Review Article

Constitutionalism as Fear of the Political? A Comparative Analysis of Teubner's *Constitutional Fragments* and Thornhill's *A Sociology of Constitutions*

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CONSTITUTIONAL FRAGMENTS: SOCIETAL CONSTITUTIONALISM AND GLOBALIZATION by GUNTHER TEUBNER
(Oxford: Oxford University Press, 2012, 232 pp., £50.00)

A SOCIOLOGY OF CONSTITUTIONS: CONSTITUTIONS AND STATE LEGITIMACY IN HISTORICAL-SOCIOLOGICAL PERSPECTIVE by CHRIS THORNHILL
(Cambridge: Cambridge University Press, 2011, 466 pp., £65.00)

In his new book *Constitutional Fragments: Societal Constitutionalism and Globalization*, Gunther Teubner warns that we must 'be careful in the terms we use' (p. 66) when defining a new field of global societal constitutionalism and critically dealing with classical concepts of constitutional and normative political theory, such as collective identity, political actors, constituted and constituent power, the nation state, and the public interest. It almost feels like a touch of irony by one of the most original and distinguished legal scholars, who has profoundly influenced current social theory of law and introduced new concepts and metaphors, such as 'legal irritants', 'transnational constitutional subjects', 'sectorial constitutions', and 'societal constitutionalism' to the theory of global law, legal culture, and transnational constitutionalism.

However, Teubner's call for terminological carefulness is not just a lightweight rhetorical remark. Rather, it highlights his ambitious and most impressive project to completely rethink and redesign the semantics of constitutionalism beyond the framework of nation states and international law, grasping profound structural changes in global law and involving a

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number of new concepts and apparent oxymorons signifying internal paradoxes of the global legal system. Its aim is to conceptualize theoretically and communicate a functional adequacy of law in system-differentiated global society[1] which is not constrained by the typically modern structure of the nation state and its constitutional organization.

Reflecting the evolution of transnational law beyond the state and the internal rationality of the global legal system, new theoretical concepts signify the systemic self-reference and operative intelligence of global law. Any neologism and conceptual innovation, therefore, has to be carefully explained against the persisting pressure of the semantics of state constitutionalism and clarified as a point of self-reference in the evolving system of global law. Indeed, the very title *Constitutional Fragments* sounds like an oxymoron establishing itself against the modern constitutional imagination which commonly associates the concept of constitution with the process of unification rather than fragmentation.

Rethinking constitutionalization as part of social fragmentation and resisting the theoretical temptation of identifying society with normative unity guaranteed by a political constitution requires a different kind of imagination. Teubner seeks to facilitate this new constitutional imagination through the most original mixture of autopoietic systems theory, the classical terminology of sociology of law, and a number of new concepts emerging in the rapidly expanding field of transnational law and constitutionalism.

THEORETICAL TENSIONS BETWEEN THE PARTICULARITY OF THE STATE CONSTITUTION AND THE GENERALITY OF FUNCTION SYSTEMS

Like any ground-breaking work, Teubner's book may be reviewed either by appraising and summarizing its content, or by raising intriguing questions and associated controversies. With the greatest respect and admiration for Teubner's social theory of law, I opt for the latter.

The book asks 'the new constitutional question' (p. 1) which addresses the alleged inadequacy of modern constitutional theory formed in the eighteenth and nineteenth centuries and exclusively focusing on the constitutional state, its rule of law and implementation of state policies. The political power of nation states is both insufficient to deal with problems of global society and insufficiently limited to avoid tensions between nation states and global politics and law. A theory of constitutionalism beyond the nation state thus needs to pose two different sets of problems, namely, problems in transnational political processes stretching far beyond nation-state powers

1 Teubner often uses the term 'world society' but this article retains 'global society' as a more common alternative, except when directly quoting from Teubner's work.

and problems emerging outside these very transnational political processes in what Teubner describes as 'private sectors' of global society (pp. 1–2).

The constitutional question, therefore, is not a political one and covers non-political areas of global society in the process of constitutionalizing themselves. Teubner's view of constitutionalism is not defined by the juridical methodology of normative constitutional theory, including the increasingly popular and diverse stream of normative constitutional pluralism studies. His concept of global legal pluralism and transnational constitutionalism is a lot more radical, and defined by a sociological perspective. It is driven by an attempt to respond theoretically to growing structural and semantic tensions between the particularity of constitutional state organization and the generality of differentiated function systems, such as law, science, economy, media, and education, operating independently of nation-state structural limitations.

Drawing on the concepts of law as an autopoietic social system and the functional differentiation of modern society, Teubner presents the most thought-provoking interpretation of Luhmann's general theory of autopoietic social systems and pleads for a sociological theory of societal constitutionalism as a distinct position overcoming the 'the obstinate state-and-politics-centricity' (p. 3) of constitutional lawyers and political philosophers. This theoretical move is made possible by a general theory of social system differentiation which makes constitutional politics merely part of the functionally differentiated political system rather than an ultimate condition of societal unity.[2] The constitution of society consists of its differentiation, not its political integration.

Indeed, Luhmann considered global society to be defined by functional differentiation. However, he treated the legal system of such society as 'a special case'[3] and warned against overlooking huge legal differences in different parts of the globe. In the absence of globally centralized legislation and decision making, a global legal order, according to Luhmann, evolves through the generalized semantics of human rights and their violations. Legal globalization is facilitated by the general expectation that states, these differentiated 'segments' of the global political system,[4] are responsible for their compliance with human rights and make them an intrinsic part of legislation and law enforcement.[5] As Luhmann comments, the divergence in legal developments at the level of global society, nevertheless, is so significant that it raises the very question of the functionality of a global legal order.[6]

2 N. Luhmann, *Law as a Social System* (2004) 404–12.
3 id., p. 481.
4 id., p. 487.
5 id., pp. 482–7.
6 id., p. 488.

Unlike Luhmann, Teubner never doubts the unity of the global legal system and the autopoiesis of its operations beyond the state and international law structures and organizations. However, Teubner rightly points out that societal constitutionalism is not a recent outcome of globalization: the tension between the general functions of politics and law and their specific organization in the constitutional state has always been present in modern society. Globalization has only increased the tension between the nation state's political constitution and self-foundation and the self-constitutionalization of function systems which already existed before recent global societal developments (described as the non-political living law of society in early sociology of law).[7] Due to the societal differentiation and globalization of function systems including law and politics, which have been rapidly adopting transnational organizational forms and networks, the role of nation states, their borders and political constitutions, has been diminished.

Globalization 'produces a tension between the self-*foundation* of autonomous global social systems and their political-legal *constitutionalization*' (p. 43). This leads Teubner to criticize the constitutional semantics fundamentally and look for the new constitutional subjects of self-constitutionalized global orders without a state. He also engages in the most difficult and controversial task of revising Luhmann's theory of functionally differentiated autopoietic systems and supplementing it by other processes of internal and external differentiation, especially internal sectorial differentiation of systems into spontaneous and organized-professional spheres and the external differentiation of systemic and cultural polycentrism.

Furthermore, the new research field of constitutional sociology supports general theories of social differentiation by providing for historical and empirical analyses between constitutional politics and other social subsystems and areas, including the areas of private law and governance. Societal constitutionalism, therefore, means the dissociation of constitutions and politics which, according to Teubner, has always been part of the sociology of law tradition. It is thus merely a question of extending Ehrlich's original concept of living law without a state from its historically localized contexts to the new global environment.[8]

'Global Bukowina',[9] Teubner's metaphorical reflection on Eugen Ehrlich's academic workplace and field of sociological research in living laws of different ethnic and religious groups inhabiting one of the most remote parts of the Habsburg Empire, is thus born out of the continuous differentiation between politics and law and not through some constitution-

7 See, especially, E. Ehrlich, *Fundamental Principles of the Sociology of Law* (1936) 486 ff.

8 G. Teubner, '"Global Bukowina": Legal Pluralism in the World Society' in *Global Law Without a State*, ed. G. Teubner (1997) 3–28.

9 id.

making momentum of global politics. The ultimate political constitution of global society is a myth of normative political theorists and cosmopolitan constitutional democrats.

Nevertheless, this global condition requires the rethinking of who is the constitutional subject of global societal constitutionalism. Unlike the hierarchies of the constitutional state established by paradoxical circularity between its constituent and constituted power subjects, Teubner promotes transnational regimes, organizations, and networks as horizontally differentiated constitutional subjects of global constitutionalism without a state. These new non-state and even non-political subjects are presented as able to steer the self-constitutive processes and deliberations formerly associated with the state's constitutional subjects.

While the new collective subject of constituent power constituting a world state – a cosmopolitan *demos* – continues to be just a global political utopia, the concept of global societal constitutionalism is not to be limited by fragments of globalized politics. It actually involves the non-political constitutionalization of global governance in which 'private actors not only participate in the political power processes of global governance, but also establish their own regimes outside of institutionalized politics' (p. 9).

Societal constitutionalism thus draws on the process of socialization of political power and its depoliticization through specific constitutional regimes of global private law. The two typical functions of modern state constitutions, namely, the constitution and limitation of political power, is thus extended by Teubner beyond the limits of the political system and turned into the most general operation of fragmented constitutional regimes of global society.

FROM LEGAL PLURALISM TO FRAGMENTED SOCIETAL CONSTITUTIONALISM

Like Luhmann's social theory of autopoietic systems, Teubner has adopted Sciulli's general concept of societal constitutionalism[10] in the most unorthodox manner to pursue the goal of theoretical description and conceptualization of social differentiation and fragmentation at level of global law and society. Teubner's concept of societal constitutionalism is inseparable from legal pluralism evolving in 'world society'.[11] He uses Sciulli's original notion of societal constitutionalism and critique of the Weberian professional authoritarianism of government[12] and reformulates these approaches in the context of systemic differentiation. Constitutions emerging in different

10 D. Sciulli, *Theory of Societal Constitutionalism: Foundations of a Non-Marxist Critical Sociology* (1992).
11 Teubner, op. cit., n. 14.
12 Sciulli, op. cit., n. 10, pp. 40–52.

sectors of global society are subsequently considered an outcome of functional differentiation rather than the deliberative politics and cooperation between state and non-state political actors.

The plurality of transnational legal regimes, organizations, and networks are an intrinsic part of the social differentiation and evolution of different sectors of global society. In the absence of a global political subject and constitution, constitution making and constitutionalization processes nevertheless flourish as internal operations of fragmented global legal arenas. Instead of the process of political unification through general constitutionalization, one is now witnessing a profoundly pluralistic movement towards specific constitutionalizations of different transnational legal regimes, organizations, and networks.

This pluralistic process of global, yet fragmented, self-constitutionalizations without a state subsequently makes it theoretically possible to think of constitutionalism as the general societal processes of self-reference of non-state subjects unlimited by concepts of collective identity, shared political destiny, and so on. The plurality of societal constitutionalism replaces the concept of unity of society facilitated by its political constitutionalization. The modern semantics of state constitutionalism drawing on the image of society ultimately organized by the constitutional state needs to be replaced by the postmodern semantics of societal constitutionalism drawing on the image of functionally differentiated society consisting of specific autopoietic subsystems.

Instead of constitutions *of* society, it is necessary to speak of constitutionalizations *in* society. Politics, including the state organization, rather than guaranteeing ultimate societal unity is just one of many social subsystems. Societal administration and steering are primarily social goals and their political context is just one of many societal fragments.

CONSTITUTIONAL FRAGMENTATION IN STATE CONSTITUTIONALISM

In the spirit of legal pluralism and socio-legal conceptualizations of 'living law', Teubner further seeks to prove that societal constitutionalism has actually been typical of the modern constitutional state and national society, and that globality only made these operative capacities of the legal system a more obvious and intrinsic part of world society.

The whole second chapter of *Constitutional Fragments*, therefore, deals with 'sectorial constitutions in the nation state' (pp. 15 ff.) and opens by reinterpreting the doctrine of liberal constitutionalism and its separation of the state constitution from autonomous areas of civil society perceived as areas of individual freedoms and activities free of state interventions.

According to Teubner, this view may be commonly accepted by constitutional law theory, yet misses a whole set of societal activities

calling for their specific self-constitutionalizations beyond the state constitution and its power. In this respect, it is fascinating to see Teubner's postmodern playful stream of argumentation accommodating Hegel's conceptualization of a plurality of social institutions, such as family and civil society, and reinterpreting the Hegelian corporatist state and constitution as early reflection of the functional differentiation of society (p. 20). Teubner subsequently offers a historical analysis of state constitutional interventions into different societal areas and, using examples from the welfare state and economic liberal constitutions to the totalitarian state and neo-corporatist constitutional arrangements, presents the history of modern state constitutionalism as a history of the expansive tendencies of politics which both undermine and underestimate the self-constituting potential of different social areas.

Commenting on the rise of constitutionalism in the economic system, its impact on welfare state and risks of its societal expansion, Teubner states that:

> [W]estern Europe is experimenting with a multiplicity of social constitutions granting the political constitution only the status of *primus inter pares*. Constitutions are everywhere in society: not just *ubi societas, ibi ius*, as Grotius once said, but *ubi societas, ibi constitutio*. Self-founding orders are developing at numerous places in society and are being stabilized by constitutional law. Law must accordingly develop a 'multilateral constitutionalism' that does not bind social orders unilaterally either to the constitution of the state or to the economy, but rather models specific constitutions that do justice to the peculiarities of the various orders (pp. 35–6).

Societal constitutionalism is described as constitutional pluralism which, more importantly, attributes a strangely asymmetrical status to the political constitution. While claiming that constitutions are everywhere and arguing that the political constitution cannot unilaterally bind other social orders, it still is expected to 'model' specific constitutions beyond its jurisdiction.

However, this modelling function raises some fundamental questions as regards political reflections of societal constitutionalism, limits, and different models of its fragmentation, and asymmetries emerging from the differentiation of political and societal constitutions. Furthermore, it raises the question of the conceptualization of constitutional politics in functionally differentiated society and the limitations of any constitutionalist discourse, including societal constitutionalism, in social theories of global law and politics.

CONCEPTUAL CONTROVERSIES OF 'CONSTITUTIONAL FRAGMENTS'

It is particularly important to examine the following controversial aspects of Teubner's societal constitutionalism: a critique of state constitutionalism; societal differentiation of political and non-political constitutionalism;

systemic and sectorial differentiation; inter-constitutional collisions and cultural polycentrism in global societal constitutionalism.

1. *Confronting Beelzebub?: a critique of state constitutionalism and the* pouvoir constitué/constituant *difference*

Teubner is heavily critical of the state constitution as a politically expansive organization of the territorial distribution of power and the exclusive legitimate claim to authority over people, resources, and any autonomous social subsystems operating within the state's territory. The core of his argument is that these constitutions are socially expanding, yet territorially limited by the borders of the nation state. Contrary to these limitations, the self-constitutionalizations of specific function systems, such as economy, science, religion, education or the media, operate irrespective of territorial borders, and their fragmented constitutions are determined by internal systemic operations and general codes of communication.

This clearly is a major conceptual breaking point. Should the concepts of constitution and constitutionalism refer exclusively to a specific organization of structural coupling and operations occurring between the legal and political systems, or should they signify any process of self-constitutionalization of internal operations of different social subsystems and sectors beyond law and politics? Would it not mean that constitutionalism is just another and, therefore, redundant name for the self-description and self-reference of functionally differentiated systems operating at the level of global rather than merely national society?

According to Teubner, the importance of national constitutionalization and traditional inter-state and international politics are radically challenged by transnational constitutional processes in different sectors of global society. Teubner's most fundamental attack on state constitutionalism is related to his claim that, in fact, it is transnational regimes, organizations, and networks that become the new constitutional subjects, replacing the nation-state constitutional semantics of a *demos*, its collective identity and founding myths, the constituent/constituted power differentiation, and the legitimacy arising from the democratic consensus and political pluralism.

Warning against the trap of methodological nationalism, Teubner calls for the following methodological modifications: disconnection of the constitution from statehood (thus opening the semantics of constitutionalism for transnational regulatory regimes); decoupling the constitution from institutional politics (thus opening the possibility of identifying other areas of global civil society as possible constitutional subjects together with transnational regimes); decoupling the constitution from the medium of power (thus making other media of communication in other specific systems possible constitutional targets) (p. 60).

Teubner calls political constitutions 'Beelzebub', casting out the devil of the power expansion of the political system by its self-limitation. The state

constitution represents a power-building model and, in the most common self-referential manner, power ensures its self-constraint.

Teubner's concept of societal constitutionalism is actually a grand critique of power politics and politics in general. It, therefore, should come as no surprise that Teubner feels comfortable when discussing non-state social orders and private transnational regimes as constitutions but desperately seeks to avoid the typical constitutionalist language of constituent and constituted power, and even suggests avoiding the classical political and philosophical concept of 'self-determination' in societal constitutionalism (p. 61).

When discussing the classical differentiation of constituent and constituted power (in the book referred to in French as *pouvoir constituant* and *pouvoir constitué*), Teubner resorts to the physics-driven conceptualizations of a 'communicative potential' and 'social energy' (pp. 62–3) which merely steers the reciprocal irritations between society and individuals, respectively communication and consciousness, and thus does not represent a specific semantic contribution to the legal and political autopoiesis.

Teubner actually reduces the problem of the modern democratic constitutional subject, which is so vividly communicated precisely in the difference between constituent and constituted power, to the constitution's external referencing and 'the area of perturbation where individual consciousness encounters social communication' (p. 63). This interface of individual consciousness and social communication does not indicate any constitution of the people as a collective with political identity or intersubjective communicative power.

Beelzebub's power remains the same devilish instrument for Teubner even if it comes in the angelic guise of discourse ethics. In fact, Teubner is so uneasy about the differentiation of constituent and constituted power that he wants to leave it to psychologists, medical doctors, and priests (p. 62). Any possibility of a sociological examination of the constituent/constituted power differentiation as specific self-referentiality in both politics (through the medium of power) and law (through the medium of constitutional normativity) is thus lost. Instead, Teubner fancies a purely functional definition of the term constitution and understands functionality in its non-political contexts, reducing the constitution to a mere hierarchy of norms and structural coupling between different function systems (p. 61).

2. *Do function systems need constitutional assistance? From political to non-political constitutionalism*

Drawing on Luhmann's description of the state constitution as politics' self-limitation of its own possibilities, historically accompanied by the increased need for structural compatibility with other social subsystems, Teubner generalizes this constitutional self-limitation as a problem facing all social subsystems, not just politics (pp. 86–8).

Teubner launches an outright attack on legalism when he states that:

> [T]hough lawyers may not like to admit it, law does not play the primary role in state constitutions and other sub-constitutions. The primary aspect of constitutionalization is always to self-constitute a social system: the self-constitution of politics, the economy, the communications media, or public health. Law, in such processes, plays an indispensable yet merely supporting role. An exacting definition of societal constitutionalism would have to realize that constitutionalization is primarily a social process and only secondarily a legal process (p. 103).

In this respect, Teubner is absolutely right when he describes Kelsen's normativism and Schmitt's decisionism as two theoretical extremes reducing constitution either to a legal phenomenon, or a power-politics phenomenon. It is true that constitution actually means a double phenomenon operating through the permanent linkage of societal power processes and legal processes. However, Teubner's reinterpretation of constitutionalism as systemic self-reference and operative closure typical of all function systems profoundly changes the very meaning of the concept of constitution and constitutionalism.

Instead of adopting Luhmann's definition of the constitution as a distinct organization of structural coupling and irritations between the legal and political systems,[13] the concept now signifies external legal referencing to the general autopoietic operations of any function system. One can only agree, for instance, with Teubner's critique of Vesting that the political constitution cannot operate as 'a secret centre and apex' of functionally differentiated society which, by definition, is without a centre or an apex (p. 64). However, Teubner's subsequent identification of constitutionalization with the paradox of internal systemic self-reference being externalized to the legal description and context is highly controversial:

> [N]ot just politics, but other social systems, too, establish themselves through self-referential processes by which, *ex nihilo*, they constitute their own autonomy. Constitutions deal with the paradoxes of self-reference practically by externalizing them to the surrounding context. Social systems are never entirely autonomous: there are always points of heteronomy. If this externalization now occurs with the help of constitutions, the moment of heteronomy comes when the social system refers to the law. The 'self' of the social system is defined heteronomously by legal norms and it can define itself autonomously thereby … its identity is created in its constitution through the re-entry of external legal descriptions into its own self-description (p. 65).

Contrary to Luhmann's concept of strict autopoietic normative and operative closure, Teubner continues in his early criticisms of Luhmann's concept of system autopoiesis[14] and reconceptualizes the autopoietic closure by linking it to the concept of social reflexivity, law as a hyper-cycle, intersystemic

13 Luhmann, op. cit., n. 2, p. 404.
14 G. Teubner, *Law as an Autopoietic System* (1993) 31.

conflicts, and so on. He suggests that legal normativity operates as an external description re-entering the system's self-description. However, this legal normativity re-enters a specific function system, such as the economy or education, exactly as normativity and not as external cognitive information to be appropriated by the autopoietic system's internal norms and operations.

A societal constitution, therefore, is not structural coupling between the legal system and other social systems in its environment because, by definition, structural coupling 'is not a normative topic'.[15] It is heteronomy without any contribution to the social system's autopoiesis and/or co-evolution with other systems. Unlike the modern political constitution, it does not guarantee the structural coupling of the legal and other social systems.[16] Societal constitutions are not a form of systemic irritation between the legal and other autopoietic social systems. According to Teubner, they only provide for help in the systemic self-reference by heterononomous legal definitions.

If the system's unifying self-referential operations merely use the legal semantics of constitutions as a metaphor, why bother about this marginal use of legal concepts if they actually describe the system's unity, produced by its specific non-legal binary coding and communication, such as profit or truth? Why indulge in neologisms and supplementary theoretical constructions of 'hybrid meta-coding' (pp. 110–13) if they merely highlight specific structural complexities and external references between law and other systems? To put it in the language of autopoietic theory, is societal constitutionalism producing more communication noise than clear and sound theoretical information?

Indeed, Teubner is well aware of these criticisms of his theory of societal constitutionalism and repeatedly emphasizes that its major aim is to get rid of the substantive concept of constitution as a vehicle for the self-determination and self-identification of a collective actor, such as a nation and its self-founding myths. For him, the act of constitution is a matter of social communication between systems and not some form of legal recognition of the existence of a collective actor and its identity.

One can only agree with Teubner's view that a constitution is not a living law in the sense of the manifestation of the spirit of a people but a societal living process of 'the self-identification of a social system with the assistance of the law' (p. 71). Nevertheless, this 'assistance' can hardly be recognized as part of autopoiesis of a specific subsystem and the legal system's contribution to the self-constitution and self-reference of other systems can scarcely be considered *constitutive* in the autopoietic sense. As Luhmann summarizes, '… [t]he environment cannot insert operations of any other

15 Luhmann, op. cit., n. 2, p. 385.
16 id., pp. 409–12.

kind in the network of the autopoiesis of the system.'[17] Social systems can communicate *about* their environment but not *with* it.

3. *Autopoiesis with a human face? Civil and political constitutions*

To make things even more complicated, Teubner engages in the normative semantics of civil society. Sectorial constitutions emerging in civil society are perceived as an antidote to the state constitutionalism when Teubner positively comments on Reinhart Koselleck's critique of constitutional theory's narrow focus on the state and considers civil society and self-constitutionalizations of non-state institutions equal to the structures of the state constitution (p. 16).

Teubner correctly asks whether there is any difference between the constitutionalization of non-state civil society institutions and their mere juridification (p. 16). Avoiding normative politics' pursuit of the constitutional unification of civil society, he identifies civility as fragmented areas of functionally differentiated society subject of centrifugal rather than centripetal and unifying societal tendencies. At the same time, the self-constituting potential of civil society institutions is systematically underestimated by state constitutional interventions and their heavy reliance on political institutions and legislative processes. Teubner subsequently welcomes Sciulli's critique of increasing political authoritarianism in modern political rationality and adopts his notion of societal constitutionalism as opposition to this authoritarian drift consisting of 'collegial formations' and the relations between the social actors seeking their social autonomy (pp. 39–40).

Teubner accepts the concept of civil constitutions as virtually another name for fragmented and fragmenting societal constitutionalism.[18] This civil field of societal constitutionalism is not just complementary but opposite to the sphere of state constitutionalism, and civility is thus understood in the state/civility antinomy elaborated by modern political and social normative theories. The civility of societal constitutionalism is further strengthened by the horizontal effect of human rights and their transnational regimes (ch. 5).

For Teubner, this self-constitutionalization of different societal sectors is another name of non-state civil society's regimes, organizations, and networks. They cannot be just expert processes of technical juridification without any constitutive meaning. They are, rather, the new constitutional subjects of the non-political *soft* constitutional semantics which replace the *hard* political concepts of the democratic state, its people, and constitutional power.

17 id., p. 465.

18 G. Teubner, 'Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory?' in *Transnational Governance and Constitutionalism*, eds. C. Joerges, I.J. Sand, and G. Teubner (2004) 3–28, at 8.

Heavily critical of normative political and constitutional theory, Teubner, nevertheless, has profoundly normative expectations of these new transnational constitutional subjects. For instance, regime constitutions may be starkly different from nation state political constitutions, yet they are oriented towards 'a global public interest' (p. 157) – a concept almost impossible to explain within the conceptual framework of autopoietic systems theory if one does not limit it to the banality of the functional differentiation of global society. It may actually be perceived as the re-entry of normative conceptualizations and moral expectations of normative social and political theories. It resembles a form of the normative expectation of normative expectations, somewhat sarcastically described by Luhmann as 'morally motivated programmes of demands' which, in the name of 'humanity', are to support 'living law' to 'prevail against established conventions'.[19]

4. *No more experts? Systemic and sectorial differentiation*

Teubner's theory involves a number of conceptual re-entries of normative social and political science, such as the legitimacy generating and guaranteeing global society, which have been considered redundant by autopoietic theory. Another problematic aspect of Teubner's societal constitutionalism is the internal differentiation of social systems into spontaneous and organized-professional spheres. Though this particular difference makes it possible for Teubner to identify different constitutional arenas, the specific distinctions of consumers and corporations (in the economy), respectively public opinion and government (in politics), raises the question of the possibility of the systemic closure and autopoiesis of societal constitutions, yet again.

Teubner calls the differentiation of the spontaneous and organized sphere 'a starting point for societal constitutionalism' (p. 89) and reflexive politics because it opens up new possibilities and reflections of dissent and disputes. In spontaneous areas, the various function-specific constituencies and social sectors have distinct modes of operations which are reflexive of system operations, yet very different from the highly organized capacities of expert knowledge. However:

> [T]he organized sphere of decision-making certainly does not receive any clear signals from the spontaneous sphere. It is condemned to freedom – and only once the critical decisions have been made, the specific mechanisms of responsibility begin to work that reside in democracy or in the market (p. 90).

The very differentiation of the organized and spontaneous spheres is part of the concept of systemic reflexivity and communicative tensions emerging between civil society and expert communication. Societal constitutionalism's goal, therefore, is to move beyond the sphere of expert knowledge

19 Luhmann, op. cit., n. 2 , pp. 468–9.

communicating through highly specific and specialized systemic codes. The self-limitation and self-constitutionalization of different function systems is thus achieved through societal mobilization of consumer groups, eco-activism, public interest litigation, human and animal rights protests, humanitarian aid networks, and other forms of spontaneously created areas of civil society campaigning.

Professional organizations and their expert knowledge are challenged and need to engage in its self-limitation because of irritations caused by the demands of civil society activism and the general public. The internal systemic differentiation of the organized and spontaneous spheres thus leads to the reflexive learning pressures between expert and civil society knowledge, between, respectively, the hard laws of organizational operations and the soft laws of public pressure, recommendations, and protests. Societal constitutionalism thus consists of perturbations and irritations between these two constitutional spheres of any function system.

The sectorial differentiation of different spheres of function systems is closely related to the problem of double reflexivity of function systems. In this context, Teubner proposes yet another definition of societal constitutions 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' (p. 105). Teubner believes that a constitution emerges in every social system which has its reflexivity supported by legal norms. Constitutional processes thus emerge as an institutionalized co-evolution between the two social systems, and constitutions should be termed 'binding institutions' between law and the social sphere (p. 105).

Unlike the process of juridification which means enacting only primary norms for behavioural control, this societal constitutionalization always involves, in the Hartian sense, secondary 'norms of norms', that is, norms prescribing the identification, setting, amendment, and regulation of primary norms. Like political constitutionalism, societal constitutionalism is impossible without these two reflexive processes which keep the societal rationalities of other systems both autonomous and juridified via already (juridically) reflexive legal processes (pp. 105–6).

This concept of constitutionalization as double reflexivity is not problematic in itself. However, Teubner introduces an additional form of reflexivity which requires social sybsystems to take account of their 'public responsibility' (p. 110). At this point, the internal differentiation of the organizational and spontaneous spheres is exposed to a critique that it actually does not consist of the internal autopoietic operations and functions of social subsystems and therefore needs to be reformulated as the specific operation of the politics of civil protest and dissent reflected and internalized by other social systems.

The very distinction of the organization and spontaneous spheres is far from the process of functional differentiation due to its spatial/sectorial

semantics and striking resemblance to the early modern sociological distinction of society and community (in which society was identified with high levels of professionalism, expertise, and rational organization while community signified the process of spontaneous social evolution). The contrast between the bureaucratically organized rational state and spontaneously evolving and consensually cooperating society was typical of nineteenth-century political and legal theory; the establishment of sociology and, later, sociology of law as new scientific fields was one of its most remarkable consequences. In Teubner's theory, the differentiation between civil and political constitutions and the general differentiation of the spontaneous and organizational spheres of the self-constitutionalization of social systems remain exposed to this normative *retro-semantics* of sociological and social theory.

5. *In the name of the noble savage? Cultural polycentrism in global societal constitutionalism*

Reading the most fascinating and original text of *Constitutional Fragments*, the reader is surprisingly confronted by another re-conceptualization of classical sociological and social theoretical concepts, namely, the difference between traditional and modern knowledge and cultures.

According to Teubner, the functional differentiation of global society and conflicts of different system rationalities leads to constitutional fragmentation. However, there is a second fragmentation emerging at global level which is caused by cultural polycentrism and the divergences of different world cultures. This fragmenting of function systems and of regional cultures involves the difference and conflicts between culturally embedded traditional knowledge and highly specialized expert knowledge produced by modern function systems (p. 163).

Unlike the vast majority of other adherents of autopoietic social systems theory, Teubner seeks to reconcile functional differentiation and the concept of culture when it comes to the protection of traditional cultures and their knowledge. He does not consider culture a mere reservoir of collective memories and past events meaningful for society's present,[20] and his major concern is the social exploitation and destruction of traditional knowledge by function systems, organizations, networks, and the expert knowledge of world society.

According to Teubner, constitutional theory:

> has to change its focus from conflicts between subsystems within functional differentiation to the conflicts between functionally differentiated globality and the social embeddedness of regional cultures (p. 165).

20 N. Luhmann, *Gesellschaft der Gesellschaft. Erster Teil* (1997) 576 ff.

This particular collision in global societal constitutionalism is thus analysed from a predetermined normative position, demanding the external imposition of limits on globalized modernity which threatens local cultures, and respect for these cultures.

The language becomes less clear when Teubner calls for 'the development of hybrid legal forms within modern law that represent a peculiar compromise between regional-cultural identities and modern-day legal mechanisms of protection' (p. 166). Inter-constitutional collisions related to cultural polycentrism are thus to be sorted by another hybridization which is mainly described in the common normative political language and ethics of 'responsibility', 'compromise', and 'sensitivity' to cultural differences.

The post-humanist radical message of autopoietic theory thus gets blended by the humanist ethics of globality and concepts completely strange or marginal to the process of functional differentiation. Those who believed that Teubner's constitutional fragmentations represent a persuasive critique of identity politics are left puzzled by the theorist's requirement that legal protection must be guaranteed not only for traditional knowledge, but also its embedding in the local culture (p. 168).

This is also the only point of reference to sovereignty, when Teubner calls for 'shared sovereignty' enabling the coexistence of modern politics and the self-determination of indigenous groups. In the most moralistic and passionate call, which is alien to autopoietic systems theory, Teubner demands that the development of these groups 'should not be exposed to the grasp of functional differentiation' (p. 168).

At this stage, the reader has to ask how the blind process of social evolution through functional differentiation may be steered at global level to exclude some segments of world society from its systemic operations. Is it possible to have governance of the world society's functional differentiation in which cultural segment differentiation could take over the functional differentiation of society? Is not the Beelzebub of the state replaced by the Furies of cultures and Weber's warning against the war of the gods paradoxically refuted by a normative call for good social practices of transnational governance and societal constitutionalism?

SOCIETAL FEAR OF THE POLITICAL, OR A SOCIOLOGY OF POLITICAL CONSTITUTIONS?

To understand these conceptual antinomies, theoretical paradoxes, and re-entries of classical modern social and legal theoretical distinctions into the complex language of societal constitutionalism, one has to return to Teubner's differentiation of *le politique* and *la politique* (pp. 114–16). While institutionalized politics, state constitutions, and the expert knowledge of governing technocrats allegedly threaten to monopolize politics, societal constitutions facilitates a high degree of social autonomy. Instead of

formalizing society in the medium of law, they use it to externally refer to social processes external to the political and legal form.

Societal constitutionalism thus involves a paradox of criticizing the political and legal form while using its concepts to describe non-political processes of self-limitation and self-constitution of different sub-systems and sectors of global society. The paradox of the political self-denial and external expansion of the concept of constitution is a hallmark of societal constitutionalism which both completely depoliticizes the concept of constitution and gives it the most prominent political role by relocating it to a higher level of theoretical abstraction and identifying it with both functional differentiation and societal alternatives to institutionalized politics.

At this stage, it is important to ask if Teubner's most fascinating and original concept of constitutional fragments expresses either an alternative concept of the politics of societal constitutionalism, or fear of the political, traditionally haunting some of the most brilliant minds of Central European social and political theory. Is societal constitutionalism part of the long tradition of preferring the richness of culture and social life to the routines of institutionalized politics? Is it but a reflexive theory of depoliticized global governance considering state politics and constitution its ultimate enemy, which deserves to be described in theological metaphors of Beelzebub and the devil rather than the politically self-referential terms of the self-constituted and self-governing polity?

A possible response to these doubts may be found in another fascinating book, *A Sociology of Constitutions* by Chris Thornhill. Thornhill is the most cited author in Teubner's book after Niklas Luhmann, and his concept of constitutional sociology is repeatedly praised and used as a methodological reference point of societal constitutionalism. It is, therefore, important to examine familiarities and differences between Teubner's version of societal constitutionalism and the constitutional sociology promoted by Thornhill.

Differences between Teubner and Thornhill's methodology, concepts, and perspectives are significant. While Teubner's book is full of convoluted arguments and complex conceptualizations, Thornhill's text is an example of conceptual clarity and straightforwardness. It opens by retelling the history of sociology as a body of descriptive knowledge and interpretation rejecting the Enlightenment's normative theories of political legitimacy through rationally generalized principles of the rule of law and universal human rights. Instead of rationally reconstructed principles of constitutional law and rights, proto-sociological and early sociological inquiries emphasized the contingencies of political and legal rule. According to Thornhill, a particular tradition of *constitutional sociology* can thus be traced back to the early works of Burke, Savigny, Bentham, and Hegel, the classical sociological theories of Durkheim, Tönnies, and Weber, and the use of sociological analysis of social integration through constitutional law in the works of Smend and Schmitt's reinterpretation of Weber's definition of power and legitimacy.

The post-1945 developments in legal and political theory may look like a great ascendancy of normative theories of constitutional liberalism and human rights, further justified by political and constitutional processes of democratization and the consolidation of the Western-style democracy model of politics, yet Thornhill emphasizes the concurrent theoretical developments of constitutional sociology, especially in Schelsky's sociology of institutions, Luhmann's functionalist theory of social systems, and Habermas's early analysis of constitutional legitimacy:

> [T]he fact that constitutional order has been promoted as a general ideal of legitimacy in post-1945 politics has tended to obstruct sociological inquiry into the deep-lying normative structure of society, and the increasing reliance of modern societies on relatively uniform patterns of constitutional organization has not been reflected in a consonant growth of society's self-comprehension in respect of its normative political foundations (p. 4).

However, normative objects of constitutional democratic principles and rights are irreducible to prescriptive judgements and require sociological explanations of the grammar of legitimacy in constitutional laws, its reproduction, and the social motives of consolidation.

A sociology of constitutions, therefore, has the traditional and important role of facilitating descriptive interpretations of the normative political foundations of modern society. It is very remote from societal constitutionalism's claim that constitutions are non-political objects assisting the self-reference and functional differentiation of social subsystems. It is much closer to the tradition of sociological interpretation, studying the normative foundations of politics and its operations, constitutional organization, and society's self-reflection, self-description, and self-legitimation through the body of constitutional laws.

Opposing Teubner's view of constitutionalism evolving outside the political realm and through private law regimes, structures, and networks, Thornhill defines the constitution as:

> . . . a distinctively political structure, originally and enduringly typified by its function in producing, restricting and refining power utilized by states. The constitution is thus observed as a restrictive order of public law that possesses a distinct normative valence for those who use and those who are subject to political power: it is an institution that allows societies to construct and articulate power as the power of states (p. 11).

Instead of the instinctive fear of the devil of politics which typifies societal constitutionalism, Thornhill's constitutional sociology accepts the definition of constitution as a vehicle of political legitimacy and organization of politics in modern society. The theory of societal constitutionalism is comprehended as just one of many traditional streams in constitutional sociology which typically overemphasized the role of non-state and non-political agents and structures. Against this background, Thornhill's project of constitutional sociology primarily seeks to reinterpret sociologically the normative foundations of political legitimacy and legal validity, and identify

the social reasons for the reliance of political institutions on abstract principles of constitutional laws.

THE METHODOLOGY OF CONSTITUTIONAL SOCIOLOGY: ON HISTORICAL FUNCTIONALISM

Political modernity is inseparable from a specific concept of a constitution as a written and prescribed formal document progressively organizing and governing modern society. The concept and history of constitutionalism are thus full of comparative studies of texts and political dynamics and expectations associated with them. Unlike constitutional and political theory, a sociology of constitutions needs to address the social context of this particular tendency in modern political history and the societal forces and formations behind this particular co-evolution of modern law and politics.

Historical and functional methods necessarily dominate this archaeological enterprise of identifying the processes of constitutional formations, their societal and cultural varieties and contingencies, and the general functions of constitutions as modern social organizations of structural coupling and extensive communication between the political and legal system.

Thornhill's major arguments are informed by Luhmann's theory of functional differentiation and his description of constitutions as the overarching form of European political modernity resulting from a pluralistic functional structure of modern society. Constitutions are thus perceived as instruments for the efficient and functional organization of political power (p. 13). They enable modern societies to elaborate meaningful concepts to simplify and facilitate consistency in distinguishing different social functions and evolving subsystems. Cultural and historical variations in modern constitutionalism are thus underpinned by the general capacity of constitutions to comprehend and communicate the differentiation of the specific functional structures of modern society.

However, Thornhill is critical of the extreme normative relativism of the functionalist method and his methodological aim is 'to examine and comprehend the reasons why societies produce normative institutions, and so to illuminate constitutions as essential components of normative societal organization' (p. 14). Furthermore, this generally moderate functionalist perspective is closely accompanied by historical methodology and its emphasis on the specific details and different variations of modern constitutionalism. Unlike general functionalist analysis, Thornhill's sociological analysis emphasizes the normative dimensions of modern society and 'is underpinned by a sociological analysis of legal norms as structurally central dimensions of modern social formation' (p. 13). This theoretical view, therefore, emphasizes the stabilizing and controlling function of legal norms and the general functional motives of the historical and political emergence of generalized constitutional norms.

The functional and historical analysis are coeval and inseparable in Thornhill's endeavour which describes the historical roots of the modern constitutional state in medieval constitutions, the differentiation of church law, and the early modern state. The historical evolution of the public power and administrative organs of early states is related to both the expansion of private modes of ownership in the economy and jurisdictional structures and increasing tensions and conflicts between secular and church power. The investiture conflicts gradually crystallized the abstracted and legally distinct forms of church and state as institutions different from the feudal particularisms, irregularities, and personalized patterns of medieval societies (p. 38).

Different forms of this early formation of states through the disaggregation of the particularistic feudal order are analysed by Thornhill, such as de-feudalization of the Holy Roman Empire, the Italian city states and their administration, and the historical consolidation of central monarchy. The formation of early modern states was thus possible because of the formalization of the law in the Western church, the translation of these legal constructs from church to state, and the medieval investiture contests which established 'a normative relation of *differentiated interdependence* between political power and positive law' (p. 58).

The subsequent chapter deals with constitutions and the rule of law in early modernity, the Reformation and the differentiation of state power especially in England and in German territories. Positivization of law and the doctrine of fundamental laws gave rise to the notion of constitution as fundamental law forming a distinct and specialized body of public law (p. 103). Historical processes, such as the Glorious Revolution of 1688, and the prescriptive concepts and theories of the 'constitution of the Government' are analysed in a comparative perspective and the utilization of the early seventeenth-century notion of constitutional rights (p. 153) is highlighted as another instrument of political abstraction and social inclusion necessary for the emergence of modern political constitutionalism.

The third chapter deals extensively with the constitutional crisis of sovereign states which emerged in Europe in the sixteenth and seventeenth centuries. Thornhill comments insightfully that the construction of these states is misunderstood as a process of heightening political force and coercion and that power, in fact:

> was refined as a differentiated social object … utilized in increasingly constant procedures, and … defined and applied in legal formulae that could be used, in internally replicable manner, to regulate very different questions across wide social boundaries (p. 158).

This process of growing political abstraction through the generalized and uniformly applicable employment of political power meant that

European sovereign states underwent the process of self-consolidation by specific structural changes. Thornhill lists three decisive changes, namely, the establishment of institutional mechanisms for integrating powerful private groups into the administrative apparatus; the development of more regular boundaries between state and other social spheres, such as the economy and religion; the establishment of control and limitation of social issues that had to be filtered through the political system, and the employment of power as 'a uniform commodity' organized in distinct procedures (p. 159).

Because of these structural changes, sovereign states became public actors using power in society through general principles and public procedures which allowed them 'to apply and reproduce power in abstracted inclusionary fashion and to withdraw the internal basis of political power from incessant contest' (p. 159). However, the legal image of the subjects of this power as bearers of general subjective rights and the constitutional construction of these rights as uniform attributes of legal subjects resulted in the expansion of political power and, as Thornhill remarks, rights evolved 'as inner elements of power's abstracted autonomy' (p. 161).

The original use of general rights by states to replace feudal societal particularism led to political and legal monism, and the sovereignty of the state could abstract itself as a public order under the rule of general laws. At the same time, the growing functional differentiation of modern societies led to the increasing dependence on generally articulated public laws and formal rights, reflected and culminating in the Enlightenment doctrines of natural and universal rights.

Modern sovereign states effectively separated themselves from other social spheres and transformed their constitutional orders into an internal power apparatus. At this point in modern European history, rights and constitutions – as the most legitimate form of political power and their normative and ideological contexts – began to play a formative role in the creation of the modern democratic state. They actually represented a revolutionary form of modern power applying itself throughout society at an unprecedented level of generalization, autonomy, and inclusion. This emergence of rights-guaranteeing constitutions resulted in varieties of constitutional crises and even state collapses, such in eighteenth-century Poland or revolutionary France.

REVOLUTIONARY CONSTITUTIONALISM AND THE CRISIS OF EXPANSIVE STATE CONSTITUTIONS

Modern revolutions, therefore, are both rights revolutions and constitutional revolutions, and the constituent power doctrine is but the final moment in the modern process of the political construction of the constitutional state. In the revolutionary constitutional principle of national inclusion, political power

finally became both an abstracted and inclusive social resource and the whole constitutional formation was reconfigured under the principles of universal rights and democratic sovereignty. The revolutionary constitutions thus transformed society:

> from a diffusely structured array of particular status-defined groups, diversely and pluralistically related to the state, into an evenly ordered mass of – in principle – functionally autonomous individuals, selectively included in and excluded from political power. The relations between these individuals, then, were increasingly mediated through the state: that is, through rights guaranteed by the state as a centre of representative sovereignty (p. 218).

After the rights revolutions, the Bonapartist design and various regimes of monarchy restoration contributed to the increasing construction of states founded in more culturally homogeneous national societies. The result of the inclusive and abstract rights was the growing self-description of societies as nations, requiring generalized reserves of political power.

The 1848 revolutionary year thus signifies the constitutional significance of nationhood expressing itself through political transformations and state formations. National sovereignty is reconfigured as democratic sovereignty based on the idea of a self-legislating and self-governing sovereign nation. The idea of popular democracy coincided with the idea of the political constitution of a self-governing and self-legislating nation.

The fourth chapter subsequently covers the long period of evolution of modern political constitutionalism from nineteenth-century imperial states to the totalitarian states of the twentieth century. While the constitutions of the imperial era were typical of the combination of the rule of law and private élite privileges and therefore did not achieve flexible, autonomous, and general options for the application of state power, the transformation of statehood during the First World War led to the increased pressure and new techniques of social inclusion and control. The pattern of material inclusion led to a system of organized capitalism, such as in Weimar Germany (p. 288). This material constitutionalism and economic regulation further strengthened the notion of constitutionalism as the structural consolidation and homogenization of the nation state. The will of the people was to permeate the state institutions and operate as the ultimate concentration of political authority in national society.

Nevertheless, this model of Weimar German constitutionalism based on national corporatism and administrative unitarism was not the only alternative in post-1918 Europe. Thornhill correctly highlights the Austrian constitution of 1920, significantly influenced by Hans Kelsen, as a document whose primary function was:

> at once abstractly to preserve and place limits on the power of the state, to locate political authority on consistent legal foundations and to offer mechanisms to avoid the absorptive concentration of all societal contests around the state (p. 291).

Like the Czechoslovak constitution of 1920, the Austrian constitution had strong legislative power, a president elected by parliament, and established a constitutional court to oversee acts of legislation and thus to act as a negative legislator. This powerful concept of the state's sovereignty exclusively applied within the constraint of constitutional norms thus represented the most ambitious goal of the depersonalization of the state and its power. A body of constitutional law was to define the state as a legal subject and facilitate its use of power beyond any volitional acts and political particularisms. Nevertheless, societal drive towards expansive mass-democracy, including mass political parties, material legislation, and the concept of the legitimate state as the ultimate source of arbitration and regulation of all social conflicts, resulted in the internalization of social conflicts and tensions for which their inclusionary constitutional structures were not prepared. The post-1918 crisis of constitutional inclusion led to the dismantling of the constitutional structure of the state and its replacement by the totalitarian state in some European countries.

According to Thornhill, the constitutional developments in many interwar European states can be summarized as transitions from expansive statist and corporate constitutionalism to fascist authoritarianism typical of clientelism and the combination of national mobilization and protection of private group interests:

> . . . the link between corporate constitutionalism and fascism resulted from the fact that, in tying state legitimacy to very expansive material/volitional inclusion and programmatic provisions, corporate constitutions of necessity at once overburdened the state and obscured the functional boundaries of statehood. This then led to the co-opting of private actors as supports for the basic functional operations of the state, and it allowed members of private elites to obtain secure positions in the extended peripheries of the state. Corporate constitutionalism thus eroded the resources of political abstraction and proportioned inclusion around which states had historically constructed their functions. This created a fertile terrain for the half-privatistic clientelism that marked fascist rule (pp. 310–11).

Instead of the common normative interpretation of political history of the twentieth century as the struggle between democracy and totalitarianism, functional, or rather dysfunctional similarities between these two constitutional systems can thus be seen.

Reading this carefully crafted and richly documented sociological argument, it is disappointing that Thornhill did not accommodate Soviet totalitarianism and its constitutional system and traditions into his argument. This omission becomes even more obvious in the fifth chapter focusing on constitutional and democratic transitions after 1945. While briefly mentioning the constitutionalization of Soviet rule in Central and Eastern European countries, Thornhill continues his historical analyses of particularly Italy and Germany. The second wave of constitutional transitions in the 1970s understandably concentrates on Portugal and Spain, and the third

wave of transitions in the 1990s covers constitutional transformations in Poland and Russia.

CONSTITUTIONAL SOCIOLOGY AS A SOCIOLOGICAL THEORY OF LEGITIMACY?

Thornhill's book is exceptionally well documented and researched as regards historical facts, legal developments, and the genealogy of major concepts of modern European constitutionalism and state politics. At the same time, historical details, specific descriptions of constitutional developments in individual European countries, and normative justifications of political and social movements never obscure the fact that this is a sociological treatise drawing on the functionalist perspective and understanding constitutions as 'functional preconditions for the positive abstraction of political power and ... highly probable preconditions of institutions using power: that is, states' (p. 372).

Modern societies are functionally differentiated and pluralistic, and constitutions ensure that modern political institutions augmenting power are both public in the sense of social inclusion and limited in terms of their expansion into other spheres and segments of society. Thornhill concludes that:

> re-patrimonialization of power is a constant danger for modern societies, and where this occurs societies experience a dramatic diminution of their power and, accordingly, a rapid loss of plurality and freedom (p. 373).

This statement may sound paradoxical due to its normative content but it actually is an outcome of sociological methodology which treats constitutional norms as intrinsically dynamic facts of evolving social and political reality. Only a sociological methodology can explain that constitutions function as maximizations of power reserves in modern society and, at the same time, 'in multiplying power, they also (normally) produce and multiply social freedom' (p. 375).

Unlike the normative analysis of political and constitutional theory taking constitutions merely as reservoirs of deductive ideals and prescriptions, a sociology of constitutions can explain the paradox of modern societies producing the highest level of power and social liberty at the same time. Liberty is not the ultimate purpose of constitutional settlements. It is, rather, a contingent outcome of constitutional functions.

In Thornhill's sociology of constitutions, legitimacy is not achieved by constitutional protection and the enforcement of political ideals and generalized principles of legal validity. It is not produced by political acts and decisions consistent with a body of theoretical normative judgments. Legitimacy, rather, is obtained through complex and contingent processes of specific constitutional formations as functional preconditions of modern

political power. It is an outcome of the societal functions of normative political forms.

This particularly strong critique of Enlightenment normative philosophy and political theory is close to Weber's paradox of the unintended consequences of purposive social action, but its major contribution is that it opens up the possibility of a sociological model of the legitimacy of constitutions. It needs to be re-emphasized that Thornhill's sociology of constitutions is a study of a specific model of political legitimacy achieved by constitutions as both the normative foundations of legal validity and the functional precondition of abstracted and generalized power in modern society.

Thornhill's sociological definition of political legitimacy is thus acceptable to normative political and constitutional theories because legitimate political power is defined as:

> power exercised in accordance with public laws, applied evenly and intelligibly to all members of society (including those factually using power), which are likely to give maximum scope to the pursuit of freedoms that are capable of being generally and equally appreciated by all social actors (p. 7).

However, the constitutional structure of society can hardly be explained by normative analysis and a sociological perspective is exactly what is needed to explain the legitimating force of these specific political constitutions in modern societies. Understanding the societal functions of constitutions, therefore, is necessary in order to understand the constitutional structure of political legitimacy.

A SOCIOLOGY OF CONSTITUTIONAL SELF-LIMITATIONS AND POWER

Teubner's *Constitutional Fragments* and Thornhill's *A Sociology of Constitutions* are two extremely important socio-legal endeavours sharing a number of methodological and conceptual tools, especially the sociological functionalist perspective and the most convincing critique of expansive tendencies in modern state constitutionalism. The idea that the political constitution constitutes society has been persuasively criticized by both scholars as one of the biggest mistakes and methodological failures of legal and political science. What needs to be studied is constitutions *in* society instead of the constitution *of* society. Both studies thus highlight the necessity of decoupling normative political and legal theory from the sociology of law and politics, and the need to embrace the sociological perspective in order to comprehend the complexity of current constitutional, political, and legal problems at national and transnational global levels.

Similarly, both Teubner and Thornhill perceive constitutions as self-limitations of power rather than its ultimate manifestation and institu-

tionalization. Teubner goes so far in this dissociation of constitution and power as to suggest the essential legal and political concepts of constituent and constituted power should be treated by doctors and psychologists, not sociologists and constitutionalists. He is very dismissive of the link between constitutionalism and power and there is virtually no space for the most contemplated paradox of modern constitutionalism[21] – the circularity of constituent and constituted power – in his societal constitutionalism.

Thornhill's approach to the problem of constitutional power is different because he actually inquires about historical processes and the societal evolution of power into the most complex, abstracted, and generalized form of constitutional rules and norms. Instead of theoretically constructing constitutional hybridizations and convoluted meta-codes, Thornhill draws on a more prosaic autopoietic notion of constitutions as institutions of structural coupling between law and politics, that is, between the codes of legality and power.

Thornhill's sociology of constitutions, therefore, is a specific field studying the normative functions of modern constitutionalism, the legitimation of power, its expansive tendencies in the modern constitutional state, and operations of self-limitations. In a sense, it is less societally expansive than the concept of societal constitutionalism, yet engages in the most general and important sociological study of societal genealogy of the modern constitutional state and constitutionalism as the legitimation formula of political power.

CONSTITUTIONAL SOCIOLOGY, OR A THEORY OF 'COMMAND STRUCTURES'?

Despite obvious influences and conceptual similarities, Thornhill's constitutional sociology is critical of the Weberian notion of politics as a socially dominating struggle for power. Political institutions are not perceived as originating in conflict between social actors over the monopoly of power (p. 14). For the same reason, Thornhill sets himself against the Foucauldian micro-social analytics of power by drawing a sharp distinction between political power and societal power and linking the use of political power to the functional operations of a distinct set of political institutions and exchanges in modern society. In short, political power is not implicated in all spheres of social action and needs to be analysed as part of the functional differentiation of politics and law in modern society (p. 15).

However, against the background of this explicit dissociation of a sociology of constitutions from the Weberian and Foucauldian perspectives

21 M. Laughlin and N. Walker (eds.), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (2007).

of politics and power in society, it is surprising to find common points of reference between Weber, Teubner, and Thornhill's conceptualizations of the modern constitutional state and its power.

In an early criticism of the emerging science of sociology, Friedrich Nietzsche wanted it replaced by a 'theory of command structures'.[22] The history of sociology is thus split between the study of social customs, mores, institutions, and their historical change, which originally fascinated the Romantic artists and philosophers, and the study of power and its genealogies. While the former has always been close to ethnology and anthropology, the inspirations and critical evaluations of political and moral theory and philosophy opened up the possibility of a sociological analysis of the power structures and dynamics behind social hierarchies of which politics and law were just two of many manifestations.

Sociology, therefore, would be unthinkable without political and legal science terminology and the academic journeys of Max Weber, Emile Durkheim, Robert Michels, and many others are persuasive examples of this scientific symbiosis which needs to be cultivated even in the emerging field of constitutional sociology. Constitutional sociology thus cannot rely on Ehrlich's concept of living law and societal recognition of legal rules as their only source of legal validity. The function of power, its manifestations, institutionalizations, varieties, transformations, different forms of symbolic legitimation, and social communication are intrinsic part of the sociological perspective.

Max Weber's sociology signifies a new approach to power, the modern state, its rule of law, and constitutional sovereignty. According to Weber, power is a basic element of social life and the state is merely one of many manifestations of power in modern society which is a result of social evolution and historical development. The state is not an ultimate social organization controlling the totality of society by external and exclusive sovereign power. It is, rather, one particular form of power institutionalization which is defined by the legitimate and politically monopolistic use of force on a specific territory and its inhabitants, and is complementary to a plethora of other particular power operations in modern society. It means that state force does not control other domains of social life dominated by many other particular forces and powers, such as the economy, with its professional bodies governed by codes of conduct, and religion, with its church organizations.

Weber is quite explicit in his sociological critique of the concept of state sovereignty when he says that '[T]he assumption that a state "exists" only if the coercive means of the political community are superior to *all* other communities, is not sociological.'[23] Instead of taking it as a precondition of

22 Quoted from W. Lepenies, *Between Literature and Science: The Rise of Sociology* (1988) 239.

23 M. Weber, *Economy and Society I* (1968) 316.

the existence of society and its persistence and unity, Weber defines state sovereignty as one of many manifestations of power in modern society which cannot be taken as a guarantee of its social integration and a symbol of its ultimate unity and moral bonds. It is belief in the state's legitimacy, a minimum of voluntary compliance, and a social interest in obedience that makes the state's physical coercion possible and legitimate.[24]

The legitimacy of the modern state is based on the idea that its officials can exercise their powers only according to established rules and that they, equally, are selected according to pre-existing rules. The state's power separation regulated by a constitution is the modern state's legitimate form.[25] Nevertheless, as Weber noted:

> [C]onceptions of the 'rightness of the law' are sociologically relevant within a rational, positive legal order only in so far as they give rise to practical consequences for the behavior of law makers, legal practitioners, and social groups interested in the law.[26]

The systems of modern positive law and politics are legitimate only if they correspond to the abstract postulates of modern rationalist humanism and its 'canon of the ends of "Nature's" will.'[27] However, this legitimacy is not guaranteed by the very definition and prescriptive character of these postulates. This 'correct' and 'right' law is legitimate only to the extent to which it has practical social consequences in legal and political life. In other words, society must be convinced that these postulates are right, and political and legal officials must act according to them.

STATE POLITICS AS A CONSTITUTIONALIZATION AND FUNCTIONAL DIFFERENTIATION OF THE ETERNAL STRUGGLE FOR POWER?

According to Weber, politics, indeed, is part of the eternal struggle for power[28] which defines all areas of social life. For instance, economic competition is another power struggle and the study of the national economy deals with power distribution within the economic system and its impact on the nation state as the organization of the nation's power. The state is a territorial political organization establishing a political community by monopolizing and legitimizing violence. It regulates the interrelations of the inhabitants of the state territory in the most general way and has the following basic functions: legislative, police, administration of justice,

24 id., pp. 212–13.
25 M. Weber, *Economy and Society II* (1968) 652–3.
26 id., p. 866.
27 id., p. 868.
28 See M. Weber, 'The Nation State and Economic Policy' in M. Weber, *Political Writings* (1994) 1–28, at 16.

military administration, and other forms of administration of social life, such as education, welfare, public health, and so on.

The state and its functions do not indicate some universal structural and functional preconditions of all societies. They are an outcome of historical development. As Weber comments:

> [t]he monopolization of legitimate violence by the political-territorial association and its rational consociation into an institutional order is nothing primordial, but a product of evolution.[29]

In fact, the state is a particular institutionalization and legitimization of politics emerging in modernity and coinciding with rationalization of social life:

> For the purpose of threatening and exercising such coercion, the fully matured political community has developed a system of casuistic rules to which that particular 'legitimacy' is imputed. This system of rules constitutes the 'legal order', and the political community is regarded as its sole normal creator, since that community has, in modern times, normally usurped the monopoly of the power to compel by physical coercion respect for those rules.[30]

Modernization thus involves the co-evolution of a rational legal order and its political guarantee by the state using legality for its rational legitimation. This rise of modern legality to political pre-eminence coincides with the dissolution of the old communal bonds and differentiation of modern society, especially its economy. The system of positive law turns out adequately to protect steadily widening social interests in modern differentiated societies.

The legal system and the state are thus structurally differentiated but mutually benefit from this differentiation by enhancing their operative capacity in modern society. The modern differentiation of economy, law, and politics equally leads to their increasing structural coupling and interdependence. Weber comments that:

> … [a]n economic system, especially of the modern type, could certainly not exist without a legal order with very special features which could not develop except in the frame of a public legal order …[31]

and subsequently summarizes the functional differentiation of economy, politics, and law as follows:

> … [t]he constant expansion of the market … has favored the monopolization and regulation of all 'legitimate' coercive power by one universalist coercive institution through the disintegration of all particularist status-determined and other coercive structures which have been resting mainly on economic monopolies.[32]

29 Weber, op. cit., n. 25, pp. 904–5.
30 id., p. 904.
31 Weber, op. cit., n. 23, p. 336.
32 id., p. 337.

In the political system, power is never fully concentrated but always distributed and conditioned by other powers (especially powers in the market economy, political parties, professional associations, churches, and so on). Modern politics operates through the medium of power. Furthermore, it is guaranteed by the legal system but legality is not its primary source as claimed by so many theories of the rule of law and the constitutional state. Weber even concludes that the most fundamental questions of politics are left unregulated by the modern system of positive law and must be resolved through the medium of political conventions and the internal rationality of the political system.[33] This differentiation of political and legal rationality makes it impossible to reduce political issues to legal categories and vice versa.

CONCLUDING REMARKS: ON THE DIFFERENTIATION OF CAPILLARY AND POLITICAL POWER AND CONSTITUTIONS

Weber definitely belongs to the Nietzschean camp and his notion of power as amorphous and detectable in all social domains and always in the process of self-legitimation is one of the most original elaborations of Nietzsche's philosophical critique of sociology. The self-legitimation of power through its constitutionalization is part of the general tendency to self-justification and a drive to accept the state of things as understandable and therefore acceptable for those living in it.

The state does not wither away, despite the normative expectations of societal constitutionalists and theorists of global law and politics. Instead, the state and its constitution continue to function as 'an artificial device for holding together what has emerged as the self-reinforcing dynamics in the political system and the legal system.'[34] Teubner refuses to answer the constitutional question and mainly uses the legal category of the citizen in a depoliticized manner as an actor of spontaneously evolving civil constitutions. Nevertheless, as Luhmann points out, the legal and political contextualizations of the citizen as a category of social inclusion became related to major political and juridical controversies in modern history,[35] such as the right to vote and other civil rights, and, therefore, cannot be relegated to specific forms of 'private law regimes'.

Weber's sociological analysis of the modern state highlights the constitutional state's capacity to distribute power in modern society. In the context of Thornhill's criticisms of politics as power, it may be surprising to realize how much Weber actually emphasized the role of societal recognition

33 id., p. 330.
34 Luhmann, op. cit., n. 2, p. 365.
35 id., p. 363.

in the legitimation process of legal norms and political commands. Quite close to Thornhill's constitutional sociology, Weber formulated the problem of legitimacy as both the general historical process of societal differentiation and the specific process of belief formation and power persuasion.

A sociological analysis of the specific function of the constitutional state to both expand power and legitimize it by the general and abstract principles of constitutional laws is the right response of constitutional sociology to the constitutional question. Reflecting on Weber's sociology of law and the state, this response already has its specific sociological tradition which can effectively accommodate Nietzsche's call for a theory of command structures.

Teubner makes a strong statement in this respect when he recalls Derrida and particularly Foucault's view of 'capillary power' achieved beyond juridical power and political sovereignty through scientific disciplines and technology (pp. 85–6). According to Derrida, this capillary power permeating all social areas has its 'capillary constitution' which permeates the state constitution, yet its specific mode of self-imposition is beyond the influence of political constitution.

While Thornhill is right in criticizing Foucault's approach to power as too socially expansive, asymmetries and structural irritations and coupling between the exercises of constitutionalized political power and other forms of societal power still need to be addressed and analysed by constitutional sociology. The modern constitutional question formulated by the paradoxical differentiation of constituent and constituted power – this unique semantic invention of the political sovereign of democratic people that does not decide anything itself and transfers all decision-making processes to the normative realm of political constitution – thus needs to be reconceptualized as coeval processes of the constitutional self-limitation of power and power dynamics beyond the realm of political constitutions which, nevertheless, recursively influence the conceptualizations and symbolization of basic constitutional categories such as the people, the citizen, constitutional sovereignty, constitutional rights, their transnational legal regimes, and so on.

Thanks to Teubner's *Constitutional Fragments* and Thornhill's *A Sociology of Constitutions*, sociologists of law and constitutionalism now have powerful methodological tools, a sociological conceptual framework, and invaluable sources of the new constitutional imagination which has capacity to accommodate even recent elaborations on Nietzsche's theory of command structures.