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CONSTITUTIONAL ORDERS?

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- **RESUMO:** O presente artigo tem como objetivo analisar a possível relação entre o constitucionalismo, – se orienta pela existência da constituição, e o pluralismo jurídico, que se direciona à diversas ordens normativas que coexistem dentro de uma mesma sociedade. Com a finalidade de propiciar a reflexão sobre como esses dois aspectos podem ser combinados e organizados parte-se da ideia de que há duas formas de constituição. A formal, que dita como a máquina jurídica deve funcionar; e a material, a qual representa uma concreta ordem legal concebida como resultado de novas situações sociais. O presente artigo apresentará esse ponto de vista através de autores da sociologia e do direito, abordando os modelos de pluralismo, o modelo sistêmico de pluralismo, as novas formas de um pluralismo constitucional e refletindo sobre a existência de um novo constitucionalismo para um novo pluralismo.

- **PALAVRAS-CHAVE:** pluralismo jurídico; constitucionalismo; constituições formais e materiais.

- **ABSTRACT:** The purpose of this article is analyse the possible link between constitutionalism, that is oriented towards the constitution and legal pluralism, that is oriented towards the many possible normative orders that co-exist in the same society, in order to provide the reflection about how this two aspects can be combined and organized. It will base on the idea that are two forms of constitution, a formal constitution, which describes how the legal machine has to work; and the material constitution, which represents a concrete legal order conceived as the result of a constitutional adjustment to changing social situations. The purpose of this article is to present this point of view with some socio-legal authors, touching on the classical models of pluralism, a systemic model of pluralism, new forms of constitutional pluralism and a reflexion about a new constitutionalism for a new pluralism.

- **KEYWORDS:** legal pluralism; constitutionalism; formal and material constitutions

1. Introductory remarks

This paper suggests a paradoxical connection. If constitutionalism is oriented towards the uniqueness of the constitution, whereas legal pluralism is oriented towards the many possible normative orders that co-exist in the same society, how can combine the two? In other words, how can the idea of the homogeneity of the legal order, embodied

by a constitution, be compatible with the pluralist idea that every society admits different social orders? In which way can a hierarchically organised normative world be reconciled with the idea of a polyarchy of different sets of norms?

These problems are obviously not only theoretical, but also practical. In many countries, the pragmatic side of law, supported by a state-centred approach, has inspired the image of law disseminated by universities among legal professionals. According to this approach, legal orders are generally perceived as both coherent and complete. State constitutions are regarded not only as the highest point of reference for the legal order, but also as an emergency pool of general criteria used for filling gaps in written regulations. When deciding what is right and what is wrong in given situations, a judge needs to find *the norm* that best suits the case. In this context, the presupposition of a legal order based on a unique constitution becomes essential for avoiding contradictions and arbitrary decisions.

The image of constitutions that derives from a socio-legal perspective assumes a different standpoint[1]. When seen from the top of the legal order, the constitution seems to be its unifying element; when seen from its social basis, the constitution shows its external roots and appears to be the result of a plurality of cultural elements[2]. Constitutions regulate this complex chain of elements, but are also profoundly, conditioned by them. The reassuring architecture of norms, characterised by hierarchical internal relations, is thus rejected in favour of a polycentric representation of circular interactions between social and legal factors[3].

From a socio-legal perspective, the legal order is generally presented as compatible with other organised social norms, being provided by a superior complexity, law is able to adapt its *content* to previous social norms, its *structure* to other normative organisations and its *function* to the needs of various social sectors. Law takes on a 'subsidiary' role. A decision based on legal rules is an *extrema ratio* that provides the ultimate response to conflicts in which no other solution, proposed by different

1 Neil MacCormick defines the constitution as "a body of higher-order norms establishing and conditioning governmental powers" (MACCORMICK, 1999, p. 119). The same author tries to balance the reflexivity of this definition, which refers to a political power capable of limiting itself, focusing attention on a plurality of at least partly independent normative structures capable of interacting with the constitution.

2 The pluralistic problem is often stressed by recent socio-legal studies. Cf. e.g (GRIFFITH, 2002, p. 289-310); (GRIFFITH, 1986, p. 1-55); (KRISCH, 2010); Id. (KRISCH, 2011, p. 386-412); (WALKER, 2002, p. 317-59).

3 As a matter of fact, the fundamental source of this circular approach is the ambitious positivistic project, sustained by Comte, to renounce external "metaphysic" factors and to exclusively explain society in terms of society. (FEBBRAJO, 1988, p. 3-21).

normative orders, seems to be acceptable. The constitution could thus be considered as the bridge that connects legal and social orders in a dual perspective: as the most social element of a positive legal order, as well as the most legal element of society.

This strategic position, recognised to legal orders and to their constitutions, is not always visible and real. In particular, we can speak of a 'silent' constitution[4] when the presence of a fundamental norm is not declared but just presupposed, or when a new legal order is established by political power without the official proclamation of a constitution. We can also speak of a 'symbolic' constitution when the formal recognition of the set of general norms, values and principles, collected by a constitution and used to legitimise a legal order, is officially maintained, regardless of the low level of implementation really achieved in legal praxis[5].

It is important to stress here that, regardless of its real effects, a constitution can absorb its apparent contradictions. It can ensure internal continuity and external adaptation, and can be considered a milestone in the internal evolution of a legal order, as well as in the external processes of the legitimation of law. These internal and external orientations, present in every constitution, might be defined as the constitution's 'formal' and 'material' aspects[6]. The task of the formal constitution is to describe how the legal machine has to work according to its 'instruction manual'; the task of the material constitution is to represent a concrete legal order conceived as the result of a continuous process of constitutional adjustment to changing social situations. In short, a formal constitution could be considered an instrument of stability, and a material constitution an instrument of innovation.

The duality of formal and material constitutions does not rule out the possibility of their mutual presuppositions, but implies it. As ideal-typical expressions of a 'conceptual' opposition within a pluralistic context of social and legal norms, stability

4 For an overview of some silent, or 'pre-constitutional', constitutions. (THORNHILL, 2011). As J. de Maistre put it, constitutions have to remain at least partially unwritten. Constitutions with "neither author nor date" may rely on God or on the deeply-rooted will of the nation and "must be left behind a dark and impenetrable cloud on pain of overturning the state". As in music, "there is something in all governments that is impossible to write". (MAISTRE, 1971 p. 162).

5 The constitution often provides a legal order with legitimation, regardless of the results actually achieved, as if it were a sort of political manifesto. The fact that the results are often inadequate compared to the objectives set out in the text of the constitution does not mean that various countries' constitutions cannot continue to be legitimised by the reproduction of their general promises at a political level. On this point, (NEVES, 2007, p. 411-444); (NEVES, 2007b).

6 The distinction between a 'formal' constitution and a 'material' constitution has been highlighted starting from a sociologically-oriented approach to constitutional studies. (MORTATI, 1940).

and innovation appear as two complementary sides of the same sociologically comprehensive concept of the constitution[7]. To have a formal constitution without a material one is no more possible than to eliminate the last carriage from a train. Formal constitutions need the support of the socially-rooted norms that contribute to the development of material constitutions, while material constitutions need the support of the legally-rooted norms that contribute to interpreting formal constitutions.

These dual aspects combined in every constitution could avoid unilateral interpretations of the constitution and ensure a socio-legal approach based on a circular movement from stabilisation to innovation and vice-versa. Constitutions influence, and are influenced, by the work of legal professionals whose internal culture *of* law is oriented to technical knowledge and skills, as well as by the culture *about* law of normal citizens presented as the rulers and at the same time as the ruled in a modern legal order[8]. Social norms can be introduced into a formal constitution by open-minded judges or by innovative legislators; legal norms can be introduced into a material constitution by regular behaviours of citizens or by political actors who participate in shaping a *communis opinio* in relation to new and constitutionally-relevant issues[9].

In this context, various combinations of internal and external legal cultures, of social and legal norms, have the potential to instil the flexibility called for by a variety of sociological issues into the concept of the constitution. These may correct models of the constitution presented unilaterally either as shields against unjustified restrictions imposed by arbitrary legislation (freedom 'from'), or as instruments for recognising the area of individual rights (freedom 'of'), without forgetting that both aspects are equally important for a modern constitution. They may also offer a solution to a question of particular relevance for sociology of law: how can the constitution

7 A formal constitution can be considered something like a legal order's official identity card. The original photo taken when the ID card holder was younger has to be interpreted in order to be recognised. Who is then authorised to proceed to such a recognition: an expert such as a judge, who can probably perceive continuities that are invisible to others? The people, who are supposed to comply with the constitution and legitimise it every day through their behaviour? A legislator, who can constantly produce new norms in conformity with the current constitution? A special body as a Constitutional Court that has to draw the line between what is constitutional and what is not? As a matter of fact, different ways of applying constitutional texts according to countless legal cultures and sources of 'legal' meanings can lead to innovative or stabilising results. Among contemporary constitutionalists with a particular affinity to this pluralistic approach, it is worth mentioning. (HÄBERLE, 2013).

8 It is no coincidence that in the West's oldest constitution the ambiguous concept *'the People'* is explicitly the abstract 'author' of the text of the constitution and at the same time its real 'recipient'. (TOCQUEVILLE, 2000).

9 One particularly enlightening example of the ample margin of flexibility allowed by constitutions can be found in the Italian constitution, where the different possible interpretations of the delicate role played by the President of the Republic smooth the way for a transition from a parliamentary system to a system that tends to be presidential. For an analysis of the material constitution produced in relation to this crucial point. (GALEOTTI; PEZZINI, 2003).

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be applied not only to the first generation of citizens, who are presumed to share its basic values and norms, but also to an indefinite series of future generations, who feel probably culturally distant from its original positions?[10].

FIG. 1. · FROM LEGAL CULTURES TO FORMAL AND MATERIAL CONSTITUTIONS

LEGAL CULTURES	ACTORS	INSTRUMENTS	EFFECTS	CONSTITUTIONAL MODELS
Internal legal culture (culture of law)	Judges Legislators	Transformation of Social into Legal Norms	From Innovation to Stabilisation	From material to formal constitution (legal selection)
External legal culture (culture about law)	Public Political Actors	Transformation of Legal into Social Norms	From Stabilisation to Innovation	From formal to material constitution (social selection)

SOURCE: ELABORATED BY THE AUTHOR.

In order to face the problems raised by a constitution that somewhat paradoxically combines both the problems of the identity of legal order and the problem of its evolution[11] sociology of law has to focus attention – at least indirectly – on a specific sociology of the constitution. In the following pages, we will briefly present some socio-legal authors who have started out from the common critical attempt to underline the limits of a hierarchical state-centred structure to develop the basic elements of a sociology of the constitution based on a circular interplay that involves internal and external legal cultures, legal and social norms, stabilising and innovative requirements.

These authors demonstrate that it is impossible to understand the real functioning of a legal order and of its pluralistic context without explicitly or

10 The question of how and to what extent the freedom of action of future generations can be restricted when it has been awarded to past generations is always a thorny one to solve. Constitutional democracy paradoxically tends on the one hand to limit future generations, on the other to leave them free. It is no coincidence that (GINSBURG, 2009), working on the basis of a wide-ranging empirical analysis, calculated the average life expectancy of a constitution at nineteen years, i.e. about the cycle of a generation. But also for the state a constitution can be an obstacle more than a spring-board. (FIORAVANTI, 1990).

11 If the common distinction between 'law in the books' and 'law in action' is used as a parallel for the distinction between the formal constitution and the material constitution, some specific features of each distinction may not be grasped. The first distinction is drawn between what is real and what ought to be real, but for many reasons is not; the second distinction is drawn between two empirical aspects of the constitution, both supported by different cultural factors and oriented towards different social aims.

implicitly adopting a certain idea of the constitution. In particular, they share the following presuppositions: a) that, in order to be combined with a pluralistic approach, the idea of the constitution has to avoid rigid, unilateral interpretations; b) that these flexible interpretations have to be oriented towards formally stabilising functions as well as towards materially innovative functions; c) that these different functions may produce paradoxical consequences to be neutralized through internal differentiation and reflexivity[12].

Further convergences among the authors examined also emerge at the methodological level. They have inserted formal and material aspects of constitutions both in a *structural* process of institutionalisation which, through a bottom-up orientation towards legal norms, shapes the gradual reception of social norms into legal orders, and in a *functional* process of mutual adaptation which, through a horizontal orientation towards other sectors of society, determines the production of effects external to the legal order. These two complementary processes form a sort of 'T junction', whose upright reproduces a self-referential perspective that can be recognised as the basis of formal constitutions, while its horizontal element reproduces a perspective oriented towards external society that can be recognised as the basis of material constitutions. Structural and functional perspectives represent a dual constitutional process capable of combining the specificity of the legal order and its pluralistic context.

In the following paragraphs, after having pointed out the fundamental continuity that links classical sociology of law (par. 2), and contemporary sociology of law (par. 3), attention will be focused on some new forms of 'constitutional pluralism' that, despite evident innovations due to the so-called 'globalisation of law' (par. 4), may justify a constructive reconsideration of the socio-legal legacy with its implicit or explicit paradoxes (par. 5), and further articulations of a traditional semantic (par. 6).

2. Three classical models of pluralism

Starting from a common anti-normativistic and anti-hierarchical approach, three classical sociologists of law have tried to combine different models of *pluralism*

12 Reflexivity as such provides the easiest way to escape from paradoxes. The power that enables political power to regulate itself through constitutions has to be a superior kind of power, a sort of 'power of powers'. As we shall see, a strategy adopted by sociologists of law for dealing with paradoxes is based on additional distinctions, such as those between internal and external legal culture, legal and social norms, formal and material constitutions.

and *constitution* with the specific support of society-oriented elements respectively definable as *traditions*, *practices* and *meanings*.

The most radical representative of an anti-hierarchical pluralism based on traditions is Eugen Ehrlich, whose work deserves particular attention here (EHRLICH, 1962). Ehrlich's pluralism is 'asymmetric', since it gives absolute priority to the material constitutions of social associations over the formal constitution of the state. He stresses that the living law (*lebendes Recht*) produced spontaneously by ethnically homogeneous social associations (*Verbände*), normally linked to a given territory where they have developed their customs and traditions in the course of history, constitutes an autonomous legal order[13]. The living law of associations is culturally closer to the single members of the community than the legal propositions formally imposed by a distant state, perceived as the most extensive 'association of associations'.

Living law can overstep the bounds to which state law is subject and become strong enough to exert a bottom-up influence on the judges and their decisions. This is clearly expressed in the frequently-quoted preface to Ehrlich's most important work, considered the first manifesto of sociology of law, where he states that "the centre of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision, but in society itself" (EHRLICH, 1962).

On this basis, a socio-legal treatment of law has to take the spontaneous order of social associations and their social constitutions as its primary field of research. The family, which comprises a plurality of social aggregations based on autonomous constitutions, is considered by Ehrlich to be the genetic group in every society. Families, and in general social associations, are made up of binding norms rooted in a tried-and-tested past of shared customs. The living law that regulates such associations is defined by unwritten constitutions produced by gradually consolidating customary laws directly inspired by the human species' primary needs.

In this context, only an oversimplification enables living law to be understood as merely the product of the general principle *ex facto oritur jus*[14]. A closer look reveals that living law is the result, not of an 'empirical', but of a hidden 'normative' process. In other words, the 'living' constitution of associations depends on a socially immanent normative principle: that of the selection of the best norm produced anonymously

13 In this sense, Ehrlich can be seen as a forerunner of the pluralism that considers every institution to be a bearer of a homogeneous law of its own, capable of successfully competing with the more abstract law of the state institution.

14 This is one of Kelsen's main criticisms about Ehrlich's work. (KELSEN, 1915, p. 839-876).

through historical developments. The basic rule of this process obliges social groups to select those norms that have proved historically more 'efficient', i.e. capable, in an 'evolutionist' perspective, of achieving their aims and meeting social needs at the lowest social costs. Norms that pass this test are destined to assert themselves. Otherwise, they will be replaced, spontaneously, by more efficient norms, without any explicit intervention on the part of the legislator and with the possible support of judges in individual cases.

It is this basic principle that shapes the material constitution of every society. Ensuring constant compliance with the criteria of efficiency, it successfully combines the supply and demand of social norms[15] and guarantees a gradual evolution of law[16]. Social rules become 'living' constitutional norms if they are consolidated by traditions. As a result, associations not only *have* constitutions, but *are* constitutions, in the sense that they are born and raised together with their living law.

It should be stressed here that what enabled this to happen was the tolerant attitude adopted by the Austro-Hungarian Empire. Its constitution traditionally left ample room to regulations implemented by the different nationalities that at that time coexisted peacefully in its territory, and in particular in Bucovina, the province of the Empire where Ehrlich lived[17]. In Ehrlich's example, this explains why the community of property between spouses was the form of property most often chosen by German Austrian peasants, even though it was completely different from the community of property accurately described by the written norms of the Austrian Civil Code. As in many other cases, this enabled Ehrlich to state that "the regulations in the Civil Code" are not generally applied in the different regions of the Austro-Hungarian Empire, because of the overwhelming presence of a plurality of concurrent living social orders[18].

The living law complied with spontaneously by a certain population is legally recognised. In order to avoid open conflicts between living and state-oriented

15 Here Ehrlich's construction refers implicitly to pre-sociological, especially historical, traditions. (FEBBRAJO, 1982, p. 137-159).

16 It is not the mere factual repetition of a given model of behaviour that makes a norm, but the intrinsically normative criterion of efficiency. Kelsen seems not to realise the hidden presence of this normative criterion when he reproves Ehrlich for the logical fallacy of relating facts directly to norms. About the answer of Ehrlich and the resulting debate in general, (FEBBRAJO, 2010).

17 Ehrlich observes that "by creating constitutional and administrative law, the state has created its own law for its own needs", *Fundamental Principles of the Sociology of Law*, 388. Therefore "the individual, in an association, lives his own life, having his own ends in view" (EHRLICH, 1962, p. 394).

18 From a sociological point of view, Kelsen's position, that a judge always has to apply the laws of the state, is hardly applicable to sectors like family, which as such are profoundly disconnected from state law. "No two marriages and

normative orders, judges create socially acceptable interpretations of positive law. It is this constant adaptation that renders a material constitution substantially different from the formal constitution. Only in Vienna could the formal constitution be realistically considered "a unitary legal basis to all independent social associations"; in reality, it was external to the living law of the regions of the Empire. Since it is supported by social acceptance, living law is capable of adjusting official legal propositions to their cultural environment. Recognising these different levels of normativity, practitioners are interested in interpreting law according to a general theory that takes the reality of living law and actors' successful expectations into consideration[19], and sociology of law could actually provide a theoretical background and useful indicators for practical operators, as it happens in other fields (e.g. medicine, engineering).

For Ehrlich, the "facts of the law" (*Tatsachen des Rechts)* are the core of a socially oriented legal theory.[20] From a comparative perspective, they are the legal relations, present in every legal order: in addition to usage (*Übung*), considered to be the fundamental fact of the law, they also include domination over other subjects (*Herrschaft)*, possession of things (*Besitz*) and declarations of will (*Willenserklärungen*), especially contracts and testaments. On the common basis of the "facts of the law", Ehrlich tried to open his socio-legal conception up to an ambitious project: to carry out anthropological comparisons in order to contribute to an empirical 'morphology' of the constitutions that support legal life in different cultural contexts[21].

Although this project was never achieved, the specific character of the principle of efficiency led Ehrlich to focus principally on one social sector: the economy. Adopting the horizontal approach that connects law functionally to other social sectors, Ehrlich states that jurists and economists "are concerned everywhere with the same social phenomena", and that "it would be difficult to find a single object that the science of the law is concerned with as much as economics"[22]. Efficiency and close links to the economy

no two families will ever be found in which the same order obtains, for the simple reason that in the whole wide world there are no two married couples that are exactly alike, nor two sets of parents and children that are exactly alike" (EHRLICH, 1962, p. 392).

19 "It is the tragic fate of juristic science that, though at the present time it is an exclusively practical science of law, it is at the same time the only science of law in existence", (EHRLICH, 1962, p. 6).

20 (EHRLICH, 1962, p. 83).

21 Cf. my *Introduction* to the Italian translation of *Grundlegung der Soziologie des Rechts* (Eugen Ehrlich, *I fondamenti della sociologia del diritto* (Milano: Giuffrè, 1976), 3 ff.).

22 In other words, "the jurist and the economist are dealing with different aspects of the same social phenomena": the former "with their legal regulation and their legal consequences", the latter "with their economic significance and scope" (EHRLICH, 1962, p. 503-4).

explain why living material constitutions of specific associations cannot accept a rigid meta-order, such as that of a natural law, which tends to stabilise constitutions rigidly. This would render the legal order basically untouchable, while it needs variability in order to take the social factors into account that may gain the upper hand in different situations. Ehrlich focuses his idea of justice on the alternation between individualism and collectivism: both are destined to prevail cyclically in a process that does not lead to the definitive victory of one over the other, but enables humanity to progress "almost as though it were following the thread of a screw", because "these two ideas of justice have been drawing the human race upward alternately"[23].

'Living' constitutions are inserted by Ehrlich into a general process that involves the following basic elements: a) customs and traditions are based on historically-established living law; b) judges are not considered as neutral interpreters of state law, but as conscious intermediaries between state law and living law; c) the state and its constitution are not the strongest, but the weakest link in this constitutional process, since every community has its living constitution, in a material more than in a formal sense. Every legal order must necessarily be completed and/or replaced by a plurality of living constitutions because, and this may seem to be a paradox, they are independent of the state, and not dependent on it.

In particular, Ehrlich constructs his model of the constitution on the basis of the following anthropological presuppositions: a) that the subject to whom the spontaneous production of social norms is attributed is a collective organism, capable of regulating itself autonomously and impersonally; b) that the criteria of this production entail a fundamentally utilitarian approach that legitimises the superiority of living material constitutions over the pale formal state constitution; c) that the strength of institutionalised customs prevails over the decisions of any central legislator, because of the living law's close functional bonds with the economy and with the fundamental, implicit rule of efficiency.

Ehrlich's sociology of law represents, and here is the reason for its importance in this context, one of the most radical counterparts to Kelsen's normative approach and, more in general, to every hierarchical explanation of the role of constitutions in a modern state. Historical traditions and efficiency are the impersonal factors that substantially condition formal and material constitutions. Law, in its highest form,

23 Ehrlich, 1962, p. 241.

is for Ehrlich *fusis* more than *nomos*, natural more than artificial regulation; it reflects society in its historically-based order, and refuses the vain attempts to bring about change in societal reality and its unwritten rules through single decisions.

Yet Ehrlich fails to come to grips sufficiently with the fundamental paradox of its socio-legal construction: unity not in spite of plurality, but because of plurality. As a consequence, he makes an insufficient analysis of such questions as: How can a plurality of local constitutions co-existing in the same state be co-ordinated?[24] How can a law that can be traced back to living constitutions assert itself against deviant behaviours?[25]

B) Deviance and sanctions, which do not attract sufficient attention from Ehrlich's spontaneous pluralism, are actually the concepts on which the 'statistical' model of pluralism elaborated by Theodor Geiger mostly focuses. Geiger tries to counter the normativistic representation of formal law and its constitutions from a behaviouristic point of view, concentrated not on valid norms, but on real practices. Starting from the premises of legal realism, Geiger considers written law to be sociologically irrelevant if it is not protected by institutionalised sanctions in case of infringements, that is not "effective". Paraphrasing Ehrlich's celebrated introduction to his *Grundlegung*, Geiger criticises the normative approach from a different perspective and clarifies his pluralist conception of the sources of law: "Neither the legislator, nor the judge, neither custom nor legal science can be considered, each one in isolation, as the source of validity of legal norms. The source of validity is always the entire dynamically structured system of legal life, in which legal society achieves its characteristic social interdependence"[26].

In this context, only those norms that are destined to become 'real' by virtue of an apparatus that reacts to disobediences with legal sanctions belong to a sociologically relevant concept of law. Sanctions are thus a useful empirical criterion for defining both the borders and the contents of law. Correspondingly, the lack of reactions to the infringement of some formal norms may demonstrate that these norms are

24 It is worth noting that there is a close connection in Ehrlich's thinking between the importance he attributes to the concept of 'interest' in interpreting individual behaviours and to the concept of 'autonomy' in interpreting collective behaviours.

25 . The role played by the concept of 'sanction' is reduced significantly. The focus for Ehrlich is on the (single or collective) actor's voluntary compliance with a normative order capable of ensuring the convergence of individual and collective interests. Therefore, Ehrlich attributes more importance to the spontaneous reactions of the members of an association when they are confronted by visible disobedience of social rules, than to institutionalised sanctions ((EHRLICH, 1962, p. 63-64).

26 (GEIGER, 1964, p.171).

perceived as socially irrelevant or potentially harmful, and therefore sociologically to be ignored[27].

If a sanction is the only visible indicator of the existence of legal norms, a norm constantly obeyed could be invisible, and thus, paradoxically, of less interest for a sociologist of law than a norm sometimes *not* applied, and for this reason capable of producing visible reactions to its infringements. In ideal societies with neither conflicts nor courts, neither victims nor criminals, law could thus become superfluous, and its place could easily be taken by morals or universally accepted customs. But in normal societies, sanctions are a selective way of reconstructing, in an evolutionary perspective, the passage from a formal constitution, seen merely as a set of officially-proclaimed language units, to a material constitution, suitable for social actors' expectations and defended by more or less institutionalised reactions to unexpected, deviant behaviours.

The institutionalisation of reactions is important for distinguishing effective law from merely written law and for defining the empirical basis of the material constitution. For Geiger, this process of institutionalisation is linked to a spontaneous social order characterised by three essential aspects: a *social interdependence*, based on the instinctive cohesion produced by the individual's need to survive with the help of others; a *vital interrelation*, in which people identify with other people, assuming that it is possible to interpret and understand (or believe to understand) their attitudes; a *conjectural interrelation*, in which the practical moment of adaptation to the behaviour of others is based on intuitive hypotheses relative to their possible reactions.

These various aspects affect real personal inter-relations guided by single individuals and by a sort of constant adjustment of the *ego-alter* relationship (GEIGER, 1964, p. 46). An advanced concept of order emerges when social evolution abandons the 'natural' level of interdependence (*Interdependenz*) and enters into the 'artificial' level of co-ordination (*Koordination*) of social behaviours. This kind of order marks the transition from archaic to civilised societies. It is oriented towards norms provided by institutionalised sanctions and is based on 'predictability'. In this 'artificial' order, the

27 The fundamental formula sàg states that, in a given integrated social group Σ, "the behaviour g usually occurs in the case of s". This empirical part of the 'real order' is transformed into a subsistent norm only if it is reinforced by a binding obligation expressed by the stigma (v). For Geiger, this means that every actor A "who becomes involved in s, must face the alternative of either putting the sàg into practice, or else of exposing himself to a reaction r against a deviant behaviour". (GEIGER, 1964, p. 51).

institutionalisation of sanctions passes through different phases: firstly, a phase that tends to address all the members *MM* of the integrated social group Σ indiscriminately with respect to the sanctions requested; secondly, a phase that is characterised by specific sanctions used in defence not only of particular, but also of general interests; finally, a phase characterised by the creation of a specific judicial organ Δ.

This last phase ensures not only that "the individual can predict with reasonable certainty how others will behave in recurrent typical situations" (GEIGER, 1964, p. 48), but also which effective reactions will respond to specific deviant behaviours. The characteristic of association in this phase is that every norm implies a second level, oriented specifically against those who fail to react to infringements of a first-level norm (GEIGER, 1964, p. 132). Geiger's approach presupposes a higher, material constitution behind this "second-level norm" that describes the ways and the limits of the sanctions applied in individual cases.

The 'artificial' order records not only what should happen from a formalistic perspective, but, from a material perspective, in what 'percentage' it actually happens. In other words, Geiger does not recognise formal constitutions that, as intended by legal positivism, adopt a rigid 'yes or no' alternative, and distinguishes unequivocally legal from merely social norms. He believes that it is impossible to hold to the idea, dominant in traditional legal science, of a clear-cut functional separation between the norm's enactment and its application, between the legislator and the judge. The legislator Θ can typically – though not always successfully – produce 'proclamatory' normative propositions, or politically recognise already consolidated subsistent, effective norms (GEIGER, 1964, p. 86). The judicial organ Δ, on the other hand, is decisive for providing certain norms with the stigma of obligation *v*, but is far from having a completely discretionary range.

A judge cannot fail to consider the extension of the semantic area of the norms as it is established by jurisprudential practices and linguistic conventions. This area "has a maximum and a minimum radius of reference", and in "the zone delimited by these two radii is located the fluid boundary of the validity of the norm, such as it is legally administered" (GEIGER, 1964, p. 262). The contents of every legal norm, including constitution's norms, will thus be encompassed within this area of oscillation. Geiger holds that it is possible to speak of a 'material' legal error if the judge makes a distorted reconstruction of the concrete circumstances, and of a 'formal' legal error if the judge's attempt to modify the statistically consolidated area of application of a given

normative proposition fails to obtain an effective affirmation, i.e. the supportive intervention of a superior organ.

Lawyers operating in their everyday practice constantly notice how difficult it is to find consolidated nuclei in the field of jurisprudence. They tend to dissimulate this truth, emphasising the ideas of unity and coherence generally connected to the legal order and its formal constitution. In Geiger's 'realistic' perspective, the contents of a legal order emerge neither from normative propositions, nor from the conceptual schemes of an 'ideally correct law', but from a sort of material constitution, i.e. from the law that is 'really applied', without asking whether its contents are just or unjust, good or bad[28].

The basic elements of Geiger's construction are clearly focused on the realistic principle of eliminating "unreal" elements from the analysis of law, including the legally supposed *ex ante* superiority of formal constitutions. The refusal of traditional premises, such as the homogeneity of jurisprudence and the predominance of formal constitutions, transforms the normative concept of the certainty of law into a 'statistical' concept. Geiger bypasses the limits of the legal order's capacity to produce certainty through the 'rule of law', by introducing a statistical '*calculation of obligation*' (GEIGER, 1964, p. 277). This calculation is based not on logical presuppositions, legislative norms or general principles, but on the simple statistical evaluation of the stability of certain jurisprudential trends in the interpretation of every legal norm, including constitutional norms.

In the case of a new law, about which no jurisprudence has yet been formed, a series of indications about the probability of its future application can be deduced from sociological elements, such as the effective social influence of the beneficiaries *BB* of the new norm. In the case of a norm that has been left in abeyance for a long time, the calculation can work on the basis of the functions already fulfilled by the norm in the period of its application. In particular, Geiger speaks about a '*calculation*' made by the judge in attempting to defend his own image against the risk of seeing his decisions corrected by other organs of jurisdiction (GEIGER, 1964, p. 157). This calculation is based on the level of conformity effectively practised by the other judges[29] and on

28 Geiger's constant concern with avoiding non-empirical elements explains why he rules values and subjective purposes out of the social factors relevant to the evolution of law. (GEIGER, 1964).

29 For Geiger, the mechanical concept of "imitation" (*mimesis*) is essential in this context.

the widespread necessity to avoid unbearable excesses in the everyday production of material constitutions.

According to a vision concentrated on the reality of law, and on the concrete possibility to react to infringements of norms, Geiger's behaviouristic model chooses unequivocally the point of view of material constitutions in order to verify *ex post* the written norms considered compatible with social relations. In this perspective, the function of legal science in advanced societies becomes purely cognitive for Geiger, while his approach ensures the transformation of illusory formal constitutions into concrete material constitutions, really defended by institutionalised sanctions.

C) A "relativistic", not simply 'realistic', definition of pluralism, capable of considering the different meanings ascribed to historical legal orders and their constitutions in a comparative perspective, can be found in the work of Max Weber. The ambitious scope of Weber's programme clearly emerges in his definition of the concept of law proposed in *Economy and Society*[30]. This definition adopts a subject-oriented perspective, *à la* Ehrlich, when Weber states that law is an "order" that is valid because it is "regarded by the actor as in some way obligatory or exemplary for him", and a sanction-oriented perspective, similar to that later adopted by Geiger, when he states that law "is externally guaranteed by the probability that 'coercion' (physical or psychological), to bring about conformity or avenge violation, will be applied by a staff of people holding themselves especially ready for that purpose" (WEBER, 1954, p. 5). The combination of these two elements (subject-oriented and sanction-oriented), is respectively based on both external and internal legal cultures, innovative and stabilising perspectives[31].

The context through which legal and social norms, internal and external orientations, traditional and new meanings can be combined is discussed explicitly by Weber in one of his more complex methodological writings (WEBER, 2012, p. 185-226). In this work, he refines his definition of the relations between legal and social norms with recourse to the metaphor of the *game*. Every game, including the game of law, has a constitution whose purpose is, at least implicitly, to define its possible contents and borders. In analysing games, particular attention has to be devoted to different kind of rules: 'regulatory' rules, which attribute the qualities of 'prohibited',

30 See in particular the collection of various sections of (WEBER, 1954).

31 One point worth mentioning in this context is that the same dual function, of stabilisation and change, is exercised by natural law in legal and constitutional history (WEBER, 1954, p. 284).

'permitted' or 'obligatory' to certain social behaviours, and 'constitutive' rules, which have the property of creating new behaviours within the legal game that would otherwise not be conceivable (WEBER, 2012, p. 203) [32]. In the game of law this second type of rules is clearly connected with legal constitution which can be considered a set of rules that gives meaning to the entire legal game.

Not all constitutive rules are concentrated in legal constitutions. They are widespread in private and in public law and, in particular, in the institutions that create previously non-existent roles that would be quite meaningless outside their respective games. Taking his example from the card game of *Skat*, traditionally embedded in German culture, Weber underlines that, like the game of law, this game can be considered from multiple vantage points: from the quasi-constitutional perspective of a *Skat* convention, from the quasi-jurisprudential perspective of the interpreters who discuss whether a match has to be considered 'lost' if a player makes a mistake, whether someone has played 'correctly' (i.e. in compliance with the norm), or 'well' (i.e. in compliance with his purposes), or 'morally' (i.e. according to the specific moral of *Skat*, which admits an understanding between two players against the third) (WEBER, 2012, p. 212).

The metaphor of the game [33] has an important consequence: when a constitutive rule of a social game, in particular of a legal game, is broken, the behaviour in question is not 'deviant', as it is when a regulative rule is broken, but merely 'irrelevant'. In these cases, the actor ends up in a position not against the game, but outside it. A further distinction needs to be drawn between the game and its contingent milieu, i.e. the multiple behaviours that are not relevant to the game (WEBER, 2012, p. 214).

Like every social game, the game of law is characterised by a sort of "constitution", whose main purpose is to preserve the game's identity. The constitution can provide the normative 'presupposition' of all possible behaviours and the criteria for defining the virtual borders of the game. The players' strategies are normally defined by presuming that each other player will make the best use of the rules of the game for his own ends. In this context, the rules of the game contribute to the interpretation of the formal constitution required for understanding how the players had to proceed, and to the empirical recognition of the material constitution designed by the real decisions of the

32 Explicitly on the 'constitutive rules', see (RAWLS, 1955, p. 3-32); (SEARLE, 1964, p. 43-58).
33 (HUIZINGA, 1949); (BAIRD, GERTNER, PICKER, 1998).

players. As a matter of fact, the interplay between internal and external legal cultures may make the reality of material constitutions quite different from the original abstract principles of formal constitutions.

Relevant to Weber's distinction between the (material and formal) constitution is the close attention he pays to the fundamental distinction between the legal and the sociological point of view. When we speak about "law", "legal order" and "legal proposition", he observes, the problem is: "What is intrinsically valid as law? That is to say: What significance, or in other words what *normative* meaning, ought to be attributed, in correct logic, to a verbal pattern having the form of a legal proposition? But if we take the latter point of view, we can ask: What *actually* happens in a community owing to the probability that persons participating in the communal activit subjectively consider certain norms as valid and practically act according to them?" (WEBER, 1954, p. 11).

Weber developes this basic distinction through an articulated typology of the different legal cultures. In modern societies, legal cultures are based on two fundamental dimensions, that of rationality and that of formality (WEBER, 1954, p. 224). In particular, formality, compared to materiality, entails a more 'technical' perspective, while rationality compared to irrationality presumes a more 'intersubjective' perspective. This means that law's 'formal' dimension is connected to the criteria of decision-making that are perceived as typically legal, while the 'rational' dimension is connected to the diffuse predictions made by those who do not belong to the professional apparatus.

The combination of these internal and external aspects is extremely rich in presuppositions, and represents a major achievement of legal evolution. A modern legal order may be not only technical but intersubjective, not only closed but open to requests from different sectors of society, not only rigid, but flexible. Weber's approach is thus oriented to a comparative analysis of different cultural models, including the normativistic one, which was widespread in German universities in his day, in order to ensure the level of predictability generally associated with the rule of law. Here lies one important paradox of Weber's concept of the constitution: to maintain a pluralistic approach, even if the prevalent formalistic legal culture appears to be strictly connected to the recognition of the centrality of the state[34]. This means that for Weber the self-representation of internal legal culture, mostly connected to

34 About this apparent contradiction, recently (FEBBRAJO, 2015, p. 171-192).

formal constitutions, and the legal perceptions of normal actors, mostly connected to material constitutions, belong to different cultural perspectives that can be combined in several ways, especially according to particular interests.

In general, of particular importance are the functional relations provided by a horizontal link between rational-formal law and different social sectors also typically oriented towards the need for predictability. These relations are important for better understanding the functional compatibility of the legal order and its constitution with other social sectors. Weber emphasises the advantages of a formal rationality for the market and for the predictability its exchanges require.

For Weber, this variety of functional relations cannot be reconstructed unilaterally. It is basically governed by three principles: the principle of the 'plurality of interests', which underlines that law guarantees not only economic interests, but also interests of a different nature (WEBER, 1954, p. 35); the principle of the 'relative autonomy' of the economic order vis-à-vis the legal order, which underlines that legal coercion comes up against significant limits when it tries to regulate economic activity, as generally demonstrated by the failure of price-calming measures (WEBER, 1954, p. 35-36); the principle of 'reciprocal indifference', which underlines that a legal order can remain unchanged, even when economic relations change radically, and vice-versa (WEBER, 1954, p. 36).

The relations between formal rationality and the capitalist economy, which should be reconstructed referring to the constitutional principle of the 'freedom of contract', can actually be limited in the most advanced Western legal orders and in their constitutions by apparently contrasting perspectives (WEBER, 1954, p. 125). Commercial law, which is strictly formalistic as far as the 'exchange' is concerned, may become non-formal in the interests of the will of the parties and of 'good commercial practice', interpreted in the sense of the need for an 'ethical minimum'.

Furthermore, it may be driven in an anti-formal direction by all those factors, such as aspirations to material justice, that claim to make legal practice into a tool of equity, rather than a tool for achieving neutral solutions to conflicts of interests. For Weber, Western legal orders are pluralistic in the sense that they may include areas where different types of rationality are asserted. A law "can be rational in several different senses, depending on which of several possible courses legal thinking takes toward rationalisation" (WEBER, 1954, p. 60). In particular, formal rational law is closely linked not only to the economy, but also to the modern state and its bureaucratic organisation

(WEBER, 1954, p. 334). Bureaucracy should be capable *in abstracto* of combining rapidity and impersonality of decisions, but this does not rule out the possibility *in concreto* of a significant distance between ideal type and reality (WEBER, 1954, p. 336).

In summary, all the authors examined underline different points of convergence between social and legal rules. Focusing attention respectively on *traditions*, *practices*, and *meanings*, they refer in particular to the defence of established customs (Ehrlich), the regular implementation of sanctions (Geiger), and the compatibility of the different criteria of rationalisation in legal and social domains (Weber). These different perspectives emphasise complementary levels of analysis to describe different aspects of the material constitution: the *asymmetric* level (Ehrlich) concentrates on the norms produced by the anonymous forces of history according to specific traditions; the *realistic* level (Geiger) concentrates statistically on the norms applied in the present by individuals and enforced by professionals according to specific practices; the *relativistic* level (Weber), concentrates on the possibility of perceiving social expectations through the specific meanings suggested by different cultural lenses.

On each of these levels, classical sociology of law implicitly suggests models of constitution, characterised by corresponding ways to connect their formal and material aspects. We have seen that we cannot speak of law without considering, directly or indirectly, that constitutions absorb a number of social norms into a legal order and give them unity; that the distinction between the formal and the material constitution is strictly connected with the distinction between the constitution as it is declared and the constitution as it is socially implemented; that a socio-legal approach has to define the structural differences, and the possible functional complementarities, between the state normative order and the many normative orders coexisting in a given society.

3. A systemic model of pluralism

Despite using a different terminology, contemporary sociology of law, especially in its most important strand inspired by the general systems theory, demonstrates a fundamental continuity with the models applied by the classics. Niklas Luhmann, without any doubt the most articulate author to adopt this approach, devoted many of his works to an in-depth analysis of legal systems grounded on many of the elements underlined by classical theories in order to reinterpret them in ways better suited to the complexity of the present situation.

Luhmann still considers constitutions to be the result of a double process of structural institutionalisation and of functional connection, but the accent in his work is on the plurality of normative strategies used to defend their internal order from an increasingly complex environment[35]. In this context, the constitution acquires greater visibility within the legal order and is presented as a sort of intersystemic bridge that, at the most abstract level, controls the borders of the legal system and its relations with the environment.

Luhmann explicitly emphasises the fundamental paradox that, in order to communicate with the rest of the world, every constitution has to combine such conflicting qualities as rigidity and adaptability, closure and opening, normativity and cognitivity, change and identity [36]. Analysing these apparently opposite aspects of the role of constitutions in modern societies from a systemic standpoint, attention focuses on two questions: how can the legal system achieve unity through a constitution? How can the constitution translate external social stimuli into its own borders?

In order to answer these questions, Luhmann concentrates on two fundamental features of constitutions: a) the *self-referentiality* of formal constitutions, and b) the *intersystemic character* of material constitutions.

a) According to Luhmann, legal structures are connected with processes of normative experience, generalisation and abstraction (LUHMANN, 1985, p. 40). In particular, norms provide: continuity of social actors' expectations, regardless of the fact that they are disappointed in individual cases; generalisation of possible standard "expectations of expectations" (LUHMANN, 1985, p. 49); abstraction of their contents that may alternatively refer to concrete persons, roles, programmes and values (LUHMANN, 1985, p. 66). Since it is capable of combining all these different aspects, law is represented as an advanced normative structure that, in a pluralistic context, takes on the task of ensuring the "congruent generalisation of normative behavioural expectations" (LUHMANN, 1985, p. 82). In order to fulfil

35 It should be noted here that Luhmann's sociology of law did not maintain a unique framework, but gradually enriched its contents by importing concepts from a variety of fields, such as cybernetics, biology, cognitive and communicative sciences.

36 As a matter of fact, the concept of identity is hardly combined with continuous processes of evolution in every social system. In particular, the borders of legal systems are constantly under pressure because social rules could become so powerful as to impose on constitutions adapting strategies for balancing the increasing levels of complexity of the outside world.

this task, advanced legal systems produce a *positive* law that is oriented towards contingent decisions. This means that law can be changed at any moment by norms that enable other norms to be created (LUHMANN, 1985, p. 159). In an evolutionary perspective, positive law can become self-critical, making decisions that change what was defined by previous decisions.

Reproducing something like the myth of Sysiphus, the more complex is the system, the more external complexity it can perceive and control and the more internal complexity it has to produce in response to the overwhelming complexity of its environment. With the introduction of the concept of *autopoietic* law, which claims to exercise internally all the functions required by the essential moments of stabilisation, innovation and selection, Luhmann considers a legal system to be self-sufficient and capable of facing up to the challenges of the external world, while maintaining its own stability.

Any analysis of law's evolution must consider not only the moments of stabilisation and innovation, but also the moment of selection. An excess of possibilities of decision is indeed the crucial premise of every attempt at reducing complexity on the part of the legal system. This moment implies the potential recycling of possibilities of decisions that, for cultural reasons, are not used at a given time (*redundancies*). The constitutionally compatible possibility of decisions, eliminated in a first phase, thus remains available and can be recuperated whenever changing circumstances call for them. This normative heritage is often preserved in the collective memory and can be drawn upon in every democracy, designing different combinations of formal and material constitutions, innovation and stabilisation, identity and change, reduction and extension of complexity[37].

Revealing in this point a partial proximity to Kelsen's vision, Luhmann depicts law as a "self-referential" social system capable of using legal decisions to produce other legal decisions. The identity of legal systems is mainly defined by applying various versions of a typical binary code: lawful/unlawful, licit/illicit, legal/

37 In practice, Luhmann holds that, in a democratic system, the same mechanism applies to the legislator, who does not eliminate discarded possibilities, but leaves them at the disposal of future decision-makers. No continuous progress can be thus found in the legal order and its constitution, but only a greater ability to choose from time to time whatever solutions are structurally and functionally most suitable.

illegal[38]. The legal system thus has to observe itself. Without reflexivity and self-referentiality it would be impossible to establish whether and to what extent certain acts, including legislative or judicial decisions, are in- or outside the legal order. A formal constitution should ensure internal consistency and external flexibility at the highest level of the legal order, reducing the range of possible decisions, or producing new possibilities of decisions.

Yet formal constitutions are not able to fulfil this important task on their own. They have to be supported by an instrument – the procedure – that is both inside and outside the legal system. In this strategic position, it can be decisive for creating a set of positive norms adequate to the challenges of a complex environment and for transforming formal into material constitutions.

b) Being itself a social system, every procedure has a normative structure that selects what is relevant and what is not relevant, what is inside and what is outside the legal system, allowing for stabilised innovations also at the level of material constitutions[39]. Material constitutions could be attributed with the function of inserting potential cognitive variation into the normative structures stabilised by formal constitutions (LUHMANN, 1982). Through legal procedures, social rules, legal cultures, and social facts that are legally relevant even if they belong to other systems are selected without causing loss of identity for the legal system. In other words, legal procedures can significantly augment the law's capacity to evolve in advanced societies, defining how and through which channels normatively selected social elements can be learned.

Since they are capable of connecting normative structures to external factors for the purpose of producing contingent results, procedures are for Luhmann the functional equivalent of what judges are for Ehrlich, sanctions for Geiger and games for Weber. For Luhmann, in particular, procedures are an instrument for producing not an improbable legitimation of legal decisions, but merely a 'delegitimation of delegitimation', which denies external support to possible resistances against the procedure's outcomes performed by the disappointed parts (LUHMANN, 2001).

38 This issue is touched upon in several places in Luhmann's work. Cf. (LUHMANN, 1992, p. 145-186).

39 The second-order level of observation is easily reached here. In this case, for Luhmann, "we observe how the system observes and how it, in so doing, operationalises the distinction between self-reference and external reference (LUHMANN, 2004, p. 106).

The selective entrance into the legal system of social factors filtered by procedures is important not only to procedural law, in particular to trials, but also to every legally relevant sequence of acts to be concluded by uncertain legal decisions. What can be introduced into the procedure has to pass through suitable filters, so as to ascertain which kind of social elements can be relevant (for the procedure), and may influence the legal decisions that constitute its final outcome. Learning from the outside world is not only possible, but necessary, for the legal system. In this way, formal constitutions gradually produce material constitutions better suited to their social environment, and more capable of learning from it. Somewhat paradoxically, constitutions have to regulate *normatively* their capacity for *learning*. But according to which kind of norms?

Criticising old European traditions, Luhmann rules out that such norms can be found within the ample scope of fundamental rights. Being associated with a sort of 'civic religion' indifferent to the costs requested and to the consequences produced in different 'systemic' contexts (LUHMANN, 1978, p. 51-71), they must take the limits of their material implementation's sustainability into account. The implementation of the constitutional culture of human rights has to be compatible, at intersystemic level, with the functioning of the different systems involved. At this level, we have to find the material roots of the limits – not always perceived through several ideological curtains – of the possibility to achieve the constitutional norms proclaimed (LUHMANN, 2001).

he selective inclusion of external elements into social systems is so important for Luhmann that he introduces specific concepts, so as to designate different ways of mapping the borders of the legal system. They are specifically defined as tools of 'structural coupling' and connect the legal system to the political system[40]. In this context, constitutions occupy an essential but ambiguous position, and are presented explicitly as the most legal part of the political system and as the most political part of the legal system. At the intersystemic level of structural coupling, constitutions have to be compatible with the functioning of more than just the political and the legal systems[41]. When a payment – i.e. an economic operation

40 For the concept of structural coupling in this context, (LUHMANN, 2004, p. 440).

41 Structural coupling no longer adopts the logic of the isolated system which reproduce itself through a sort of parthenogenesis. If something is produced by the collaboration of two or more systems, each system can refer to the other in a circular manner.

– produces an obligation, the legal system selects certain economic behaviours and recognises that they are capable of producing legal effects. This happens in relation to every communicative connection which, by defining the borders of social systems, also absorbs external complexity through increasing internal complexity[42]. In their internal autopoietic circuit, constitutions combine stabilisation and variation, selecting the possibilities of stabilisation offered by internal legal cultures, the possibilities of variation offered by social rules and the possibilities of self-representation offered by dogmatics. (LUHMANN, 2004)[43].

FIG. 2 · INTERNAL AUTOPOIETIC CIRCUIT

Constitutions select possibilities of	Variation provided by Social rules
	Stabilisation provided by Internal legal cultures
	Self-representation provided by Dogmatics

SOURCE: ELABORATED BY THE AUTHOR.

In this context, the constitution takes the form of an instrument of intersystemic interactions that reflexively connects different and apparently contradictory aspects of the social functioning of law. Here lies the fundamental paradox manifested by constitutions in Luhmann's work, as well as in classical sociology of law: the ability to maintain, in every legal system, an essential connection between normativity and cognitivity, between conservation and change[44].

As we have seen, this calls both for a duplication of the constitution's functions and the circular connection of its material and formal aspects. Legitimised by

42 As we have already seen, this general approach can be found in Luhmann's first socio-legal writings. Law is here inserted in a circular process whose aim is to tackle the world's complexity and contingency, increasing at the same time the internal and external complexity of the legal system. (LUHMANN, 1969, p. 28-48).

43 In this and other cases, for Luhmann "the conditions for evolution" themselves produce further social evolution, because every change of social structures creates the conditions for new legal and social change (LUHMANN, 2004, p. 243).

44 In relation to the paradoxical connection "conservation because change", Luhmann on several occasions observes that a true conservative strategy must be open to change, because it is only by changing that it is possible to conserve. Only change can defend stability and to conserve means to adjust constantly. This is also required by the endless expansion of the complexity of the environment, which is destined to increase continuously as a consequence of the increase in the complexity of the systems.

society when it comes into force, a formal constitution in its turn legitimises the innovations inspired by society as soon as it is transformed into a material constitution. The flexible borders of material constitutions which recognise and legitimise aspects of society that are not explicitly regulated by a formal constitution are perceived as constantly ready to switch on to a normatively-selected cognitivity and/or to a cognitively-selected normativity.

For the classics, as well as for the sophisticated systemic approach, the constitution is inserted into a pluralistic context and absorbs the risks of social evolution for the entire legal order. The following table represents these visions as, characterised by different, in principle complementary, types of social order, structural and functional connections, and models of constitution.

FIG. 3 · SOCIO-LEGAL MODELS OF PLURALISM AND CONSTITUTION

Model of Pluralism	Basis of the social order	Structural connection with the legal order	Functional connection with the social order	Model of Constitutions
Asymmetric (Ehrlich)	Associations	Judge	Efficiency	Tolerant
Realistic (Geiger)	Calculation of Obligations	Sanction	Effectiveness	Statistical
Relativistic (Weber)	Formal Reciprocal Orientations	Game	Rationality	Bureaucratic
Systemic (Luhmann)	Generalisation of Expectations	Procedure	Reduction of Complexity	Explicitly Paradoxical

SOURCE: ELABORATED BY THE AUTHOR.

All the authors examined are not referring exclusively to formal constitutions, and are concentrating, at least implicitly, on the material aspects of constitutions seen as a temporal bridge. In order to defend norms inherited from the past, determined by the present and directed to the future, these reconstructions of legal and social orders can complement one another. In particular for Ehrlich, the material constitution is a common cultural orientation of integrated communities based on reliable traditions of traditions; for Geiger, it is a

constantly-changing statistical series of behaviours and reactions to other behaviours clearly embedded in the present; for Weber, it is a set of criteria of criteria of decisions oriented basically to their future effects on the functioning of different sectors of society; for Luhmann, it is connected with the reflexive mechanism of a normativity that combines the three typical moment of a stabilisation oriented towards the past, a selection oriented towards the present and an innovation oriented towards the future.

4. New forms of constitutional pluralism

Sociology of law has constantly set out to criticise a rigidly state-based model of law, which probably never existed in these terms (*pars destruens*), and to recognise the social norms and external legal cultures relevant to its development (*pars construens*). This programme was maintained combining the more static level of formal constitutions with the changing legal praxis of material constitutions, more oriented to innovative interpretations under the presupposition of a pluralism internal to the state. In all of the previous reconstructions, pluralism and the constitution were linked by structural and functional connections, which ensure that the admission of external inputs into legal structures is regulated selectively and that the functional impact of legal structures on different social sectors is generally sustainable.

Now, at a time when increasing numbers of normative orders interfere with the decisions made by individual states and a transnational framework is producing increasing quantities of legal rules outside the state, new forms of constitutional pluralisms are emerging. Local and transnational problems, such as the defence of natural resources, the fight against organised crime, the control of financial investments, the protection of individuals and the circulation of data, are *de facto* inserted in a perspective that is not confined to individual states and to national constitutions.

We have thus to ask whether the critical legacy of socio-legal studies against a unilaterally state-oriented law is still of significance. The answer to this question cannot be reduced to a simple yes or no alternative. Since sociology of law is no longer accompanied by the challenging presence of an apparently powerful state, it sometimes seems to approximate to a political party that has been deprived of its regular adversary, so has to redefine its critical targets by passing through an inevitable phase of semantic confusion and possible refoundation.

In the emerging transnational context, constitutions need a perspective open to a new multilevel pluralism not only within the state, but also outside it[45]. Moreover, traditional collectivities, such as families, organised parties and professional associations, which in the past produced social rules recognised by material constitutions, no longer seem to be capable of maintaining this role in the face of competition from national and transnational movements, with closer relations to new media and more flexible organisations.

This panorama of potentially globalising factors challenges not only the state's constitution, but also the state's most important pillars, which seem to be miles away from their traditional representations and inadequate for comprehending transnational and/or global phenomena: a *sovereignty* frustrated by the intensive presence of supranational entities is substantially reduced by external pressures; an increasingly mobile *demos* is oriented towards norms prevalently produced by multicultural horizons; a *territory* inhabited by multinational organisations is showing that its borders are inadequate for efficient controls at transnational levels.

All these elements could prevent even the most convinced supporters of the formula *ubi* state *ibi* constitution from speaking about a truly state-oriented constitution. It may seem to be necessary for the legal order either to absorb the external pressures coming from a large variety of norms, more or less independent of the state, or to construct additional storeys for supra-state constitutions and authorities on which the state constitution nowadays depends. In other words, in the present situation new constitutions could be produced either by horizontal connections with the functional requirements of a global society, or by new forms of vertical institutionalisation, inserted in structural, metanational hierarchies higher than in the past.

But a third solution is now emerging with particular evidence. This is characterised by a neo-constitutionalism based on circular communications among homologous actors and on new centres of constitutional aggregation. Significant examples of this transnational constitutionalism are: a) the dialogue between judges of different constitutional courts, whose effect is to create a self-imposed law on the basis of judge-to-judge relations, according to a material constitution still vaguely perceived far

45 (KUMM, 1999, p. 351-86); (SOUSA SANTOS; GARAVITO, 2005); (WALKER, 2002, p. 317-59; 2007, p. 247-67); (SOUSA SANTOS, 2002); (WEILER; WIND, 2003); (WEILER,1998). A musical analogy is sometimes used to explain the difficult process of harmonisation required by this transnational perspective. Cf. (MADURO, 2003, p. 501-37); (WINCZORECK, 2013, p. 229-254).

beyond a given territory; b) the increasing attention devoted by many states to new definitions of specific legal concepts, such as that of citizenship, according to a material constitution whose value-oriented influence is recognised far beyond the traditional demos; c) the pressures exercised on state government by external institutions for the purpose of defining internal regulations, according to a material constitution that goes far beyond national sovereignty and is oriented towards trans-national criteria of purposive rationality.

FIG. 4 · EMERGING FORMS OF CONSTITUTIONALISM OUTSIDE THE STATE

Objects	Actors	Criteria	New type of constitution
Constitutional Dialogue	Judge	Formal rationality	Constitution beyond Territory
Value-oriented citizenship	Legislator	Material rationality	Constitution beyond Demos
Transnational Institutions	Government	Purposive rationality	Constitution beyond Sovereignty

SOURCE: ELABORATED BY THE AUTHOR.

These connections, which respectively overcome the territory, the demos and the sovereignty traditionally attributed to individual states, have important side-effects on the role of a Eurocentric legal culture. The pluralistic approach, external to the state, has the potential to enhance, on the one hand, a more relativistic perspective of European values in a globalised vision and, on the other, a more radical defence of them as a reaction against the dangerous threats to which they seem to be exposed in this context. This ambivalent cultural attitude is capable of stimulating the expansion of material constitutions inspired either by an emerging cosmopolitan vocation or by a reinforced sense of cultural identity (WEILER, 1998).

Also for jurists, the production of new norms (*nomogenesis*) without the umbrella of nation-states and their material constitutions is now becoming a problem. They can no longer find adequate solutions in traditional legal theories and have in particular to admit that territory offers a setting to legal relations that is not limited by national borders, that demos is not a homogeneous entity, but

a cluster of multilevel citizenships, and that sovereignty is limited by powerful external factors. Moreover, given the increasing external influences exercised on constitutions at spatial (*territory*), social (*demos*), and substantial (*sovereignty*) level, frequent transplants of parts of constitutions between different states become easily admissible (WATSON, 1993).

In this global – or transnational – context, the concept of state, which international law still considers to be sufficiently homogeneous, would appear to be profoundly articulated by new sources of stratification and oligarchy. At least four types of state define their positions in the transnational arena, on the basis of their relations with differentiated sources of constitutional principles. In addition to *traditional* states, oriented towards a coherent construction of material constitutions founded on the basic principles proclaimed in formal constitutions, we can register the presence of *imperialistic* states, which try to interpret their constitutions in order to follow, with varying degrees of success, the strategies of older empires oriented towards expanding their areas of cultural, economic and political influence[46]; of *emerging* states, which try to use the possibilities offered by their constitutions to compete with the former states, concentrating more on economic and cultural expansion[47], and of *spectator* states, which constantly struggle for survival within the community of states in order to defend the level of autonomy proclaimed by their formal constitutions[48].

5. A new constitutionalism for a new pluralism?

Given the emerging revisions of the traditional concept of the state, the fundamental reasons for the socio-legal critique of the state-centred model of the constitution may be found at a more abstract level. Socio-legal studies now have to develop a more articulated idea of a constitution, also outside the state, using not only the basic

46 Russia can easily be identified with this type of state, being more aware than other comparable states not only of its global role, but also of its past at the head of an empire. The limits of historical experience apparently affect the parallel role of the USA.

47 With the exception of Russia, this seems to be the case of the countries normally identified as the BRICS, which are still developing their global role. Also the nuclear weapons divide is obviously relevant, even if, apparently, not always decisive in this context.

48 The limited size of some states or their institutionalised territorial divisions could be a precondition for playing this role, with at least one significant exception: the Vatican City, which in some circumstances exercises a much stronger cultural influence than that of a normal spectator.

criticisms expressed by classical sociology of law against a state incapable of fulfilling its ambitious promises, but also the reflexive strategies suggested by Luhmann's self-referential approach.

A *first* reflexive strategy is offered by the possibility to reconsider the use of *regulations of regulations*. Constitutions now have to regulate not only the regulations internal to the legal order, but also the mutual regulations of different sectors of society, such as politics and the economy, in a transnational perspective. In particular, a more extensive use of this reflexive mechanism is necessary in those situations of transnational crises that are often produced by self-reinforcing instabilities of several intersystemic borders and by negative feedbacks between different systems. At present, however, legal regulations are far from reaching a level suitable for controlling transnational crises, so that this task can only be approached by processes of trial and error (KJAER, TEUBNER, FEBBRAJO, 2011).

A *second* reflexive strategy is suggested by the possibility to reconsider the use of *communication of communication*. In order to reflect on the sustainable level of opening and closure of autonomous systems in a transnational perspective, the functional specificity of the different systems may require a more articulated communication of the communications about systemic borders and an increasing awareness of their own flexibility. This could be provided by new strategies of communication articulated with the form of networks, and by new combinations of cognitive and normative communications, so as to avoid a counterproductive systemic isolation and to explore the adjustments required by an increasingly complex environment.

A *third* reflexive strategy is offered by the possibility to develop a sort of *differentiation of differentiation*. This reflexive mechanism is already used by Luhmann to differentiate specific intersystemic entities that connect different systems. From this standpoint, Luhmann's recognition of the role played by the constitution as the structural coupling that connects political and legal systems[49] cannot be considered a *Grenzfall*, a borderline case, but could be applied generally, creating further differentiations between systemic differentiations. The constitution may appear to be a more form of structural coupling, focusing not only on how legal and political systems overlap, but also on the possible interrelations

49 On the large field of possible applications of this concept, (FEBBRAJO; HARSTE, 2013).

of law and politics with other systems as economy and religion.[50] In this context, such constitutionally significant issues as fundamental rights related to freedom, equality and the environment would require a series of intersystemic connections at transnational level that individual states are hardly in a position to achieve. Consequently, the attempt to clarify what is *inside* and what is *outside* a politico-legal system at transnational level can open up new relationships with the outside world, while the widely accepted and consolidated functionalism of distinctions could be corrected by means of an emerging functionalism of connections (FEBBRAJO; HARSTE, 2013).

Moreover, even if we consider the constitution merely as an intermediary element between legal and political systems, this does not necessarily mean that the constitution occupies a position midway between both systems. The perfect balance of these systems achieved by means of the constitution is an ideal-typical simplification. In every conceptual – or human – couple, the concrete result generally leans towards one side or the other. It is thus possible to imagine a constitution in different situations that is more politically oriented or more legally oriented[51].

Without having recourse to the hypothesis of a radical disappearance of the state[52], these reflexive strategies could clarify the role of the various supranational bodies that are largely independent of the state and of its formal constitution[53]. The reconstruction of the material constitution studied by sociologists of law at local and

50 Among the classical authors, Weber was the most committed to developing a potentially intersystemic, historically-based perspective. (WEBER, 1930).

51 Europe and Latin America are two good examples. In Latin America the actual use of constitutions seems to be more flexible. Constitutions appear more interested in the real production of certain effects and more oriented towards material effectiveness than towards formal stability. They are thus less able to absorb delusions because every government is considered directly responsible for fulfilling or not fulfilling constitutionally relevant expectations. The idea of order has thus to be combined, somewhat paradoxically, with the idea of progress, as announced by the Brazilian flag which starts from positivistic presuppositions to suggest a continuous production of *ordem e progreso*, This means that the concept of order is not static, but every order has to be transformed into a new, more complex order with the potential for being adequate to the complexity of the environment. In this context, the level of popular tolerance for political delusions seems to be much lower than in Europe, where constitutional continuity is considered a positive factor which assures both more certainty to the legal order and more independence to the political system.

52 Like a solar eclipse, the twilight of state law is more visible from some parts of the world than from others. It is obviously particularly visible from Europe, where the EU is a political reality and the multidimensional government imposed by the EU shows up significant limitations of the real role of the state.

53 The profound structural and functional transformation of the state and its politics constitutes one of the dominant themes in recent literature. Particularly provocative in this context is (TEUBNER, 1997).

national level is now in progress at transnational level, where we have still to transform "a hitherto uncodified constitution into a codified one"[54].

6. Conclusions

All the possible ways out of the present cultural gap between the level of complexity of the emerging constitutional problems and the level of complexity of available theoretical solutions converge towards the quest for a new semantics. One fundamental question has to be raised here: is it still possible to use the old concept of "constitution" in this new context? In the present confused scenario, one thing is sure: that the role played by the concept of the constitution has changed significantly, and that the formula *ubi* state *ibi* constitution tends to be replaced by a radical institutionalism, based on the formula *ubi* institution *ibi* constitution, which explicitly bypasses the state and the centrality of its political dimension[55].

In a society that is acquiring a global perspective and losing sight of the role once played by states, the resulting multidimensional pluralism might affect the legal as well as the social role of constitutions, their formal as well their material aspects. The use of the term 'constitution' has no longer to be restricted in the present context to a fully recognisable formal constitution or its counterpart, a fully-fledged material constitution, but also encompasses still insufficiently defined signals of spontaneous orders, such as the new material constitutions emerging independently from the state at trans-national level[56].

Traditional state constitutions could thus be perceived, especially in Europe, as a portrait gallery of ancestors wearing very elegant ceremonial clothing, reflecting a hierarchically organised legal order. If we really want constitutions to face up to the

54 This could happen "in a piecemeal and ad hoc way", without "any degree of consensus as to what the final resting place should be". Cf. Vernon Bogdanor, "The Conflict between Government and the Judges" (Working paper of the Foundation for Law, Justice and Society, Centre for Socio-legal Studies, Oxford, 2).

55 Institutionalism, seen as the attribution to every spontaneous social organisation of the ability to produce law as an alternative to, or as a replacement for, what the state actually does, represents the strongest element of continuity linking Ehrlich's sociology of law to the critiques expressed today with regard to the centrality of the state in a global society. Among the old interpretations of institutionalism that straddle the borderline between legal and sociological sciences, cf. (ROMANO, 1910); (ROMANO, 1918). For a recent reformulation of institutionalism, (MACCORMICK; WEINBERGER, 1986).

56 Analyses of the new constitutionalism that goes beyond the state are highly differentiated. I use the term 'transnational' very generally here. For an attempt to discover the connections between the constitution and society in the current situation by means of a neo-institutional approach, cf. (SCIULLI, 1992); (TEUBNER, 2012).

concrete normative problems of today's social context, they must shed those uniforms and adopt a more fashionable and diversified dress. The most important step for a better understanding of recent forms of constitutional pluralism would thus be to develop a more articulated conceptual framework[57]. To the extent that the state is no longer recognised as the supreme controller of social relations and turns out to be controlled, some aspects of the socio-legal models of the constitution may be further articulated (MELLISARIS, 2009).

For this purpose, some of the distinctions that have been implicitly suggested by sociology of law in different phases of its own history could be useful to differentiate the now widespread pan-constitutionalism. Firstly, we have not only to distinguish between living constitutions (LC), created spontaneously in various sectors of society by social institutions, and state-constitutions (SC), or between formal state constitutions (fSC), i.e. officially-proclaimed state constitutions, and material state constitutions (mSC), i.e. state constitutions produced by the constant adjustment of formal state constitutions to their social environment, but it is now useful to differentiate, in analogous way, the emerging category of transnational-constitutions (TC), which correspond to the normative orders created by collective actors in areas not restricted by the borders of a single state. As a matter of fact, TC reproduce either formal aspects (fTC), which may be institutionalised by means of international agreements, or material aspects (mTC), which may be institutionalised informally, for instance by a constitutional dialogue between international courts. The grey area characterised by cross-cutting relationships between material transnational constitutions (mTC) and formal transnational constitutions (fTC), is still unable to regulate private and public legal institutions in a global society sufficiently (FEBBRAJO; GAMBINO, 2013).

These distinctions could be further articulated starting from the anti-hierarchical hypothesis that does not consider constitutions to be the apex of legal orders, but the movable guardians of their porous borders, to be defended in different ways where the pressure of social norms and external cultures is more intense. In this context constitutions can be seen not so much as an example of structural coupling, but as

57 At present, models of constitutions are concentrated not so much on structural restrictions of political power as on functionally acceptable, normative orders rendered even more pluralistic by the eclipse of a strong state. According to a 'back to the future' perspective, the concept of community, which was central for Ehrlich and the birth of sociology of law, is now considered to offer a potential benchmark for a *new* pluralistic approach independent of the state. Cf. (COTTERRELL, 2008, p. 1-18).

genuine *sub-systems* that can assume a more explicit learning *and* normative character, and are involved in a constant confrontation with the external world.

This suggests a new paradox: not only that of stabilisation *because of* change, but that of order *because of* disorder. The *process* of constitutionalisation multiplies the possible causes of normative disorder by multiplying the levels of selection of norms. But we should not forget that disorder is a contingent category in this case[58]. If we consider that disorder encompasses what is extraneous to the current self-representations of legal sciences and is produced by our inability to find adequate categories for describing and understanding the current situation, the apparent paradox is just the result of the present inadequacy of the concept of the constitution, and would be solved by introducing more reflexive-distinctions, so by expanding the areas of possible order to be reached through socio-legal research.

To overcome this kind of disorder, sociology of law could achieve a better understanding of the relations between formal and material aspects of constitutions in a situation characterised by the reduced role of the state and by the emergence of a new kind of pluralism. While in a state-centric vision of the law and society the constitution was pluralist, in the sense that it could use the various social norms and legal cultures existing within state' borders as its wheels towards preservation or change, today's pluralist dimension is produced by a larger range of factors, most of which are outside states' borders.

Here the old socio-legal teaching surfaces again that decreed that the sum of long-term historical factors is more important for the evolution of law, especially of constitutions, than single events[59]. The main challenge that now faces sociology of law is that it must continue its long fight against the model of a state-centred society[60],

58 A reference to the important contributions by Edgar Morin concerning the theory of disorder is almost obligatory here. In fact, if disorder is construed as the inability to find a rule capable of explaining and forecasting (Wittgenstein), this latter paradox appears to be the contingent product of a defect of cognitive and normative complexity in the current models of constitution. Cf. (DELMAS-MARTY, 2009).

59 In fact, there is still a widespread tendency of internal legal culture to overestimate the importance of formal decisions, compared to gradual and less visible processes, not only because of the persistent influence of the role attributed to decisions by normativism, but also because of the general weakening of the relations between sociology and history. One largely documented critique of this formal approach from a socio-legal standpoint can be found in (LEONI, 1991).

60 In this context, there is scope for further developing Ehrlich's critique against a state-centred vision of law. It is no coincidence that illustrious scholars of Roman law recently revived the main Leitmotivs espoused by Ehrlich, who was a scholar of Roman law himself. These interpretations of the current situation are based on the cognitive-normative combination that provides the inspiration for an adaptive law like that of Roman jurists. Even in law like today's, it is possible to overcome law's apparent disorder using flexible and adaptive tools like that invented by Roman jurisprudence, which these days would be described as tools of intersystemic connection. Cfr. (BRAGUE, 1992); (FÖGEN, 2002), where the judge is represented as the "thermostat of law".

adapting the anti-hierarchical awareness of its past to long-term cultural factors such as an emerging transnational pluralism and a prevalently institutions-oriented constitutionalism.

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