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The rhetoric of ‘legal fragmentation’ and its discontents Evolutionary dilemmas in the constitutional semantics of global law

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1. Introduction

It would certainly not be overstated to speak about a *cosmopolitan shift* in the theoretical imagination of the beginning of the 21st century.¹ Indeed, even those who still resist in accepting Luhmann’s claim that under modern conditions of functional differentiation there is only one and the same world society over the globe,² have to deal with a ‘transnational’, ‘post-national’, ‘globalized’ and ‘cosmopolitan’ vocabulary, which seems to gradually prevail in the most different theoretical fields.³

Within legal sciences there is also a similar shift. The discussion among legal theorists is intimately related to the making of a new postnational or transnational legal order, to the fragmentation of international law, and to the implications of these tendencies for new forms of dealing with the paradoxes of legal decision-making, be it within national law or in transnational legal regimes.⁴ Indeed, if one pays attention to the legal journals of the global scientific system,

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1 See U. Beck, ‘Weltrisikogesellschaft, Ökologische Krise und Technologiepolitik’, in U. Beck et al. (eds.), *Der unscharfe Ort der Politik*, 1999, p. 319.

2 N. Luhmann, ‘Globalization or World society? How to conceive of modern society’, 1997 *International Review of Sociology* 7, no. 1, p. 67.

3 For the example of the sociology of globalization, see the articles in the special issue of *International Sociology* containing already in 2000 very important contributions to the theme: J. Meyer, ‘Globalization: Sources and Effects on National States and Societies’, 2000 *International Sociology* 15, no. 2, pp. 233-248; S. Sassen, ‘Territory and Territoriality in the Global Economy’, 2000 *International Sociology* 15, no. 2, pp. 372-393; P. Bairoch, ‘The Constituent Economic Principles of Globalization in Historical Perspective: Myths and Realities’, 2000 *International Sociology* 15, no. 2, pp. 197-214.

4 See for example M. Koskeniemi, ‘Formalismus, Fragmentierung, Freiheit: Kantische Themen im heutigen Völkerrecht’, in R. Kreide & A. Niederberger (eds.), *Transnationale Verrechtlichung: Nationale Demokratien im Kontext globaler Politik*, 2008, pp. 65-89; M. Koskeniemi, ‘Legal Fragmentation: An Essay on Fluidity and Form’, in G. Calliess et al. (eds.), *Soziologische Jurisprudenz. Festschrift für Gunther Teubner zum 65. Geburtstag*, 2009, pp. 95-97; A. Fischer-Lescano & G. Teubner, *Regime-Kollisionen: zur Fragmentierung des globalen Rechts*, 2006. See also: R. Wai, ‘The Interlegality of Transnational Private Law’, 2008 *Law and Contemporary Problems* 71, pp. 116-118. For problems of legitimization of global law, see H. Brunkhorst, ‘Die Legitimationskrise der Weltgesellschaft. Global Rule of Law, Global Constitutionalism und Weltstaatlichkeit’, in M. Albert & R. Stichweh (eds.), *Weltstaat und Weltstaatlichkeit. Beobachtungen globaler politischer Strukturbildung*, 2007, pp. 63-109.

it is easy to realize why questions concerning the *technification of legal semantics*,⁵ and especially the emerging problems related to the *constitutional moment of global legal regimes*,⁶ became the primary concerns of legal theory.

In this paper, my main concern is exactly the radical functional differentiation of today's world society and the evolutionary tendencies arising in the semantics of both political and legal global systems. Nevertheless, instead of looking just at the so-called 'fragmentation of international law' and analysing its supposed dangers, I would here like to raise questions about the pertinence of such debate, exploring the possible causes of the theoretical – sometimes also emotional – anxiety that accompanies these tendencies. In fact, legal fragmentation (and pluralism) is not a novelty – neither in law itself nor in legal theory.⁷ As Koskenniemi puts it, there has always been some extent of legal fragmentation.⁸ Such a phenomenon is deemed to be a problem only under certain circumstances. Hence, more than only describing what might be the 'fragmentation of global law', if one wants to understand the critical scenario of today's legal theory and its permanent anxiety with respect to the consequences of such fragmentation, one must then ask what is at stake in this debate.

I would like to propose here that questions regarding the fragmentation of world law and its so-called *creeping constitutionalization* can only be deemed to be problematic due to its relations to a very particular perception of the phenomenon of *social inclusion* in world society.⁹ This is (most) definitely not a trivial claim. My basic assumption is the following: the fragmentation of global law, with all its consequences, becomes problematic in the eyes of scholars of – national and international – public law because it does not just alter the self-description of legal and the political systems in a way that jeopardizes the very structures of their differentiation, but also because it alters the way of dealing with the paradoxes of inclusion in the functional differentiated modern world society. In other words, since democratic constitutionalism is the rhetorical basis of what Luhmann used to call the *totalitarian semantics of full inclusion* of all individuals in each functional system of world society,¹⁰ the already well-known problems regarding the globalization of law and policy are closely related to the evolutionary bifurcations

5 R. Howse, 'From Politics to Technocracy and Back Again – The Fate of the Multinational Trade Regime', 2002 *The American Journal of International Law* (Symposium: Boundaries of the WTO) 6, pp. 94-117; D. Kennedy, *The Three Globalizations of Law and Legal Thought*, available at: <<http://duncankennedy.net/bibliography/chrono.html>> (last visited on 9 July 2010); D. Kennedy, 'Challenging Expert Rule: The Politics of Global Governance', 2005 *Sydney Law Review* 27, no. 1, pp. 5-28; A. Lang & J. Scott, 'The Hidden World of WTO Governance', 2009 *European Journal of International Law* 20, no. 3, pp. 601-614; J.H.H. Weiler, 'The Rule of Lawyers and the Ethos of Diplomats, Reflections on the Internal and External Legitimacy of WTO Dispute Settlement', 2001 *Journal of World Trade* 35, no. 2, pp. 191-207.

6 G. Teubner, 'Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory?', in C. Joerges et al., *Transnational Governance and Constitutionalism*, 2004, pp. 3-29; N. Walker, 'The Idea of Constitutional Pluralism', 2002 *The Modern Law Review* 65, no. 3, pp. 317-583; J. Trachtman, 'The Constitutions of the WTO', 2006 *The European Journal of International Law* 17, no. 3, pp. 623-646; Brunkhorst, *supra* note 4, pp. 76-83; J. Bohman, 'Constitution Making and Democratic Innovation: The European Union and Transnational Governance', 2004 *European Journal of Political Theory* 3, no. 3, pp. 315-337.

7 Only to begin with, one should look at the debate about pluralism between Kelsen and Ehrlich or at the pluralist debate in Latin America in the 1980s. See S. L. Paulson, (ed.), *Hans Kelsen und die Rechtssoziologie: Auseinandersetzungen mit Hermann U. Kantorowicz, Eugen Ehrlich und Max Weber*, 1992; M. Neves, 'Del pluralismo jurídico a la miscelánea social: el problema de la falta de identidad de la(s) esfera(s) de juridicidad en la modernidad periférica y sus implicaciones en América Latina', in M. Villegas & C. Rodríguez (eds.), *Derecho y Sociedad en América Latina: Un debate sobre los estudios jurídicos críticos*, 2003, pp. 261-290.

8 M. Koskenniemi, 'Legal Fragmentation: An Essay on Fluidity and Form', in Calliess et al., *supra* note 4, p. 797.

9 For the concept of inclusion in a functional differentiated modern society, see R. Stichweh, *Inklusion und Exklusion. Studien zur Gesellschaftstheorie*, 2004, pp. 45-66; See also S. Farzin, *Inklusion/Exklusion. Entwicklungen und Probleme einer systemtheoretischen Unterscheidung*, 2006, pp. 40-88. For its comprehension on the level of transnational processes of globalization, see H. Brunkhorst, 'Globale Solidarität. Inklusionsprobleme der modernen Gesellschaft', in K. Günther & L. Wingert (eds.), *Die Öffentlichkeit der Vernunft und die Vernunft der Öffentlichkeit*, 2001, pp. 605-626.

10 See N. Luhmann, *Die Gesellschaft der Gesellschaft*, 1997, pp. 625-628; Stichweh, *supra* note 9, pp. 71-73.

of functional differentiation itself, especially with regard to the ways it deals with problems of social inclusion/exclusion.¹¹

Indeed, within modern society, it seems to be obvious that conditions of extreme exclusion of the legal, political, educational and economic systems are deemed to be unacceptable or at least problematic.¹² The possibility of the 'scandalization'¹³ of social exclusion – almost as if it were a case of violation of human rights – is, however, a relatively new phenomenon. Only after the shift to modern functional differentiation did society change in such a direction, according to which any sort of social hierarchy and individual differences can no longer be accepted if they do not rely on the choices made by the concerned individuals in the unfolding process of their own biographies. In fact, under the constitutional orders of the 'Westphalian Era', at least in the so-called centre of the economic world system,¹⁴ it was possible to materialize to a great extent the 'command' towards social inclusion.¹⁵ All over the world, constitutions have established catalogues of human rights, which have gradually extended their scope from personal negative freedoms to positive participative social rights.¹⁶ Even if many of these constitutions – those at the so-called 'periphery' of the world system – had only a *nominal* or *symbolic* character,¹⁷ they still served as the only valid model of legitimization that could stabilize the co-existence of – often conflicting – functional systems. In other words, if the constitutions of the capitalist periphery do not have the same effective including character as those of the centre,¹⁸ they are still a vital mechanism for the differentiation between the plurality of codes,¹⁹ being thus essential to the spreading movement of functional differentiation over the globe. Moreover, *symbolic constitutions* have always functioned as a way to *temporalize* problems of exclusion, as if there is something like a 'path towards development' that every country must follow. Thus, they were often responsible for making invisible the real causes of the so-called 'underdevelopment', stabilizing – even if only negatively – existing stratifications (between a centre and a periphery) in the different subsystems of world society.²⁰

In principle, functional differentiation is only possible if there is a legal system that performs the function of an immunizing system between the destructive growing tendencies of functional systems against each other.²¹ This is a condition of both (1) the differentiation of the functional system and (2) the neutralization of possible excluding tendencies of particular

11 I think it is possible to find indications of this same thesis in different works by different scholars. See, for example M. Neves, *Symbolische Konstitutionalisierung*, 1998, pp. 116-131, 138-145. See also Brunkhorst, *supra* note 9; M. Schroer, 'Die im Dunkeln sieht man doch. Inklusion, Exklusion und die Entdeckung der Überflüssigen', 2001 *Mittelweg* 36 10, no. 5, pp. 33-46.

12 Luhmann, *supra* note 10, pp. 625-630; Farzin, *supra* note 9, pp. 40-88.

13 N. Luhmann, 'Das Paradox der Menschenrechte und drei Formen seiner Entfaltung', in *Soziologische Aufklärung 6: die Soziologie und der Mensch*, 1995, pp. 230-232. See also A. Fischer-Lescano, *Globalverfassung. Die Geltungsbegründung der Menschenrechte*, 2005, pp. 67-98.

14 For the centre/periphery difference see I. Wallerstein, *World- Systems analysis: an introduction*, 2004, pp. 28-30. To the modern centre/periphery distinction within systems theory, see Luhmann, *supra* note 10, pp. 612, 760-761.

15 Farzin, *supra* note 9, pp. 41-44.

16 H. Brunkhorst, *Solidarität. Von der Bürgerfreundschaft zur globalen Rechtsgenossenschaft*, 2002, pp. 79-110.

17 Following Lowenstein, Neves speaks of nominalist constitutions when the constitutional order serves only as a legitimization of authoritarian regimes and of a symbolic constitution when a constitutional order exists, but does not manage to bring to reality the structural coupling between law and politics. See Neves, *supra* note 11, pp. 90-94. For the original classification, see K. Lowenstein, *Verfassungslehre*, 1997, pp. 148-160.

18 See Brunkhorst, *supra* note 16, pp. 153-154, 162-170.

19 To this extent, it would be really misleading to talk about the existence of modern societies (in the centre) and non-modern societies (at the periphery). The idea of the existence of a centre and a periphery of an economic world system, for instance, implies from the outset the idea of the existence of a whole system – that we may call the world society. As Neves puts it, one should even assume that peripheric modernity, with its multiplicity of codes and with its only limited constitutional effectiveness, would be even more complex than central modernity. See Neves, *supra* note 7, pp. 261-290. See also J. Souza, *A modernização seletiva: uma reinterpretação do dilema brasileiro*, 2000.

20 Neves, *supra* note 11, pp. 98-101, 143-153.

21 N. Luhmann, *Das Recht der Gesellschaft*, 1993, p. 162.

systems that may jeopardize the reproduction of others (this seems to be the case, for instance, for the economic system²²). This fact is reflected in the self-descriptions of law and politics, as they used to be found in democratic constitutionalism. If one observes the development of world society and the actual conditions of the extreme fragmentation of world law, one realizes that there are no indications that the legal system can perform the exclusion/neutralizing task, or even to make it invisible – perhaps through symbolic constitutions in the same way as it did.²³

Nevertheless, as long as this task is still an indispensable function for the reproduction of a functional differentiated world society *in the long run*, it seems that the old national democratic self-descriptions of law and politics tend to show a resistance to the emergence of alternative semantics. Since the evolution of ideas²⁴ can also have a decisive influence on the evolution of social systems,²⁵ the current disputes over the possible constitutional self-descriptions of world law seem to be a key element for determining the future world society and functional differentiation. The theoretical anxiety about the fragmentation and the transformation of constitutional theory reflect these deep structural changes. They seem to focus on the possibility of democracy being expanded to a global level, which seems to be a condition for the reproduction of functional differentiation itself.

In what follows, I will first approach, once again, the phenomena which led to the semantics of the so-called fragmentation of world law and to a correspondent decay of politics within the language of law in today's world society (2). After this, I will observe the shifts of legal semantics, suggesting what may be called a decay of the semantics of public law (3), and the consequent resistance on the part of public lawyers to the legal discourse on 'legal fragmentation' and 'global governance' (4). Then, from the standpoint of systems theory, I will make a sociological observation of the possible reasons for the semantic resistance against the emergence of new pluralists and privatized constitutional semantics. In order to do that, I relate these 'reactive tendencies' to the imperative towards social inclusion that forms the basis of the self-description of the legal and the political systems under conditions of functional differentiation (5). Finally, I will deal with the question of whether semantics, which do not rely on public mechanisms of democratic legitimization, can perform the same including functions of so-called democratic constitutional law (6).

2. The emerging rhetoric of 'legal fragmentation' and the semantic decline of politics in global law

The lack of a state-like global organization functioning as the centre of the global political system seems to give occasion to a multiplicity of emerging self-descriptions of both the political and legal systems of world society. These new semantics describing global law seem, for their part, to compete not only among each other, but also with (the) old national democratic

22 For this including capacity of politics and law in the face of the excluding tendencies of the economic system, see Brunkhorst, *supra* note 16, pp. 99-102, 113-138.

23 This intuition seems also to be present in Neves, see M. Neves, 'Grenzen der Autonomie des Rechts in einer asymmetrischen Weltgesellschaft: Von Luhmann zu Kelsen', 1997 *Archiv für Rechts- und Sozialphilosophie (ARSP)* 93, no. 3, pp. 394-395.

24 For the concept of the evolution of ideas within systems theory, see N. Luhmann, 'Gesellschaftliche Struktur und semantische Tradition', in *Gesellschaftsstruktur und Semantik. Studien zur Wissenssoziologie der modernen Gesellschaft, Band I*, 1980, pp. 45-57.

25 For this heterodox comprehension of Luhmann's theory of evolution, see U. Stäheli, 'Die Nachträglichkeit der Semantik. Zum Verhältnis von Sozialstruktur und Semantik', 1998 *Soziale Systeme* 4, no. 2, pp. 118-130.

constitutionalism.²⁶ The consequence of this fact might be depicted in a sort of theoretical inflation of terms like 'legal pluralism', 'societal pluralism', 'heterarchical law', 'constitutional pluralism' etc.²⁷ All these terms point to the fact that there is seemingly a plurality of constitutional theories competing for a hegemonic role in the representation of the final levels of legal decision-making in global law. More interesting, at this point, is that such a 'pluralist trend' is not limited to transnational orders, but also encompasses international and even national legal orders that are now taken to be only legal regimes among many others.²⁸

Under the framework of a systems theory, constitutional theories consist of a *second order observation* of the operative dynamics of the legal system.²⁹ To this extent, they are bound to the so-called system's structure, since they observe operations that are not directly their own operations and that should be deemed to be the object of their observation – as if it was the 'reality' they observe. Self-reflexive theories – as is the case with constitutional theories – observe, so to speak, an already existing *first order* observation. At the same time, since second order observation, as part of the system itself, always produces new operations that are also responsible for making invisible the paradox of the unity of the system³⁰, they turn out to be 'structurally' decisive for the whole system's reproduction.³¹ In the case of the legal system, for instance, it turns out to be determinant how constitutional theories set, by its observation, the ideological frameworks that determine in which extent basic operations will be irritated by operations of other systems, as, for example, politics or science. This sort of dynamics will also indirectly (in)form legal decision-making taking place on the structural level about the final uses of the differences between legal/illegal, constitutional/unconstitutional. Indeed, every system is in a position of permanent potential conflict and dependence with its social environment, since it does not have any mechanism of automatic adaption or direct cognition of what is situated outside its operative limits.³² Social systems thus depend on their reflexive theories to remain operatively closed at the same time that they can establish the structural couplings which will allow them to survive in an opaque environment.³³ By describing the conditions of legal validity,

26 For this idea of competing self-descriptions, see the concept of the 'politics of deparadoxification' (*Politik der Entparadoxierung*), see U. Stäheli, 'Politik der Entparadoxierung. Zur Artikulation von Hegemonie- und Systemtheorie', in O. Marchart (ed.), *Das Undarstellbare der Politik. Zur Hegemonietheorie Ernesto Laclaus*, 1998, pp. 52-66. See also U. Stäheli, *Sinnzusammenbrüche. Eine dekonstruktive Lektüre der Systemtheorie Luhmanns*, 2000, pp. 218-223.

27 For the concept of legal pluralism in global administrative law, see N. Krisch, 'The Pluralism of Global Administrative Law', 2006 *European Journal of International Law* 17, no. 1, p. 247. Within constitutional law, see Walker, supra note 6, pp. 317-583; M. Neves, *Transconstitucionalismo*, 2009. Within legal theory and legal sociology, see G. Teubner, 'Alter Pars Audiatur: Das Recht in der Kollision anderer Universalitätsansprüche', 1996 *Archiv für Rechts- und Sozialphilosophie (ARSP)* 65, pp. 199-220. See also H. Willke, *Heterotopia: Studien zur Krisis der Ordnung moderner Gesellschaften*, 2003, pp. 10-75, 112.

28 For an overview of the concept of legal pluralism, see B.Z. Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global', 2008 *Sydney Law Review* 30, pp. 375-411. On the idea of an epistemic pluralism, see Fischer-Lescano & Teubner, supra note 4, pp. 36-38. For pluralism as a fact that must also be faced by national courts, see Neves, supra note 27. Other authors insist that pluralism is only a problem on the transnational level, since national law remains, at least in its own domains, untouched. See M. Amstutz & V. Karavas, 'Weltrecht: Ein Derridarischeres Monster', in Calliess et al., supra note 4, pp. 645-672.

29 For the concept of second order observation, see N. Luhmann, *Einführung in die Systemtheorie*, 2004, pp. 156-166.

30 N. Luhmann, *Soziale Systeme*, 1987, pp. 611-619.

31 As Stäheli suggests, I assume that the semantic description of a system is sometimes part of its own operation. Moreover, social semantics has a constitutive character via-à-vis the structure. See Stäheli 2000, supra note 26, pp. 218-223.

32 For Luhmann it means: 'To this extent, self-referent systems operate necessarily in self-contact'. (See Luhmann, supra note 30, p. 59). For its part, 'requisite variety' means that a model system or controller can only model or control something to the extent that it has sufficient internal variety to represent it. Luhmann always stresses that no system disposes of requisite variety for itself. The 'Law of requisite variety' has its origins in cybernetics. See W.R. Ashby, 'Requisite Variety and Its Implications for the Control of Complex Systems', 1956 *Cybernetica* 1, p. 97. See also D. Baecker, 'Die Umwelt als Element des Systems, Dirk Bäcker über W. Ross Ashby, "Design for a Brain: The Origin of Adaptive Behavior" (1952)', in D. Baecker, *Schlüsselwerke der Systemtheorie*, 2005, p. 59

33 For the reflexive theory of a system as a necessity for maintaining the system operatively closed and for allowing it to build structural couplings, see R. Stichweh, 'Semantik und Sozialstruktur. Zur Logik einer systemtheoretischen Unterscheidung', 2000 *Soziale Systeme*, no. 6, pp. 237-250.

constitutional theories define which hegemonic interpretations will set the boundaries between the structural coupled systems of law and politics, law and economy, law and psychic systems.³⁴

Hence, if talk within today's legal and constitutional theory is about a plurality of constitutions and legal systems, this fact must somehow correspond to the particular features of the emerging global law and its existing structural couplings. To this extent, the so-called 'Derridian Monster' of world law,³⁵ which does not allow for a hurried definition based on any past theoretical frameworks, seems really to be a consequence of the dynamics of a functional globalization that overcharges traditional democratic constitutionalism, forcing a semantic shift in the traditional self-description of political constitutional law and shifting it into a sort of post-political and post-democratic era of 'expertise' and 'managerialism'.³⁶

Accordingly, since the cosmopolitan theoretical turn that began in the 1990s, a so-called 'fragmentation of global law' (not only of international law) has been widely talked about.³⁷ Less talked about has been the formation of an 'international global legal order', or even new accounts of the 'legal interpretation' of national constitutions, two subjects that used to be the main occupation of legal scholars up to the 1990s. Since the last two decades, the rhetoric of legal theory has been mainly concerned with a sort of messy (dis)order of autonomous legal regimes, which seems to have a jeopardizing effect on the sovereignty of national legal systems and on the discourses about national law. That is to say, the tendency towards a fragmentation of transnational law would have deep consequences for the way the legal system deals with its code on the most different levels.³⁸ So, from a transnational level, legal pluralism would also infiltrate into national legal constitutionalism, realizing a powerful shift in the whole constitutional theory of a world society.³⁹

On the one hand, the traditional international legal order, based on treaties and agreements bound to national politics, seems to be the object of a deep transformation due to its increasing fragmentation and technification. Thus, only a few scholars still seem to believe that it is possible to talk about a consistent and Unitarian international legal order. According to legal pluralists, since there are no sovereign authorities with sufficient power to produce binding norms on the global level, one must deal with a functional multiplication of the epistemic domains within an international law that turns out to be built in an *ad hoc* fashion with the participation of not only states, but also a plurality of actors from the world society.⁴⁰ On the other hand, international treaties continuously establishing new fragmented regimes seem to create obligations for national states also 'without or against their will',⁴¹ their enforcing power thereby relying on functional imperatives that can be ascribed to different systems such as the economy, mass-communication, sports, science etc. If the original theory of *international regimes* – formulated in the political sciences – understood that such structures 'should not be interpreted as elements of a new

34 On the self-referent control of validity as a legal symbol within the law, see Luhmann, *supra* note 21, pp. 98-110. For the relations between validity and constitutional law, see N. Luhmann, 'Verfassung als evolutionäre Errungenschaft', 1993 *Rechtshistorisches Journal* 9, pp. 645-672.

35 See Amstutz & Karavas, *supra* note 28.

36 In this argumentative direction, see Koskeniemi, *supra* note 4, pp. 72 et seq. See also P. Allot, 'The Emergence of an International Aristocracy', 2003 *NYU Journal of International Law and Politics* 35, no. 1, pp. 309-338.

37 For a brief overview of the history of the 'legal fragmentation' discourse, see Koskeniemi, *supra* note 8.

38 See Neves, *supra* note 27.

39 Transconstitutionalism or transversal constitutionalism is already understood as a method of constitutional interpretation also on the national level of constitutional jurisdiction, see Neves, *supra* note 27.

40 A. Fischer-Lescano & G. Teubner, 'Fragmentierung des Weltrechts: Vernetzung globaler Regimes statt etatischer Rechtseinheit', in M. Albert & R. Stichweh (eds.), *Weltstaat und Weltstaatlichkeit. Beobachtungen globaler politischer Strukturbildung*, 2007, p. 25.

41 C. Tomuschat, 'Obligations Arising for States Without or Against Their Will', 1993 *Recueil des Cours*, pp. 195-237.

international order beyond the nation-state',⁴² it seems today that world politics also seems to have been replaced by a kind of cooperative bargaining based on an interactive accommodation of potentially conflicting interests of so-called 'stakeholders' that would also include the national states themselves.⁴³ These interest-based 'cognitive' orders assume the form of legal regimes in their own right that encompass even the fields of former national law and politics.⁴⁴

In other words, the current experimental self-descriptions of global law, its plural constitutional theories, so to speak, try to take into account the reality of a far-reaching denationalization that seems to jeopardize the sovereignty of national constitutionalism as the sole discourse which is able to define the boundaries of legal operations.⁴⁵ On the reflexive level of the legal system, we can certainly talk about a gradual post-national constitutionalization of law that finds support even in the discourse taking place in national constitutional courts. Indeed, even if national legal orders still represent important subsystems working either as a cooperative or as a hostile environment for transnational law,⁴⁶ it is hard to think that facing such a dynamic and functionally differentiated world society, national law could still be deemed to be a purely politically regulated legal regime, which is not constrained by the communicative streams of functional global systems. In fact, state administrations and national legal systems were, from the outset, under pressure from complex global functional systems within the borders of their own sovereign territory.⁴⁷ Now, it seems only that the democratic consciousness described by Habermas⁴⁸ as the last means of defending the *lifeworld* from the threatening dynamics of functional systems might face its biggest challenge in the face of the global autonomization of 'instrumental' rationalities and their uncontrolled growing dynamics.

The development of global law – at its national and at its transnational levels – tends to be characterized by the fact that emerging regimes are only bound by its own rationality, which evolves according to its own dynamics of mounting and dismounting structural couplings.⁴⁹ In this sense, a global Babel of technical vocabularies, in which there is no common language available for any kind of possible *general communication*,⁵⁰ jeopardizes the old stable forms of the structural coupling of the legal system as used to be the case with its *structural drift*⁵¹ under national constitutional orders. That is to say, transnational regimes do not dispose of any kind of

42 See R.O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy*, 1984, p. 63.

43 Some authors seem to be contradictory if they treat the state as mere 'stakeholders' on the transnational level, but, at the same time, reserve for them a quite unchanged role within national law. See P.F. Kjaer, *Elemente einer Theorie des Transnationalen Konstitutionalismus*, E-Manuscript, presented at the interdisciplinary Colloquium at Flensburg University, 2010. As I see it, the plurality of legal programmes in the world society has consequences for the legal code in its different sub-systems, that is to say, in different fields of segmentation. See, in this argumentative direction, Fischer-Lescano & Teubner, *supra* note 4, pp. 17-19.

44 National neoliberal politics sticks to the very same vocabulary of transnational governance when it, for instance, comes to privatization, public-private partnerships and administrative law in general. The key term for this new semantics within public law is 'Global administrative law'. See S. Cassese, 'The Globalization of Law', 2006 *NYU Journal of International Law and Politics* 37, pp. 973-993.

45 For a critique of national constitutionalism, see Walker, *supra* note 6, pp. 319-332. Stressing the role of the state in globalization processes: M. Stolleis, 'Was kommt nach dem souveränen Nationalstaat? Und was kann die Rechtsgeschichte dazu sagen?', in A. Héritier et al. (eds.), *European and International Regulation after the Nation State*, 2004, pp. 19-23

46 See Amstutz & Karavas, *supra* note 28.

47 See, for instance, J. Habermas, *Legitimation Crisis*, 1976, pp. 130-143. See also J. Habermas, 'Die postnationale Konstellation und die Zukunft der Demokratie', in *Die postnationale Konstellation*, 1998. For an observation of this problem from a constitutional perspective, see D. Grimm, 'Die Bedingungen demokratischer Rechtssetzung', in Günther & Wingert, *supra* note 9, pp. 489-506.

48 See J. Habermas, 'Können komplexe Gesellschaften eine vernünftige Identität ausbilden? Rede aus Anlaß der Verleihung des Hegel-Preises', in *Zwei Reden. Aus Anlaß des Hegel-Preises*, 1995, pp. 92-126.

49 *Ibid.*, pp. 25-32. See also M. Koskeniemi, 'The Fate of International Public Law: Between Technique and Politics', 2007 *The Modern Law Review* 70, no. 1, pp. 4-9.

50 See Fischer-Lescano & Teubner, *supra* note 4, pp. 10-25. See also Teubner, *supra* note 27, pp. 199-220.

51 In the language of system theory, the structural drift of a functional system consists of all structural couplings at its disposal. See Luhmann, *supra* note 29, p. 116.

political constitution, although they can collide with politically regulated regimes.⁵² Hence, possible collisions among the different legal orders that used to be resolved on the basis of the broadly disseminated techniques of public law possessed by a Unitarian national constitutional jurisdiction have to find new solutions, which can no longer thoroughly rely on the idea of sovereignty and democratic will formation.

As some scholars seem to believe, the only lasting plausible solution to deal with possible problems arising from this fact would consist of relying on the so-called 'vitality of societal ordering dynamics', which could engender spontaneous civil law, adapted to its environment by the natural forces of social evolution.⁵³ In an ideological turn that is reminiscent of the anarchist-liberal ideologies,⁵⁴ some scholars engage from different perspectives (such as systems theory⁵⁵ or some of the streams of the transnational-networking theory⁵⁶) in a sort of anti-statist discourse that celebrates the possibility of a self-regulated society which is able to spontaneously produce its norms without relying on the formal processes of centralized political decision-making. Legal regimes would then be able to coordinate global regulation on the basis of a sort of cognitive learning that only social evolution can provide.

As I understand it, this seems to be a very optimistic understanding of the blind dynamics of social evolution and the radical improbability of the emergence of structural couplings between social systems, above all between legal regimes which only operate in self-contact in their irreconcilable plurality. In fact, it still seems to be an open question to what extent one can expect that the evolution of this supposed multitude of legal systems could reproduce the conditions of differentiation of modern society in the same way as democratic constitutionalism did. At the end of the day the old paradoxes of legal pluralism re-emerge once again, only in a new version.⁵⁷ If the legal system is to be understood as a plurality of many constitutions, how could it possibly be considered as one and the same functional system? If they are based on the same code, however, they should form one sole system which could connect all its communications among them. At the same time, if there is not *one*, but *many* legal systems, how could they integrate themselves normatively without breaking their respective operative autonomies?

The decay of national political constitutions seems to deliver a new challenge to the constitutional observation of law. Legal theory seems to react to it in different ways, either with critical anxiety or with an enthusiastic celebration of its novelties.

52 T. Vesting, 'Politische Verfassung? Der moderne (liberale) Verfassungsbegriff und seine systemtheoretische Rekonstruktion', in Calliess et al., supra note 4, pp. 620-626.

53 See Amstutz & Karavas, supra note 28, pp. 668-669, see also Wai, supra note 4.

54 I think here particularly of the so-called post-leftist anarchism, which is intimately related to neoliberalism.

55 G. Teubner, 'Globale Bukowina. Zur Emergenz eines transnationalen Rechtspluralismus', <https://www.uni-frankfurt.de/fb/fb01/Personal/em_profs/teubner/dokumente/Bukowina_english.pdf> (last visited on 8 September 2010). For an analysis of the relations between Teubner's and Hayek's thoughts, see G. Günther, '(Zivil-)Recht. Kann das Zivilrecht im Zuge der Globalisierung das öffentliche Recht ersetzen?', in: C. Joerges & G. Teubner (eds.), *Rechtsverfassungsrecht, Recht-Fertigung zwischen Privatrechtsdogmatik und Gesellschaftstheorie*, 2003.

56 The spontaneous formation of non-statist networks is an important point of Slaughter's work, even if she does not seem to believe that they can jeopardize state sovereignty. See A.-M. Slaughter, 'Global Government Networks, global Information Agencies, and Disaggregated Democracy', in *Harvard Law School Public Law, Working Paper 018*, available at: <<http://papers.ssrn.com/abstract=283976>>, (last visited on 9 July 2010).

57 Unity is a premise of the legal system that is not understood as either a factual or a logical reality: R. Christensen & A. Fischer-Lescano, 'Die Einheit der Rechtsordnung: Zur Funktionsweise der holistischen Semantik', 2007 *Zeitschrift für Rechtsphilosophie* 4, no. 1, pp. 8-14.

3. Spontaneous constitutionalization of global law: the celebration of private plural constitutionalism and the decline of the semantics of public law

Within the so-called constitutional 'Rule of Law', even though law and politics are respectively differentiated from each other, it is possible to find a matching self-description for both systems.⁵⁸ Relying on very similar semantics, both systems project their respective unity onto the *revolutionary achievement*⁵⁹ represented by a political constitution – which we could call their last strategy of the invisibilisation of paradoxes.⁶⁰ At the same time, both the legal and the political systems build, through constitutional law, a very useful structural coupling, which, between them, is able to retain a high level of reciprocal irritability.⁶¹ Accordingly, law binds politics through legally regulated processes, and politics *uses* law as an instrument for achieving its 'goals'. This is at least how it works according to the self-description of law and politics within the constitutional democratic state.⁶² Certainly, the differentiation of the legal system implies that a legal decision can only connect itself to another legal decision. That is to say, validity can have its paradoxes unfold only internally. Even though, through legal argumentation, political legislation can always irritate the reproduction of legal communication and, thus, the management of the symbolic value of legal validity. Such an idea could be very well depicted in the liberal tradition of constitutionalism that describes law as a system with a Janus face; accordingly, it is deemed to be a instrumental order of binding norms directed towards the regulation of the lives of citizens and, at the same time, is seen as the result of a process of collective will formation that makes citizens the authors of the same norms.⁶³ It is easy to see that this model cannot satisfactorily explain how things work under the conditions of the radical fragmentation of global law.⁶⁴ The new rhetoric describing the legal system of world society makes reference to a 'law without a state', and consequently to a law which has no political constitution.⁶⁵

Indeed, even if the political system of a world society has no centre, in which it would be possible to build a *constitution-like* structural coupling with global law, world societal communication depends on a functional system which is able to engender and to maintain patterns of congruent expectations.⁶⁶ In order to keep transnational communication operational under modern

58 Stichweh suggests that the establishment of a possible structural coupling between different social systems also depends on the semantic conditions assured by a system's self-description. See Stichweh, *supra* note 33, pp. 237-250.

59 H. Brunkhorst, 'Machbarkeitsillusionen, feierliche Erklärungen und Gesänge: Zum Verhältnis von Evolution und Revolution im Recht', in Calliess et al., *supra* note 4, pp. 447-464.

60 See Luhmann, *supra* note 32, pp. 176-183.

61 H. Brunkhorst, *Democracy under the Pressure of Global Capitalism. Return of Dialectic of Enlightenment in World Society*, Heuss Lecture at the New School for Social Research, 2010. For a discussion of the interplay between law and politics within democratic constitutionalism, see M. Neves, 'Verfassung und Öffentlichkeit, Zwischen Systemdifferenzierung, Inklusion und Anerkennung', 2008 *Der Staat. Zeitschrift für Staatslehre und Verfassungsgeschichte deutsches und europäisches öffentliches Recht* 47, no. 4, pp. 477-509. See also Luhmann, *supra* note 21, p. 422.

62 See Luhmann, *supra* note 32, pp. 201-208. For the political system, see also F. Kastner, 'Luhmanns Souveränitätsparadox: Zum generativen Mechanismus des politischen Systems der Weltgesellschaft', in M. Neves & M Voigt, *Die Staaten der Weltgesellschaft: Niklas Luhmanns Staatsverständnis*, 2007, pp. 75-97.

63 This is clear in the liberal tradition that connects Kant and Rousseau. See J. Habermas, *Faktizität und Geltung, Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*, 1998, pp. 112-134; I. Kant, *Metafísica dos Costumes*, 2003, pp. 162-164. J.J. Rousseau, 'A Discourse on Political Economy', in *Great Books Of Western World*, 1956, pp. 370-373. Within systems theory, the constitution is understood as an evolutionary achievement that performs the function of making invisible the paradox of the unity of the legal system. See Luhmann, *supra* note 32, pp. 184-188.

64 See Teubner, *supra* note 6, pp. 7-9.

65 See Teubner *supra* note 55.

66 See Fischer-Lescano, *supra* note 13, pp. 62-66.

conditions of *a-central* and *a-topical* functional differentiation,⁶⁷ it is necessary to keep the respective codes, languages, semantics and organizations of different systems operatively closed and immune from direct (destructive) interferences by other subsystems.⁶⁸

On the other hand, just as world society needs a legal system to stabilize its normative expectations, transnational regimes also need the figure of a constitution to handle the paradoxes of validity. ‘By necessity, every process of juridification simultaneously contains latent constitutional norms’.⁶⁹ As Luhmann puts it, ‘a constitution has to be interpreted as a necessity, since legal validity itself must also be justified’.⁷⁰ The constitution then consists of an answer to the question of the validity of the difference between legal/illegal,⁷¹ whose paradox always arises if one asks whether the legal code itself is legal or illegal.⁷² This point is very important, because law needs to continuously reproduce this basic difference. If it is then confronted with *hard cases* in which the simple ‘do as usual’ no longer works, the system must access those norms which can tell something about which norm is to be considered valid. These are the ‘rules of recognition’ in Hart’s sense.⁷³ Once the question is raised whether legality itself should be considered legal, one has to either deal with a tautology (expressed in sentences like: ‘legality is legal’ or ‘legal is legal’) or, if the question is to be posed in its negative version (‘is illegality legal?’), with a paradox (expressed in sentences like: ‘illegality is illegal legality’ or ‘illegal is legal illegality’).⁷⁴ If the legal code must unfold its own paradoxes internally through validity, the paradoxes of validity (as a second-order observation of the code on the level of procedural reflection) must unfold through a constitution. Therefore, the legal constitution consists exactly of a strategy for making the paradox of validity invisible. It is an achievement that only arises after the advent of legal positivism. The decision for one of the sides of the difference is a decision that is internally pictured as the result of people’s sovereignty, on which the ‘Rule of Law’ is based.

As I have tried to show in the last section, it seems that fragmented legal regimes, no longer being able to rely on the unifying effect assured by a single sovereign constitutional order,⁷⁵ are then set free to establish their own institutions and mechanisms for realizing the management of legal contingency. At this point, the emerging theoretical self-descriptions talk about a pluralist societal constitutionalization of transnational legal orders.⁷⁶ Just as Teubner puts it, under conditions of spontaneous constitutionalization, ‘world-law develops from the periphery of social systems, from the contact to other social systems, and just not from the centre represented by national and international political institutions’.⁷⁷ On the one hand, a compound of ‘civil actors’ inhabiting spontaneous sectors of functional systems comes about as a functional equivalent of the political public sphere. On the other hand, organized sectors, in which decision-making procedures find some degree of formalization, could play the role of the centre of the legal

67 For the idea of the world society as an atypical society, see H. Willke, *Atopia. Studien zur atopischen Gesellschaft*, 2001, pp. 107-123.

68 About the so-called immunizing function of law, see Luhmann, *supra* note 21, p. 162.

69 See Teubner, *supra* note 6, p. 15.

70 See Luhmann, *supra* note 32, p. 184.

71 For a definition of the paradox of law, see F. Kastner, ‘The Paradoxes of Justice: The Ultimate Difference between a Philosophical and a Sociological Observation Law’, in G. Teubner & O. Perez (eds.), *Paradoxes and Inconsistencies in Law*, 2006, pp. 171-173.

72 See Luhmann, *supra* note 21, p. 70-73.

73 H. Hart, *The Concept of Law*, 1961, p. 77.

74 See Luhmann, *supra* note 32, p. 185.

75 See Grimm, *supra* note 47, pp. 489-506.

76 See Walker, *supra* note 6, pp. 317-583; Teubner, *supra* note 6. See also Vesting, *supra* note 52; T. Vesting, ‘Constitutionalism or Legal Theory: Comments on Gunther Teubner’, in Joerges et al., *supra* note 6.

77 See Teubner *supra* note 55.

system (its courts), without being bound by national sovereignty.⁷⁸ Accordingly, the *decentralized* multiple centres of the fragmented global legal regimes would offer the necessary means of judicial review, which should then guarantee some degree of generalization of the legal specialized code.⁷⁹ Increasing problems of collisions between different judicial practices would be solved by the internal responsiveness of each regime⁸⁰ in the form of a permanent process of the politicization of legal decision-making that could be informed by new forms of legal networking between the respective operative closed legal subsystems.⁸¹

Some scholars insist that the semantics of global law would actually diverge from both languages: that of public and of private law.⁸² As they comprehend it, one should not rely on the old distinctions between *public* and *private*, *subjective* and *objective*, *national* and *international*, but should look for new kinds of *hybrid*, *plural*, *soft*, *hard* and *flexible* law.⁸³ The idea of overcoming dualisms is, however, not so new. Hans Kelsen had already strived to dismiss methodological dualisms. He did it exactly by means of the logical supposition of the unity of the legal system established by a sovereign constitutional order. Nonetheless, methodological monism does not seem to be suitable for legal pluralism.⁸⁴ The plurality of so-called private legal constitutions and epistemological communities implies not only a lack of political sovereignty, but also a lack of any sovereign rationality. As long as legal rationality is left to the spontaneity of private societal dynamics, it sets free what we could call, in Hegelian language, the *indeterminacy of the particular*. In other words, *civil society* – also understood in a fairly Hegelian way – takes control of the programming of the legal code.⁸⁵ This is the reason why transnational legal pluralism seems to get along so well with the principles of private law in its most radical liberal comprehension. Different forms of rationality can easily use private law. Its form – Pashukanis' 'form of law' – can easily be the object of a process of commodification.⁸⁶

Indeed, it seems hard to believe that the *lex mercatoria* is only by accident pictured as 'the' model of such a spontaneous legality that emerges from processes of transnationalization. As has often been argued, the movement towards the globalization of *commercial litigation* blasts the old schemes of territorial adjudication,⁸⁷ and thereby even a *judicial review* can become a '*private good*'.⁸⁸ As Teubner shows, the paradox of contract can be made invisible by means of peculiar semantics,⁸⁹ which does not take into consideration the language of public law and the idea of the political sovereignty of the people.⁹⁰ The old basis of private law serves as the paradigm of a societal constitutionalism of contract law, in which the domain of the particular over the universal is the task of a continuous reproduction of legal communication on the basis of very

78 See Teubner, *supra* note 6, pp. 27-28.

79 *Ibid.*, pp. 24-27.

80 Teubner, in a quite philosophical formulation, relies on what he calls the 'transcendence formula of law'. See G. Teubner, 'Self-subversive Justice: Contingency or Transcendence formula of law?', 2009 *The Modern Law review* 72, no. 1, pp. 1-23.

81 See Fischer-Lescano & Teubner, *supra* note 4, pp. 57-65.

82 See Teubner *supra* note 55. See also P. Zumbansen, 'Neither "Public" nor "Private", "National" nor "International": Transnational Corporate Governance from a Legal Pluralist Perspective', in *Comparative Research in Law & Political Economy*, Research Paper n. 22/2010, available at: <<http://www.comparativeresearch.net/papers.jsp>> (last visited on 6 January 2011).

83 See Willke, *supra* note 27, pp. 108-109.

84 This debate is reminiscent of the polemic about legal pluralism in Latin America in the early 1980s. For a critical appraisal, see Neves, *supra* note 7. This is certainly not by accident, as Kelsen was the most hated legal scholar among legal pluralists of the so-called '*derecho alternativo*'.

85 See Teubner *supra* note 55.

86 E. Pashukanis, *The General Theory of Law and Marxism*, 2002, pp. 109-134.

87 J. Dammann & H. Hannman, 'Globalizing Commercial Litigation', 2008 *Cornell Law Review* 94, no. 1, pp. 55 et seq.

88 W.M. Landes & R. Posner, 'Adjudication as a Private Good', 1978 *The Journal of Legal Studies* 8, pp. 236 et seq.

89 See Teubner *supra* note 55, pp. 18-22.

90 For a critical approach, see C. Möllers, 'Transnational governance without public law?', in Joerges et al., *supra* note 6, pp. 229-237.

loose mechanisms of coupling with the economic system. Teubner apparently wants to stress that the level of basal self-reference would be enough to make legal paradoxes invisible. As Amstutz points out very effectively, it seems, however, that Teubner remains limited to the observation of the *legal code*, not paying much attention to the *function* that transnational law has to perform and how, on this basis, it copes with its social environment.⁹¹

Further, the *lex mercatoria* is not the only form of the depoliticization and privatization of the self-description of the legal system that we can observe. The rhetoric of private law – what we may also call its semantics – becomes decisive as well in domains that were typical of international and national public law.⁹² Already the emerging rhetoric of global *governance* – often used in opposition to the classic political semantics of *government* – operates to a great extent with the vocabulary of private law.⁹³ Military and humanitarian operations, development policies⁹⁴ and even the use of internal security forces seem to be privatized in a *legal sense*. By this phenomenon is not necessarily meant the privatization of organizational initiative, but instead a semantic transformation and a shift in the legal mindset with regard to the administrative aspects of such activities.⁹⁵ This transformation naturally implies the use of the vocabulary, as well as the legal techniques, of private law.⁹⁶ Different regimes that used to be narrowly coupled with the practices, vocabularies and organizations of the political system – such as administrative law and tax law – may now be described through the *language of contracts*. Even legal disputes with respect to human rights can also be described through the rules of private law.⁹⁷

The reasons for such a methodological transformation are usually deemed to be the advantages of one of the most characteristic features of private law, at least as it used to be understood in the classical Western legal tradition: its capacity to guarantee horizontality and its neutrality concerning the chaotic mishmash of conflicting legal regimes in a world that can no longer only rely on the sovereign force of national constitutions.⁹⁸ Privatization allows a far-reaching delegation of capacities from the political centres of power circulation towards self-regulating legal regimes. The *form of law*, its objective code so to speak, is best expressed in the easily manageable language of private law, as Pashukanis had already noticed.⁹⁹ As a result, complexes of legal norms are no longer comprehended according to the concepts of public law; ‘they might rather be seen as informal regimes – that is to say norms, practices and expectations – restricted to certain spheres defined by their particular form of reproducing their internal functional communication’.¹⁰⁰

91 See Amstutz & Karavas, *supra* note 28. I will come back to this point in the last section.

92 R. Wai, *supra* note 4, pp. 112-115. See also Möllers, *supra* note 90, pp. 329-337.

93 See S. Picciotto, *Constitutionalizing multi-level Governance*, Conference given on Rethinking Constitutionalism in an Era of Globalization and Privatization, available at: <<http://www.esrc.ac.uk/my-esrc/grants/PTA-026-27-0483/outputs/Outputs/Download/08e6be60-6036-4f1c-875d-c974678961e2>>, (last visited on 18 January 2011). See also A. Vasilache, ‘The Rise of Executive Sovereignty in the Era of Globalization’, *Working Paper 03/2009*, Institut für Weltgesellschaft an der Universität Bielefeld, 2009; Möllers, *supra* note 90, pp. 329-330.

94 We can see this very well in the paper by Santos on the judicial reforms proposed by the World Bank for developing countries, always concerned with strengthening private law institutions. See A. Santos, ‘The World Bank’s Uses of the “Rule of Law” Promise in Economic Development’, in A. Santos & D. Trubek (eds.), *The New Law and Economic Development: A critical Appraisal*, 2006, pp. 282-286.

95 A. Vasilache, *The Rise of Executive Sovereignty in the Era of Globalization*, p. 11.

96 D. Caruso, ‘Private Law and State-Making in the Age of Globalization’, 2007 *NYU Journal of International Law and Politics* 12, no. 38, pp. 1-74.

97 *Ibid.*, pp. 33-42.

98 *Ibid.*, p. 31.

99 See Pashukanis, *supra* note 86, pp. 110-117.

100 See Koskeniemi, *supra* note 4, p. 70.

4. The resistance of public international lawyers: the emerging critical semantics on 'legal fragmentation'

The new and gradually dominating emergent semantics of transnational law seems to allow a free rein for the radical fragmentation of the sectarian functional rationalities of the world systems. This is the point at which most criticisms engage. On this basis, fragmented legal regimes are meant to enclose themselves within their correspondingly constitutional orders which, for their part, are neither subjected to the accountability of a global public opinion, nor are they bound by any kind of functional equivalent to the classical system of checks and balances of national constitutionalism.¹⁰¹

Nevertheless, it does not seem to me that it is only due to a traditionalist methodological prejudice that public legal scholars resist conceiving of the possibility of transferring the constitutional idea from the national-political to the post-political context of transnational private regimes.¹⁰² As I understand it, this reaction expresses how such a semantic shift seems to touch upon sensible political matters, concerning the structural conditions for the reproduction of world society. The descriptions of global legal regimes, which constantly appeal to the basic ideas of a privately ruled societal spontaneity, seem to strongly forfeit the old democratic semantics of public law.¹⁰³ In other words, this transformation takes place not only with regard to the very idea of state sovereignty, but also with regard to the principles of the classical democratic theory of law, beginning with the traditional theory of the division of powers. According to the very idea of this theory, there should be a separation between a politically controlled legislature, a politically and legally-bound administration and a legally enclosed judiciary.¹⁰⁴ The legislature would be based on a close relation between law and politics, bound by the legal mechanisms of constitutional law, and the judiciary should then be bound by politically produced legislation, oscillating its argumentative resources within the semantic range provided by the constitutional principles of equality and freedom and by the idea of public interest, what should guarantee a permanent equilibrium between public and private autonomy.¹⁰⁵

As it is easy to realize, transnational organizations like the WTO¹⁰⁶ or the ILO do not have a clear differentiation of those functions, being instead either controlled by a technocratic and

101 T. Prien, *Fragmentierte Volkssouveränität - Recht, Gerechtigkeit und der demokratische Einspruch in der Weltgesellschaft*, Dissertation, Flensburg University, 2008.

102 For Vesting, for instance, the evolutionary idea of a constitution seems to depend on the social 'reality' of a political community. See Vesting, *supra* note 52, pp. 609-626.

103 This is not only a tendency in international or transnational law, as also within national administrative law the keyword 'governance' seems to replace the traditional administrative theory based on the ideas of hierarchy, procedure, impersonal treatment etc. For a critical approach to the idea of an international and a transnational law without public law, see Möllers, *supra* note 90, pp. 329-337.

104 For the classical theory of checks and balances based on the division of powers: J. Madison, 'The Federalist n. 51', in A. Hamilton et al., *The Federalist*, 1961, pp. 347-353.

105 For a contemporary description of the separation of powers and its intrinsic relations with democracy, see Habermas, *supra* note 63, pp. 208-237; See also C. Möllers, *Gewaltgliederung. Legitimation und Dogmatik im nationalen und internationalen Rechtsvergleich*, 2005, pp. 28-40.

106 In the case of the WTO, one could easily observe the current debate about a constitutional resistance of its dispute settlement and its so-called literalism. The appellate bodies would then rely on a strict interpretative literalism, because they do not have clear legitimization methods in the form of a legislative body (or a functional equivalent thereto). W. Magnuson, 'WTO Jurisprudence & Its Critiques: The appellate Body's Anti-Constitutional Resistance', 2010 *Harvard International Law Review Online* 51, pp. 121-154. See also E. Carvalho, 'The decisional juridical discourse of the Appellate Body of the WTO: among treaties and dictionaries as referents', 2007 *International Journal for the Semiotics of Law* 20, pp. 1-26. It could be the case that this anti-constitutional resistance does not mean that there is no process of constitutionalization. Perhaps it would consist of a functional process of constitutionalization. A functional differentiated society that still has democratic semantics at its disposal will fatally read it as a crisis of legitimization, as some scholars may notice. See, for example, Brunkhorst, *supra* note 4.

functionally-oriented judiciary,¹⁰⁷ or by administrative bodies of experts with no clear democratic legitimacy.¹⁰⁸ Indeed, this phenomenon could already be observed on the level of national administrative law, in the privatization of its semantics and in a gradual transition to the language of ‘governance’, which limits the hierarchical state-based powers of legal regulation in favour of a sort of joint decision-making based on cognitive reactions to the behaviour of so-called stakeholders.¹⁰⁹ If we think about transnational law, it seems that this tendency is even more radical: ‘any sort of law that is politically produced turns to be only marginal vis-à-vis the law formulated by legal scholars’,¹¹⁰ although by legal scholars one should not understand academia, but the cognitive-oriented ‘clubs’ of experts, which tend to undertake the management of the legal code.

To understand the phenomenon of this so-called fragmentation and of a possible privatization of the semantics of global law, we should look at public lawyers’ reactions thereto. Such an observation could give us an idea about what is at stake in evolutionary terms in these developments within global law. Here, I would like to point out three phenomena, which are most commonly seen as encroaching tendencies jeopardizing the traditional logics of public law and the basis of democratic constitutional orders. I would then like to identify (a) a *deformalisation of the legal code* that alters the way in which law is programmed, (b) an emerging *managerialism* of legal reproduction, that alters the kind of decision-making process based on the observation of internal contingency that used to be typical of legal positivism, and (c) a process of *network-building* that produces a kind of transnational elite of powerful experts that can bypass political processes and seemingly reduces the range of irritability of the system to its systemic environment.

4.1. Deformalisation of the legal code

In the last few years, some scholars, especially international legal scholars, have been calling attention to the fact that the specialized legal regimes of transnational law do not operate according to the classic form of conditional programming that used to be central to the legal system since its shift to positivism. That is to say, transnational law would dismiss the sort of programming based on conditional sentences like ‘if..., so...’, so typical of national civil and criminal law.¹¹¹ Some scholars use the word ‘*deformalisation*’ to point out new forms of norm production and legal interpretation, according to which a wide range of options are left to the interpreters, who shall hence fulfil these blank clauses taking into consideration the technical demands of (always very particular) functional rationalities.¹¹² The most mentioned example of this kind of loose international legislation is the UN Convention on the Law of the Sea of 1982. Many international lawyers have criticized this treaty because it contains no real rules, but only very broad regulations that leave every substantial decision to the experts.¹¹³ Actually, transnational legal regimes do not need – in fact they do not have at their disposal – the same means of

107 See Möllers, *supra* note 105.

108 See Picciotto, *supra* note 93; Lang & Scott, *supra* note 5, pp. 601-614.

109 See, for instance, Grimm, *supra* note 47, pp. 489-506.

110 See Teubner *supra* note 55.

111 For the concept of conditional programming, see Luhmann, *supra* note 21, pp. 195-198.

112 See Koskenniemi, *supra* note 49, p. 9.

113 M. Koskenniemi, ‘The Politics of International Law’, 1990 *European Journal of International Law* 1, no. 1, p. 28. See also S. Picciotto, ‘Networks in International Economic Integration: Fragmented States and the Dilemmas of Neo-Liberalism’, 1997 *Northwestern Journal of International Law & Business* 17, no. 2-3, pp. 1014-1056.

national state law to enforce their decisions.¹¹⁴ Decisions can mostly be enforced only through the mechanisms of a cooperative *soft law* that is directly coupled with the operative constraints of functional systems. In the case of legal regimes bound by the economic system, the parties concerned tend, for instance, to cooperate on the basis of a calculation of costs and benefits that leads to compliance by means of a technically justified joint decision-making.¹¹⁵ In the case of the cybernetic system of the global networks of communication, the limits to regulation would, for instance, result directly from the structural conditions imposed by the digital computing code.¹¹⁶ This is reflected on the level of the programs, according to which law becomes a soft, manageable, flexible structure, able to be adapted to different and changeable particular realities.

4.2. The rise of 'legal managerialism'

The talk about the rise of a new legal '*managerialism*' has also obtained a great deal of importance in the so-called critical legal debate during the last decade. It expresses itself mostly in the language of 'global governance', which, according to its critics, would supposedly overlook democratic constitutional semantics in favour of a technocratic closure in the language of functional subsystems.¹¹⁷ Concepts exhibiting a quite empty meaning, like *accountability*, *joint decision-making*, *bargaining*,¹¹⁸ all seem to say nothing by saying too much. They actually seem to aim at a gradual replacement of the legitimizing strategies based on democratic constitutional principles – that used to make invisible both the paradox of law and the paradox of power – by apolitical forms of structural coupling between law and other functional systems. As some scholars suggest, world law seems to be rather more of a *cognitive* than a *normative* enterprise.¹¹⁹ Amstutz, for instance, argues that this legal 'Derridian monster' of transnational law would rely on collision norms formulated to regulate conflicts between the fragmented constitutionalized sub-systems of national, transnational and international organizations, such as states, multinational companies and organizations founded by treaties. Such a law would, however, only be a means for adaption and cognitive learning between these normative closed systems and not really a legal system with normative prescriptions in its own right.¹²⁰

114 For the discussion about *soft law* within international law see: V. Heyvaert, *Hybrid Norms in International Law*, London School for Economics: Law, Society and Economy Working Papers 6/2009, available at: <<http://www.lse.ac.uk/collections/law/wps/wps.htm>> (last visited on 12 October 2010).

115 See S. Cassese, 'Administrative Law without the State. The Challenge of Global Regulation', 2005 *NYU Journal of International Law and Politics* 37, pp. 680-684.

116 See Teubner, *supra* note 6.

117 On the power of expertise within global law and governance, see Kennedy, *supra* note 5, pp. 5-28. See also Koskenniemi, *supra* note 49, pp. 1-30; Lang & Scott, *supra* note 5, pp. 610-614.

118 R.O. Keohane, 'Governance in a partially globalized World', in *Power and Governance in a Partially Globalized World*, 2002, pp. 245-271. For an application of this vocabulary to the global constitutionalization of regimes, see Kjaer, *supra* note 43.

119 *Ibid.*; I. Sand, 'Hybrid Law – Law in a Global Society of Differentiation and Change', in Callies et al., *supra* note 4, pp. 871-886. For the distinction between cognitive and normative expectations, see Luhmann, *supra* note 21, pp. 80-83.

120 Amstutz does not make it clear if world law is to be understood as a structural coupling between different regimes. It is however clear that he ascribes to world law the character of an interlegality, which cognitively adapts the plurality of legal regimes to their respective reciprocal internal demands. See Amstutz & Karavas, *supra* note 28, pp. 653-657. This *cognitive shift* seems highly problematic to me, since normative collisions can only be overcome by norms providing *normative expectatives* that can be observed by the concerned systems as part of their code. Any cognitive element would only mean that the normative closure of at least one of the regimes has to be broken. In other words, as used to be the case in any pluralist legal theory, it is not clear whether world law is a 'law in its own right', 'a structural coupling between different regimes' or just 'one more regime struggling for being observed by the others'. As I understand it, to play the role of a *meta-law* – or a sort of *interlegality* – in the sense of Amstutz, global law would have to function either as a global constitution or as a means of breaking the legal autopoiesis of one of the regimes involved in a collision. On the other hand, as a specialized cognitive regime (a kind of 'non legal' legal system) engendering evolutionary adaption, transnational law would be no less than useless, since adaption must be comprehended as a condition for the existence of any system and, as such, is already a characteristic feature of any legal system. In fact, it seems that Kelsen really had very good logical reasons to understand international law in a monist way. See: H. Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts: Beitrag zu einer reinen Rechtslehre*, 1920, pp. 204 et seq.. For him, at least logically, lawyers must comprehend the legal system as a Unitarian system, otherwise it would be impossible to decide. This is the reason why a constitution

Cognitive processes of observation are in fact more adaptive to and thus more suitable for the demands of flexibility, since cognitive learning consists of the change of social expectations of a system according to the observation of respective changes in its environment. Nonetheless, any observation of the environment by an *autopoietic* system can only mean the observation of the system itself. It is then nothing but *hetero-reference* (or *hetero-observation*), being possible only by means of the very improbable evolutionary achievement represented by a structural coupling.¹²¹ In fact, structural couplings are never the result of planning or of conscious creation.

Consequently, as the critics point out, due to the lack of knowledge and time of the formulation processes of traditional legal mechanisms, the experts of the respective ‘functional domains’ would become gradually those who are responsible for legal decisions and norm elaboration.¹²² These decisions, for their part, are to be followed more thanks to the predictable benefits of their compliance to the reproduction of closed functional systems than due to the fact that they are the result of a legally regulated political process of the production of norms.¹²³ The consequence seems to be the intensification of the decay of the semantics of public international law and the triumph of expertise over politics.

4.3. The emergence of transnational networks of elites

Since, in the 1990s, it became clear that the state-centred structure of post-war international organizations seemed no longer able to engender a forced cooperation in the field of world economic regulation,¹²⁴ scholars from the legal and the political sciences then began an attempt to rethink the frameworks of global governance and its decision-making processes, attempting to observe the realities that were taking place not on the surface of organized world politics, but in the underground of an emerging transnational society of individuals and private players.¹²⁵ In this search for alternatives that could be adapted to the increasing fragmentation of the old hegemonic order – above all with the decline of North American hegemony under the framework of the Bretton Woods institutions¹²⁶ –, scholars from the political sciences were enthusiastic about the emergence of so-called *regulatory regimes*, in which cooperation was to be attained through a cognitive convergence of expectations within the decision-making processes of a given area of international relations.¹²⁷

Against a radicalization of these ‘post-hegemonic’ (that is to say radically apolitical and post-national) approaches, some legal scholars called attention to the emergence of transgovernmental networks lying between existing national states and autonomous and politically unbound transnational regimes. For Anne-Marie Slaughter, who seems to be the most important enthusiast of the steering potential of such networks, it would be necessary to stress that ‘the state is not disappearing, but it is rather disaggregating into its component institutions,

always has to come about as a strategy of the invisibilisation of legal paradoxes. For an interesting actualized reading of Kelsen’s monism, see H. Brunkhorst, ‘Kritik am Dualismus des internationalen Recht – Hans Kelsen und die Völkerrechtsrevolution des 20. Jahrhunderts’, in Kreide & Niederberger, *supra* note 4, pp. 30-64. For the logical necessity of the fiction of unity in the legal system, from an actual pragmatic perspective, see Christensen & Fischer-Lescano, *supra* note 57, pp. 8-14.

121 Any relation of causality is only possible through internal processes of ascribing causes and effects. See N. Luhmann, ‘Gleichzeitigkeit und Synchronisation’, in *Soziologische Aufklärung 5. Konstruktivistische Perspektive*, 1990, p. 97; Luhmann *supra* note 10, pp. 107-109, 1138.

122 See Kennedy, *supra* note 5.

123 See Koskenniemi, *supra* note 4, pp. 76-77. Baecker also indicates that there is something like a cognitive shift in the management of medium power. See D. Baecker, ‘The Power to Rule the World’, in Callies et al., *supra* note 4, pp. 673-686.

124 See Keohane, *supra* note 42, p. 49.

125 For a brief view of the development of the debate about the formation of spontaneous transnational networks, see Slaughter, *supra* note 56.

126 See Willke, *supra* note 27, p. 132.

127 See Keohane, *supra* note 42, pp. 57-61.

which are increasingly interacting principally with their foreign counterparts across borders'.¹²⁸ Thus, transnational organizations enclosed in their respective specialized legal regimes would develop a sort of democratic accountability as long as they can provide the formation of networks of officials, diplomats and lawyers. These networks would then be able to strengthen the exchange of information, engendering cooperation and responsiveness in favour of the interests of individuals, NGOs, environmentalists and other actors present on the periphery of organizations, be it at the national, regional or international level.¹²⁹ *Disaggregated democracy* would be a kind of interplay of knowledge and information widening the cognitive possibilities of transnational, international and national regimes.¹³⁰

Despite such an optimistic view of this issue from the so-called *New Haven School*, the critiques seem to rely on strong arguments.¹³¹ From the outset, these networks are often related to the neo-liberal mindset. Accordingly, 'within a neo-liberal perspective, it may be argued that these groupings and interactions begin to create a directly global policy arena, in which issues are increasingly dealt with without first being refracted through the prism of the state and the national interest'.¹³² Networks are then seen as mechanisms, which might bypass the political processes of decision-making of the national states and the politically-based mechanisms of power delegation in international law, typical of the old Westphalian liberal order. As Picciotto argues, according to some of the neo-institutionalist discourses pleading for their benefits, transnational networks would consist exactly of 'an attempt to "depoliticize" issues, by developing technical, scientific, managerial, or professional techniques, based on universalizing discourses, for their resolution'.¹³³ They would consist of an effort to make global governance supposedly 'more rational' and not subject to the wild interests of a Hobbesian natural state, in which every nation only pursues its own interests, executing mercantilist politics, which in the end can only jeopardize the rationality of the global economic order. Legal experts could, on the basis of these networks, build a kind of legal autopoiesis without any sort of *ideological political noise*.

Nonetheless, as has been very well illustrated in the case of the International Monetary Fund (IMF), which is often praised as an excellent case of good governance through 'wise' experts – at least after the Second World War and under the rule of the so-called 'club model'¹³⁴ – these informal networks do not seem to be apolitical at all.¹³⁵ 'The "experts" in 1943-5 were highly political individuals' conducting 'a clandestine foreign policy' that decided key matters such as the IMF quotas based on a political calculation of its possible acceptability, although it was presented 'as objective and scientific to facilitate acceptance'.¹³⁶ If we observe the events in

128 A.-M. Slaughter, *The New World Order*, 1997, p. 18.

129 See Slaughter, *supra* note 56.

130 *Ibid.*

131 See, for instance, D. Zaring, 'Informal Procedure, Hard and Soft, in International Administration', 2004-2005 *Chicago Journal of International Law* 5, no. 2, pp. 547-604; Weiler, *supra* note 5, pp. 191-207. See also Picciotto, *supra* note 113.

132 *Ibid.*

133 *Ibid.*

134 Under the 'club model' Keohane understands a very close cooperation of interests, based on commonly shared values, knowledge and information, between a group of leading diplomats, lawyers or officials. Once one belongs to this 'club', it becomes easier to discuss controversial issues under the same terms and to achieve consensus about regulation options and policies. This was typical of the institutions just after the 2nd World War and has made possible what John Ruggie once called the era of 'embedded liberalism'. See Keohane, *supra* note 118, pp. 219-244.

135 Howse depicts a very similar picture of this fact in the case of the GATT in its early years. I think he is also a little bit too optimistic in relation to the juridification movement that took place in the WTO. Also within this organization the talk is still about a constitutional resistance. See Howse, *supra* note 5.

136 See Picciotto, *supra* note 113. Very similar cases – this time in the formation process of GATT – are mentioned by Weiler. See Weiler, *supra* note 5, pp. 194-195.

Argentina at the beginning of 2000s¹³⁷ or the role of the IMF in the last financial crisis, we should ask why obvious mistakes are being made again and again?¹³⁸

Gunther Teubner tries to make the picture of global law a little less dramatic. As he puts it, such a shift in the legal semantics must not be understood as a dangerous threat to the auto-referential reproduction of law and its responsiveness to the social environment.¹³⁹ Neither the cognitive reprogramming of the legal code, nor the formation of enclosed epistemic legal communities of experts operating in informal networks should be deemed to be the end of *modern democratic autopoietic law*. For Teubner, these evolutionary tendencies are perhaps an interesting push towards the liberation of spontaneously democratic societal dynamics from the constraints of a state order that can only act destructively towards its social environment, given the high level of complexity of world society. Instead of deformalisation, one should call it a multiple and spontaneous reprogramming of the legal code (that would however remain the same everywhere), destroying the old centralization of legal management in national courts. This kind of societal production of law could actually represent a way out of the so-called ‘regulatory trilemma’ in which the national state was entrapped, and that represented a real threat to democratic deliberation.¹⁴⁰ According to this well-known diagnosis, the democratic administration would be exposed to an intrinsic limitation of its regulatory powers under conditions of functional differentiation. Firstly, due to its internal lack of complexity, legal and administrative regulation could become irrelevant to the other sub-system it wants to regulate, thereby having no effect on it – what can then be called a ‘mutual indifference’ between law and social reality. Secondly, through its *creeping legalism*, regulation could damage other systems by inhibiting their capacity to reproduce themselves. Finally, due to an ‘oversocialisation of law’, the legal system could destroy the operative closeness of other sub-systems by limiting their self-reproductive capacity.¹⁴¹

Moreover, Teubner is not unwilling to see the possible problems of the depoliticization of global management. He is seemingly aware of the possible repercussions of the fragmentation of legal rationalities in the amplification of problems of social exclusion in a world society. As he seems to understand it, fragmented legal regimes could produce an internal politicization through processes of the ‘*judicialized dejudicialization*’ of *hard cases*.¹⁴² By making legal collisions between different legal rationalities a problematic issue, transnational courts could be forced to reassess legal issues politically.¹⁴³ Referring to Kelsen, Teubner suggests that ‘every legal conflict consists of a conflict of interests or power, representing thus also a political conflict’ that can also be decided politically.¹⁴⁴ Furthermore, he argues that if the equilibrium

137 Global 21, *Relatório aponta fracasso do FMI*, Available at: <<http://www.global21.com.br/materias/materia.asp?cod=32333&tipo=noticia>> (last visited on 11 December 2010).

138 Independent Evaluation Office of the International Monetary Fund, *IMF Performance in the Run-Up to the Financial and Economic Crisis: IMF Surveillance in 2004–07*, available at: <http://imf-ieo.org/eval/complete/pdf/01102011/Crisis_Report_English.pdf> (last visited on 11 February 2011).

139 See Teubner, *supra* note 55.

140 For the idea of a ‘regulatory trilemma’, see G. Teubner, ‘Juridification: Concepts, Aspects, Limits, Solutions’, in R. Baldwin et al. (eds.), *Socio-Legal Reader on Regulation*, 1998, pp. 406-414.

141 *Ibid.*

142 See Fischer-Lescano & Teubner, *supra* note 4, p. 128.

143 *Ibid.*, p. 128-129.

144 *Ibid.*, p. 130; H. Kelsen, ‘Wer soll der Hüter der Verfassung sein?’, in H. Klecatsky et al., *Die Wiener Rechtstheoretische Schule: ausgewählte Schriften on Hans Kelsen, Adolf Julius Merkl und Alfred Verdross*, 1968, p. 1883. To me, this reference seems to be ironic, since, at least as I understand it, the political dimension of legal decisions - which comes about in every act of interpretation - relies, according to Kelsen, exactly on an almost pragmatic comprehension of the system as a Unitarian order. Kelsen’s argumentation would hardly get along with a legal pluralism which does not ascribe to the judge the power of being, in every act of interpretation, the last expression of a Unitarian legal system.

between the so-called spontaneous civil sector and the organized sector of transnational organizations could be set within a framework that is sufficiently pluralist, then even democratic legitimation would be guaranteed.¹⁴⁵ For him, 'in the nation-state, the glare of the political constitution has been so blinding that the individual constitutions of the civil sectors have not been visible'.¹⁴⁶ As a consequence, many still resist ascribing to societal movements of spontaneous constitutionalization a creative potential for the production of democratic law. In the end, the ideological resistance of public international lawyers would not be much more than an unjustified prejudice that is entirely incompatible with the new conditions of the reproduction of the legal system on a transnational level.

At this point, I would like to insist that I understand the critiques of the dynamics of legal fragmentation as an evolutionary reaction by the semantic structures of world society. These criticisms would mainly result in an evolutionary *negative feedback*. Accordingly, variations, which tend to alter the form of the differentiation of society, are, in principle, negatively selected.¹⁴⁷ Every turning point in social evolution depends on the production of a certain amount of communicative variation that must become sufficiently 'influential' to overcome the natural conservatism of systemic operations.¹⁴⁸ Social systems operate mostly in a conservative way, because they dispose of a semantic structure limiting their range of internal oscillation.¹⁴⁹ We could call such a normative determination of structures by a specific semantics a '*dispositive*', in the sense of Michel Foucault.¹⁵⁰ Innovations can come about either in social structures or in social semantics itself, but they only become part of a new form of social life if they can produce a new positive *feedback*. That is to say, only if they alter sufficiently social structures and social semantics in a way that makes them reproduce their basic differences as a defining difference for the entire system. In other words, the social evolution of the legal system must be reflected not only in the plurality of uses of the code – which has actually always existed – but also in a new dominant self-reflection: a new hegemonic constitutional theory.

Finally, it is important to say that the *self-description of a society* must not register every evolutionary change as a possible political issue. The evolutionary shift from segmented communities to traditional statehood, for instance, was not perceived by societal self-descriptions as a result of political conflict. Rather, it was described as a shift to what Weber described as ethical religions.¹⁵¹ Only in modern times can we understand critical transitions as a political problem.¹⁵² Actually, this might be the reason why the disputes taking place within the constitutional semantics of world society are a sort of evolutionary politicization. Though, it is exactly this evolutionary normative dimension of democratic politics which allows the politicization of the theoretical debate on global constitution(s). Besides that, it allows many other kinds of politicization which are central to the reproduction of functional differentiation.

145 See Teubner, *supra* note 6, p. 18.

146 *Ibid.*, pp. 27-28.

147 For the concepts of negative and positive feedback, see Luhmann, *supra* note 29, pp. 55-56.

148 For the concept of social evolution within a systems theory, see Luhmann *supra* note 10, pp. 413-494.

149 See Luhmann, *supra* note 24, pp. 19-21.

150 M. Foucault, *História da Sexualidade I: A vontade de saber*, pp. 100-113. For this meaning of the concept of *social semantics*, see Stichweh, *supra* note 33, pp. 237-250.

151 A. Nassehi, *Die Zeit der Gesellschaft: Auf dem Weg zu einer soziologischen Theorie der Zeit*, 2008, pp. 259-266. See M. Weber, *Wirtschaft und Gesellschaft, Grundrisse erkennender Soziologie*, 1980, pp. 263-268.

152 R. Koselleck, 'Einleitung', in O. Brunner et al., *Geschichtliche Grundbegriffe. Historisches Lexikon zur politisch-sozialen Sprache in Deutschland*, 1972.

5. A sociological observation of the reasons for the semantic resistance to the rhetoric of 'legal fragmentation': the intrinsic relation between political democracy and functional differentiation

Functional differentiation is far from being a harmless phenomenon. Among its side-effects, there are certainly some of the most traumatic experiences in world history. The dramatic impoverishment of local colonial communities as a result of their 'integration' into global economy,¹⁵³ the persistent racism that, as Foucault argues, should not be seen as a product of a natural fear against otherness, but as a necessary means for the normalizing character of *disciplinary power*,¹⁵⁴ the continuous processes of exploitation on the periphery – as well as the new forms of economic exclusions in the centre regarding migrants – of the economic world system,¹⁵⁵ these are only some of the downside aspects of functional differentiation. Nevertheless, the possibility of politicizing social demands – making, for instance, inclusions/exclusions a social problem – is also a typical achievement of functional differentiation on the basis of democratic political constitutionalism. As far as I am concerned, it seems difficult to believe that fragmented legal regimes with no political constitutions could realize the observation of contingency, which underlies every political decision-making process. In other words, it seems that fragmented world law, based on the pluralist semantics of societal constitutionalism, could be unable to carry out the political problematization of social inclusion/exclusion.

Certainly, one can only hardly believe that, in a highly complex society split into different rationalities, systems, 'cultures' and technical language, it would be possible, from the perspective of political decision-making, to meet sufficient conditions of knowledge for a rational deliberation.¹⁵⁶ Yet, as already seen at the national level, it did not seem to be the task of politics to decide on 'rational standards'.¹⁵⁷ For systems theory as well as for discourse theory, the model of power circulation that really came about in the political reality of complex state administrations did not exactly correspond to the classical model of the division of powers described by Kant and Rousseau.¹⁵⁸ For Habermas, only in very exceptional cases can the specialized and self-referent routine of the fragmented administrative bureaucracy be broken by the direct interference of communicative power.¹⁵⁹ For Luhmann, political decision-making does not have its decision programmes determined by democratic elections. Despite that, its internal oscillation is based on a complex semantic reservoir of differences, in which a broad pool of scripts, differences and values are available. So, instead of becoming a self-referent *black box* without any responsiveness to its social environment, bureaucratic administration can realize a routinization of including practices, which are the result of a particular structural coupling of politics with law and with public opinion.¹⁶⁰ The democratic structural drift of politics, so to say, increases its internal irritability, thereby making the politicization of new issues possible.

Indeed, political decisions cannot be the result of a well-informed cognitive process, in which decision-makers can assess all the complexity of the respective themes. Expert 'consulting' can neither help politics, nor predict the future nor make it easier to decide politically.

153 J.P. Sartre, 'Colonialism is a system', 2001 *Interventions* 3, no. 1, pp. 127-140.

154 M. Foucault, *Em defesa da sociedade*, 1999, pp. 69-73.

155 See Wallerstein, *supra* note 14.

156 See Teubner *supra* note 55.

157 N. Luhmann, *Die Politik der Gesellschaft*, 2000, pp. 142-144.

158 N. Luhmann, *Politische Theorie im Wohlfahrtsstaat*, 1968, pp. 46-50.

159 See Habermas, *supra* note 63, pp. 432-434.

160 See Luhmann, *supra* note 158, pp. 46-50.

(Maybe technical consulting can reduce complexity for other systems, for example, the economy. It would hence increase the probabilities of responsive decisions by the economy, which can sometimes be useful in politics. But, as long as it depoliticizes political decisions, it ceases to contribute to engendering legitimacy – the *contingency formula* of politics.). In fact, *political decision-making* is only possible, because the future always remains unknown: 'Choice is an exploitation of unknowledge' and every decision must be exposed to the *rec sic stantibus* clause.¹⁶¹ Political decision-making consists of a sort of management of contingency; a way to tackle the inexorable 'undecidability' (*Unentscheidbarkeit*) of every decision.¹⁶² Although it can sound as if, under these conditions, democratic politics would be unthinkable, since no decision could be justified through rational means, it is precisely the relation between undecidability and provisority which guarantees that the political system can perform its function. According to Luhmann, the function of the political system consists of guaranteeing the capacity to collectively binding decision-making.¹⁶³ If every decision is to be deemed undecidable, the only way to guarantee the acceptance of its decisions is to rely on a sort of contingency management that can be carried out by all those concerned. In this sense, the radical contingency of decision-making, the absence of any sort of intrinsically valid political aim, implies an *agonism*¹⁶⁴ that functions as a permanent form of inclusion of interests, representing the very condition of any politicization.

As I understand it, this kind of *agonist* observation of contingency (politicization itself) is something that cannot be carried out by the language of hybrid law or by any other decision-making process, which is not based on the language of a democratic political constitution. In other words, neither the civil spontaneous sector formed by functionally specialized organizations that remain as internal phenomena of legal regimes, nor networks of experts that are clubs of well-informed decision-makers can be considered functional equivalents to the plural public opinion of a democratic political system. If the enthusiasts of the depoliticization of global governance miss the point, because they dismiss all too quickly the necessity of observing contingencies as a condition for inclusion and then to the reproduction of functional differentiation, those who support the idea of a private spontaneity of global legal regimes seem to be mistaken – even if they are aware of the importance of including the reproduction of functional systems –, because they see politics where it is unlikely to be found.

In fact, there is a very intimate relationship between *politicization*, *democratization*, *individualization* and the so-called *rise of the public sphere*. A shift from a hierarchical order in which there is a prevalence of the social dimension of meaning (based on a semantics of perfection that ascribes a higher social *status* to one specific stand, or social class) to a functional differentiated order with no centre, in which every difference must be followed by a respective semantic *temporalization of complexity*,¹⁶⁵ which displaces the observation of social hierarchies to the temporal dimension of political decision-making.¹⁶⁶ Such a '*temporalization*' is only the theoretical concept that makes visible a far-reaching process that Koselleck calls a simultaneous '*politicization*', '*ideologization*' and '*democratization*' of decision-making through the formation

161 See Luhmann, *supra* note 157, p. 147.

162 *Ibid.*, p. 152.

163 *Ibid.*, p. 84.

164 To this extent, Mouffe's account is quite accurate. See C. Mouffe, *The democratic Paradox*, 2000, pp. 80-108.

165 For this concept, see N. Luhmann, 'Temporalisierung von Komplexität: Zur Semantik neuzeitlicher Zeitbegriff', in *Gesellschaftsstruktur und Semantik. Studien zur Wissenssoziologie der modernen Gesellschaft, Band 1*, 1980, pp. 235-299.

166 See Luhmann *supra* note 10, pp. 1005-1015.

of a public sphere.¹⁶⁷ After the decay of hierarchical orders, the only form of keeping decisions passive of being collectively binding was to make them rely on the temporalized promise of full inclusion and on a democratic self-description of the political system.

Accordingly, due to its internal differentiation in parties, groups, identities and tendencies, due to its capacity of handling a great amount of – ethnic, cultural, social, classist – interests and values, the democratic political system managed to be the only one that could function as an specialized system of searching for exclusion and the production of inclusion, thereby producing legitimacy.¹⁶⁸ Under functional differentiation, since there is in principle no system that can be deemed to be more important than the others,¹⁶⁹ there is also now no reason for individuals to be excluded from any functional system due to any sort of hierarchical argument – in principle, the inclusion in or exclusion from one social system does not ‘justify’ *per se* other inclusions or exclusions.¹⁷⁰ A functional differentiated society then seems to operate under the necessary supposition of the *full-inclusion of all individuals in all subsystems*.¹⁷¹ Individuals are to be included either in the role of active participants in the system or in the role of passive recipients of the system’s goods.¹⁷² Any exclusions that exist after the complete shift to functional differentiation must be understood as the sole consequence of individual decisions regarding the unfolding process of an individual biography or to mere incapacities of the individual in the internal selections of the respective systems.

The idea of *participatory equality* is thus a corollary of a differentiated democratic political system.¹⁷³ Since individuality has to rely on the individual self-description developed around the concept of an individual career performed over time, it has to count on the support of political principles aiming at social inclusion. Only by the potential inclusion in all functional systems is one able to build a career on the basis of its own selectivity.¹⁷⁴ The so-called ‘trick’ of modernity – which makes it more capable of adapting and in a certain sense is more rational – consists precisely of the fact that politics as well as the public law that emerged from constitutional revolutions were based on the semantics of principles like *equality* and *freedom*.¹⁷⁵ As Luhmann used to stress, these two values have the peculiarity that they do not reveal their own forms.¹⁷⁶ In fact, none of them makes clear what the other sides of their main differences are. One can quickly see the difference between equality and freedom, but it always remains unclear what obtaining more freedom actually means. In other words, one cannot exactly say in advance from what one can be set free. The form ‘*freedom*’ does not reveal its other side: only through artistic imagination, rhetorical appraisal, through a sort of immanent transcendence, is it possible to access the other side of its form.¹⁷⁷ The same assumption is also valid for the case of ‘*equality*’.

167 See Koselleck, *supra* note 152, pp. XVI-XVIII. See also J. Habermas, *Strukturwandel der Öffentlichkeit*, 1962, pp. 200 et seq.

168 See Stichweh, *supra* note 9, p. 77.

169 See Luhmann *supra* note 10, p. 169.

170 See Stichweh, *supra* note 9, pp. 67-73; Farzin, *supra* note 9, pp. 40-49.

171 See Luhmann *supra* note 10, pp. 627-630.

172 See Stichweh, *supra* note 9, pp. 71-73.

173 It reminds us of the concept of *participatory parity* of Nancy Fraser, which, as a semantic enunciation of the internal normative constraints of the political system, is quite appropriate. See N. Fraser, ‘Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation’, in N. Fraser & A. Honneth (eds.), *Redistribution or recognition? A political-philosophical exchange*, 2003, pp. 32-42, 87-89.

174 N. Luhmann, ‘Individuum, Individualität, Individualismus’, in *Gesellschaftsstruktur und Semantik: Studien zur Wissenssoziologie der modernen Gesellschaft, Bd. 3*, 1989, pp. 252-255.

175 See Luhmann *supra* note 10, p. 1076

176 In systems theory, the concept of form is taken from Spencer-Brown. See G. Spencer-Brown, *Laws of Form*, 1972, p. 1. See also Luhmann, *supra* note 29, pp. 70-73.

177 The form inclusion already implies the other side of the form. To this extent, exclusion always remains the blind spot of communication itself. The sectors of exclusion can only be touched upon by communication through metaphorical devices. See S. Farzin, ‘Sichtbarkeit durch Unsichtbarkeit. Die Rhetorik der Exklusion in der Systemtheorie Luhmanns’, 2008 *Soziale Systeme* 14, no. 2, pp. 202-205. However, one

It always remains unclear what must be treated equally in a concrete case, even though one knows the obligation to equally treat equal situations.¹⁷⁸ As communication always has to build a semantics, it determines, on the basis of the meaning of words, what should have the same meaning (then being treated equally). Sometimes, however, one can treat as equal cases that previously used to be considered unequal (because they were of a different character) or one can treat unequally people who expected to be treated equally, then committing an act that would be deemed an injustice by the person concerned. In this case, it would thus be necessary to rebuild the semantics according to which actions and experiences are to be considered equal, possibly by amplifying the meaning of words or creating new meanings.¹⁷⁹ For Luhmann, equality and freedom are proclaimed as a sort of 'blank check to the future'.¹⁸⁰ With regard to the political system, this means that it has to always include new interests that have not yet been considered.¹⁸¹

Public law, for its part, must come about as a supporting strategy for the invisibilisation of the paradox of individuality that arises as a consequence of functional differentiation.¹⁸² As Luhmann puts it: 'Individuals owe their individuality to the unity between law and politics, and this unity is inextricably bound to the individual character of individuality'.¹⁸³ If Teubner stresses the defensive (negative) character of the positivization of civil rights vis-à-vis the totalitarian traits associated with the expansion of the political system,¹⁸⁴ I think that we should go back to Habermas and also stress their positive political dimension as a condition of individualization and of the politicization of exclusions. Accordingly, we should also see 'civil' as the result of the revolutionary foundation of a democratic community through the *pouvoir constituant* and as a condition of political and legal democratic decision-making.¹⁸⁵ Certainly, communicative freedom means that one can participate, but also that one has the right not to participate.¹⁸⁶ The possibility of positive participation is, however, a condition of political legitimization and it cannot depend on the internal conditions of inclusion or the inclusion of other sub-system – like the economy or science –, as seems to be the case in the spontaneous civil sector of functional legal regimes. The so-called disorganized civil sectors depend on the internal conditions of the inclusion of a particular functional system to have its interests considered and then politicized – otherwise they cannot even propose a lawsuit. On the other hand, the positive dimension of human rights consists not of its dependence on statehood, but of its intrinsic relation to democratic decision-making.¹⁸⁷ It consists of the fact that, after the revolutionary achievement of a

must here make a distinction between exclusions in the objective dimension of meaning (which always remain as the blind spot of communication itself, as a *black hole* where nothing can be seen), and exclusions which take place in the social dimension of meaning. (For this point, see A. Nassehi, 'Die Theorie funktionaler Differenzierung im Horizont ihrer Kritik', 2004 *Zeitschrift für Soziologie* 33, no. 2, p. 111). In this sense, there are always exclusions of some functional systems, although it does not mean the exclusion of society as a whole. The way the functional differentiated society deals with this problem is by setting the preference value of the inclusion/exclusion form of the political system on the side of inclusion. As Stichweh puts it, under democratic conditions the political system then turns out to be a *search machine* for exclusions. See Stichweh, supra note 9, pp. 78-79.

178 See Luhmann supra note 10, p. 1076.

179 Wellmer develops this argumentation in detail in a very interesting way: A. Wellmer, *Ethik und Dialog, Elemente des moralischen Urteils bei Kant und in der Diskursethik*, Frankfurt, 1986.

180 Ibid. It reminds us, even if only approximately, of the Habermasian comprehension of the dialectic of equality within the democratic Rule of Law. See Habermas, supra note 63, pp. 493-515.

181 See R. Nichelmann, *Form und Funktion der „freiheitlichen demokratischen Grundordnung“*, Dissertation, Technische Universität Dresden, 2009, pp. 126-131.

182 See Luhmann, supra note 174, p. 257.

183 See Luhmann, supra note 21, p. 411.

184 G. Teubner, 'The Anonymous Matrix: Human Rights Violations by "Private" Transnational Actors', 2006 *The Modern Law Review* 69, no. 3, pp. 336-338.

185 See Habermas, supra note 63, pp. 151-166.

186 Ibid., p. 152.

187 C. Möllers, *Staat als Argument*, 2000.

constitutional foundation, inclusion cannot be the result of ‘accidental’ concessions, but has to be the object of permanent problematization and the consequence of the positive activity of politics.

Without a certain level of inclusion, it is impossible to guarantee that individuality is the result of a temporal unfolding process of individual self-description. If we observe the history of the self-descriptions of both the political and the legal system, we realize how the comprehension of human rights has been extended from the very narrow catalogue of private rights of defence against the state and of freedom to contract to a more comprehensive conception that includes social and political rights.¹⁸⁸ The contradictions between an economic and a political system that can do nothing but reproduce inequality and economic constraints to individual freedom led to what Habermas once called a ‘*dialectics of equality*’.¹⁸⁹ Accordingly, politics should intervene, through law, in the functional systems, pursuing the continuous amplification of inclusion, in order to guarantee participatory parity.¹⁹⁰ In other words, modern individuality needs the additional semantic support of including politics and public law to guarantee its conditions of reproduction. This is the ‘*double movement*’¹⁹¹ implied in legal and political Liberalism; a movement that could actually be considered a condition of the full differentiation of law and politics and, in the long run, of legal autopoiesis itself.

6. Inclusion/exclusion and functional global constitutions: evolutionary bifurcations in the world society

As I have already argued, the critical reaction of public international lawyers against the different emerging constitutional semantics of fragmented global law seems to be a response to its privatization. This resistant attitude has deep roots in the form of differentiation of world society and, as I see it, represents a *negative feedback* for any shift in the constitutional semantics tending to hide the contingency of political decision-making and the democratic production of legal norms. The reasons for the reaction may thus rely on the fact that the current debate on *global governance* and *global law* seems to understand globalization under a neoliberal framework that leaves not so hopeful alternatives to democracy as the valid self-description of law and politics. In other words, it seems that we are at the forefront of a decisive bifurcation in the evolution of world society.

On the one hand, if world society does not base the management of political and legal operations on democratic semantics (as seems to be the case for some theorists from the political theory of transnational regimes), there would be apparently no means available for keeping the promise of total inclusion in the future, and hence for guaranteeing the respective scandalization of social exclusion (and thus the internal including dynamics of a political transcendence of law¹⁹²).

188 R. Alexy, *Theorie der Grundrechte*, 1986, pp. 377-389. See also T. H. Marshall, ‘Staatsbürgerrechts und soziale Klassen’, in *Bürgerrechte und soziale Klassen*, 1992, pp. 33-94.

189 See Habermas, *supra* note 63, pp. 493-515.

190 See Luhmann, *supra* note 13, pp. 230-232.

191 K. Polanyi, *The Great Transformation: The political and economic origins of our time*, 1944, Chapter 12.

192 Teubner seems to bet on the general politicization of legal decisions as if it would be only a question of internal transcendence and nothing else. See Teubner, *supra* note 80.

On the other hand, an internal politicization relying on either (a) a kind of 'symbolic force of human rights'¹⁹³ engendering scandalization within a so-called *weak public opinion*,¹⁹⁴ or (b) the so-called societal dimension of human rights,¹⁹⁵ does not seem to be enough to guarantee the same kind of observation of contingency that was possible within the political system of democratic constitutionalism.

(a) As a *pool* of values, having only of a sort of *noisy* symbolic force at its disposal, the idea of human rights is unable to produce the internal oscillation that only an active public sphere is able to generate. As we all know, a symbolic catalogue of formally equal human rights was already present in the legal semantics of North American constitutionalism. Yet, slavery was legally accepted until 1863, and a far-reaching – legally based – exclusion of Afro-Americans from many subsystems was to be seen until the 1960s in the USA.¹⁹⁶ Only politics, democracy and active (positive) participation made new levels of social inclusion possible, as well as the amplification of what should be considered as equal in a legal sense.¹⁹⁷

(b) Besides, it seems doubtful whether autonomous legal regimes could develop a *semantic pool*¹⁹⁸ of internal differentiations that could produce enough irritability for its human and social environments, as if they thus dispose of a sort of functional equivalent to democratic politics. As I have suggested above (in Section 3), it is not by accident that transnational law often relies on the semantics of private law. A self-description based on a *semantic pool* that is typical of the principles of private law provides, in fact, a high level of social 'disintegration'¹⁹⁹ for the legal system. Such disintegration seems to be an exigence to the emergence of a 'law beyond the state' and, as such, to the pluralist mindset of the celebrative rhetoric of legal fragmentation.

Actually, the idea of interlegality, based on the neutral language of private law,²⁰⁰ should be able to provide enough cognitive irritability between the plurality of regimes, as well as between them and psychic systems (individuals). This would be necessary, since the multitude of autopoietic systems have neither a sort of common language to which law, as an Unitarian system, can couple, then being able to be irritable by psychic and other subsystems, nor they count on politics as a system specialized in producing inclusion, thanks to its particular temporalized democratic self-description. Instead, under the conditions of such a legal pluralist mindset, we must understand that there is a multitude of agents and organizations – NGOs, social networks, individuals, states, national, transnational and international organizations – which must be able to build reciprocal irritability through the language of transnational interlegality. Accordingly, they will produce an interesting relationship. The organizations of world society, each having its own legal regime, would reciprocally represent towards each other an organized and a spontaneous sector. That is to say, if one of its legal regimes is at stake – let us say the WTO regime – all other regimes – let us say states, national and transnational NGOs as well as individuals – would represent its periphery: the 'spontaneous civil sector' of the respective

193 M. Neves, 'Die symbolische Kraft der Menschenrechte', 2005 *Archiv für Rechts- und Sozialphilosophie (ARSP)* 90, no. 2, pp. 159-187.

194 See A. Fischer-Lescano, 'Globalverfassung: Verfassung der Weltgesellschaft', 2009 *Archiv für Rechts- und Sozialphilosophie (ARSP)* 88, pp. 358-371.

195 See Teubner, *supra* note 184.

196 This example, used in this context, is taken from Neves, *supra* note 61, p. 487.

197 For the idea of legal equality in systems theory, see Luhmann, *supra* note 21, pp. 110-117. An extremely interesting philosophical debate about the expansion of the semantics of equality is to be found in Wellmer, *supra* note 179.

198 For the idea of a *semantic pool* of differences that provides possibilities for structural coupling, see Stichweh, *supra* note 33.

199 Within systems theory, 'social integration' is understood as the amount of freedom to carry out a system's own selectivity vis-à-vis other systems. The most numerous are the structural couplings to which a social system is exposed, the more it is integrated. For this concept, see Luhmann *supra* note 10, pp. 602-603.

200 See Wai, *supra* note 4.

regime. The same can happen if one national legal system must come to a decision that concerns transnational organizations and that affects the interests of, say, farmers in some other country.

As perfect as this image may appear, the truth is that the rules (the internal normative expectations) regulating the conditions under which this so-called ‘civil sector’ can be structurally coupled to the legal system depend exclusively on the conditions imposed by the respective functional system which the regime is meant to regulate. The conditions of inclusion in the human rights regime are very different from the conditions of inclusion, say, as a ‘stakeholder’ in the WTO regime. That is to say, the civil sector is only very indirectly coupled to the legal system: its organizations and social systems depend on the rules of inclusion²⁰¹ of the respective functional system to count as addressees of communication for the legal system.²⁰² Hence, in contrast to the idea of a *hyper-irritable* (and then over-integrated) complex global law, it seems rather that fragmented legal regimes only have their functionally-oriented self-descriptions to build the structural couplings that could guarantee them the necessary social responsiveness. If the legal system, represented by the multiplicity of its codes, becomes quite disintegrated – then having a high degree of freedom to act²⁰³ – the opposite seems to occur with its ‘civil sector’. The actors of the so-called disorganized civil society become highly integrated in the functional systems on which they depend. Hence they have a very limited capacity to communicate, to politicize issues and to change the lines of argumentation within legal processes. This must be so, since they can access the formal paths of legal decision-making only through the narrow conditions for the inclusion of the respective specialized systems. This is the reason why authors like Willke, who are also enthusiastic about pluralist and heterarchic law, insist on interpreting economic scarcity as if it could be a functional equivalent of democratic legitimacy.²⁰⁴ This sort of understanding would enlarge the conditions of inclusion in the transnational economic regimes, making possible the internal politicization of upcoming problems.

Nevertheless, if we think of the *contingency formulas* of the globalized functional systems of world society – which should limit the blind expansive tendencies of the respective codes – we should accept the fact that they are only bound by the respective functional rationality of the subsystem to which the legal regime is coupled. Also Teubner’s idea of a *transcendence formula* of law seems to exactly address this problem.²⁰⁵ However, with all the limitations of the *contingency formula* of politics – *legitimacy*²⁰⁶ – this was exactly the function of the political system under democratic constitutionalism: to guarantee the capacity of binding collective decision-making by continuously searching for exclusions and producing inclusion.²⁰⁷ Through constitutional structural coupling, politics could also amplify the internal semantics of legal equality. Furthermore, if economics, whose *contingency formula consists* of the figure of *scarcity*, also became ‘socially responsible’, it was only possible on the basis of political democratization.

As I understand it, no matter how surprising it seems, legal regimes based on private transnational interlegality have a much lesser irritability than the old – national or international – public law. In other words, its semantics does not provide the wide ranges of oscillation that were possible within the princiology of democratic constitutionalism. In fact, although the

201 On the relation between socialisation and inclusion as a form of structural coupling (in this case *interpenetration*) of the psychic system with social systems, see Luhmann, *supra* note 174, pp. 162-165.

202 See Teubner, *supra* note 184, pp. 338-342.

203 See Luhmann *supra* note 10, p. 618.

204 See Willke, *supra* note 27, pp. 108-117.

205 See Teubner, *supra* note 80.

206 See Luhmann, *supra* note 157, pp. 118-126.

207 *Ibid.*, p. 121. See also Stichweh, *supra* note 9, pp. 71-73.

'foundations of private law'²⁰⁸ today seem to rely on a kind of embedded liberalism, its formal structure, the 'form of law', can easily be the object of what Marxist theoreticians used to call a process of 'legal commodification'.²⁰⁹ Indeed, since the Romans the principle of the '*prohibition of unjust enrichment*' has been understood as the corollary of loose-coupled commutative justice.²¹⁰ The unproblematic and a-temporal conception of equality implied in this conception of justice was an evolutionary achievement that was, already in its origins, connected with social exchanges, from which monetary economics originated. This is the reason why Pashukanis affirms that private law is the bourgeois law *par excellence*.²¹¹ It is based on the abstract idea of equality, understood as a natural premise of social life.²¹² Nonetheless, it is exactly against the 'deaf' obstinacy of the only 'insufficiently' responsive '*contingency formula*' of economic law that public law carries out a reprogramming of the legal figure of *unjust enrichment*. Under the realms of contemporary constitutional law its prohibition then turns out to consist of a possibly suitable right, which relies on an *objective cause of action* established by statutory law and not of the given equality between contracting parts.²¹³ As a consequence, it has been broadly relativized by egalitarian principles of redistribution, brought to reality by the compound formed by tax law and public policies.²¹⁴

If I understand it correctly, it seems that the shift towards a multiplicity of different semantics, each of them related to a particular functional legal regime disposing only of its own rationality, jeopardizes exactly the necessary conditions that were intrinsically related to the process of the temporalization of individuality. Social responsiveness, on the part of these fragmented legal regimes, used to be grounded on a kind of private transnational interlegality that can hardly play the role of a *functional equivalent* to democratic constitutionalism. If the legal system no longer has the means of being – at least symbolically – irritable by problems of inclusion, one must then ask whether it is not possible that, *in the long run*, the difference between inclusion/exclusion could become a code with the power to reprogram all other codes of functional differentiated sub-systems.²¹⁵

The internal semantics of global law, in order to be able to carry out the functional imperatives of political inclusion, must have a democratic self-description at its disposal. The legal code must remain limited to its closed recursivity also on the global level. But the management of legal validity must be sufficiently open to allow legal politicization on the ground of an including semantics that can encompass the paradoxes of private and public interests. This is the condition of *politicization* itself. In other words, the legal system, to play the role of a functional equivalent of democratic politics, must allow enough internal oscillation, guaranteeing that emerging interests can be represented, expressed and considered as politically relevant.

The constitutional semantics of democracy could perhaps be replaced by a functional equivalent. Nevertheless, a functional equivalent to democracy that corresponds to all its highly sophisticated premises would be nothing but democracy under another name. The task of

208 J. Gordley, *Foundations of Private Law: property, tort, contract, unjust enrichment*, 2006, pp. 25-31.

209 See Pashukanis, *supra* note 86, pp. 109-134. See also C. Mieville, 'The Commodity-Form Theory of International Law: An Introduction', 2004 *Leiden Journal of International Law* 17, pp. 271-276, 281-293.

210 For the history of this principle, see Gordley, *supra* note 208, pp. 419-432.

211 See Pashukanis, *supra* note 86, pp. 109-112, 116-119.

212 *Ibid.*, pp. 110-112

213 This consists of the so-called materialization of private law. See Habermas, *supra* note 63, pp. 484-492.

214 See Luhmann, *supra* note 157, pp. 423-424.

215 We could even speak of the emergence of a new form of differentiation that is not to be confounded with modern functional differentiation. See, for instance, Schroer, *supra* note 11, pp. 33-46. Luhmann himself does not exclude such a hypothesis, see N. Luhmann, 'Beyond Barbarism', 2008 *Soziale Systeme* 14, pp. 38-46.

producing inclusion beyond democratic constitutionalism would require, in Foucault's vocabulary, a peculiar *regime of truth*: a peculiar *dispositif du pouvoir*,²¹⁶ able to reproduce the interdiction of some kinds of internal social exclusions and to allow others subject to the condition that they may be justified as the result of individual decisions or incapacities. In the long run, however, participatory parity must be pursued. It sounds more or less acceptable, depending on how metaphysical our ideas of freedom and equality are. Indeed, since utopian ideas have been entirely temporalized, they must assume the form of constitutional revolutions if they want to realize their 'millenarist ideals' in a mundane dimension. To this extent, utopias are always exposed to the intrinsic excluding dynamics of communication. In other words, freedom must always cope with a *dialectics of enlightenment*²¹⁷ that can only be avoided by its permanent enlargement through the institutionalization of the pursuit for inclusion. This idea we could relate to Piaget's concept of a permanent overture to '*nouveaux possibles*',²¹⁸ which is not so different from the shift to a constructivist self-description of society, with which Luhmann ends his most important book.²¹⁹

If we can still identify something like a *colère publique mondiale* that reacts in an outraged fashion to processes of social exclusion in the world society²²⁰ – mostly with consequences for the national legal and the political systems – we also have to ask what are the ideological mechanisms, that is to say, the hidden paradoxes, which make it possible. As I understand it, the symbolic force of human rights, which indeed still might have a cognitive dimension on this level,²²¹ is a consequence of structural processes of temporalization, democratization and politicization, which hold together with the semantics of democratic constitutionalism. If this particular arrangement of law and politics is to be overcome, then nothing can guarantee that any kind of scandalization will still be possible.

216 See Foucault, supra note 150, pp. 102-113. We could also follow Stäheli's intuition the self-description would also set the boundaries of the system, consisting of a constitutive element of autopoiesis, see Stäheli, supra note 25, pp. 315-339.

217 See Brunkhorst, supra note 59.

218 J. Piaget, *Le possible et le nécessaire. L'évolution des possibles chez l'enfant*, 1981.

219 See Luhmann supra note 10, p. 1128-1143.

220 See Fischer-Lescano, supra note 13, pp. 67-98.

221 See Luhmann, supra note 21, p. 581. See also Fischer-Lescano, supra note 194, pp. 359-365.