

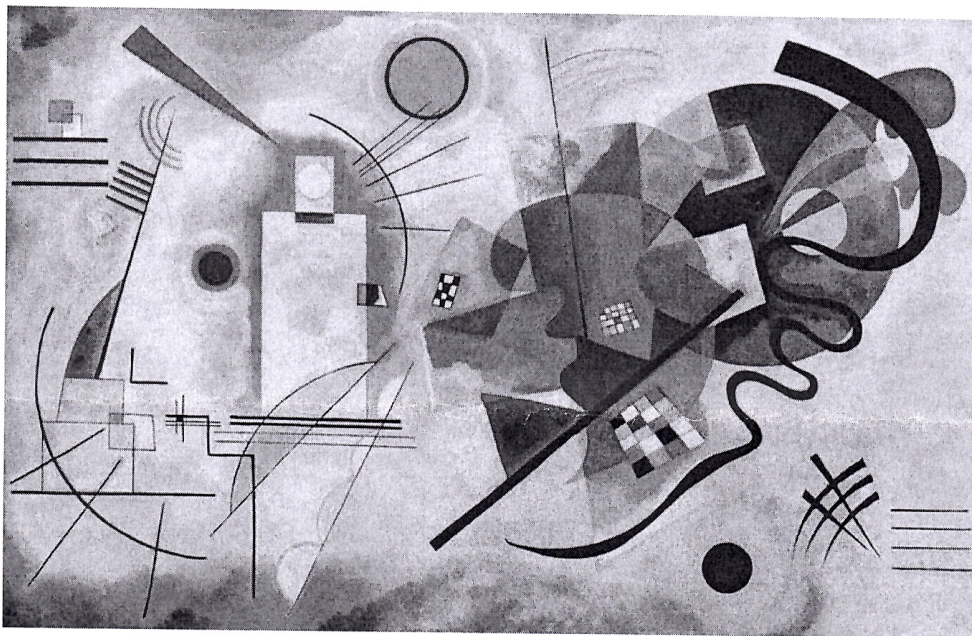
Revolution, Contestation and Transition: Towards a New Global Constitutional Order?

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Synopsis: A shift to a post-Westphalian reality requires rethinking our constitutional concepts, paradigms and institutional designs.

We are living on the edge of epochs. Again. We are starting to experience the trembling of the foundations of political order and its constitutional repercussions will not be far behind. Financial and migration crises, 'Brexit', the 2016 US presidential election, the rise of illiberalism and populist constitutionalism, but also the emergence of supranational constitutional regimes entrenched in an

increasingly pluralist socio-legal setting, are not the causes. They are just some of the first visible results of a dramatic change that is going to produce deep structural shifts in the constitutional architecture we have inherited from modern constitutionalism. This change will go deep beneath the political surface and will restructure our constitutional axiology comprising the core values and principles which have emerged with humanism and rationalism. Moreover, it will reshape the constitutional design that has been so comfortably framing our socio-political reality since the end of XIX century.

This profound structural change is triggered by globalization and the information and mobility revolutions. They are partially interrelated phenomena and they affect our constitutional orders and political systems simultaneously, producing interference and cumulative effects. The information revolution consists of the global spread of easily accessible information, leading to both a quantitative and (in most cases) qualitative rise of information flows. To some extent paradoxically, this 'democratization' of information has increased the importance of communication and 'knowledge' as key socio-political resources for belonging to the empowered segments of global society, producing new information elites. The mobility revolution consists of the intensification of mobility of people triggered by complex factors, driven predominantly by business, political and scientific elites and by disempowered and disadvantaged people. In its broader meaning, the mobility revolution comprises also the increased mobility of capital and goods.

These revolutions will profoundly change the constitutional world similar to the way the industrial revolution produced that world some centuries ago. The industrial revolution produced the structural prerequisites for constitutionalism. Now, the information, technology and mobility revolutions are reshaping national constitutionalism into a global one. There are some underlying resemblances in these two fundamental transitions – from the pre-constitutional age to national or Westphalian constitutionalism, and then from Westphalian to post-Westphalian constitutionalism. The industrial revolution produced the bourgeoisie as the driving force of political modernization. The clash between the bourgeoisie and the aristocracy was the initial driving force behind the constitutional bargaining during Hobsbawm's 'long XIX century' which led to the establishment of Westphalian constitutionalism. The 'social contract' was in fact the result of the need for socio-political adjustment to the novel capitalist, industrial and urban reality of Westphalian Modernity.

The revolutions which we are globally experiencing since the late XX century and which have accelerated at the beginning of the XXI century are leading to a new phase of socio-political and constitutional development of the world. They will produce a new constitutionalism which will be simultaneously post-Westphalian and global. They will also enhance the societal dimension of

constitutionalism as suggested by G. Teubner, and may eventually have elements of post-territorial constitutionalism.

Several key normative ideologies, principles and sets of institutional design are challenged by the transition from Westphalian to post-Westphalian constitutionalism. Globalization reorders the scale of socio-political interaction. It shapes new institutional designs – most visible in the case of the EU – which cannot be adequately managed via some of the fundamental concepts of Westphalian constitutionalism. This is especially true for sovereignty, representative democracy and the welfare state, which are currently increasingly dysfunctional in the early post-Westphalian context. Information and mobility revolutions challenge the territoriality of constitutionalism, constitutional law and public power. They produce spaces of information, migration and financial capital flows which are transterritorial, aterritorial and global. The Internet is the first territory-detached constitutional reality. The Internet is not fully detached from the territory since some of its infrastructure can be controlled by the states – capacity which can even be used for undermining constitutional principles. However, the Internet as a virtual global order, platform and reality cannot be controlled entirely by territorially entrenched means of power. Thus, it imposes the challenge of aterritoriality to constitutional law, demanding a concept of post-territorial constitutionalism.

Moreover, globalization and the current information, mobility and technology revolutions produce structural shifts in constitutional geometry which comprise the ordering and explanatory schemes for establishment of constitutional order out of socio-political disorder. The concepts of hierarchy and pyramid, used as key tools in Westphalian constitutional semiotics, are being challenged by the circle and the network. Thus, the early post-Westphalian constitutional geometry, in line with the trend towards constitutional pluralism, is an uneasy and even controversial mixture of hierarchies, pyramids, networks and circles resembling, as M. Koskeniemi suggests, a Kandinsky painting where the fixed territoriality of the nation state and traditional international organizations are challenged by the emergence of spaces of mobility, information, criminality and capital flows. Indeed, constitutional pluralism has emerged as a Western analytical concept aimed at explaining the complexity produced especially by European integration. However, with the rise of new global powers, which do not share the Western experience, values and constitutional heritage, constitutional pluralism may be used also as world-wide platform for negotiation of political *modus vivendi* of Western and non-Western constitutional cultures on a global scale. Thus, constitutional pluralism remains an alternative to both unilateralism and multilevel constitutionalism as concepts for legal ordering of the world at the beginning of the XXI century.

Last but not least, globalization produces ‘winners’ and ‘losers’. It reorders social order paradoxically triggering in parallel ‘hierarchization’ and ‘horizontalization’ of society and transforming

national communities into a global semi-constitutionalized society. In line with the hypothesis of U. Ecco that the world clock is going backwards and with the suggestion that we shall experience a “new middle ages” as proposed by several scholars, the world is becoming increasingly hierarchical. The main beneficiaries of globalization are the business and intellectual elites as well as the people that make use of the freedom of movement and freedom of information. However, globalization is a challenge to both the welfare state and the middle class. In parallel to this process of global hierarchization of society there is another one which to some extent runs in the opposite direction: horizontalization. The global information and mobility revolutions foster the emergence and the rise in importance of global or regional networks of scholars, civic activists, businessman etc. Moreover, key normative ideologies of Westphalian constitutionalism such as absolute, holistic and exclusive sovereignty and absolute supremacy of the constitution are being challenged by the need for adjustment of constitutional law and constitutional theory to the needs of post-national, and to some extent post-territorial and global society. The controversy between hierarchization and horizontalization, however, is not that dramatic since the networking and the inclusion in socio-political circles is asymmetrically biased in favor of the social strata allocated on the top of the emerging global pyramid. In other words, it is arguably the elites who benefit most from these new opportunities.

The future of constitutionalism and especially of global constitutionalism does not look as bright as it did a decade ago. The age of optimism about globalization seems to have perished with the financial and migration crises and with the rise of constitutional populism and illiberal democracies. Yet, I subscribe to a slightly different scenario for the development of global constitutionalism. Indeed, neo-liberal paradise *a la Fukuyama* seems to be impossible. However, we have some of the most important preconditions for constitutionalism not only preserved but even, to some extent paradoxically, enhanced.

The clash between two veto players – the bourgeoisie and the aristocracy, objectively triggered by technological revolution - has produced the need to bargain a common constitutional platform for peaceful coexistence at the edge between the medieval epoch and modernity. It has produced Westphalian constitutionalism. Now, the clash between neo-liberal and neo-conservative political, economic and societal elites is similarly triggered by the last technological revolution. And, we are also in dire need of a common constitutional framework for maintaining the rule of law and, hopefully, democracy. This time such a platform cannot be anything different than global. Thus, not only neo-liberals are engaged with globalization, but the rising neo-conservative discourse is also ‘stuck in globalization’ and doomed to fight on a global constitutional chess playground. In other words, even neo-conservatives and populists will inevitably ‘go global’. Hence, a new global constitutional order will arise out of the clash between nationalists and globalists since it will have global dimension and scale, it will be concentrated around

global constitutional problems and it will, at the end of the day, aim at the establishment of global rules of the game hopefully in the shape of global rule of law.

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