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## **My message for the celebration of thirty years of the research center of law and philosophy**

My cordial congratulations on this important event at the Research Center of Philosophy and Law at Externado University. I am happy that I had a chance to contribute to an exchange of ideas between South American and European legal scholars. I had been invited to present some ideas about law as an autopoietic system, the institutional role of human rights and the concept of societal constitutionalism in the transnational realm. Legal autopoiesis helps break the monopoly of methodological individualism which governs the Anglo-American intellectual scene and personifies collectivities, animals, rivers, and digital agents as genuine actors in the world. In the same spirit, conceiving human rights not only as individual entitlements but as social institutions is directed against totalitarian tendencies of an excessive politicisation of society. Societal constitutionalism breaks the monopoly of state-centred constitutionalism and expands it not toward a comprehensive global constitution but toward a conflicts law constitution for the global society. I will make some suggestions on the direction of how the cooperation between South American and European legal theorists could expand traditional nation-state constitutionalism.

The direction of the expansion lies in what I would call world society's double diversity. The diversity of nations is nothing special. It has developed in many regions of the globe. The point is the tight interrelation of two types of diversity. This observation has been expressed in different theoretical registers, most prominently in the culturalist and the sociological registers. A somewhat improbable blending of Jacques Derrida's and Niklas Luhmann's perspectives visualises 'World Society's Two Bodies'. Two powerful pluralities stand orthogonal to each other but are strongly intertwined at the same time. In his article '*L'autre cap*', Derrida speaks of the close interrelation between '*la capitale*', i.e. the centre of power, and '*le capital*', which for him is not just economic capital but '*capital idéal*', i.e. the whole variety of cultural potentialities in art, literature, and science.<sup>1</sup> In a parallel fashion, Luhmann sees the diversity of autonomous nation-states as closely intertwined with the diversity of autonomous function systems or

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<sup>1</sup> J Derrida, *L'autre cap* (Minuit 1991), 38 ff.

'cultural provinces,' as Karl Mannheim had called them. In their close interrelation with nation-state politics, science, education, art, religion, economy, and law, each has erected an autonomous and powerful "cultural empire". Each empire is ridden by an obsession with one and only one *idée directrice*.<sup>2</sup> Derrida, in his reading of Paul Valéry, identifies this obsession as the "desire to maximise" or the "maxim of maximisation", i.e., striving ever to increase either the cumulation of power, knowledge, capital, labour, or the exploitation of nature, a technique of maximisation which has overwhelmed the world. In a parallel fashion, for Luhmann, each function system's obsession with one binary code is responsible for the global improbable cultural dynamics.

In both theoretical registers, it is the inseparable interwovenness of these two diversities that defines world society's identity. Nation-states interact intensively with the cultural provinces and their constitutions' *'extrême capillarité des discours'*, which extends to the finest ramifications of social processes. It is a striking peculiarity of history that it was often one '*capitale*', one singular nation, that succeeded in peak performance within one distinct cultural '*capital*', each dominating the scene for a certain historical period. When these cultural peaks are surrounded by all kinds of imitations by other nations, counter-reactions, cultural appropriations followed by re-appropriations, hybridisations, then this unique enmeshing of national variations with cultural variations is responsible for the richness of world society.

In the world society, we witness the

[...] paradox of global constitutionalism: that its need to adopt a sectoral form of integration may cause a legitimacy gap/deficit because international authorities, resting their legitimacy primarily on instrumental grounds, may face problems in compensating for the legitimacy deficit caused by the erosion of domestic sovereignty and extending their legitimacy to non-instrumental grounds.<sup>3</sup>

Consequently, world society's material constitution needs to be conceptualised as a plurality of national constitutions and simultaneously a plurality of sectoral constitutions. Kaarlo Tuori makes the central argument for an expanded material constitution, an

[...] entity whose 'thin' [one-dimensional, G.T.] credentials as a self-standing juridical and politico-institutional order are unarguable [but] might also be re-imagined and reconstructed in 'thick' [multi-dimensional, G.T.] terms as a popular and indeed 'political, societal' constitution – one with its own democratically sensitive self-constituting authority and its 'own' transnational society as an object of reference.<sup>4</sup>

Paradoxically, the unitary character of a global material constitution can be understood only if one takes its dissolution into two diversities seriously. This changes the character of the global conflicts-law constitutions. Not just the conflicts between nation-state policies but the more profound conflicts between diverse rationalities and

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<sup>2</sup> N Luhmann, *Theory of Society vol. 2* (Stanford University Press 2013), 87 ff.

<sup>3</sup> Gr Çapar, 'The Paradox of Global Constitutionalism: Between Sectoral Integration and Legitimacy' (2023) *Global Constitutionalism* 1-41, 5.

<sup>4</sup> K Tuori, 'The Many Constitutions of Europe' in K Tuori and S Suvi (ed), *The Many Constitutions of Europe* (Ashgate 2016) 169-190, 178.

normativities of society shape the global conflicts-law constitution. Thus, a global constitution should not be understood only as a transnationalisation of the 'political' constitutions of nation-states and their underlying conflicts but at the same time as a 'societal' constitution in which the constitution inscribes itself in the conflicts of previously unconstitutional worlds and becomes a 'transformative' constitutionalism that drives social change.

However, there is a dark side to this intricate interplay of national states and sectoral empires, which nourishes 'growing scepticism about attempts to derive future opportunities from the European rationality of the division of labour and functional differentiation.'<sup>5</sup> Christodoulides identifies this dark side in expansionist tendencies of dominant function systems, mainly the economy and politics:

Dangers attach to the generalisation of one single logic of action – political, economic, scientific, legal, and so forth – to the detriment of others in a way that the resultant asymmetries might lead to the subjugation, displacement, or substitution of those other, variably differentiated fields.<sup>6</sup>

History has experienced not only the disasters of nation-states' imperialistic and colonialist expansion, cumulating in World War I and II but also an equally destructive imperialistic and colonialist expansion of the dominant political-military complex, cumulating in the totalitarian politicisation of society, by fascist and communist regimes.

The damaging dynamics of national domination and functional colonisation are not only a matter of the past. Controversies between nation-states are growing today, even within the EU, not to speak about the Russian invasion of Ukraine. At the same time, massive conflicts have exploded between the function systems; in particular, the dominating economic and political system have colonised more or less aggressively the other more vulnerable cultural provinces, science, art, education, law, religion, medicine, and other social systems. External and internal colonisation has created an asymmetry between nations and between function systems.

As a consequence, a material global constitution should concentrate on both combating the dark side of national and functional plurality and, at the same time, cultivating their bright side. *The transnational conflicts-law constitution, which attempts to domesticate destructive conflicts between the nation-states, should be expanded toward dealing with equally destructive conflicts between cultural provinces or functional systems.* On the bright side, this means protecting national varieties within the overarching functional systems as well as cultivating functional varieties within the global multi-level political system.

The constitutional challenge is to strive for a precarious dynamic equilibrium within the two pluralities and between them, which means building constitutional safeguards against both the domination by a powerful nation-state and the expansionist trajectory of one of the subsystems at the expense of the others. In any case, such a twofold-

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<sup>5</sup> N Luhmann, 'Europa als Problem der Weltgesellschaft' 2 (1994) Berliner Debatte 3-7, 5.

<sup>6</sup> EA Christodoulides, *The Differentiation and Autonomy of Law: Elements in the Philosophy of Law* (Cambridge University Press 2023), 21.

directed conflicts-law constitution would be in the spirit of the famous Derrida-Habermas-Manifesto<sup>7</sup> and could serve as one of the correctives that South American and European scholars could develop against the contemporary two totalitarian tendencies of surplus value orientation, power surplus value in China and Russia, and monetary surplus value in the USA.

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<sup>7</sup> J Habermas and J Derrida, 'February 15, or What Binds Europeans Together: A Plea for a Common Foreign Policy, Beginning in the Core of Europe' 10 (2003) *Constellations* 291-297.