Review of Teubner, Constitutional Fragments (OUP 2012)

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What are the dynamics, characteristics, and politics of a “constitutionalism beyond the nation state” - a constitutionalism not just outside state borders, but also outside the sphere of institutionalized politics, in the “private” sectors of global society? These are the questions Gunther Teubner sets out to answer in *Constitutional Fragments*.

Teubner presents his analysis in the form of a “sociological theory of societal constitutionalism”, intended as a challenge to both familiar laments over the decline of constitutionalism under conditions of globalization and to calls for an ambitious “compensatory constitutionalization of world society” (pp.2-3). At the heart of this theory lies a sociological view of the dual functions of constitutions as the “foundation of an autonomous order and its self-limitation” (p.18). State constitutions in liberal-democratic systems fulfil these functions for institutionalized politics. They constitute an autonomous political sphere by way of the reflexive application of power to power. That autonomy is then stabilized through law, which formalizes the medium of political power (pp.17, 75). But this dual function of strengthening autonomy and capacities for self-limitation - the constitutional genus - Teubner claims, is equally relevant in other social sectors. There, “sectorial constitutions” - the constitutions of the economy, of science, the media, and the health system, for example - all perform a “parallel constitutive function” of “securing the autonomy of their own specific medium” (pp.10, 18, 75).

*Constitutional Fragments* offers an exhilarating grand tour among these sectorial constitutions, revealing unfamiliar facets to a wide range of canonical topics in public law along the way. But Teubner also goes beyond sociological description to set out an important normative agenda. If political constitutions constrain political systems, he asks, “does a societal constitutionalism have the potential to stem the current - and no less problematic - expansionist tendencies of numerous other social subsystems when they endanger the integrity of individuals and institutions?” (pp.4, 41). The combination of these two projects - sociological and political - constitutes one of the book’s main attractions. It is also, at least in the opinion of this reviewer, the source of some tensions, in ways to be discussed more fully below.
Teubner begins his account in Ch.2 by sketching the basic features of sectorial constitutionalism within nation states. The main concern for this chapter is to present a severely constrained conception of the role of the state in relation to civil society constitutions. Rejecting what he calls a “statist” societal constitutionalism, Teubner instead favours allowing different areas of society “a constitutionalization of their own” - a constitutionalization, which would respect their “independent rationalities and normativities” (p.30). Chapter 3 extends this analysis to the transnational sphere. Here, Teubner rejects both the illusion of a “constitutional emptiness of the transnational” and the idea of a comprehensive constitutionalization through international public law (pp.7, 49-50). Instead, “[i]n the sea of globality, only islands of the constitutional will emerge”, by way of the “strange new phenomenon” of the “self-constitutionalization of global orders without a state” (pp.52-53; emphasis in original). The strongest potential candidates for such self-constitutionalization, Teubner argues, are “transnational regimes” - “sets of principles, norms, rules, and decision-making procedures around which actors” expectations converge in a given cause-area” (p.58), and it is with these regime constitutions that the remainder of the book is concerned.

These constitutions, as shown mainly in Chs. 3 and 4, are at once compellingly familiar and utterly strange to traditional public law conceptions. “Constitution”, on this systems-theoretical view, becomes “a living process: the self-identification of a social system with the assistance of the law” (pp.62, 71). In a description borrowed from Larry Catá Backer: “[c]ontract replaces law; networks of relationships replace a political community; interest replaces territory; the regulated becomes the regulator” (p.47). Regime constitutions are neither purely legal nor purely social, but always “double” phenomena (p.106). They do not obey to any either/or logic in terms of the public/private boundary, but rather “reconstruct” this distinction within each social sector, replacing an “outdated dualism with more complex models of a plural differentiation” (pp.29, 115). The “paradoxical relation of pouvoir constituant/pouvoir constitué”, far from being unique to political constitutionalism, has its equivalents in the way “other social systems, too, establish themselves through self-referential processes by which, ex nihilo, they constitute their own autonomy” (pp.60, 65). And although regime constitutions are, of course, political, theirs is a “politics outside politics”, not to be confused with, or modelled on, state democratic processes. “They
are not part of society’s political constitution and yet they are a highly political matter for society” (pp.28-33, 114-122).

This broad overview of the characteristics of societal constitutionalism in both its domestic and transnational settings forms the background to the final three chapters of *Constitutional Fragments*. Chapter 4 looks in more detail at the functions and processes of transnational societal constitutionalism. Chapter 5 offers a case study on the reinterpretation of fundamental rights as means of societal constitutionalism. And Chapter 6 deals with the topic of “collisions” between the constitutional fragments in the global sphere and the development of a new kind of constitutional conflicts of law.

Chapter 4 begins with a simple enough summary of what has gone before: if political constitutions fulfil “the constitutive function of securing the autonomy of politics” by “formalizing the medium of political power”, then sectorial societal constitutions fulfil the parallel constitutive function of “securing the autonomy of their specific medium”, often on a global scale (p.75). But then the direction of the argument shifts somewhat. “What is striking about the constitutions of the functional global regimes”, Teubner writes, “is how exclusively they promoted [the] constitutive function in the last few years - that is, how their attention focused solely on the institutional conditions for their autonomy”. An overriding obsession with dismantling national boundaries, in Teubner’s view, has engendered nothing less than a “worldwide ‘neo-liberal’ constitutionalization, aimed at achieving the autonomy of social subsystems (and of global markets in particular)” (p.76-77). In the longer term, however, this “one-sided ‘neo-liberal’ reduction of global constitutionalism to its constitutive function cannot be sustained” (p.78). And so, the central problematic of transnational societal constitutionalism emerges: “How can a sufficiently large degree of external pressure be generated on the subsystems to push them into self-limitations on their options”, in order to limit their “endogenous tendencies towards self-destruction and environmental damage”? (pp.84-86). On this point, Ch.4 discusses a number of different limiting strategies, especially in relation to the economy, such as the development of “sites of political reflection” to foster “internal politicization”, and changes to the “inner constitution” of global finance through direct intervention in the monetary mechanism (pp.119, 88, 97-102). Chapter 5 adds to this an analysis of fundamental rights as “social and legal counter-institutions to the expansionist tendencies of social systems” (p.143).
Chapter 6 describes how, “[i]n a world society with neither apex or centre, there is just one way remaining to handle inter-constitutional conflicts”. This is by way of a “strictly heterarchical”, “decentralized” method of conflict resolution; a “meta-constitutionalism” which puts pressure on different social subsystems “to develop a stronger regard for the overall social environment” (pp.152-153). In such a setting, the idea of a comprehensive, unitary “political formula of the public interest” is replaced by a multiplicity of formulas of “ordre public transnational”, generated within each individual regime (p.161). The guiding principles for this new form of conflict of laws, in Teubner’s view, should be those of “indigenous self-determination” and of “regime-specific sustainability” (pp.167, 173). “The high autonomy of global function systems”, Teubner concludes, “demands a new type of sustainability and a new sensitivity for their environments”. And it is precisely such an “intensified sustainability” - a “tightrope walk, along the border between system and environment, considering both equally in order to balance their reciprocal effects” - that societal constitutionalism aims to effectuate (p.173).

To call Teubner’s account rich and complex would be an understatement - its choice of a Homeric epitaph, referring to Odysseus’ strategy of self-constraint in navigating the songs of the Sirens, is entirely befitting the scale of its ambition, and its achievements. Both this richness and this complexity, as mentioned above, to a large extent stem from the audacious attempt to combine a rigorously sociological, systems-theoretical view of the institutions and processes of societal constitutionalism, with normative claims relating to its politics (see e.g. p.9). These two accounts do, however, pull in very different directions. Systems theory, on the one hand, has no space for individual and collective actors and their values and interests (Teubner warily notes the familiar objection that this perspective “de-humanizes”, at p.62). But it is precisely such authors, actors, values, and interests that Teubner’s political argument - his manifesto for instilling “environmental responsibilities” in out-of-control social subsystems - cries out for. The resulting tensions are visible in various ways throughout the book. One micro-level manifestation, for example, is that a relevant subject is often difficult to identify, either because of the frequent use of passive tenses (“combating unrestrained liberalization has become indispensable”), or because of rapid shifts between the impersonal (“sub-constitutions do not strive towards a stable balance”) and the personal (“Our objective would be to … multiply the sites at which decisions could be
seen and contested”). Most often, though, it is “societal constitutionalism” itself that figures as subject - a subject with a dual “agenda” of “allowing” autonomy and “coercing” self-restraint. That agenda, of course, cannot be a neutral one. This much is borne out by the overall structure of Constitutional Fragments: Ch.2, on societal constitutions within nation states, heavily emphasizes the case for their autonomy, while Chs 4 to 6, on transnational societal constitutionalism, are preoccupied with (self-)limitation. The formulas Teubner uses to integrate these two projects - the idea of “autonomy as constitutively linked to responsibility vis-à-vis the whole and others”; notions of “balance” and of “constitutional tolerance” - cannot hide the fact that value choices are required (pp.71, 84, 158). These choices, though, are not acknowledged explicitly. As a result, it is not always entirely clear whether Teubner is describing inevitable social processes, defending normative positions, or doing both. Consider, for example, the important question of whether “the political constitution of the state [should] not have the privilege of regulating the fundamental structures of social sub-spheres?”. Teubner’s answer slips from the empirical - the “fundamental structures of modernity” make political coordination impossible - to the normative - “[s]ocietal constitutionalism opposes the centralization of fundamental socio-political issues in the political system” (pp.115-121). But such slippage raises the question of whether the sociological account and the normative project could not both be strengthened by somewhat clearer distinctions.

Doing that, though, must be easier said than done. And to be fair: Teubner should certainly be allowed to demand some tolerance for causal uncertainty and familiarity with paradox from his sociologist and lawyer readers. Constitutional Fragments does recognize many of these difficulties, and at times adopts a noticeably modest tone. “Societal constitutionalism”, Teubner notes, “does a difficult balancing act between external intervention and self-direction”. “No one knows in advance how such a capillary constitutionalization might work in practice” - “there is no alternative but to experiment”. That experimentation will require “a bit of luck” and, most importantly, “institutional imagination” (pp.84-86, 166). It is this imagination that Teubner’s work can only be said to have profoundly enriched.

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