SOCIOLOGY OF LAW BETWEEN NATIONAL LEGAL SYSTEMS AND WORLD SOCIETY

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ABSTRACT: According to the luhmannian paradigm of world society, policontestural and characterized by functional differentiation, a regional idea of society should be rejected. However, it is clear that there are still strong differences in national political and legal subsystems, particularly with regard to the fundamental rights recognized to individuals and their effective protection. In particular rights and values recognized by international treaties are often incompatible (see M. Neves, 2013). This work will be compared with the contributions on this issue by N. Luhmann (fundamental rights are institutions that emerge to allow social differentiation, protect it from the expansionist tendencies of the political subsystem and assign individual rights outside of the norm of reciprocity) and by G. Teubner (according to him it is necessary to distinguish between institutional, personal and human rights, the latter "understood as negative limits imposed on societal communications, where the physical and mental integrity of the individuals is undermined by a communicative matrix"). These contributions are representing a sociology of constitutions at present widely discussed in Latin American countries. In order to avoid an anti-humanistic approach, which considers the individuals outside the inter-systemic communication, we need to take into account that, in a contemporary world characterized by less and less differentiated systems, the multisystemic environment is subject to dynamism and reflexive communicative channels (*strukturelle Kopplung*) between subsystems. Constitutions could be thus combine closure and openness of the legal system by resorting to strategies of institutionalization of internal self-reflection and external communication.

KEYWORD: sociology of constitutions; transnationalism; functional differentiation, structural coupling; fundamental rights; world society.

1 INTRODUCTION

Nowadays we can see an increasingly evident worldwide hyper-connection, both in economic-financial aspects and in socio-cultural ones. In this context the issue of fundamental rights becomes more and more important, while the

contemporary constitutionalism, anchored to the territoriality of nation-states, shows its limits in the matter. In the first place, it is clear that there are considerable differences in the legal systems of different socio-political contexts; on the other hand, it seems to become more insistent the request to achieve an universally valid legal threshold, concerning the recognition of these rights but also their actual protection.

From a legal sociological perspective, we might ask questions such as: is it possible (and if yes, how) to achieve a global governance of fundamental rights in the present complex changing context? What kind of contribution could Sociology of Constitutions (and sociological theory in general) provide in the whole framework of world society?

The starting background seems to be a society characterized by less and less differentiated systems (according to Luhmann, we could say a "over-integrated" society). Moreover, within the legal national sphere, at the constitutional level, there are differences that sometimes come into conflict[30].

Therefore, we focus on the discrepancy between the normative side of the legal system (Charts and International Treaties that institutionalize the "self-reflective" recognition of "global" values and rights) and the concrete reality, namely the environment of the system: individuals that move in an increasingly complex and fragmented context.

By dealing with the subject (fundamental rights), that seems to highlight better the tension between localism and universalism of law, we try to abstract theoretical arguments, useful to contribute to the general debate on the relationship between law and society.

From a methodological point of view – without forgetting the theoretical roots of classical legal sociology – this analysis uses a systemic approach and the conceptual toolkit provided by the social system theory of Niklas Luhmann. In particular, through the concepts of "operational closure" and "functional

[30] See M. Neves, *Transconstitutionalism*, Trasleted by K. Mundy, Hart, Oxford and Portland Oregon, 2013.

differentiation"[31], we will try to understand the current relationship between different subsystems of society and the links between them. Although the concept of "relationship between autopoietic systems" is not present in the Luhmann theory, founded on operational closure, systems are not isolated units. They are connected to each other by a constitutive link with their environmental conditions: in this sense the notion of "structural coupling" (strukturelle Kopplung)[32] is a pivotal concept.

The argumentative structure starts from the current state in evolution of the material dimension (with the related difficulty of contemporary constitutionalism), and it develops by identifying theoretical references, as the contribution of Niklas Luhmann himself and Gunther Teubner in this field. The analysis is enriched by the description of the "transcostitutionalism" provided by Marcelo Neves.

In the frame of their homogeneity of systemic approach and conceptual toolkit, we have three different perspectives, that constitute a space of pluralistic theoretical debate. Through this analysis we can try to find an hermeneutic path, useful to understand and to interpret the current crisis in terms of constitutional guarantees of fundamental rights, for trying to identify possible answers.

In particular, it seems important to establish conceptual connections, to emphasize the links and to stress the different ideas that emerge within the same systemic vision.

From now on, some problematic aspects might be originated, on one hand, from the different speeds of the cognitive process, more and more fast thanks to globalization, and, on the other hand, the lower speed of the regulatory process, anchored in the territorial space of distinct states. The institutionalization of the social reflection at a global level, made by the legislation of supranational treaties, does not seem to operate as an effective structural coupling, between the political

[31] See various works by N.Luhmann, e.g. *Theory of society*, Translated by R. Barrett, Stanford University Press, Stanford California, 2012.

[32] It is a sociological concept that indicates the connection that can promote and filter the mutual influences and pressures between the different autonomous systems, connecting them in a durable and stable way, but without that the systems lose autonomy. See many works by N.Luhmann, e.g. *Theory of Society*, vol. 1, op. cit. (2012), pp. 54-56.

subsystem and the legal one, to which we could add the systems of consciousness in the issue of fundamental rights. In sum, the current transition of society towards a model of world society, involves the question of how it is possible to predict (or rather hope) developments in the field of constitutional matters, in the light of the current challenges.

2 FUNDAMENTAL RIGHTS AND THE DIFFICULTIES OF CONTEMPORARY CONSTITUTIONALISM

During the XXth century the global legal system has been enriched by a set of rules and principles established to protect a set of rights defined as *fundamental*[33]. They are provided by various documents (treaties, agreements) internationally established and recognized. In this sense, those rights were born with different purposes, and each of them has different validity and strength.

In this regard, we can have two preliminary considerations: in the first place, beyond what it is written in these documents, it is evident that their concrete application is something different (it depends on the existence of specific organisms able to detect conflicts and violations, of specific courts, and so on). Moreover, the plurality and heterogeneity of the rights recognized every time, reflects the different sensitivities of the respective socio-spatial contexts, which, however, are increasingly in contact to each other in a global scenario (the so-

[33] We choose not coincidentally the expression *fundamental rights* (instead of *human rights*). First of all, in fact, we intend to limit the discussion to the effective rules and principles in a specific legal context (basically: those provided by Constitutions), then by invoking a strictly legalistic conception of rights. On the contrary, for example, A.K. Sen talks about human rights with a "not legally, but ethically founded" approach (*Identità, povertà e diritti umani*, in *Giustizia globale*, Il Saggiatore, 2006, p. 16). He conceives them as ideal-legal rights, statements that should ideally be legislated. Moreover, as pointed out by G. Palombella (*Diritti fondamentali. Argomenti per una teoria*, in «Filosofia Politica», 1999, disponibile online: http://lgxserver.uniba.it/lei/filpol/glp.htm), while the expression *human rights* concerns strictly human beings, *fundamental rights* may also be referred to societies, legal or moral systems, and so on. So a theory of fundamental rights "obliges us to focus also on that which is capable of contributing to the existence of a *society*" (Id., *From Human Rights to Fundamental Rights. Consequences of a conceptual distinction*, EUI Working Paper LAW No. 2006/34). Finally we point out that the treating of fundamental rights from a sociological point of view, on the basis of N. Luhmann, leaves aside any dogmatism, instead questioning on their function, to find their sense of reality in terms of their substitutability (*Grundrechte als Institution: Ein Beitrag zur politischen Soziologie*, Duncker & Humblot, 1965).

called *world society*[34]). This matter, often, in the international context poses problems of dialogue and could create conflicts between the various parties involved[35].

G. Teubner[36] highlights other obvious difficulties regarding the effect of fundamental rights within transnational social spaces : as it happens regarding the topic of a possible global governance, the discussion usually remains anchored to the national state, lacking a truly transnational inspiration. Moreover, when the authors of violations of fundamental rights are private transnational actors (such as multinationals), they usually are not called to respond to them consequentially, but it is always the community of states that must provide protection with respect their violations[37].

Basically there is a problem of fragmentation of the world society and its related law: fragmentation due not only to the aforementioned regional differences, but also to the functional differentiation of society[38]. Fragmentation thus leads to conflicts of rationality, or to non-harmonic relations between different functional subsystems[39].

We are facing the problem of a global constitutionalism which is struggling to define itself and that it seems to decline himself in an "horizontal" perspective[40], in respect of obligations that go imposing itself, as well as to state authorities, also for the private actors. The question therefore is "whether the autonomy of the function systems might not lead to mutual burdens to the limits of their structural

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[34] We use this term according to Luhmann. See. N. Luhmann, *Globalization or world society: how to conceive of modern society?*, in «International Review of Sociology», Mar 1997; *Id.*, *Theory of society*, vol. 1 and 2, Stanford University Press, Stanford (CA), 2012; Luhmann N., De Giorgi R., *Teoria della società*, Franco Angeli, Milano, 1992. See also E. Morin, *Quelle « autre mondialisation »?* in «Revue du MAUSS» 20, 2002.

[35] Cfr. M. Neves, *Transconstitutionalism*, Hart, Oxford, 2013.

[36] Cfr. G. Teubner, *Nuovi conflitti costituzionali*, Bruno Mondadori, Milano, 2012.

[37] *Ibidem*.

[38] We are referring here to the separation (which is the final step in the evolution of the society's structures), between the various functional systems, operationally closed, each one characterized by a different communicative *medium* (money, knowledge, law, medicine, technology, etc.) and inclined to overcome territorial boundaries, building own autonomous global systems.

[39] G. Teubner, *Ordinamenti frammentati e costituzioni sociali*, in *Il diritto frammentato*, Giuffrè, Milano, 2013.

[40] Cfr., in addition to the already cited works by Teubner, see also *Constitutionalising Polycontexturality*, in «Social and Legal Studies» 19, 2011 and *Transnational Fundamental Rights: Horizontal Effect?*, in «Rechtsfilosofie & Rechtstheorie», 2011 (40) 3.

adaptability with their very differentiation"[41]. In this way, Teubner advocates to connect in a network the respective constitutional fragments – nations, transnational regimes, regional cultures – for a constitutional "right of collisions"[42]. This, of course, does not prevent to consider the issue of the constitutional autonomy of subsystems and their coordination, namely the problem of a latent tension between functional systems, which are not bound to the land, and their constitutions, which instead are[43].

From these theoretical considerations important practical consequences derive. They arise not only the attention of lawyers, philosophers and sociologists of law: we have not only to conceive fundamental rights as institutions able to protect the autonomy of the individual from states, limiting the action of the latters, ensuring the participation in the communication of the former[44], but also – because it is no longer possible to identify the state with the society, or at least the state "as societal organizational form, and politics as its hierarchical co-ordination", when other "highly specialised communicative media (money, knowledge, law, medicine, technology) appear to gain in autonomy other highly specialized communicative media"[45] – to deal with threats coming from the various subsystems. Such as those already highlighted by Marx (relative to the economy) or by Foucault (discussed in reference to models and dynamics of various types: total institutions, governance, etc ..). Problems then arises, Teubner writes,

> "in numerous social institutions, each forming their own boundaries with their human environments: politics/individual, economy/individual, law/individual, science/individual. Everything then comes down to the identification of the various frontier posts, so as to recognise the violations that endanger human integrity by their specific characteristics. Where are the frontier posts? In the various constructs of persons in the subsystems: *homo politicus*, *oeconomicus*, *juridicus*, *organisatoricus*, *retalis*, etc. These may only be constructs within communication that permit attribution, but they are at the same time real points of contact with people 'out there'"[46].

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[41] Cfr. N. Luhmann, *Die Gesellschaft der Gesellschaft*, Suhrkamp, Frankfurt, 1997, p. 1087.
[42] G. Teubner, *Nuovi conflitti costituzionali*, Bruno Mondadori, Milano, 2012, p. 22.
[43] *Ivi*, p. 25.
[44] N. Luhmann, *op. cit.*, 1965.
[45] G. Teubner, *Transnational Fundamental Rights: Horizontal Effect?*, in «Rechtsfilosofie & Rechtstheorie» 2011 (40) 3, pp. 207.
[46] *Ivi*, pp. 208-9.

Therefore we have to face concrete issues, that affect the freedom of action and the integrity of the individuals, both regarding communication and in respect of processing of their personal experience and most basic needs[47].

3 LUHMANN AND TEUBNER ON FUNDAMENTAL RIGHTS: COMPARATIVE CONSIDERATIONS AND INSIGHTS

Before pondering on the possible "dialogue" between constitutions and on the influence that different subsystems of the society have to each other, we should try to observe the effects that the operations of the system of law and, more generally, those of the overall social system, have on the individuals, considering them not only as *persons* – namely from a strictly communicative point of view – but also in their irreducible bio-psychic, and therefore symbolic, part[48]. It is also possible to do this within the tradition rooted in systems thinking and that finds in Niklas Luhmann its main representative, despite the superficial objection that this is an "anti-humanistic" sociology, in which the role of individuals is underestimated or anyway subject to the emerging social "impersonal" level[49].

Luhmann defines fundamental rights as "institutions" , namely expectations of behavior, realized in the context of a social role and relying on social consensus[50]. Their function lies in the stabilization of the differentiation of the political system, specialized in production of binding decisions. For making this possible, it is necessary that it remains separate from other subsystems (economics, law, etc.) – each subsystem of society, in fact, is always subject to the

[47] In this regard, we will refer later to the luhmannian distinction *persons/bodies*.

[48] We use this term with the meaning of E. Cassirer. See *An Essay on Man. An Introduction to a Philosophy of Human Culture*, Yale & New Haven, 1944.

[49] Not only it is possible to trace in that tradition resources and insights for treatments that could take into account the different elements of individuality (As P. Stenner did in *Is Autopoietic Systems Theory Alexithymic? Luhmann and the Socio-Psychology of Emotions*. In «*Soziale Systeme*» 10 (2004), 159–85). But, above all, it is necessary to try to understand better modernity in its most different aspects and concrete phenomena, including those that relate more closely individuals in their specificity and in the most different expressions of this specificity: cognitive, affective or normative: see C. Baraldi, *Il disagio della società. Origini e manifestazioni*, Franco Angeli, Milano, 1999.

[50] "Le istituzioni sono aspettative di comportamento generalizzate nella dimensione temporale, materiale e sociale e, in quanto tali, formano la struttura dei sistemi sociali.": N. Luhmann, *I diritti fondamentali come istituzioni*, Dedalo, Bari, 2002, p. 45 (*Fundamental Rights as an Institution: A Contribution to Political Sociology*, 1965; translated in english by us).

risk of dedifferentiation – guaranteeing to individual a degree of autonomy and independence from the action of state: fundamental rights are necessary to prevent that

"All communications are oriented to specific purposes of the state bureaucracy, making possible the rationalization of these purposes in the sense of a provision functionally specified that must always presuppose the existence in the social order of other benefits, of other systems to pursue of interests, other sources of power and social prestige"[51].

Fundamental rights, therefore, ensure *chance* of communication, but at the same time they adjust communication "in such a way that it remains available for differentiation"[52], specifically that of the political system. They emerge in a specific historical era of social evolution (in this sense are not 'eternal' and immutable), characterized by high complexity and functional differentiation: their function is precisely to stabilize the social structure by maintaining the differentiated autonomy of the political system and its separation from other subsystems.

This is done by preventing the political system from 'invading' other spheres of social reality (individual personality, socialization, economics, etc.) and by preventing disorientation from its specific function (precisely to establish binding decisions). The separation of the law system from other subsystems is therefore a systemic need for the maintenance of differentiation of the social order: the fundamental rights therefore represent a guarantee towards regression to previous stages of development of society. Therefore they are *positive* rights: in fact the "separation of the law from religious, moral and scientific representative contexts and its positivization are an acquisition of the modern age"[53]: the increasing complexity of society corresponds to an increase of the internal complexity of the law, which frees itself from religious and natural law's ties (legitimacy of divine nature disappear) becoming contingent, changeable. The law is not, however, blind to such contingency: the difficulty in placing values on a continuing basis (just because of the loss of legitimacy of natural law) in a complex reality (the modern

[51] *Idem*, p. 60.
[52] *Idem*, p. 59.
[53] *Idem*, p. 82.

one), so it represents the premise to institutionalize tolerance and availability to compromise, as long as it is possible to reach "in a vast temporal horizon, a high pace in the changing of preferences of values"[54]. Each value and any rule become reversible, but they must remain valid until they will be replaced by others: for this reason, the law must be generalized in time, that is any legal decision "should be taken, in principle, independently of the moment in which it is assumed"[55].

Law, however, doesn't decide which are the rules to apply: it must enforce them and stabilize expectations. Political system is the one that establishes valid standards – and can change them. It is responsible for the production of binding decisions, necessary to ensure order and lasting peace: for this it is necessary to establish fundamental rights, so they can limit the expansionist tendencies of the political system, in a way that the exercise of physical force and decisions remains legitimate (and therefore accepted), but at the same time allowing sufficient space and dimensions of freedom to individuals. This also explains the distinction between judicial and legislative function (the separation of powers of the state, another evolutionary achievement of modernity): law and politics must remain separate, because only in this way it is possible to rely on lasting and legitimate (however rebuildable) rules. In this sense, constitutions are the structural coupling between political system and system of law[56].

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[54] N. Luhmann, *Il tempo scarso e il carattere vincolante della scadenza*, in S. Tabboni (a cura di), *Tempo e società*, Franco Angeli, Milano, 1985, pp. 120-137, p. 132 (*Die Knappheit der Zeit und die Vordringlichkeit des Befristeten*, in "Politiche Plannung", 2 Aufl., Westdeutscher Verlag, 1975, pp. 143-165).

[55] N. Luhmann, *op. cit.* (2002), p. 247. Law has the function to stabilize over time expectations and behavior, to turn rules in a rational order, so that even if they are disappointed, they will not lose their validity. Law is a kind of immune system: it develops rules to solve conflicts, which are generalized and maintained. The system in this way generates a past that serves in the present as a guide for the future.

[56] "The constitution serves the dual function of including and excluding reciprocal perturbations of political and legal operations. Its two-sided form of including and excluding influence maintains the separation of the systems and allows for separate autopoietic reproduction without any confusing overlap. It also characterizes the ways in which the legal system (and on the other side, the political system) avoids isolation (which means entropy) and constructs on its internal screen what can serve within the system as information.": N. Luhmann, *Operational closure and structural coupling*, in «Cardozo Law Review» 13 (1991-1992): 1419–1441, p. 1437. See also G. Corsi, *On paradoxes in constitutions*, in ???, Ashgate, Farnham, 2015. Especially this excerpt: "The idea is that the constitution was invented to regulate the relationships between law and politics, once these two systems are differentiated once and for all and there remains no possibility of polyfunctionality. The concept employed by systems theory to clarify the function of the constitution is that of *structural coupling*. […] This concept indicates the capacity – and the

According to Luhmann fundamental rights therefore are not statutes, eternal and inviolate values, but tools that ensure the inclusion of individual in society, socialization, ie participation in the social context as a *communication partner*, ensuring a successful outcome of individual's self-representation, conceiving it as a character, as *form person*, "able to report their actions to multiple social systems and to bring together in a personal behavioral synthesis their conflicting demands"[57]. The modern social order in fact puts the individual in front of an unprecedentedly rich range of possibilities for action, choices, opportunities: the emancipation from traditional constraints based on wealth, on belonging to a defined social class (that characterized functionally layered societies), the increased possibility of movement, they make possible to choose which profession or trade is to undertake and membership in different circles and social groups, allowing access to differentiated roles among the various contexts. However, it is difficult for a single to develop a variety, because it is constantly called to staring purposes and to act accordingly. So the individual is called to be otherwise (contingency)[58]: in order to do that, however, he needs a correct self-representation as individual. *Dignity* and *freedom*, as defined in a functional sense, intervene at this level: they indicate the basic conditions for the success of self-representation, they are preconditions for the socialization of man as an individual, as a partner of the interaction. Beyond their claim as historical values/rights in liberal Western tradition, *dignity* and *freedom* for Luhmann are institutionalized as unlimited capacities of contacts (a requirement for inclusion in the communication). They act on the outside (freedom) and on the inside (dignity) of self-

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necessity – on the part of a system to develop specific kinds of awareness towards sectors in its environment, while remaining indifferent to all the rest. The systems theory defines these kinds of awareness as "irritations", in the sense of disturbances or interferences, so as to underline that they are not cases of input coming in from outside, but of points of contact inside the system itself that generate effects that depend on its own structures and not on those of the irritating factor".

[57] N. Luhmann, *op. cit.* (2002), p. 99.

[58] Contingency as fundamental character of modern society means that safety becomes improbable, that everything could be otherwise. This is true in every field, also in interpersonal relationships: we are not facing an impersonal mass society, reminds Luhmann. Modern society differs from previous configurations for greater chances of impersonal relations and more intense personal relationships: the differentiation of personal and social systems becomes for people more and more a reason to re-interpret their difference with environment on the basis of own person. See, N. Luhmann, *Amore come passione*, Bruno Mondadori, Milano, 2008 (*Liebe als Passion Zur Codierung von Intimität*, Suhrkamp, Frankfurt am Main, 1982).

representation: *freedom* means that "social action does not end in the fulfillment of the action, but is included in the processes of symbolic attribution"[59]. It means, in other words, that we have the right to a free development of personality as a self-conscious individuality, to a space of personal action, protected from external interferences and violations (first of all those of the state). *Dignity* instead means that the roles to which we adhere are reconciled with a self-representation worthy of consideration: it is the knowledge that you can express what you are that lets you identify with your own person. It "indicates the successful self-representations"[60]; therefore it must be built and nurtured. His loss marks the loss of personality, and consequently of the social role[61].

Freedom and *dignity* are products of functional differentiation, not 'inalienable human rights': the differentiated social order institutionalized them precisely to ensure the inclusion of the *person*. The overall social system and the various functional subsystems are oriented in fact to the inclusion of the entire population"[62].

Obviously every subsystem operates according to its own logic, and decides "how far one can do"[63]: any individual relates in different ways to different subsystems, in dependence of its aspirations and abilities, but also in dependence on external conditions: citizenship is attributed to the individual based on place of birth and family, as well as the availability of money depends, even more than by the individual talents and commitment to their work, by familiar legacy; and so on.

In principle, however, each one should have the opportunity to participate: *freedom* serves to this. But also another fundamental right, that of *equality*, fulfills the same purpose: it "creates the preconditions for enlargement of the possibilities of communication because it frees the act by the differences that limited the

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[59] N. Luhmann, *op. cit.* (2002), p. 115.

[60] *Idem*, p. 119.

[61] "L'uomo non può usare la sua personalità, se la sua autorappresentazione non ha successo, se non ha dignità. Se non è in grado di effettuare un'autorappresentazione sufficiente, recede da partner della comunicazione e la sua scarsa comprensione delle esigenze del sistema lo conduce al manicomio.": *idem*, pp. 120-1.

[62] "There is no obvious reason to exclude someone from the use of the money, from the legal capacity or from belonging to a State, from education or marriage, nor to let depend everything that from licenses or special conditions outside the system"[62]: N. Luhmann, *Oltre la barbarie*, in «Sociologia e politiche sociali», n. 3, 1999.

[63] *Ivi*.

generalization and that bound the possibilities of self-representation in predetermined social positions"[64].

Equality is not an individual right or value[65], but a systemic necessity: in this way, it becomes possible "taking decisions on internal problems of the system, about what is equal or unequal" [66], at the same time forcing the political system to relate to citizen regardless of his class, meaning with an equal treatment of individuals. The right to *equality* therefore does not exclude inequalities: nevertheless they must be justified, motivated. Discrimination can no longer depend on the decision maker, according to his feelings, his preferences, but must be based on objective reasons: the positivised law does not oblige to compliant conduct, but protects those who adapt them; likewise it does not guarantee justice and fairness[67], does not prevent the rise and the development of inequalities: it makes unequal treatments possible "as long as sufficiently motivated"[68]. Human rights of *freedom* and *equality*, therefore, are not grounded on 'human nature': in modern society, where is no longer possible to define the social context in which everyone have to take action, their (latent) function lies on keeping the future open to further possibilities[69].

Then, if it could make sense toclaim for a just society – or at least 'fairer' – and universal values (whether freedom, equality, tolerance, peace, democracy, etc.), it is possible from a 'civic', 'human' point of view. Even for this, as already explained, we do not speak of 'human rights'[70] but of 'fundamental rights': modern

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[64] R. De Giorgi, *Modelli giuridici dell'uguaglianza e dell'equità*, in *Disuguaglianze ed equità in Europa*, edited by L. Gallino, Laterza, Roma-Bari, 1993, p. 369.

[65] N. Luhmann, *op. cit.* (2002), p. 249.

[66] N. Luhmann, *op. cit.* (2002), p. 259.

[67] "In un ordine sociale pienamente differenziato le pretese di un agire giusto ingenerano complicazioni enormi e ricche di contraddizioni." N. Luhmann, *op. cit.* (2002), p. 267.

[68] R. De Giorgi, *op. cit.*, p. 365.

[69] N. Luhmann, *Theory of society*, vol. 2, Stanford University Press, Stanford (CA), 2012 (original edition 2007), p. 301.

[70] About 'human rights' social sciences were traditionally skepticist, starting by philosophers and sociologists of XVIIIth and XIXth century (as, for example, Karl Marx: he tought that they were only a façade, masking economic and social inequalities. Rights originated by private property, that clouded social relations arising from the capitalist mode of production. See *On the Jewish Question*, in *Deutsch-Franzosische Jahrbucher*, 1844). Cfr. G. Sjoberg, E.A. Gill, N. Williams, *A Sociology of human rights*, in «*Social Problems*» Vol. 48, No. 1, 50th Anniversary Issue, Feb., 2011, pp. 11-47; P. Hynes, M. Lamb, D., M. Waites, *Sociology and human rights: confrontations, evasions and new engagements*, in «The International Journal of Human Rights» Vol. 14, No. 6,

society – in luhmannian terms – is made of communication[71]. Society is not 'unjust': it simply works at another level than that of individuals[72].

Stating that does not mean to be cynical, being blind to inequalities and social distress: but is not useful keeping on describing exclusions in the different functional systems through a semantics that uses terms such as 'exploitation', 'social oppression', 'marginality'. Instead of an impossible claim (precisely from a systemic point of view: the inclusion must be understood as a form of two sides: the other side is precisely the exclusion, where individuals count only as *bodies*[73]) for a total inclusion of everyone or looking for guilty 'subject to blame'[74], theory must try to describe "facts a little better than does the optimistic-critical tradition of our discipline; and precisely the facts that society itself builds"[75].

In addition to those shown here, Luhmann analyzes other rights, on which we cannot dwell: the right to property (which allows the individual to participate in the economic system), to vote (which offers citizens a role for participation in the political system), the legal protection of marriage and family, and so on[76]. What is described above, however, reveals what it means to analyze fundamental rights not from the point of view of legal dogmatics, but from the one of sociological theory, functionally-structuralist inspired: it could open the possibility of a more extensive and detailed understanding of legal and political systems, thus allowing

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November 2010, 810-830; Bryan S. Turner, *Outline of a theory of human rights*, in «Sociology» Vol. 27, No. 3, August 1993, pp. 489-512.

[71] "the distinction between individual and society – since the mid-nineteenth century also individual and collectivity – is external to society.": N. Luhmann, *op. cit.* (2012), p. 295. People therefore are in the environment; they are not part of the system. Society requires people, representatives that could communicate. Individuals as psychic systems are in relationship with social system through structural coupling, but this is a contact that occurs at the level of their respective structures. Biological and emotional-sentimental components (and consequently a number of needs of the individual) are not matter of society. It cannot take charge of them in the reproduction of its operations.

[72] That is communication, the only genuinely social operation. See N. Luhmann, R. De Giorgi, *Teoria della società*, Franco Angeli, Milano, 1992, p. 26.

[73] N. Luhmann, *op. cit.* (2012), pp. 16-27.

[74] A research starting by the idea of a stratified society: See N. Luhmann, *op. cit.* (1999).

[75] *Idem*, p. 127. O, with different words: "Theory not only formulates what we know but also tells us what we want to know, that is, the questions to which an answer is needed. Moreover, the structure of a theoretical system tells us what alternatives are open in the possible answers to a given question. If observed facts of undoubted accuracy will not fit any of the alternatives it leaves open, the system itself is in need of reconstruction.": see Talcott Parsons, *The Structure of Social Action. A Study in Social Theory with Special Reference to a Group of Recent European Writers*, The Free Press, Glencoe (Illinois), 1949, p. 9.

[76] N. Luhmann, *op. cit.* (2002).

a more aware and responsible formulation of social problems, primarily those that underlie fundamental rights[77]. Instead of conceiving fundamental rights merely as values, we look them as institutions, therefore,

"it is possible explain our involvement in certain constellations of problems, which let appear as meaningful only a limited range of action"[78].

The contribute of Gunther Teubner to the discussion on fundamental rights moves from Luhmann's legacy. However he adds some critical and purposeful ideas: they could be suitable for an operative use: this is especially true if we consider his tripartite distinction of fundamental rights.

Teubner, starting by Luhmann, takes note of the problematic expansion of political system in modern society, which tends to cross boundaries of other social subsystems and at the same time impinge the individual "in his attempt to control both the body and the mind of people"[79]. Also he highlights the "expansionary effects" of other, specialized and autonomous functional systems: so we have to face a "multiplicity of anonymous and now globalized communicative processes" [80], a society that can be described as an "anonymous matrix" of codified communications, which tends to expand itself without regards of human beings. So fundamental rights should defend the individual not only from the state, but also by the intrusion of other social subsystems, and should protect the autonomy of the various systems function[81].

Therefore Teubner proposes a tripartite division of the dimensions relating to the protection of fundamental rights, distinguishing them between *institutional*,

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[77] *Idem*, p. 307.

[78] *Idem*, p. 311. Values therefore are points of view for certain preferential consequences of action. They remain valid, fair, even if action or actors disappoint expectations: "I valori sono, cioè, aspettative stabilizzate in modo controfattuale ed in questo sono simili alle norme giuridiche […] Le norme giuridiche implicano un'alternativa chiara tra legalità e illegalità. Nell'universo dei valori, al contrario, non può essere introdotta una tale struttura di alternativa […] Chi si orienta ad un valore, trascura gli altri." (p. 312).

[79] G. Teubner, *Ordinamenti frammentati e costituzioni sociali*, in *Il diritto frammentato,* a cura di A. Febbrajo, F. Gambino, Giuffrè, Milano, 2013, p. 386.

[80] *Idem*, p. 389.

[81] Fundamental rights, as R. Prandini told, commenting on Teubner, are "contro-istituzioni moderne poste dentro ai sottosistemi funzionali per limitarne il potere. La loro funzione non è semplicemente quella di proteggere l'individuo, bensì anche quella di mettere in sicurezza l'autonomia delle sfere sociali, contro le tendenze espansive di altri sottosistemi.": R. Prandini, *Distinguere aude! Il* Grand Récit *sociologico di Gunther Teubner,* in *Il diritto frammentato*, edited by A. Febbrajo, F. Gambino, Giuffrè, Milano, 2013, pp. 240-1.

personal and *human rights*. Institutional rights handle with the autonomy of the "social discourses" (such as religion, art, science) against the totalitarian tendencies of the communicative matrix: they work as "conflict of law rules" between different partial social rationalities, trying to protect the integrity of art, family, religion against totalitarian tendencies of science, media or economy[82]. *Personal rights* instead concern the autonomy of communication: they protect people as "fictions", communicative artifacts, ie individuals as they are included in the systems function. Human rights, finally, are "negative bounds on societal communication, where the integrity of individuals' body and mind is endangered by a communicative matrix crossing boundaries."[83]

They are those that concern the individual in its most genuine, less social, aspect, related to his bio-psychic endowment.

The operative, already mentioned, potential of this tripartite division lies in the fact that a clear distinction of referents, the rights' 'holders' – or at least of the different dimensions in which it is necessary to establish spaces and actions for protection – facilitates the task of those who are called to design and place actions for protection and preservation of rights. In other words, they become more obvious targets to reach and, together with them, the obstacles to face. Social policies, humanitarian claims, but perhaps also most general instances by groups and organizations, can benefit from a sort of 'disillusionment', which, instead of pushing to classify projects with the label of idealism, strengthens them, because it makes more aware their promoters. Just one example: affirming the importance of a particular right and at the same time recognizing it as *human*, in the sense of Teubner means clearly distinguishing what we are facing not only as 'citizens', but also as human beings, as members of the specie: beyond their citizenship, the state in which they are located, their possibility to pay, and so on. This leads us to focus attention on essential data and to exclude from the discussion claims and fears that don't have anything to do with dimensions that is intended to preserve. Of course the contribution that this tripartite division can provide cannot overcome the intrinsic limits of law: institutional and personal rights in general are more

[82] G. Teubner, *The anonimous Matrix*, in «Modern Law Review», 69, 2006.
[83] G. Teubner, *op. cit.* (2013), p. 390.

easily recognized in judicial system than human rights. In this sense, Teubner says, we are faced by "a strictly impossible project" [84] because society cannot "do justice" to real people, as "people are not its parts but stand outside communication" [85]. For Teubner, only

"the self-observation of mind/body – introspection, suffering, pain – can judge whether communication infringes human rights. If these self-observations, however distorted, gain entry to communication, then there is some chance of humanly just self-limitation of communication."[86]

This is a significant shift of paradigm, a purely sociological approach, aware of the inevitability of inequalities and exclusions, that are *natural* and *obvious* in a functional differentiated society. On this basis, it is therefore necessary to introduce "new devices of re-inclusion" able to "distinguish between the empirical and existential concreteness of the *individual*"[87], which is more than the *person*[88].

Fragmentation of world society imposes this and other challenges: in fact, when rights are established, it needs both referents able to enforce them (such as national, international and transnational courts), and clear information on those who must respect them and have to answer for it in case of violation. This fact is not always clear. What are, for example, duties of transnational private actors who violate fundamental rights? Usually national states are called for the protection of

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[84] "All the groping attempts to juridify human rights cannot hide the fact that this is a strictly impossible project. How can society ever "do justice" to real people if people are not its parts but stand outside communication, if society cannot communicate with them but at most about them, indeed not even reach them but merely either irritate or destroy them? In the light of grossly inhuman social practices the justice of human rights is a burning issue, but one which has no prospect of resolution.": G. Teubner, *The anonimous Matrix*, in «Modern Law Review», 69, 2006.

[85] *Idem*, p. 393.

[86] G. Teubner, *op. cit.* (2006). *Human rights* therefore represent a great challenge for contemporary society, which could be faced redefining them as *ecological rights*: "Ciò significa che il diritto della società non deve porsi come finalità l'impossibile inclusione giuridica dell'uomo, bensì l'improbabile relazione con esso, senza alcuna pretesa di *risolverlo/ridurlo* attraverso comunicazioni giuridiche", R. Prandini, *op. cit.* (2013), p. 223.

[87] "La matrice sociale deve invece essere capace di riconoscere che l'individuo è *sacro* e *intoccabile* e che, proprio per questo, va ricostruito semanticamente all'interno della società in quanto persona.": *Idem*, p. 224.

[88] It is worth noting that in this sense is at stake not only a general individual "health" or "harmony", but foremost the validation by people of their individual identity, in its specificity and difference from the one of the *form person*, exclusively communicative and therefore "always proper": *people* do not coincide with consciences, with corresponding psychic systems. See E. Esposito, *Identità e persona nella teoria dei sistemi sociali*, manuscript, url: www.cisi.unito.it/hal9000/ricerca/tsais/Resposito.doc.

violations. That is, Teubner explains, a "thorny issue" [89] regarding global constitutionalism, called for the challenge of "connecting each other in a network constitutions from global fragments – nations, transnational regimes, regional cultures – , in a constitutional law of collisions".[90]

This fragments exist due to the affirmation of different transnational regimes, separated from each other but that can try to govern itself internally, independently, until they 'positivate' their standard of fundamental rights, through the decision-making practice: it is the case, for example, of ICANN (Internet Corporation for Assigned Names and Numbers) or the WTO (World Trade Organization)[91]. This fragmentation however generates numerous occasions of conflict between the various constitutional systems, as Teubner highlights. More generally, also, should not be ignored a socio-cultural problem: it is questionable, in fact, if the global order (however you define it: post-national, global, and so on), which is based on heterogeneous elements such as pressure groups, NGOs, social movements, courts, etc., will succeed "to combine itself with some conventions on minimum standards and values, which do not require strict adherence to liberal social contract of Western modernity"[92].

If we consider threats to individual integrity provided by this fragmented reality, we can see that they don't come only from political system, but also by various social institutions: economics, law, science, and so on. The research of Michel Foucault on micro-power, biopolitics, governmentality or the ones of Karl Marx in the economic field[93], represent valuable contributions in this sense. All these arguments lead us to accept the inevitability of violations of individual

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[89] G. Teubner, *op. cit.* (2012), p. 19.
[90] *Idem*, p. 22.
[91] The authority designated to appoint IP addresses and Internet domains. See G. Teubner, *op. cit.* (2012), *op. cit.* (2006).
[92] A. Appadurai, *Modernità in polvere*, Raffaello Cortina, Milano, 2012 (1996), p. 35 (*Modernity At Large: Cultural Dimensions of Globalization*, University of Minnesota Press, 1996).
[93] G. Teubner, *op. cit.* (2012), p. 167. "There is not just one single boundary *political communication/individual,* guarded by human rights. Instead, the problems arise in numerous social institutions, each forming their own boundaries with their human environments: *politics/individual, economy/individual, law/individual, science/individual, medicine/individual*": G. Teubner, *op. cit.* (2012). About the examples cited: references are to the overall work of Marx and on Foucault's researches on total institutions and biopolitics. See, among many others, *La volontà di sapere. Storia della sessualità 1*, Feltrinelli, Milano, 1988 (*Histoire de la sexualité*, 1: *la volonté de savoir*, Gallimard,1976).

integrity in a social system that, in order to maintain the self-renewal of its environmental difference, absorb physical and psychic energy from individuals, through selective perturbative cycles of selective requests and selectively conditioned responses[94].

We can now try to identify some problematic issues to which theory could be applied.

We have seen Teubner's attention for the protection of bodies and minds: they have therefore, as noted by Prandini[95], latent intrinsic rights. We can see, in comparison with Luhmann, a difference: the german sociologist, in fact, dealing with fundamental rights, still maintained a systemic reference, looking at the *person* as a construction of the social system, which uses it as their own environment. Teubner instead asserts the value and the inevitability of individuals in their concrete difference from society, even if he recognizes that only when psychic and mental suffering are able to irritate communication they could reclaim their validity.

The modern challenge, then, is to make systems *responsive*, that is, at the same time, able to "manage the difference" between system and environment and "respect it, putting it in the conditions to be stay-different"[96]. The challenge thus consists in a permanent success in distinguishing between social and non-social, and to safeguard the latter, be it psychological, organic, natural. In order to do this are necessary devices, especially policies, able to operate a *re-entry*, to enter the system/environment distinction again in itself, thus building "a space of mediation between a growing social matrix and an increasingly biological-psychic individual"[97].

In any case, if we identify fundamental rights as institutions with a specific function – and therefore not as absolute and in this sense not necessary – we have to accept their generality and non-specificity, without classifying them, however, as useless: if fundamental rights don't determine the actual content of

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[94] G. Teubner, *op. cit.* (2012), p.165.
[95] Rights to conceive as tendencies to *self-subsistence* and *integrity* inasmuch different from societal: R. Prandini, *op. cit.*, p. 228.
[96] *Idem*, p. 266.
[97] *Idem*, p. 267.

potential new rules, but they are merely limited to exclude some possibilities, to delimit the scope of intervention, to keep open possibilities for the future, for situations that might be important[98], it means that they represent both a resource that could continuously stimulate planning of those who promote the discussion inside legal system, and a tool for theoretical reflection on boundaries between functional subsystems and their definition.

Of course the attempt, from a sociological point of view, to develop a critical theory on fundamental rights must use observations – produced by sociology and by other fields of research – on this issue and on the safety of individual's psychological well-being. In this sense, it is necessary to take into account, for example, the evolution of semantics of rights and human dignity[99]; semantics of the relation beetwen identity and its public and private dimensions[100]; and also philosophical research on social order; studies on the correlation between cultural phenomena and psychological and social processes[101]; theoretical studies on the crisis and the future of Western civilization[102]; the proposals of a specific sociology of human rights.

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[98] "It has to establish fundamental rights that are not just an historically recent invention, but are also the product of decisions, so contingent like any other norm. This means that they are fundamental *because* they are not necessary. […] In the form they have take on today, values and fundamental rights are formulated to be substantially generic or even a-specific. […] These values' universalism thus seems to oblige them to be semantically empty. […] These rights declare themselves to be unalterable, because that is the only way that they can claim to legitimise the future, while at the same time waiving the right to define it in advance.", G. Corsi, *op. cit.* (2015).

[99] See, among others, M.C. Nussbaum, *Giustizia sociale e dignità umana. Da individui a persone*, il Mulino, Bologna, 2012.

[100] See T. Dumm, *Loneliness as a Way of Life*, Harvard University Press, 2010.

[101] See, among others: M. Benasayag, G. Schmit, *L'epoca delle passioni tristi*, Feltrinelli, Milano, 2004 (*Les passions tristes. Souffrance psychique et crise sociale*, Editions La Découverte, 2003); B.-C. Han: *La società della trasparenza*, Nottetempo, Roma, 2014 (*Transparenzgesellschaft*, Matthes & Seitz, Berlin, 2012), *Eros in agonia*, Nottetempo, Roma, 2013 (*Agonie des Eros*, Matthes & Seitz, Berlin, 2012), *La società della stanchezza*, Nottetempo, Roma, 2012 (*Müdigkeitsgesellschaft*, Matthes & Seitz, Berlin, 2010); G. Piazzi: *Julie*, Quattroventi, Urbino, 2009; *Teoria dell'azione e complessità*, Franco Angeli, Milano 1988 (1984); G. Manfré: *Le radici culturali del disagio contemporaneo*, I libri di Emil, Bologna, 2014; *Ripensare l'identità: nuove prospettive di teoria critica*, in «Studi Urbinati, B - Scienze umane e sociali», vol. 81, 2011.

[102] On current era, characterized by a global financial and economic crisis that affects individual's state, see, among many others, J. Brassett, N. Vaughan-Williams, *Crisis is governance: sub-prime, the traumatic event, and bare life*, in «Global Society» 26:1, 2012, pp. 19-42. On 'crisis', see D. Baecker, *Culture crisis*, in *The Financial Crisis in Constitutional Perspective. The Dark Side of Functional Differentiation*, edited by P.F. Kjaer, G. Teubner, A. Febbrajo, Hart Publishing, Oxford, 2011; M. Augé, *Futuro*, Bollati Boringhieri, Torino, 2012; L. Gallino, *Finanzcapitalismo. La civiltà del denaro in crisi*, Einaudi, Torino, 2010; Z. Bauman, *Vite di corsa. Come salvarsi dalla*

All these phenomena, in the proposal that is made here, are processed within a framework based on the awareness that in a society characterized by functional differentiation there isn't - and couldn't be – a system able to direct all the others, with the resulting "lack of symbolic production capable of holding together the different systems"[103]. If it is true that modern society in its relation with the complexity of the environment always seems to find new opportunities for adaptation, at the same time we know that sometimes these opportunities do not include the human factor, since society is functionally oriented[104]. We have to consider: is this a fact that must be taken for granted? Probably yes, but it should be noted, on one hand, the limits of semantics, of conceptual heritage used by the observers, and the constant delay of semantics in the description of the structures of society[105]; on the other hand, we have to consider the unpredictability of the future, produced by structural conditions[106].

Not least, it should be noted that nowadays human dignity and the rights attached to it represent prejudices of modernity, inviolable values, tools through which humanity reflected "looking for his most profound unity"[107]: the emergence of hyper-global value of human dignity would seem to indicate "a road, in the middle of a barbarity that sometimes seems to exceed the ability of a containment" [108]. This could be seen as the product of the reaction of (human) environment towards unacceptable outrageous incidents, inconceivable barbarity, that must be rejected, not only from a moral, but also from an aesthetic point of view[109]. But it is also necessary to evaluate as the strategic result of contingent and recursive structure of society, that can generate 'own values' (*eigenvalues*), 'inviolate levels'

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tirannia dell'effimero, il Mulino, Bologna, 2009 (*Consuming Life*, 2008); D. Fusaro, *Essere senza tempo. Accelerazione della storia e della vita*, Bompiani, Milano, 2010.

[103] Paolo F., *Crisi della struttura o crisi della semantica*, in «Imago. Rivista di Studi Sociali sull'immaginario», Anno II, n. 2, 2013, pp. 18-49, p. 21.

[104] *Idem*, p. 43.

[105] *Idem*, pp. 26-7.

[106] See note 13. see N. Luhmann, *op. cit.* (2013).

[107] See *Introduzione*, in N. Luhmann, *Esistono ancora norme indispensabili?*, Armando Editore, Roma, 2013 (*Are there Still Indispensable Norms in Our Society?*, in «Soziale Systeme», 14, 2008, 1, pp. 18-37), p. 31.

[108] *Idem*, p. 38.

[109] *Idem*, p. 35.

corresponding to their organizational archetype[110] able to "block the thinking", allowing the law and society to give themselves "indispensable norms".

4 TRANSCOSTITUTIONALISM IN A MULTICENTRIC SOCIETY

Now we can consider the contribute provided by Marcelo Neves, who adopts, like Luhmann and Teubner, the systemic approach for theoretical speculation. The Brazilian constitutionalist focuses on the new size of the demand for fundamental rights[111] as it emerges from world society. In fact, this issue is increasingly becoming relevant to more than one legal order and to different social systems at the same time.[112] Thus, from a constitutional perspective, problems of fundamental rights have a shared value and a dimension that concerns the relations between different permanent cross-cutting relationships among legal orders and between them and other subsystems.

We might say that the cognitive aspect seems to insist on a space much larger and more complex in comparison to the normative classic constitutionalism, which traditionally is rooted on a defined history and territory.

Starting from this premise, Neves first of all rejects the widespread tendency to a metaphorical use of the term "constitutional". Also he rejects the consequent invitation to create a new constitution whenever new social need arise[113]. Rather, Neves limits the use of the term "constitution" in its strict semantic and historical sense, and he proposes a new model called "transcostitutionalism"[114].

For his theoretical work, Neves borrows from Wolfgang Welsch and develops the concept of "transversal reason"[115], conceived in the context of a

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[110] N. Luhmann, *op. cit.* (2013), p. 67-8. See also *Id*. (2012), pp. 301-305.
[111] On this, see M. Neves, *op. cit*. (2013), pp.157 ssg.
[112] *Ivi*, p. 2.
[113] *Ivi*, pp. 5 ss.
[114] *Ivi*, pp. 74 ss.
[115] For a deepen treatise, see W. Welsch, *Gesellschaft ohne Meta-Erzählung*, edited by W. Zap, Die modernisierung moderner Gesellschaft: Verhandlungen des 25. Deutschen Soziologentages in Frankfurt am Main 1990, Frankfurt am Main/New York: Campus, 1991; W. Welsch, *Vernunft: Die zeitgenössische Vernunftkritik und das Konzept des transversalen Vernunft* 2nd edn, Frankfurt am Main: Suhrkamp, 1996.

multicentric society, with reference to language games[116]. It consists of "an ability not to impose decrees but to make transitions"[117]. Thus, it is a reason that is not incorporated in the language games but, on the contrary, is involved in the bonds that operate as "bridges of transition" among heterogeneous groups of language[118]. In other words, it is a meta-narrative, not oppressive but liberating. Welsch proposes the concepts of "all-encompassing transversal reason" and "postmodern supraordered metanarrative", but according to Neves, they are questionable under the conditions of reproduction of a world multicentric policontestural society[119].

Therefore, Neves affirms that social pressures to different modes of communication, due to mutual distinct relations (claims of autonomy, self-descriptions) are difficult to reconcile with the idea of an all-encompassing reason and the related meta-discourse. In fact Neves focuses on the development of stable mechanisms of mutual learning and mutual influence between spheres of communication. From this thought, he develops the concept of "partial transversal rationalities", able to support constructive relationships between the rationalities of each system of language games. Each partial transversal rationality is structurally coupled with the corresponding particular rationality and it acts as a specific "bridge of transition"[120].

The existence of structural couplings between subsystems is a necessary but not sufficient condition for the existence of a "transversal rationality", which thus constitutes an additional concept, and not a substitute. Transversal rationality, integrating the concept of structural coupling, seems to express the cognitive aspect of the legal system, for which, according to Neves, there must be the

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[116] According to the interpretation by Neves, this means that there is not a higher-level discourse imposed as ruler. In fact, the imposition of one of the fields of language on others would mean the destruction of the heterogeneity of the discourse spheres and of their communication systems. See M. Neves, *op. cit.*, p. 28.

[117] W. Welsch, *op. cit.*,1996, p. 759; W. Welsch, *Unsere postmoderne Moderne*, 6th edn, Akademie Verlag, 2002, p. 296.

[118] W. Welsch, *op. cit.*,1996, p. 754.

[119] See M. Neves, Transcostitutionalism, *op. cit.*, 2013, pp. 28 e ss.

[120] *Ivi*, p. 30.

possibility of emergence of transversal rationality, considered a scarce resource in a multicentric society.

The integration of concept of structural coupling, developed by Luhmann, with the new concept developed by Neves, thus leads to the construction of a theoretical tool, able to convey the cognitive aspect of constitutional law, which must necessarily be associated to the normative aspect. In summary, the mechanism consisting of structural couplings and transversal rationalities enables interactive communication between systems, which appear less closed and less differentiated, so that we can hypothesize the transition from "functionalism of distinctions" to "functionalism of links"[121]. At this stage, thus, it seems important to wonder what is the optimal combination of openness and closure of the system, namely the intensity and frequency of transmission of nerve impulses, as well as identify connective tissue diseases.

First, we can focus on what Marcelo Neves calls "the two sides of the coin" of structural coupling and "transversal rationality". In a strictly luhmannian reasoning, based on operational closure, a total system openness would lead, through the mechanism of structural coupling, to "systemic corruption"[122], which implies the prevalence of a system on one other, that would prevent the autopoiesis of the latter. Neves identifies the opposite faces, the "downsides" of transversal rationality, calling them "atomization" and "imperialist expansion"[123] of the system. The atomization resulting from the closure could lead to "autism" or "idiot specialization"[124], whose antidote would be just to build some functional links. In fact, while the internal consistency becomes something of absolute, the harmonization with the environment fails[125]. On the opposite side, transversal rationality could lead, according to Neves, to "imperialist expansion", that is the weakening of the system code of communication because of the excessive strength of the other, which does not necessarily coincides with systemic

[121] A. Febbrajo, Introduzione a *Law and Intersystemic Communication*, edited by A. Febbrajo and G. Harste, Ashgate, Farnham, 2013, p.1.
[122] M. Neves, *op. cit.*, p. 32.
[123] *Ivi*, pp. 32-33.
[124] *Idem*. See also W. Welsch, *op. cit.*,1996, pp. 433-5.
[125] Excessive external adjustment would produce instead irrationality. See M. Neves, *op. cit.*, p. 32.

corruption, that is, with a rupture of internal communication within a given system due to external blocks.

Rather than the two sides of the same coin, it seems appropriate to connote "atomization" and "imperialist expansion" as the endpoints of a *continuum*[126], representing a range of intermediate situations between the total openness and the total closure of system[127].

5 FINAL CONSIDERATIONS

In a multi-level or multi-center legal system, the issue of "fundamental rights" is directly or indirectly connected to the so-called "transcostitutionalism".

Multidimensional transcostitutionalism of fundamental rights would acquire meaning through the transversality of the different legal systems, by stimulating both cooperation and collisions. For this reason, it is desirable to have a transcostitutional "conversation" through "bridges of transition", that allow mutual learning of the involved legal systems. The core of the problem seems then the attempt to limit the Teubner's claim illustrated above, concerning the fragmentation that leads to conflicts of rationality, or to non-harmonic relations between different functional subsystems[128].

On the one hand, we could say, there is a "demand" for rights protection, that emerge quickly from a global galaxy of social interconnected subsystems; on the other hand, we are facing what Teubner calls the "fragmented law"[129], made up of legal systems often autistic in a double way, in their relationships and in the relationships between the legal subsystem and the other ones.

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[126] A. Febbrajo, *op. cit.*, 2013, p. 1.

[127] "Autopoiesis appears to be an amphibius concept which as such combines, in variable degrees, the ability of social sustems to change in order to properly react to external impulses (openess), and the ability to save their own identity to remain recognizable in spite of the changes occurred (closure)". *Ivi*, p. 2.

[128] M. Neves, *op. cit.*, 2013.

[129] See A. Febbrajo, "Dal diritto riflessivo al diritto frammentato. Le tappe del neo-pluralismo teubneriano", in *Il diritto frammentato*, A. Febbrajo, F. Gambino (a cura di), Giuffrè, Milano, 2013.

In summary, while there is a trend of global society towards a process of diminishing differentiation, within the legal sphere of the single states, at a constitutional level, remain differences which often are in conflict[130].

Using concepts that belong to economics, we might apply to the Sociology of constitutions the theoretical model of market analysis, in order to identify the issue of fundamental rights as a space where operators produce a rigid supply of constitutional guarantees (because of the substantial aspect regarding the link with their legal culture, and because of the formal aspect regarding the complex procedural process required for adaptation to social changes. By contrast, the demand of users, detected by sociologists, is elastic, depending on environmental changes. In other words, there is an elastic demand in terms of protection of fundamental rights, which is resilient according to certain variables inherent to the social evolution, and there is a supply of normative production more rigid, represented by constitutional systems of different states.

According to this scheme, to stabilize the system, we could say that the demand of fundamental rights by world society must meet the supply of constitutional protection. In our case, the offer must adapt to the demand. That is, to get closer to a balance point, we must find a way to make more flexible the normative offer and therefore adequate (or adaptable) to the demand.

The problem is then to understand how to do it, since the cognitive process seems to follow logics of global communication that are different from a self-reflective process of the operational closed constitutional system.

The answer might lie in the study of mechanisms of connection, which, potentially, are capable of achieving the “trancostitutionalism”.

Here, then, the functionalism of links could be modulated along a scale that start from the atrophy and ends with the hypertrophy of the links themselves. This could be the strategic key by which to pass, in the “law of collisions” of Teubner, from conflicts to cooperation.

The teubnerian oxymoron of a globalized fragmentation of law is explicated in the statement about the need of “connecting a network of constitutions

[130] M. Neves, *op. cit.*, 2013.

belonging to global fragments, in a constitutional law of collisions"[131] and it expresses, at the same time, the discrepancy between a unique coherent concept of law, and the pluralistic presence of social rules internal and external to the states.

Without pretending to provide a comprehensive answer, we could conclude that the law seems to react to social changes through dynamics of the legal systems that identify a boost, still potential, to increase transnational processes, and thus intersystemic communication.

First of all, it seems appropriate to identify the mechanisms that make up the connective tissue between the two interacting systems: the material one and the legal one, namely the cognitive aspect and the normative one.

The cognitive aspect (exemplified by media) and the normative aspect (represented by constitutional dispositions), have different rates of change. This speed difference creates tensions and therefore instability in the complex system constituted by a galaxy of subsystems that, albeit basically operational closed and autopoietic, are bound together by structural couplings, that are increasingly important in a context in which differentiation and closure, by contrast, are progressively losing their constructivist value. Referring once again to economic models, we can remember how the single currency can work in conditions of stability only when the different monetary "structurally coupled" systems have similar rates of inflation. A very different rate would blow the mechanism, because of the rigidity of the currency that could not, for example, be devalued or issued in an expansive sense by an autonomous country.

Similarly, between different legal systems or between different social subsystems, the structural coupling of constitution seems to have to acquire degrees of flexibility enabling the institutionalization of self-reflection within the legal system; that is, making it possible to adjust the normative supply to the demand of fundamental rights.

Then, the problem seems to establish adequate bridges between the various subsystems, flexible and thus resilient to change, not rigid and susceptible

[131] G. Teubner, *op. cit.*, 2012, p. 22.

to breakage, with the consequent result of detaching the normative process and the cognitive one and therefore preventing institutionalization of internal self-reflection and external communication.

The theoretical instrument generated by the integration of structural coupling with transversal rationality (through the assignment of an active valence to cognitive operations of the structural coupling) could, in theory, provide a plausible answer. That is, it could be a mechanism to solve the problem of the right combination of opening and closing, in a complex system where the subsystems are not autistic but incorporated into a framework of relationships that make up a new scenario based no longer, or not only, on autopoietic communication, but also on the inter-system intersystemic communication.

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