed by other political systems territorially organized into states.

III. Instead of conclusions: not only "we the people" but also "the others the peoples"

In this context, the concept of "people sovereignty" has to be redefined. The emphasis should no longer be placed only on autonomy, but at the same time on responsiveness towards others, ultimately towards world society. This implies that each democracy must be responsive towards other political systems, foremostly those organized into states. Without responsiveness in this regard, the hollowing out first, and then the collapse of democracy(ies), is far from improbable in the mid-and long-runs.

To put it differently. It is no longer sufficient to identify democracy with "we the people"[87]. Democracy has to incorporate "the others", and so add the phrase "the others the peoples" as an expression of its self-understanding. And at least the third limb of Abraham Lincoln's Gettysburg formula has to be edited as follows: "government for the peoples". To put it differently: from an almost exclusive stress on people's identity, democracy has to switch to an emphasis on peoples' alterity. It is not just a question of hospitality, neither in Kant's sense [88] nor

[87] A phrase which meaning and transformation in US constitutional history was deeply treated by Bruce Ackermann, *We the People 1: Foundations* (HUP 1991); *id.*, *We the People 2: Transformations* (HUP 1998); *id.*, *We the People 3: The Civil Rights Revolution* (HUP 2014).

[88] Immanuel Kant, 'Zum ewigen Frieden. Ein Philosophischer Entwurf' in Immanuel Kant, *Werkausgabe*, vol XI: *Schriften zur Anthropologie, Geschichtsphilosophie, Politik und Pädagogik 1* (first published 1795, Wilhelm Weischedel ed, 10th edn, Suhrkamp 1993) 191, 213 ff [40 ff].

in Derrida's.[89] Democracy requires going beyond hospitality. What is required is conviviality with the political others, that is, showing respect to others, also when visiting them at *their* home. If this path proves unviable, it would portend the elimination of the very external political conditions of domestic politics, which would amount to an ecological catastrophe for existing democracies.

[89] Jacques Derrida and Anne Dufourmantelle, *Anne Dufourmantelle invite Jacques Derrida à répondre: De l'hospitalité* (Calmann Lévy 1997).