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The Morphogenesis of Constitutionalism

Riccardo Prandini

We are living through a new constitutional era, and we are overwhelmed by strange constitutional–constituent experiences. It is not a time of exceptional politics, as exists during the founding episodes of modern constitutions. It does not represent a demise of constitutionalism, since there is no such unique real thing to be demised. And it does not represent a transmutation because nothing is really mutating: there is only an emerging new form. We are facing a living and latent process of morphogenesis which reframes the very idea of constitution in a way which is more adequate to world society. This is a peculiar phase, which is taking place apparently without popular mobilisations and with difficulties in finding either the constituent powers or the real legal processes of constitutionalisation, and often without clear polities which are to be constituted.

In this chapter I argue that it is possible and necessary to talk about processes of constitutional morphogenesis. Morphogenesis is a socio-cultural cycle, whereby a given institutional and cultural structure (at T_0, here 'the modern constitution') gives rise—through cultural and structural interactions activated by societal actors—to new forms (morphogenesis) or which maintains the old ones (morphostasis). This process is contingent upon a plurality of variables, with nothing to be taken for granted.[1] My hypothesis is that at the centre of this process there are two connected problems: the recognition of a real polity, and its self-governance framed in a constitutional way.

1. FRAMING THE CONSTITUTIONAL FRAME

We need to identify the generative mechanisms that give rise to new and pluralistic forms of civil (non-state) constitution, that is, to discover their morphogenetic logic. This morphogenetic renewal comes from three main causes.

1. *Substantively*, nation states remain the most significant hosts to constitutional discourses, institutions, and structures. Only by starting from the state is it possible to elaborate a new discourse. We need both historical continuity *and* discontinuity.

[1] See M. Archer, *Realist Social Theory: The Morphogenetic Approach* (Cambridge: Cambridge University Press, 1995).

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On the one hand, as the history of constitutionalism shows, there is nothing really *essential* in the relationship between constitutionalism and statehood. On the other hand, state constitutions have become, for different reasons, the real examples of what we mean in a modern sense by constitution.[2] Today, as a new morphogenetic cycle begins, the claims and the advocates of 'societal constitutionalism' often originate from contexts of constituted (non-state/non-modern) polities, which gradually try to elaborate a discourse concerning a new 'good working order'. Constitution, constitutionalism, and constitutionalisation should be conceived as processes in time, which can vary from a minimum level of institutionalisation to a maximum one.

2. *Sociologically*, we need to generalise *and* re-specify the modern constitutional frame. Generalising means separating and abstracting the core concepts of constitutionalism from historical contingencies, and in particular from the modern political system and the state apparatus. Re-specifying means that the generalised elements of constitution must be connected with different global social subsystems, with their specific operations, structures, media, codes, and programmes.

3. *Temporally*, generalisation and re-specification are conceptual operations concerned with the elaboration of a general theory of societal differentiation/evolution. When a social system is pressed by internal and external stresses and strains it has to rearrange itself to cope with the new environmental—whether material, technological, human, cultural, or natural—situation. In this process of active and creative adaptation the system must upgrade its structures and processes by: generating new resources; differentiating new goals and sub-institutions; integrating them inside the new generalised system; and generalising its identity.[3]

For analytical purposes, I propose to freeze the morphogenetic process at a precise historical moment. As Norbert Elias has shown, during the sixteenth and seventeenth centuries the decentralised, plural, autonomous, localised, communal, and diverse socio-political powers of the medieval *Respublica Christiana* were slowly concentrated into a revolutionary institution: the national and absolutist state.[4] Public powers—the ability of making collectively binding decisions—were encaged in a new social subsystem and this gave rise to the modern idea of sovereignty, thickly connected with territoriality and nationality. After the transitional semantic of *Raison d'Etat*, *arcana imperii*, etc, and with the development of notions of public administration, rule of law, democracy, citizenship, and welfare, political power was reframed and limited, with the objective of guaranteeing the multiple processes of social internal differentiation against swamping tendencies. In this process of societal differentiation, constitutions and constitutional discourses were created to structurally couple the political (state) subsystem and the law of

[2] See H. Mohnhaupt and D. Grimm, *Zur Geschichte des Begriffs von der Antike bis zur Gegenwart* (Berlin: Duncker & Humblot, 2002).

[3] T. Parsons, *The System of Modern Societies* (Englewood Cliffs, NJ: Prentice-Hall, 1971); N. Luhmann, *Die Gesellschaft der Gesellschaft* (Frankfurt am Main: Suhrkamp, 1997).

[4] N. Elias, *Über den Prozeß der Zivilisation* (Frankfurt am Main: Suhrkamp, 1977).

(regional) society (see Fig. 15.1). Having abandoned the ancient solutions of *jus eminens* and *lois fondamentales*, the political subsystem had to solve the problem of arbitrariness of decision making and the legal system had to confront the issue of its foundation: the problem of the validity of law. Both subsystems became auto-referential, that is, they operated without any external foundation, whether of natural law, traditional legacies, customs, social stratification, or the will of God. As the fundamental juridical ordering of a (regional) polity, the constitution represented a new legal–political order, and performed the role of distinguishing auto-referentiality from etero-referentiality *within* the political system. With its functions of *constituting* the polity (inventing 'we the people' and transforming legally the *pouvoir constituent* into the nation), *defining* its goals and expectations (the so-called constitutional principle), *attributing*, *separating*, and *limiting* the power inside state institutions (no longer absolute and indivisible, but separable powers and ruled by law) and *regulating* procedures (distinguishing primary and secondary rules, and establishing procedural, jurisdictional, and accountability rules), the modern constitution represented a new frame for ordering territorially organised societies.[5]

As many scholars have emphasised, from a historical point of view constitutions emerge as a counterpart to the emergence of autonomous spheres of action typical for modern societies. As soon as expansionist tendencies arise within the political system, threatening to ruin the process of social differentiation itself, social conflicts emerge, as a consequence of which fundamental rights, as social counter-institutions, are institutionalised precisely where social differentiation was threatened by its own self-destructive tendencies. One effect of this structural coupling is to restrain both legal and political processes' abilities of mutual influence. The possibility of one system being swamped by the other is addressed, their respective autonomies

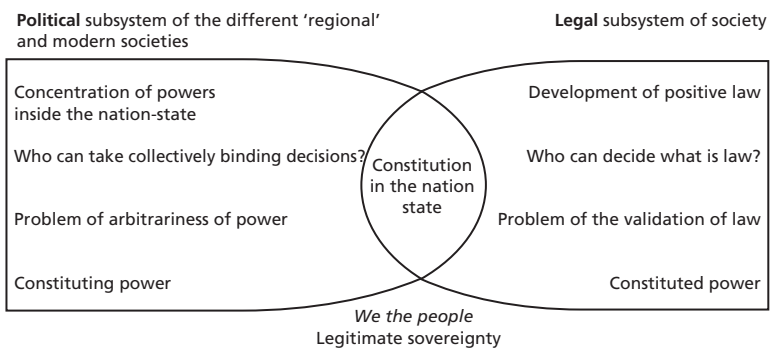

Figure 15.1

The modern structural coupling between the political and legal systems.

[5] Here I connect the substantive-historical argumentation of Neil Walker, with re-elaboration of the Parson's AGIL Scheme, as developed by Luhmann (see Walker in this volume; Parsons, Luhmann, above n 3).

enabled, and mutual irritation concentrated upon narrowly delimited and openly institutionalised paths of influence.[6]

While Luhmann and Teubner have underlined the 'control–integrative' function of the constitution, I believe that the conceptual horizon might be expanded. In fact, constitutions perform four main functions: they (1) *establish* a legitimacy principle for political power, (2) *regulate* the conditions for the real exercise of powers (ie they establish the basic legal norms which comprehensively regulate the social and political life of a polity and usually impose special impediments over unwarranted transformations), (3) *institute* the boundaries between the political system and the other subsystems (eg civil society), and (4) *determine* the ultimate goals of the polity. This modern territorial-state configuration framed the international world, and during the twentieth century exported the idea and the institutions of constitutionalism around the world. Constitutionalism became the most influential frame of reference for a legitimate regulatory framework of any national political community.

II. THE BOUNDLESS DEMANDS OF NORMATIVE EXPECTATIONS AND REGULATION

Why is a new morphogenetic cycle emerging?

The reasons for a new morphogenetic cycle are plural, and they originate from an extraordinary growth in the need to govern, regulate, regularise, and institutionalise the poly-contextuality of social relations.[7] It results from increasing demands of different governance regimes to coordinate communications and actions to achieve collective goals through collaboration. This boundless demand of 'good governance' is a strict corollary of growing systemic contingencies, and it gives rise to a plurality of forms of 'living law'. The state—conceived as the unitary representation of the political system in the territorially bounded society—and its law-making procedures no longer supply adequate responses to these tremendous demands. In a 'generalised anywhere'—the so-called 'atopic' society, a society without an institutional centre—new levels and structures of decision-making capacity and an unrestrainable expansion of positive and negative externalities drive new demands for governance as well as new kinds of regulatory institutions and normative instruments associated with its supply. Decisional powers and controlling powers grow together in an unplanned way, requiring enhanced structures of global governance and accountability similar to the previous constitutionalisation of the absolutist state.

[6] C. Joerges, I.-J. Sand, and G. Teubner (eds), *Transnational Governance and Constitutionalism* (Oxford: Hart, 2004).

[7] G. Teubner and A. Fischer-Lescano, *Regime-Kollisionen: Zur Fragmentierung des Weltrechts* (Frankfurt am Main: Suhrkamp, 2006).

National governments mostly conduct business as usual: the much announced death of the nation state is premature. At the same time, states are not well equipped to supply the normative ordering needed for the development and steering of a world society. Furthermore, it seems improbable that the world will soon switch into a global political community/polity, not even in the cosmopolitan way that Rawls and Habermas have suggested.[8]

In the last phase of the twentieth century, globalisation took off and most of the underpinning conditions of state sovereignty began to change. The modern system of international relations, based on the traditional idea of discrete-territorial political societies maintaining absolute internal sovereignty, is being transformed into a 'multi-level, concatenated network of diverse forces, resources, actors and interests' within a globalising world containing 'many forms of authority, many shades of legitimacy, diverse aspects of accountability and complex arrangements of partial or divisible sovereignty'.[9] This does not mean that states will lose all their powers: it could even enhance their influences in new spheres of action. The problem is that in the age of globalisation social evolution develops through the global extensions of the internal functional differentiation of modern societies beyond the nation states. This world society assumes peculiar forms of self-differentiation: not spatial/regional, but functional. It is differentiated in discrete subsystems: economic, legal, health, art, sport, scientific, etc. And, fuelled by the new media of communications and diffusion, most of these systems are becoming global.

For Luhmann, only the political and legal subsystems can be differentiated in a territorial-state form, because they need territorial boundaries. Within their borders, state politics and law can define and regulate relevant parts of the autonomy of all the other (national) subsystems. But the very existence of those boundaries indicates that the global diffusion of truth, pandemics, health risks, terrorism, education, finance, personal relationships, migration, news, information, or negative externalities cannot be controlled, regulated, or addressed by the state. At the same time, we must distinguish between three different observational operations: *function* as the observation of the whole system, *performance* as the observation from other subsystems, and *reflection* as self-observation. This is necessary in order to distinguish between, on the one hand, the (historical) concept of state as a particular form of reflection (ie auto-observation) on the national political system and, on the other hand, the function of a political system responsible for collective binding decisions. We must also draw a distinction between law as legislation and law as a pluralistic normative process inside the society. The conflation of these two different forms of observation produces only the hypertrophy of the *conscience d'état* and of the legislative-positive law.

[8] P. Niesen and B. Herborth (eds), *Anarchie der kommunikativen Freiheit* (Frankfurt am Main: Suhrkamp, 2007).

[9] J. Agnew, 'Sovereignty Regimes: Territoriality and State Authority in Contemporary World Politics' (2005) 92 *Annals of the Association of American Geographers* 437–61, at 439.

This means that we should speak of a variety of global governance regimes (or self-governance of lateral global subsystems) which are not embedded in the boundary of national territoriality, and that enact processes of collectively binding decision making outside the legislative procedures. In other words, there is no world government, nor global political parties, global elections, or global parliaments; there exists only governance regimes for the global economy (WTO), the world health system (WHO), labour interests (ILO), sport (IOC), etc. Most of these new institutions were created through treaties or agreements between nation states, but have developed autonomously and have bolstered their influence, legitimacy, and expertise by including non-state actors. Global governance does not evolve as a unitary political regime. In the words of Keohane and Nye, 'what we find is not world government, but the existence of regimes of norms, rules and institutions that govern a surprisingly large number of issues in world politics'.[10] We see the emergence of new regimes as specific forms of governance, that is, as 'norms, rules and procedures agreed to in order to regulate an issue-area'.[11]

The cognitive turn of decision-making processes in the knowledge society

According to Helmut Willke, the problem is 'governing the knowledge society', that is, a society that comprises a lateral global system.[12] His basic idea is that the preconditions for sound governance have changed and keep changing with the dynamics of the ongoing transformation from industrial societies to knowledge societies. In this morphogenetic process, the preconditions for decision making are shifting from normative to cognitive foundations. Knowledge is becoming the most important factor of production, surpassing the traditional factors of land, labour, and capital. The most important good today is expertise, that is, hyper-specialised knowledge needed to sustain and legitimate decision making. Politics is not enough! Parliaments are not competent! Politicians are not experts! So what follows?

This cognitive turn is linked to the erosion of the core principles of state government: authority, legitimacy, and accountability. Each of these political elements generalises itself, escapes the boundaries of nation states, and re-specifies itself in lateral global subsystems. In Willke's words:

> Global governance consists in large part in creating governance regimes for global contexts by establishing organizations (institutions), structures, processes and rule systems that have the capabilities to provide intelligent

[10] R. Keohane and J. Nye , 'Introduction', in D. Held and J. Donahue (eds), *Governance in a Globalizing World* (Washington, DC: Brookings Press, 2000), 1–27, at 16.

[11] E. Haas, 'Why Collaborate? Issue-linkage and International Regimes' (1980) 32 *World Politics* 357–405, at 380.

[12] H. Willke, *Smart Governance: Governing the Global Knowledge Society* (Frankfurt am Main: Campus, 2007).

> decisions for highly complex and concatenated problems. Accordingly, a core element of global governance is to create and manage specific organizations as global institutions and cornerstones of global context: the WTO for the global economic system, the WHO for the global health system, the Basel Committee for the global financial system, the World Bank and the IFM for the global developmental context, etc. the crucial resource of all theses institutions is knowledge.[13]

It is important to define the differences between state and non-state political elements. These can be explained by reference to the principles of authority, legitimacy, and accountability. First, state authority is defined by formal rules of inclusion, participation, and representation into a territorial system. There are, however, at least four kinds of authority beyond nation-state arrangements: supranational, private, technical, and popular (global public opinion). The authority of expertise is quite different from state-based authority. Its rules derive from the standard set by knowledge, epistemic, scientific, and practical communities. This knowledge is no longer elaborated within the nation state and its political structures: it develops in private or quasi-public organisations and by the other actors in the area of rule making, arbitration, dispute settlement, standard setting, and organisation of societal sectors.

Second, for modern states the rules of formal legal legitimacy were popular participation, representation, the majority principle, and party competition. Nowadays, new forms of legitimacy are building on this legacy and are beginning to delineate derivatives of formal legitimacy. The most important are knowledge-based legitimacies. State structures of course seek to base their decisions on expert knowledge. But it is increasingly evident that territorial nation states are unable to cope with new global problems; they are unable to develop within their structures the specialised knowledge needed to solve transnational problems.[14]

Various forms of non-state governance, based on new forms of authority, accountability, and derivatives of legitimacy, are needed to complement the work of state institutions in complex and deterritorialised policy arenas in global society. It is sufficiently clear that there does not exist a global level of law-making, only pluralistic processes of juridification. Global law regimes are based on derivatives of legitimacy and diverse *foci* of authority, such as *lex mercatoria*, *lex constructionis*,

[13] Ibid 42.

[14] Ibid 48: 'A few of the global institutions, particularly WTO, WHO, WB, G-30, FSF or BIS and its Basel Committee, make exemplary use of existing expertise and in addition produce relevant knowledge with impressive speed and quality ... the familiar regulatory competition evolves into a pervasive matrix of cooperation and competition among national and transnational policy networks. National democratic political systems, in spite of their unique legitimacy, lose their status of autonomous players with unquestioned sovereignty. Instead they become mutually dependent parts of a complex supra-structure of multi-level political decision-making, ranging from the local to the global level.'

or *lex digitalis*.[15] These are 'living laws' based only on legitimacy acquired through expertise, reputation, fairness, and problem-solving capacity and which depend on mutual voluntary commitment, compliance, and consensus over deliberative fairness. These regimes—which included norms, rules, standards, regulations, and operating procedures such as audit and accounting regulations—are forms of self-organisation of functional arenas of the world society. They apparently lack the core elements of a full-fledged territorial society: the political system with its state sovereignty (the capacity of a public body to act as the final and indivisible seat of authority) and popular sovereignty (the people considered as subjects and objects of the law).

The collectivities—the people—addressed by global law are not defined within state boundaries, but only functionally and operationally. They are communities of choice, of practices and of interests, in which membership is not ascribed but achieved. Some global institutions have acquired reputations as intermediate appellate bodies, such as the International Court of Arbitration or the Appellate Body of the WTO, but they lack an executive branch for enforcement based on the legitimate monopoly of the use of force. Instead, they rely on powers of persuasion, deliberation, expertise, fair procedures, and impartiality. The relevance of these global regimes is so vast that we can now ask: 'what public task (and collective goods) will the democracies of this century be able to organize and implement on the basis of territories, and territorially limited collectives?'[16] Put another way: we are witnessing a new beginning in the morphogenetic cycle, and we can see retrospectively that the state monopoly of political governance is simply a relevant but historical incident of an ongoing process. And, as Anne-Marie Slaughter emphasises, we face for the first time a trilemma of social governance in the form of 'the need to exercise authority at the global level without centralized power but with government officials feeling a responsibility to multiple constituencies rather than to private pressure groups'.[17]

III. BEYOND THE GLOBAL PROCESS OF JURIDIFICATION

Inside the morphogenetic cycle

Fig. 15.2 shows the four-phased process of 'simple' juridification–normativisation. On the left side of the figure, where a new cycle begins opening the box of the established normative system, we find *pressures towards innovation*. This phase derives from the irritations (communications, actions, conflicts, claims, changes in institutions, etc) coming from both (1) internal (the different subsystems of society) and (2) external (individual consciences, bodies, human and ecological nature, etc) environments

[15] S. Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton, NJ: Princeton University Press, 2007).

[16] Willke, above n 12, 95–6.

[17] A.-M. Slaughter, *A New World Order* (Princeton, NJ: Princeton University Press, 2004), 257.

of the normative system. Irritations are new and unexpected normative claims coming from the outside of the normative subsystem of the global society. They are not yet normative events, since they first need to be transformed/translated as normative elements by some mechanism, that is, by the plural 'processes of juridification' developed by the society.

This translation takes place in the upper and central side of Fig. 15.2, where we find the 'processes of conditional opening' of the normative system. It opens itself to the innovations, but only translates them into its peculiar language. Here we find the mechanism of the *selection and recoding* of normative innovations. Law-making—and norm making—takes place outside the modern sources of national and international law: in agreements between global players, in private market regulation by multinational concerns, in internal regulations of international organisations, interorganisational negotiating systems, and through worldwide standardisation processes that come about partly in markets and partly in processes of negotiation among organisations. Regulations and norms are produced by new semi-public, quasi-private, or private actors which respond to the needs of a global society.[18] In the space between states and private entities, self-regulating authorities have multiplied, blurring the distinction between the public sphere of sovereignty and the private domain of particular interests. And legal norms are not only produced within conflict regulation processes by national and international official courts but also within non-political, social, dispute-settling bodies; international organisations; arbitration and mediation schemes; ethical committees; and treaty systems. The 'living laws' developing new jurisgenerative processes and the demands of governance regimes are socially selected and recoded where and when an urgent need of normative expectations and social arbitration emerges and where real competencies to reconstruct normativity develop.

On the right side of the figure, we can observe the third phase of the cycle. It is related to the 'closing' and the 'internal integration' of the previously 'irritated' and then selected normative expectations. In this phase selected innovations are accepted, retained in normative-legal documents, and socially institutionalised. The mechanisms for this institutionalisation concern the reconstruction of law and its methods, the creation of fictive hetero-references, overruling, dogmatic and doctrinal innovative interpretations, and the so-called 'democratic iterations'. These three phases of the new morphogenetic cycle are included inside what I call the sphere of 'living law', the endlessly normative social elaborations which try to respond to the huge and dramatic needs of 'juridification' across the world society.

In order to develop and maintain itself, this 'living law' needs to relate to a cultural pattern, a sort of identity scheme, which retains the function to record and interpret the whole morphogenetic cycle. It is the locus of 'latent pattern maintenance', where the latent meanings of the new laws are elaborated, becoming 'living' and (if necessary) positive laws. Here the normative system combines with the cultural symbolic environment (the 'ultimate reality' in the Weberian sense), that is, the

[18] See Sassen, above n 15.

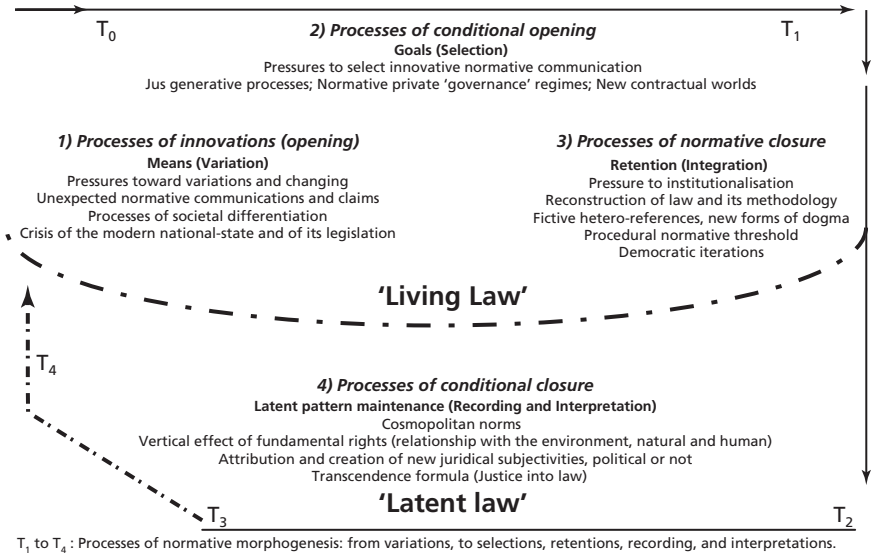

Figure 15.2

stored and maintained cultural symbols that represent the coherent memory of the social system. Not everything is acceptable in a particular (normative) world, so long as the system wants to maintain its internal coherence. Who (or what) decides on the maintenance of normative communications is properly hosted in this *locus* of cultural elaboration and interpretation.[19] It is here that the normative system, often through the production of conflicts, finds its ultimate transcendence and breaks its closure. The best example of this latent pattern of normativity is provided by the elaboration of new human or ecological rights. It is here that, as Seyla Benhabib argues, the emergence of international human rights regimes is intended to protect the individual in a global civil society and to articulate public standards of norm justifications.[20]

Constitutionalisation as a specific sub-process of the global normative morphogenesis

Constitutionalisation is not simply juridification or normative regulation: it is a very different social process. It is a specific and important part of the process of proliferation of diverse, overlapping, and interconnected legal orders at subnational, supranational, international, and private levels. Why is this problem of new constitutional morphogenesis emerging? The starting point (T_0) of the morphogenetic cycle concerns the constitution as the elaboration of a social–political

[19] L. Boltanski and L. Thévenot, *On Justification: Economies of Worth* (Princeton, NJ: Princeton University Press, 2006).

[20] S. Benhabib, *Another Cosmopolitanism* (Oxford: Oxford University Press, 2006).

vision and a frame of normative order in terms of which the state polity identified and regulated itself qua sovereign. Its function was not only to internally regulate the state, its relationships with the other social subsystems and with its environment (through individual rights), but also to define and constitute the polity itself. In the modern age, there is no politics without a constitutional frame and no constitutional law without a political form. The modern constitution is a contingent arrangement which is useful to define and design a specific polity (a collective selfhood, an imagined historical community) and to govern it, bypassing the paradoxes generated by the arbitrariness of power and the validity of law. It is a mechanism which enables the recognition, coordination, assimilation, and self-legitimacy of the legal–political system. If this is true, than we have to answer two fundamental questions. First, are states and their governments the basic units of contemporary political analysis, or must we abandon the idea that the sole centres of constitutional authorities are states? Second, what are the differences between a process of constitutionalisation and a mere process of self-regulation or juridification? I define the first question as the 'problem of the polity' and the second as 'the problem of self-governance'. The two problems are interconnected and represent the elements of what I call the 'relation of constitution' (Fig. 15.3).

To constitute means literally to give shape and form to something.[21] The logic of the 'relation of constitution' is: an *X* constitutes a *Y* at time *T* and only under certain conditions. Constitution does not mean identity of *X* and *Y*. If an *X*, for example

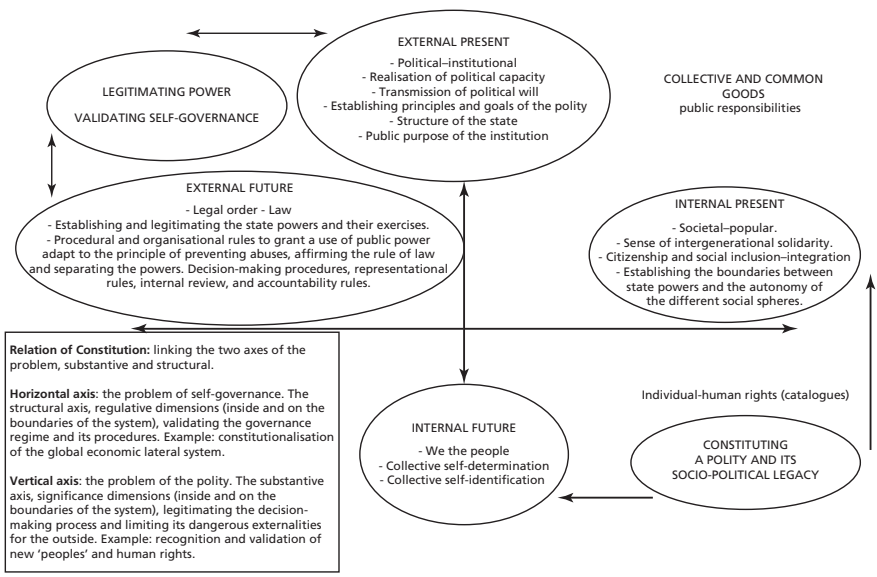

Figure 15.3

[21] L. Rudder Baker, *The Metaphysics of Everyday Life: An Essay in Practical Realism* (Cambridge: Cambridge University Press, 2007).

a group of individuals or of institutions, that in time *T*, within and under specific conditions, constitute a new polity *Y* and supply self-governance, then *X* and *Y* are not the same thing: *Y* is not a mere aggregation of *X*. If a *Y* is emerging, then new ontological powers, objects, and identities are generated. In particular, if we take into consideration a newly constituted polity, we face a new social object, usually inscripted in a normative document or in another form of 'recording'. To constitute a polity—not merely to institute it—means ordering the relations of its members through a self-governing normative order, and to recognise/validate it by way of a peculiar collective identity. The problem of the polity is connected to the issue of the arbitrariness of power (who can take legitimate collectively binding decisions?), and represents the substantive and vertical axis of the problem, linking the constitution of a 'we' with its goals. The problem of self-governance concerns the validity and recognition of law (and of the other normative regimes) and represents the structural and horizontal axis of the problem, linking the legal regulation of the polity with its internal integration.[22] The 'relation of constitution' couples these two axes, linking a specific way of self-governance (the fundamental law) to a recognised-validated polity (the sovereign people). If this does not happen, 'simple' juridification or mere self-governance occurs.

We might stop here, affirming with Neil Walker that in 'societal constitutionalism' the idea of a 'holistic constitution' is lacking in each of the four register-elements.[23] In a sense this is perfectly true, but only if we continue to take as our paradigmatic example a modern 'holistic' definition of the situation: (1) holistic legal order, (2) holistic political institution, (3) holistic societal reference, and (4) holistic popular we-ness. Those who affirm that if we remain inside the modern constitutional frame we can only encourage a proliferation of compensative devices for the four registers both substantively and structurally, are right. Specifically, on the substantive axis we see a franchising of universal human rights and standards of public behaviour and corporate responsibility, and on the structural axis we observe franchising of new modes of governance, the rolling out of democratic experimentalism, and the development of quasi-universal principles. But here we can differentiate two different meanings of societal constitutionalism: a 'defensive' one, where the objective is to protect the human beings—not constituted in a new global polity—from the newly emergent, non-state powers; and a 'pro-active' one, where the accountability, legitimacy, and regulation of the public exercise of power by transnational elites can be demanded by their own functional (and non-state) constituencies.

The vertical axis: generalising and re-specifying the polity

Who are this new 'we' that constitutionalise themselves? In order to answer this question we must again generalise and re-specify the concept of the polity for coping with the new cultures and identities which are emerging outside modern nation-state political sites.

[22] P. Donati, *Teoria relazionale della società* (Milan: Franc Angeli, 1991).

[23] Walker in this volume.

A new polity (not simply a group, or a lobby, or fluid collective movement) starts to constitutionalise itself when it begins to elaborate, in a reflexive way, two connected political issues. First, it seeks to define the we-ness, that is, the identity and the membership of the actors united in the new polity. 'We the people' is the relevant example only within a state democratic frame. At stake here is something more fundamental: the idea that a constitution pertains to a particular societal formation, self-understood, self-identified, and self-integrated as such. Here is the locus of the *pouvoir constituant* that might express itself not in a revolutionary way but, for example, through democratic iterations of specific functional/subsystemic constituencies. Second, it seeks to define the common goals, goods, and mission of the system, and seeks to select the key organs and representatives charged to announce, prescribe, and preserve that political character necessary to make collectively binding decisions. Here we find not a democratic procedure of representation, but expert groups legitimating through acknowledgement of their expertise and problem-solving capacity.

We see these two reflexive elaborations by observing the morphogenesis of a corporate agent into a corporate actor. By corporate agent I mean a group of people who objectively share a specific position in the society (from the point of view of particular 'goods', 'rights', 'status', etc). A corporate agent, always in the plural meaning, is not aware that it is sharing this position with other people (ie representatives): it is an agent *an sich*. A corporate actor, by contrast, is a group of people (or representatives) that not only objectively share something with others but are aware of sharing it: they are a collectivity *für sich*. In a specific sense, a corporate actor is constituted by the self-consciousness to belong to a 'we'. It is constituted by and of a group of individuals which come to think about themselves as a 'we', so that every member can act and reflect by reference to this membership: for example, a member of the WTO, WHO, Basel Committee, or Amnesty International. They belong to a collective identity that is a collective selfhood and not only a collective sameness. Sameness responds to 'What am I?' Selfhood to 'Who am I?'

The collective selfhood of a corporate actor is reflexive in a twofold sense. First, the members of a group consider themselves as a unity that intends to act collectively. Second, the act is undertaken for the sake of the collectivity. This collectivity is simultaneously the object and subject of an act, specifically a subject and the author of the laws. This new identity-constituted corporate actor has to elaborate and institutionalise its own goals and mission and the institutional authority to legitimate (inside the system) binding decisions. A polity is a structure with: the capacity to mobilise persons and resources for specific purposes, a peculiar degree of institutionalisation, specific goals, and a representation of collective identity.

It is useful to address the problem of polity by reference to the work of James Tully.[24] For Tully, the issue is whether or not modern constitutions can recognise the cultural diversity—the strange multiplicity—of their constituencies. In the

[24] J. Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995).

world society, there is a dramatic movement of intercultural voices, organised or not, represented or not, aiming to be constitutionally recognised: nationalist movements, supranational associations, intercultural voices, feminist movements, and indigenous people excluded by the present constitution. These politics of cultural recognition constitute the third phase of anti-imperialism promoted by peoples and cultures who have been excluded by the movements of decolonialisation and constitutional state building. The leitmotif of this new form of constitutional discourse is the aspiration of these 'agents' to self-rule (and so to become a corporate 'actor') in accordance with one's own customs and ways of life. Modern constitutionalism developed around two main forms of recognitions: the equality of independent, self-governing nation states and the equality of individual citizens. But today most of the new polities do not seek to build independent nation states in order to gain independence and self-government. They seek self-rule and recognition within, across, and beyond existing nation states through which they try to mediate two fundamental public goods: freedom and belonging.

The polities of these different and incomparable cultures are not nation states, and contemporary demands for cultural recognition are not of this inclusive type. The modern concepts of people, popular sovereignty, citizenship, unity, equality, and democracy, alongside the modern institutions of parliament, voting, courts, bureaucracy, police, and dissent, all presuppose the uniformity of a nation state with a centralised and unitary system of legal and political institutions. What the liberal, national, and communitarian constitutional modern traditions share is the idea of a culturally homogeneous and sovereign people establishing a constitution through a form of critical negotiation. By a self-conscious agreement, people give rise to a constitution that 'constitutes' the political association. The constitution lays down the fundamental laws which establish the form of government, the rights and duties of citizens, the representative and institutional relation between government and governed, and an amending formula. But today the process of constitutionalisation is more similar to the ancient constitutions, ie processes that do not need a positive and singular act of foundation, but an assemblage of laws, institutions, and customs, derived from certain fixed principles of reason, directed to certain fixed objects for the public good.

Facing the problem of multiplicity 'inside' a singular nation-state constitution, the argumentation of Tully is synthesised by the formula, *audi alteram partem*: that is, be able to understand the multiple narratives (not only national) through which citizens participate in and identify with their (political) associations. Constitutions are chains 'of continual intercultural negotiations and agreements in accordance with conventions of mutual recognition, continuity and consent'.[25] This new 'intercultural' constitutionalism is incompatible not only with the idea of exclusive integrity of the nation (it is compatible with it only if with 'nation' we mean the aspiration to belong to a group of people that governs itself by its own laws and ways) but also with individual freedom conceived in the modern liberal term (it is compatible if it respects the secure belief that what one has to say and do in politics and life is worthwhile)

[25] Ibid 184.

and also with the creation of undemocratic enclaves based on the modern idea of sovereignty, ie a single locus of political power that is absolute.

We have to abstract from the argument of Tully and reflect on the substantive/vertical axis of constitutionalisation. First, in a world society, processes of constitutionalisation will occur specifically when and where there will be a real demand for elaborating, articulating, and empowering areas of social autonomy, and sheltering them against the swamping tendencies of powerful social systems. We can foresee the prevalence of the control-integrative function of the constitution, with its corollary of the development of new human rights and cosmopolitan norms. But, as Tully has shown, there will be also a dramatic demand for self-rule and recognition by new and emerging (identity- or interest-based) polities in the global scale. Second, we will probably witness a sort of de facto process of constitutionalisation where the 'we' will originate indirectly from the need of governance. But with the cultural dialogue going global, we can also expect new and active constituent powers, represented by activists of an emergent global civil society or by the 'citizen' of new and unexpected societal subsystems. Finally, civil constitutions will probably not be produced by some sort of big bang, the spectacular revolutionary act of the constituent assembly, nor will these global regimes have a single original text embodied as a codification in a special constitutional document. On the contrary, civil constitutions will grow through evolutionary processes of long duration.

The horizontal axis: generalising and re-specifying the normative order

In this section I will try to answer the second question: the problem of 'self-governance'. What does it take for procedural norms, or a rule-guided practice of social cooperation, to be recognised as constitutional? Here we find the structural coupling between the juridical and the societal frames. In the first frame we are confronted with all the legal devices that shape a constitution: rule of self-production, self-organisation, self-extension, self-interpretation, self-amendment, self-enforcement, self-discipline, etc, including the rules that specify the terms of an order's internal stratification and those who posit its sovereignty over any external claim to priority. In the second we face the problem of defining the differences, boundaries, and powers between the political–institutional frame and the civil society, including the problem of flexible citizenship and membership.

It will be not predictable whether the new processes of civil constitutionalisation will be identical with the modern one, but the basic point remains the structural coupling between the law (of the different lateral subsystems) and their analytically political representations. Auto-constitutional regimes are defined by their duplication of reflexivity. Secondary rule making in law is combined with fundamental rationality principles in an autonomous social sphere. In different globalised subsystems we can find several emerging elements of a constitution: provisions on the establishment and exercise of decision making (organisational and procedural rules) on the one hand; the definition of individual freedoms, belonging, and societal autonomies (fundamental rights) on the other.

We can observe these emerging elements with the aid of the concept of societal contitutionalism elaborated by David Sciulli.[26] Sciulli is not concerned directly with the problems of democratic political form, the constitutional liberal concerns of separation of powers and human rights. His reflections represent a strong criticism of the idea that non-authoritarian social change is possible only by means of institutions and practices peculiar to Western democracy. Sciulli is searching for a 'social infrastructure'—a collegial form of organisation—capable of supporting a non-authoritarian social development. These collegial formations, that can be found everywhere and not only in Western societies, are not democratic in any formal way. So, the basic argument is that not every non-democratic collegial organisation is immediately authoritarian and that the best defence against authoritarianism is not only what we call constitutional liberal-democracy.

For Sciulli, a modern constitutional state may be relatively egalitarian and yet become everyday more manipulative. He sees a risky drift towards authoritarianism within the institutional setting of modern societies. It manifests itself in four thrusts: (1) fragmentation of logics of action, with the compartmentalisation of separate social spheres; (2) dominance of instrumental calculation across all the different domains; (3) comprehensive replacement of informal coordination with bureaucratic organisation; and (4) increasing confinement in the 'iron cage of servitude to the future', especially in social spheres. This drift has the nature of a dilemma because every conscious attempt to achieve control over the drift gets caught up in this logic. More freedom brings more authoritarian social control. More instrumental action leads to more substantive tendencies to control this action, but this in turn leads to more interpretative conflict. Market 'mock' competition is not able to ensure the balance between actors' subjective interests, as with the formal constitution. Every internal normative restraint (whether substantive, as in group competition, religious proscriptions, or division of powers; or procedural, as with elections and rational–legal enforcement) is impeded, because of its internality to the process of rationalisation itself.

To control this drift, the different actors of a complex society must develop and institutionalise a certain kind of norm, external to the logic of the drift itself, that is, a 'non-rational' normative restraint. Sciulli's seeks to find, within an existing civil society, the external procedural restraints on the inadvertent exercises of power. He locates them in a normative standard of 'reasoned social action' recognised even by competing actors: heterogeneous actors and competing groups are possibly integrated rather than demonstrably controlled within any complex social unit when the shared social duties, being sanctioned within it, can at least be recognised and understood by them in common. This normative threshold indicates the violation of the arbitrariness of power's exercise. It is, from Lon Fuller's perspective, a threshold of law's interpretability. Sciulli shows this empirically through the institutionalisation of various forms of professional conduct, centring on deliberative bodies, research

[26] D. Sciulli, *Theory of Societal Constitutionalism* (Cambridge: Cambridge University Press, 1992).

divisions of corporations, professional associations, universities, etc. These collegial formations are deliberative and professional bodies, wherein heterogeneous actors and competing groups maintain the threshold of interpretability of shared social duties. The sharing of these norms establishes a sort of new and specific polity.

In *Corporate Power in Civil Society*, Sciulli tries to develop an application of the societal constitutionalism to what he calls the American Corporate Judiciary (ACJ), in particular the State Courts of Delaware, California, and New York, which monitors how managers govern publicly traded corporations. For Sciulli the problem for those who remain within the constitutional liberal-social-democratic legacy is that their concepts fail to address manifestations of social authoritarianism, ie purposefully and inadvertently arbitrary exercises of collective power by powerful 'private' actors within civil society. They have difficulty in extending their concepts from the individual's relationship to the state to the individual's relationship to powerful organisations within civil society. They are only able to discuss arbitrary government and not other forms of arbitrary exercises of collective power.[27]

In this sense, the role of the ACJ is to define and limit how corporations may conduct themselves in civil society. In the market-driven culture, the problem of how managers govern the companies is left to competition and self-regulation. The limitations can be only economic, instrumental, and pecuniary in their sanctions. From this point of view there is no problem with the basic institutional design of a democratic society. The real problem is that the companies are the single most significant set of intermediary associations in American society and they have a huge impact not only on their members (or shareholders) but also on the lives of the stakeholders and of other citizens, what Sciulli call 'institutional externalities of corporate power'. Companies are embedded in society and their institutional settings are part of the society's structural design. The institutional design of a democratic society extends normative mediations of power from government to major intermediary associations in civil society. These associations (and other sites of professional practice, such as hospitals, universities, museums, governmental agencies) mediate the state's power and broaden individuals' loyalties beyond their families and primary groups. But the state cannot monopolise collective power in civil society. From the perspective of corporations, this means that they are able to exercise collective power in abusive ways. By monitoring corporate governance with an eye to institutional design, Delaware courts perform what Parsons called a pattern-maintenance (fiduciary) function for the entire society. So 'it is not an exaggeration to say that Delaware's Chancery Court and Supreme Court together function as the constitutional court of the United States for all intermediary associations, for all powerful private bodies in American civil society'.[28] Courts do not intervene in the productive functions of corporations, but only in the private governments of the corporations, deciding and evaluating their legitimacy, equality, and basic fairness.

[27] D. Sciulli, *Corporate Power in Civil Society: An Application of Societal Constitutionalism* (New York: New York University Press, 2001).

[28] Ibid 15.

The Delaware court remains concerned that certain changes in corporate governance can jeopardise a democratic society and undermine its own legitimacy as the country's constitutional court for intermediary associations. Sciulli emphasises that:

> Corporate law, like most law, is primarily about the rule-oriented structuring of social power, and it is specifically about the rules that structure the organization of economic power … the powers and restrictions of corporate law are formulated with a view toward achieving a set of rules for incorporated business that conduce to the public advantage. In the words of Professor Melvin Eisenberg, 'corporate law is constitutional law' in this fundamental sense.[29]

As constitutional law for powerful private persons, corporate law identifies the rights corporate officers exercise within structured situations in civil society and the duties corporate officers must bear when advancing either the corporate entity's collective interest or their own positional interests. But corporate law also identifies social norms and institutional arrangements to which corporate officers are expected to exhibit fidelity as they otherwise exercise their business judgement in 'private' domains. This reduces corporate officers' positional powers and freedom of contract in civil society and prevents one-sided exercises of collective power in structured situations.

This example shows very well that processes of constitutionalisation occur exactly when and where in the social sphere (not only in the political sphere) there emerges a social need to guarantee the chances of articulating, enhancing, and empowering areas of autonomy (social differentiation) for societal reflection and institutionalising them against swamping tendencies.[30] This is a clear example of defensive constitutionalism, without a real self-authorising polity, based on the spread of cosmopolitan norms. We can observe the same process in different functional subsystems. These processes confirm the idea that societal constitutionalism is for the moment powered by the attempts—on the horizontal axis of the 'relation of constitution'—to limit and to make accountable the anonymous matrix of social powers which threatens human rights. But if we want to conceptualise a fully fledged, new societal constitutionalism, it is also necessary to identify new democratic and constitutional experiments on the vertical axis, where non-predictable non-state polities will probably emerge.

[29] Ibid 25.

[30] G. Teubner, 'Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory?', in Joerges, Sand, and Teubner, above n 6, 3–28.