

Online Research @ Cardiff

This is an Open Access document downloaded from ORCA, Cardiff University's institutional repository: <https://orca.cardiff.ac.uk/id/eprint/113327/>

This is the author's version of a work that was submitted to / accepted for publication.

Citation for final published version:

Priban, Jiri ORCID: <https://orcid.org/0000-0002-4760-6734> 2018. Societal constitutions in transnational regimes: an introduction. *Journal of Law and Society* 45 (S1) , s1-s4. 10.1111/jols.12101 file

Publishers page: <https://doi.org/10.1111/jols.12101>
<<https://doi.org/10.1111/jols.12101>>

Please note:

Changes made as a result of publishing processes such as copy-editing, formatting and page numbers may not be reflected in this version. For the definitive version of this publication, please refer to the published source. You are advised to consult the publisher's version if you wish to cite this paper.

This version is being made available in accordance with publisher policies.

See

<http://orca.cf.ac.uk/policies.html> for usage policies. Copyright and moral rights for publications made available in ORCA are retained by the copyright holders.



Societal Constitutions in Transnational Regimes: An Introduction

JIRÍ PŘIBÁŇ*

This collection is the outcome of 'Societal Constitutions in Transnational Regimes', the second annual conference of Cardiff University's Centre of Law and Society, held at the School of Law and Politics, Cardiff University, Cardiff, Wales, 30 June–1 July 2017.

The concept of societal constitutions has introduced important methodological modifications in constitutional and socio-legal theories and produced several studies of non-political and non-judicial constitutions and constitutionalism in the last decade.¹ First, it extends the concept of constitution beyond its classical juridical meaning. Second, it detaches the constitution from statehood and thus opens the possibility of studying the constitutionalization of different transnational regimes, from global finances and technologies to sport and canon law. Third, it decouples constitutions from institutional politics and thus looks for new modes of political action and subjects beyond their typically modern conceptualization in popular sovereignty, nationhood, constituted and constituent power, and so on.

* *School of Law and Politics, Cardiff University, Law Building, Museum Avenue, Cardiff CF10 3AX, Wales*
priban@cardiff.ac.uk

1 See, especially, D. Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (2008); G.P. Calliess and P. Zumbansen, *Rough Consensus and Running Code: A Theory of Transnational Private Law* (2009); G. Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (2012); G. Teubner and A. Beckers (guest eds.), 'Symposium: Transnational Societal Constitutionalism', published as issue (2013) 20(2) *Indiana J. of Global Legal Studies* 523; P.F. Kjaer, *Constitutionalism in the Global Realm* (2014); R. Nobles and D. Schiff, 'Civil Disobedience and Constituent Power' (2015) 11 *International J. of Law in Context* 462; C. Thornhill, *A Sociology of Transnational Constitutions* (2016); J.-P. Rob et al. (eds.), *Multinationals and the Constitutionalization of the World Power System* (2016); P. Blokker and C. Thornhill (eds.), *Sociological Constitutionalism* (2017).

Finally, it decouples the constitution from the medium of power and thus makes other modes of communication in other specific systems possible targets of constitutionalization.

The constitutionalization of transnational regimes produces secondary rules on rules present in specific societal orders. This meta-encryption prevails over the legal/illegal difference and creates different intra-systemic (intra-law, intra-politics, intra-economy, intra-science) operations. The constitution as a normatively binding institution mutates into a legal, political, economic, scientific, and so on, form of communication, thus passing from the unity of law to a multitude of communication fragments.

Nevertheless, for Gunther Teubner and other adherents of the theory of societal constitutions, the political element continues to be of high relevance for regime constitutionalization – something illustrated by Teubner’s distinction between *la politique* and *le politique*.² The political system of *la politique* cannot establish the constitution for other social domains, yet these domains are subject to their internal politicization. Transnational regimes are subsequently capable of self-imposing responsibilities beyond common political hierarchies and the institutions of state constitutions. The self-restricting constitutions of transnational regimes create regulatory conditions for their internal politicization of *le politique*. Constitutions thus work as catalysts for the reflexive internal and external references of specific transnational regimes.

This collection of articles, therefore, focuses on transnational regimes and their societal constitutionalization from different perspectives of legal, social, and political science. It allows lawyers to discuss specific normative legal issues of specific transnational regimes beyond the conceptual constraints of traditional constitutional law theories. At the same time, it allows social scientists to present general theoretical insights as well as empirical inquiries into specific transnational regimes, and political scientists to reflect critically on global and transnational changes and their impact on political institutions and operations within the political system of *la politique*.

While the controversies accompanying the concepts of societal constitutions and societal constitutionalism have focused mainly on theoretical developments in the last decade, there is now a need for detailed studies of specific constitutional problems in particular, regimes to which this volume hopefully responds because its contributors cover a wide range of themes and problems, such as democratic legitimation and its deficits, governance, transnational political mobilizations, the public sphere, resistance and citizenship, finances, science, international public and private law, human rights, health law, sports law, and canon law.

The first part of the volume focuses on politics in societal constitutionalism and opens with **Gunther Teubner**’s groundbreaking article, ‘*Quod*

2 Teubner, id. (2012), pp. 114–16.

Omnes Tangit: Transnational Constitutions Without Democracy?’, addressing long-standing criticisms of transnational regimes as deficient in democratic legitimacy. Teubner’s recontextualization of democratic legitimation draws on the replacement of the national framework of democracy with the transnational variety of self-contestations, dissent, and the constitutional principle of ‘epistemic subsidiarity’. Reflecting on Teubner’s recontextualization of democratic legitimation, **Jiří Příbáň**, in ‘Constitutional Imaginaries and Legitimation’, analyses societal constitutions as organizations of power enhancement through specific knowledge regimes and imaginaries which legitimize the systemic facts of *potentia* and *potestas* as constitutional *auctoritas*. In the next article, ‘Constitutional Mobilization and Contestation in the Transnational Sphere’, **Paul Blokker** focuses on the role of civil society and social movements in the societal constitutionalization of European and transnational law. He particularly discusses the plurality of legal rationalities and political claims in the public sphere. Blokker’s discussion of transnational law and politics is followed by **Chris Thornhill**’s article, ‘The Citizen of Many Worlds’, which uses the historical analysis of citizenship, its national framework, and general normative implications to propose a world model of citizenship, its coeval legal universalization and societal multiplication leading to the establishment of new constitutional agencies operating in global society. In the final article of the opening part, ‘The Right of Resistance as a State Law Basis for Transnational Regimes’ Self-contestation’, **Daniela Bifulco and Angelo Jr. Golia** return to the right of resistance and revisit the medieval and modern history of this specific political right, applying it in the context of globalized law and politics to explore its potential as a tool of self-contestation and democratic legitimation of transnational regimes.

The second part of this collection deals with more general issues of globalized constitutional connectivity, governance, and rationality. It opens with **Poul F. Kjaer**’s article, ‘Constitutionalizing Connectivity’, which considers the connectivity type of norms structurally pre-eminent in global law because of their capacity for transferring condensed social components from one legally structured context to another within global society. This general function of global law can be traced to colonial law and its functional equivalents in contemporary global governance. ‘Transnational Networked Constitutionalism’ is the title and subject of the next article, by **Oren Perez and Ofir Stegmann**, who recontextualize the concept of network as a framework for explaining the emergence of authority outside state and public international law. Using empirical data, Perez and Stegmann highlight the weakness of global governance and the importance of new hybrid forms of governance bringing together conventional organizations of international public law and transnational private agencies and instruments of governance. In the final article of the second section, ‘Regulating Scientific Research’, **Gert Verschraegen** discusses a specific regime of connectivity between the rationality of the self-constitutive system of science and the increasing role

of counter-constitutive initiatives, strategies, and bodies externally institutionalizing and regulating responsible or ethical scientific research.

These intra-systemic and inter-systemic processes of constitutionalization are further explored in the context of different sectors of globalized law in the third part of this volume which starts with **Horatia Muir Watt**'s article, 'When Societal Constitutionalism Encounters Private International Law'. Muir Watt discusses general principles of fairness, predictability, and coherence to highlight intimations between private and public international law domains as regards the problem of legal authority, pluralism, and chronotopes. 'Financial Markets and Societal Constitutionalism' is the title of **Cesare Pinelli**'s article addressing the causes and consequences of the global financial crisis of 2008 and the interplay between weakly regulated global financial markets and national governments' handling of the collapse of these markets, acting as public agencies destabilized by private financial agencies. If the first two articles innovatively use the private/public law distinction to address recent developments and crises of international law and global finances, **Atina Krajewska**'s article, 'Transnational Health Law Beyond the Private/Public Divide: The Case of Reproductive Rights' moves beyond this distinction by using a specific example of the transnationality of legal subjectivity in the realm of assisted-reproduction technologies. Krajewska shows the impossibility of keeping the conventionally sharp opposition between transnational legal regimes and global constitutionalism as the opposition between private and public law constructions. Similarly, **Antoine Duval**'s article, 'The Olympic Charter: A Transnational Constitution Without a State?' demonstrates both the hybridity of the global sports law (*lex sportiva*) and the capacity of this subsystem to internally constitute its institutions, procedures, and even the specific dynamics of politicization of the Olympic Charter as a constitutional document. Finally, **Ino Augsberg**'s article, 'Global Law Before the State? On Canon Law as a Transnational Regime', brings together both historical and recent knowledge to show that the medieval system of canon law was behind the emergence of the modern Western legal system and operated as a system of transnational law in pre-modern times. Augsberg persuasively argues that the canon law system even had the motif of the minimum unity of the constitution considered by Teubner a common motif of societal constitutionalism outside the state and political constitutions.