Gunther Teubner

ISBN 9780199644674 (hbk). $100.00.

This volume represents the culmination of research Gunther Teubner has been developing for a long time and it puts forward the most updated and challenging version of the theory of societal constitutionalism. Teubner’s starting point is that the emergence of globalization has made fully visible the existence of societal constitutionalism, i.e., the existence of self-constituted subjects of each social system. Therefore, the new constitutional question is not whether social spheres of global society might be constitutionalized, but what is the role of politics in these transnational and subnational arenas. An analysis based on constitutional sociology illuminates the potential of constitutionalism even within these areas. It actually shows that constitutionalism is not at its end, but is experiencing a renaissance. The outcomes of such an approach are beneficial to a better understanding of the structural coupling between law and politics beyond the level of the national constitution. Constitutional sociology “projects the constitutional question not only onto the relationship between politics and law, but also onto all areas of society ... the question of constitutionalization arises not just for the state world of international politics and international law, but equally for other autonomous sectors of global society” (p. 3). Given its molecular style of analysis, a more nuanced account of constitutional principles, norms, rules and functions is the added value provided by constitutional sociology.

Teubner adopts (but modifies) Luhman’s theory of systems which puts an emphasis on the autopoiesis or self-generation of every system and on the importance of communication for their stability. As a consequence, law plays an essential role since, once coupled with other systems, it provides the stabilization of normative and communicative expectations and it also protects the autonomy of each system. Teubner links societal constitutions to the problem of double reflexivity. Societal constitutions are defined as “structural coupling between the reflexive mechanisms of the law (that is, secondary legal norm creation in which norms are applied to norms) and the reflexive mechanisms of the social sector concerned” (p. 105). In practice, societal constitutions emerge when their reflexivity is supported by legal norms. Globalization has shown how productive the coupling of law and other systems can be beyond the horizon of the nation state. And therefore, it has changed the experiences of the nation state itself, a fact which has complicated the constitutional question. According to Teubner, national constitutionalism is now threatened by two forces which produce a double fragmentation of world society. The first
fragmentation is brought about by the autonomy of global social sectors like science and technology; the second fragmentation concerns the consolidation of regional cultures and it preempts any possibility of a unitary global constitution. Moreover, the development of global social subsystems has not been realized at the same pace. Social systems still tied to the national state level have not been globalised, creating an asymmetry between different media. However, according to Teubner, this gap is not absolutely negative, but it can actually enrich contemporary constitutionalism.

As is evident, the main target of Teubner’s work is political constitutionalism, and more specifically, the political constitution of the nation state. His main concern is to liberate the idea of a constitution from the grip of the state because only in this way it will be possible to redeem the promises of constitutionalism. Teubner rejects political constitutionalism for two reasons: at the epistemic level, political constitutions obscure the role of other societal formations, distorting our knowledge of society; at the normative level, they empower only individuals through public law and in the best case scenario social groups through norms of private law; theoretically, political constitutionalism understands constitutionalism in a strictly formalist way to the detriment of the material constitution. Finally, political constitutionalism is always verging on the brink of a totalitarian turn, that is, a re-shaping of the constitution from a liberal one, where society is just left to the regulation of private law, to one where society is completely controlled by the state constitution. The conceptual underpinning of this position is that, as Teubner recognizes, political constitutions do claim a double function: to constitute power and to limit it (p. 17). But the methodology of constitutional sociology suggests that this double function cannot be limited to the constitution of the nation state. Teubner believes that the main insight provided by a sociological study of constitutions is that societies are much more complex and they contain multiple non-state social orders. The foundation of an autonomous order and its self-limitation are required for vast numbers of institutions. Therefore, constitutionalisation brings with it the full autonomy of the system. Teubner’s fear is that the political constitutionalisation of social systems may engender new forms of totalitarianism because social autonomy would be denied.

Despite its multiple merits, Teubner’s proposal is quite troubling when it comes to his assessment of the role of politics in limiting the expansionist tendencies of social sub-systems. If functional differentiation – i.e., the strict separation of social functions – is considered as absolute then what is left of politics?

This issue becomes evident when Teubner assesses the effects of the globalization of the market systems. In fact, he believes that “a strengthened politics