

**From State Politics to Global Societal Constitutions: A Review
Note on Scamardella's *Etsi Constitutio non daretur*.
*Le costituzioni civili nel mondo transnazionale***

**Dalla politica statale alle costituzioni sociali globali: una nota
sul libro di Scamardella *Etsi Constitutio non daretur*.
*Le costituzioni civili nel mondo transnazionale***

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Sommario

Il contributo intende offrire una rilettura critica dell'ultima monografia di Francesca Scamardella, *Etsi Constitutio non daretur. Le costituzioni civili nel mondo transnazionale* (2023). Il libro prova ad esplorare la categoria del 'costituzionalismo sociale' che tra i suoi principali e contemporanei interpreti annovera Gunther Teubner. Tuttavia, non si tratta di una semplice ri-proposizione della teoria del sociologo tedesco, perché l'autrice iscrive la nuova "questione costituzionale" nell'attuale contesto sociale, politico e giuridico, caratterizzato da un polisemico pluralismo giuridico. Invocando una governance costituzionale di tipo transnazionale, il costituzionalismo post-weimariano si dota dell'elemento riflessivo e di quello funzionale. Questo ci conduce ad immaginare una normatività costituzionale che limiterebbe il potere espansionistico dei sottosistemi sociali, piuttosto che organizzare il potere politico, come hanno fatto le Costituzioni tradizionali.

Parole chiave: costituzionalismo sociale, Gunther Teubner, teoria dei sistemi, governance costituzionale transnazionale, Costituzione funzionale e riflessiva.

Abstract

The article offers a critical reinterpretation of Francesca Scamardella's latest monograph, *Etsi Constitutio non daretur. Civil constitutions in the transnational world* (2023). The book seeks to explore the category of 'social constitutionalism', whose main contemporary proponents include Gunther Teubner. However, this is not a simple re-proposal of the German sociologist's theory, since the author situates the new "constitutional question" in the current social, political, and legal context, characterized by a multi-face-

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ted regulatory pluralism. By calling for a new constitutional governance of a transnational type, post-Weimar constitutionalism is complemented by a reflective and a functional element. This leads us to imagine a constitutional normativity that would limit the expansionist power of social subsystems rather than organizing political power, as traditional Constitutions have done.

Keywords: social constitutionalism, Gunther Teubner, theory of systems, transnational constitutional governance, functional and reflexive Constitution.

1. Beyond the national Constitution: constitutionalism, global constitutionalism, social constitutionalism

“Etsi Constitutio non daretur. Le costituzioni civili nel mondo transnazionale” is the title of Francesca Scamardella’s latest monograph, edited by FrancoAngeli (2023).

Starting with a first and very general consideration, the title is insightful for two main reasons. First, it immediately recalls the well-known expression coined in the 17th century by Grotius, *Etsi Deus non daretur*, with which the Dutch philosopher intended to affirm the validity of natural law, beyond the existence of God.

Second, the title chosen by Francesca Scamardella heralds the existence and affirmation of a constitutional normativity beyond the formal and material Constitution that we all know as the supreme legal source of modern nation states.

The socio-legal context of the book is the last forty years of our history, dominated by globalisation and profound social, cultural, political, economic and, finally, legal transformations. These are radical and deep changes that Francesca Scamardella re-reads in terms of an increase in the complexity of the processes of social differentiation that, among other things, have favoured the emergence of an informal, softer, unofficial normativity and that have weakened the nation states, taking away from them the exclusive dominion of legislative processes.

It is just that in recent years global processes seem to have run out of steam, due to the painful economic and financial crises that have affected several countries since the beginning of the new millennium. Does this imply a return *sic et simpliciter* to the nation-state, with globalisation and its effects zeroed in? According to the Author – although we are still crossing a moment of new and radical changes – it is not possible to take leave of the globalisation scenarios and return *tout court* to the nation state as we knew it with the Peace of Westphalia.

In this new scenario in which different and distinct instances coexist, the crucial question, and no longer postponed, then becomes the following for the Author: *what law do we need? What regulation should we call for?* Is there a regulation that develops beyond positive law, beyond the legal sources as we have known them from the experience of the modern legislative state?

If the autonomy of social systems and sub-systems in the transnational space has determined the genesis of a new systemic normativity, more spontaneous and flexible, than the traditional one, the question now moves to a further level that invests in constitutional normativity. The point, in fact, is no longer to admit that systems such as the Internet, science, economics or money have developed a regulatory autonomy but that these sub-systems are equipped with real 'civil constitutions' that can be interpreted as an expression of a new constitutionalism, social or societal, according with Gunther Teubner who can be considered one of the main theorists of this socio-legal perspective.

The constitutional dimension is thus recalled and developed by the Author by raising two main trajectories: on the one hand, we are in the presence of a new "constitutional question" (Scamardella 2023, p. 17), because it is a matter of identifying the structure (i.e. the ontological constitution) of these systems and sub-systems (what is, for example, the structure of the Internet or open science?). On the other hand, the "constitutional question" concerns the attempt to stop or at least limit the colonizing tendencies of these sub-systems which, with their normative autonomy, can, at times, damage or restrict fundamental rights and freedoms (recurrent, in the book, is the example of the Internet and all related issues such as the privacy of sensitive data, fake news, etc.).

The book, with a preface by Joxerramon Bengoetxea, proposes an introductory Incipit, *World Without End or The End of The World?*, in which the Author presents to the reader the questions she intends to analyze and address in the pages she writes.

Then follow five chapters in which the new constitutional question is examined from the perspective of the traditional theory of constitutionalism and up to what the author calls the "third way" of constitutionalism, that is, social (or societal) constitutionalism.

In the first chapter, starting from the traditional constitutional theory, the Author examines those historical and socio-legal processes that led to the birth of a global constitutionalism, reconstructing the main voices that have theorized this new perspective (Habermas 2023, [2011]2012, [2011]2017, [2007]2008, Fried 2000, Grimm 2018, 2010, Ferrajoli 2022, 2021, 2017). Immediately emerges what Francesca Scamardella considers a kind of third way, between national and global constitutionalism, that is, social constitutionalism, understood as constitutionalization of systemic normativity beyond the national state space. The perspective – that the Author retrieves

from Gunther Teubner – is reconstructed following two main trajectories: systemic theory and the functional-constitutional perspective.

It is not a question of developing a theory contrary to the (constitutional) sovereignty of the state but of following the evolution of constitutionalism beyond the state and of grasping it in those movements of social systems and sub-systems in the transnational space. The idea, ultimately, is that social constitutionalism is based on the possibility of separating the traditional idea of the indissoluble link between constitutionalism and politics and of admitting processes of constitutionalization also between the social spheres.

In the second chapter, Francesca Scamardella recalls the systemic theory, in its evolution from Luhmann ([1972]1977, [1984]2001, 1986) to Teubner's (1983, 1996), as the theoretical antecedent of the social constitutionalism, highlighting, above all, the reflective element and its evolution in Teubner's perspective.

The third chapter is devoted to a functional conception of the Constitution. It means that the “new” constitutional process does not grasp so much the aspect of the *pouvoir constituant*, of a power that must be legitimized through the supreme normative document, but the need to limit systemic colonizing tendencies.

Systemic theory, above all in its reflexive feature (Teubner 1983), and functional constitutionalism are the two constitutive presuppositions of the theory of social constitutionalism, since the first one expresses the reflective element of law, while the other one (the functional interpretation of the Constitution and constitutionalism) allows to rethink the ability of constitutionalism and constitutionalization processes to limit the negative effects of the systemic explosion in globalized society.

In the fourth chapter, the Author points out the conditions necessary for the creation of civil constitutions by transnational private regimes and investigate the nature of the new constitutional subjects moving in the supranational panorama. To re-read the transnational constitutional processes, it will also be necessary to question the role of fundamental rights, which for Teubner develops a so-called horizontal effect (2011a, 2011b, 2011c, [2012]2012). The rights, together with those spontaneous movements from below that civil society develops, embody the necessary limit to systemic colonial expansionism, expressing a dual function of the Constitution that, even at the global level, not only legitimizes power but must also (and above all) limit it.

The question can also be formulated as follows: How to reconcile the inevitable constitutionalization of systems and sub-social systems with the constitutionalization of fundamental rights and freedoms that in the twentieth century passed through a salvific process of national constitutionalization that now seems to have lost its impetus and its attractiveness?

In the last chapter, the Author resumes the threads of the discourse, trying to give an account of the protagonism of the legal pluralism examined in the previous chapters and outlines a new transnational constitutional governance. It is a theoretical-descriptive model, but it also has a normative value that arises from social constitutionalism borrowing from it both the reflective element and the functional one. It is therefore a governance that should express a reasonable law capable of turning back on itself and able to limit systemic colonizing expansions.

To better delineate this model, the author analyzes some judgments of the European Court of Justice on the ESM (European Stability Mechanism). The choice is not accidental, because the decisions examined show the European tendency to give priority to neoliberal instances, instead of policies of solidarity between member countries. Here then returns the image of a constitutional governance of transnational actors that arises from the awareness that power has emerged from the riverbed of the state and has poured into the many riverbeds of the globalized world and that the same happened for the normativity, borrowed in new principles, rules, institutes, practices laboriously produced by the forge of the great economic operators, the new merchants of the global area. Transnational constitutional governance is therefore a challenge that indicates the impossibility of reducing the global to unity and the tendency of legal systems to fragment under global pressure but, at the same time, try to interpret the attempt to govern these phenomena, despite their polysemy and mutability.

In her insightful monograph *Etsi Constitutio non daretur*: the normativity of 'civil constitutions' in the globalised world, Francesca Scamardella writes that

[...] we are therefore in the presence of a form of *governance* that contrasts with classic *government* not only because of the reticular and more flexible ways in which it operates, instead of *command-and-control* mechanisms, but above all because of its capacity to develop a political and regulatory hybridity, derived from the connected action of nation-States and other actors of global society: multinationals, associations, non-governmental organisations, agencies, etc. (Scamardella 2023, p. 122)²

2 Traduzione personale dall'italiano: "Siamo cioè in presenza di una governance che si contrappone al classico government non solo per le modalità con cui agisce, reticolari e maggiormente flessibili, in luogo di meccanismi di *command-and-control*, ma soprattutto per la capacità di sviluppare una ibridazione politica e normativa, derivata dall'azione connessa di Stati-nazione e di altri attori della società globale: multinazionali, associazioni, organizzazioni non governative, agenzie, ecc." (Scamardella 2023, p. 122).

The statement summarises both the problem and perspective selected to address the evolution of societal or civil constitutions operating beyond the institutional framework of modern law and politics.

2. Towards a global constitutional governance

Scamardella is aware that modern constitutional theory requires legal as much as philosophical conceptualisations because the idea of political constitution evolving through structural coupling between the systems of positive law and politics is still considered the very foundation of legitimate government. Modern normative constitutional and political theory draws on the generally shared belief that legality is the most efficient tool of limiting government and its political power as much as granting citizens their freedom and rights. The rule of law expressing the people's collective will shapes the constitution of modern democratic statehood in both descriptive and normative terms. Nevertheless, the process of globalisation reveals frictions and differentiation of law and politics and leads to the constitutionalisation of many societal areas beyond politics.

Establishing her philosophical and theoretical position, Scamardella adopts recent theory of global societal constitutions and governance formulated by Gunther Teubner and other sociologists (Ferrajoli 2017, 2022, Thornhill 2016, Dunoff and Trachtman 2008, Weiler and Wind 2003, Wiener 2011, Schwöbel 2011) of global constitutionalism to explore non-political and non-judicial constitutionalisations of global governance. The distinction between the political system operating through power and external social domains of what Scamardella poetically describes as “new islands of constitutionality in the ocean of globalisation” (Scamardella 2023, p. 110)³ in the fourth chapter of her book, powerfully demonstrates the need of methodological modifications in constitutional and socio-legal theories extending the concept of constitution beyond its classical juridical meaning.

Furthermore, the disconnection of the constitution from statehood and its political institutions invites rethinking specific modes of constitutional governance and its hybridisation as much as analysing new constitutional subjects and agencies beyond popular sovereignty, nationhood and constituted/constituent power dichotomy. The constitution as a normatively binding institution evolves through the hybridisation of governance regimes and passes the unity of law to a multitude of global societal self-constitutionalisations.

³ Traduzione personale dall'italiano: “Nuove isole di costituzionalità nell'oceano della globalizzazione”. È il titolo del quarto capitolo del volume.

Scamardella's book succeeds exactly in this decoupling of institutional politics and constitutions which opens new theoretical routes of studying the constitutionalisation of different transnational regimes and their subjects and agencies from economy and technologies to the digital media, sport and other private regimes evolving in global society.

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