Comparing Transconstitutionalism in an Asymmetric World Society

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Comparing Transconstitutionalism in an Asymmetric World Society
Conceptual Background and Self-Critical Remarks

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1. From Panconstitutional Catharsis

At the turn of the twentieth century to the twenty-first century, the notion that any new legal or political organization that arose has a constitution was widespread. This concept of the Constitution can be called historical-universal for suggesting at least that in every state historically formed there has been a Constitution, according to the formula ‘no state without a constitution’. Writing from the perspective of a history of the constitution, Koselleck extends the concept to include ‘all legally regulated institutions and their forms of organisation, without which a social community of action is not politically capable of acting’. And he clarifies this as follows: ‘My proposal that the history of the constitution should encompass all domains characterised by repeatability by virtue of legal rules is therefore designed to bridge the gap between premodern histories of law and modern histories of the constitution so as to include not just interstate but also post-state and to some extent suprastate phenomena of our times.’ Thornhill also proposes a historical-universal concept of constitution ‘in terms that can be applied to many societies in different historical periods’, although limiting his view of constitution to ‘the fact that it refers primarily to the function of states [in general, not the modern states – MN], and it establishes a legal form relating to the use of power by states, or at least by actors bearing and utilizing public authority.’ Nevertheless, the extreme proposal of a historical-universal concept is offered by Teubner, who states: ‘not just ubi societas, ibi ius, as Grotius once said, but ubi societas, ibi constitutio.’

Indeed, this comprehensive vision of the constitution, implying a real panconstitutionalism, has, to some extent, a relationship with the ambiguity of the very term ‘constitution’. In this regard, Antonio Hespanha points to the plurivocal character of the word ‘constitution’, which, beyond its historical variations in its political and legal meaning, exceeds the scope of the cultural world, denoting biological or physical dispositions. But it is worth warning that an excessive attachment to the significant can distance us from understanding its (semantic) meaning and (pragmatic) function in a given social or historical context. The danger in this circumstances is to fall into ‘fallacies of ambiguity’, which occurs when, discussing around a same word as a linguistic expression, each participant in the discussion is referring to different concepts. The question put then is to remove this danger, trying to define the meaning and the historical function of the concept of constitution in the modern sense. A tendency to ‘anachronism’ in the very historic location of the concept, looking alone for equating social institutions, structures and processes of the past with those of the present, makes difficult to contextualise the societal background of the modern constitution: the concept loses both his historical meaning and political-juridical function. One might say that Koselleck himself also tends to anachronism by extending the concept of constitution to embrace historically very different institutions and experiences.

If we take the example of the term ‘Politeia’ (πολιτεία), especially in the Aristotelian formulation, which respects structural and teleological characteristics of the polis, we can see that its translation by constitution appears in the period of constitutional revolutions of the eighteenth century. Until then, it was used to translate that ancient Greek term by ‘government’. Nowadays, it is sometimes translated by (political) ‘regime’. Its translation by constitution is a typical
anachronism of the era of liberal revolutions. In general, when using the historical-universal concept of constitution is not just an empirical sense, but a reference to basic political-legal or social structure of an organization, institution or society, both in its factual and counterfactual dimension, or rather, its cognitive and normative expectations. The question on the meaning and function of constitution as an artefact of modern state and society gets lost. At least, it is very hard to assay the specificity of the meaning and function of a constitution as – in Luhmann’s words – one of the few ‘achievements of modern civilisation’ that are ‘the result of intentional planning’.\(^9\) when the analytical tools to be used are these historical-universal concepts.\(^10\) Unlike what Thornhill asserts, Luhmann has not ‘accepted latitude in the definition of constitution’,\(^11\) rather he has proposed a very strict concept of constitution: ‘My theses will be that the concept of constitution – contrary to the first impression – responds to a differentiation between law and politics, even more: to a separation of these both functional system and to the need arising therefrom for linkage.’\(^12\)

In the age of liberal revolution, the new emerging word ‘constitution’ and its meaning corresponded to structural transformations.\(^13\)

This circumstance relates to the fact that the constitution has become a ‘support for hope’;\(^14\) indeed, the concepts of both constitution and constitutionalisation have become part of a ‘victorious offensive’,\(^15\) and are being used as a ‘fighting political concept’.\(^16\) Thus, they match what Reinhart Koselleck calls ‘asymmetric counterconcepts’, which morally disqualify those who oppose them by introducing ‘a depreciative meaning’ that functions for their adversaries ‘as a linguistic deprivation, in actuality verging on theft’.\(^17\) Inasmuch as ‘constitution’ in the modern sense originally invokes ‘the opposite of a political order of oppression’,\(^18\) that is, suggests emancipation, it has become usual to use the term rhetorically as a label for the righteousness and correctness of those who defend it and of what it designates. This situation leads to a tendency to apply the term ‘constitution’ to quite distinct institutions and legal and political situations, in highly different contexts. Thus in actuality the constitution has become a contextually unlimited metaphor. The notion has become decoupled from the history of the concept and from its structural foundations. It has become unrecognisable as a semantic artefact and no longer refers reflexively to a specific social structure.

II. To transconstitutionalism

I aim to avoid the tendency to invoke the creation of a new constitution whenever a legal order, institution, or organisation emerges in contemporary society. I start from the solid notion that the meaning of ‘constitution’ in the strictly modern sense is linked to the constitutionalism that resulted from the liberal revolutions of the eighteenth century in France and the United States, as well as from British political and legal history, albeit atypically so in the latter case. From this conceptual start-point, I set out to identify the problems that presented themselves as a condition for the historical possibility of the emergence of the constitutional state. Having determined the problems, it is relevant to ask what functional and normative answers were intended to be embodied in the constitutions of modern states. It is precisely this relationship between problems and solutions that enables the concept of constitution arising from constitutionalism to be stabilised.

Two problems were of vital importance to the appearance of constitutions in the modern sense. On one hand, the emergence of demands for fundamental or human rights in a society of increasing systemic complexity and social heterogeneity. On the other, and associated with this, the organisational question of the limitation and internal and external control of power (including participation by the governed in procedures, especially those involved in determining the composition of government bodies). Related hereto was the question of the growing specialisation of functions, a condition for greater efficiency of state power. As world society has become more integrated these problems have recently become untreatable by any single national legal order within its territory alone. Problems of human or fundamental rights and power limitation or control are increasingly becoming relevant to more than one legal order at the same time; many of these are non-state orders but they, too, are called upon to offer solutions to such problems. This entails permanent cross-cutting relationships among legal orders revolving around shared constitutional problems. Thus, constitutional law emancipates itself from the state, in which its foundations were originally located, not exactly because a multitude of new constitutions have appeared, but rather because other legal orders are directly involved in resolving basic constitutional problems, frequently prevailing over the orientation of the legal orders of the respective nation states. Furthermore, permanent direct relations are formed between states to deal with the constitutional problems...
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they have in common. The exception has become the rule in both cases.

To address this situation I propose the concept of transconstitutionalism. On the one hand, transconstitutionalism should not be confused with mere transjuridicism, such as, for example, in relations between legal orders in mediaeval pluralism, especially between canon law (including Roman law), urban law, royal law and feudal law, since mediaeval experience did not involve constitutional problems in the modern sense. Thus it was not a matter of fundamental rights, or of the legal limitation and control of power, much less of various claims for the self-referentiality of the foundations of law (ultimately the law had sacred foundations).

On the other hand, what I am proposing to discuss is not international, transnational, supranational, national, or local constitutionalism. The concept of transconstitutionalism points precisely to the development of legal problems that cut across the various different types of legal order. A transconstitutional problem entails an issue that may involve national, international, supranational and transnational courts or arbitration tribunals, as well as native local legal institutions, in the search for a solution. In discussing transconstitutionalism I refer to Wolfgang Welsch’s concept of ‘transversal reason’, although I keep my distance somewhat from this ambitious concept, to analyse the limits and possibilities of the existence of ‘transversal rationalities’ (or ‘bridges of transition’), both between the legal system and other social systems (transversal constitutions) and among legal orders within the law as a functional system of world society.

Moreover, discussing transconstitutionalism I do not consider it merely as a functional requirement and normative claim for transversal rationality among legal orders, but also take into consideration empirically the negative aspects of transconstitutional entanglements, such as cases where the problem involves situations of anti-constitutional orders or practices, that is, those which counteract the protection of human and fundamental rights, or which counteract the control and limitation of power. Similarly, I address the question of anti-constitutional practices found within the orders of typically constitutional states. Therefore, it is worth distinguishing transconstitutionalism (genus), which includes relations between constitutional and anti-constitutional orders, from interconstitutionalism (species), which comprises only relations between legal orders to fulfil constitutionalist requirements.

Transconstitutionalism does not take any single legal order or type of order as a starting point or ultima ratio. It rejects nation-statism, internationalism, supranationalism, transnationalism, and localism as privileged spaces for solving constitutional problems. Instead, it points to the need to build ‘bridges of transition’, promote both ‘constitutional conversations’ or ‘dialogue’ and ‘constitutional collisions’ as well as strengthen constitutional entanglements among the various legal orders, be they national, international, transnational, supranational or local. The transconstitutional model avoids the dilemma of ‘monism versus pluralism’. From the standpoint of transconstitutionalism, a plurality of legal orders entails a complementary relationship between identity and alterity. The orders involved in solving a specific constitutional problem continuously reconstruct their identity at the level of their self-referential foundations by means of transconstitutional entanglement with another order or with other orders: identity is rearticulated on the basis of alterity. Thus rather than seeking a ‘Herculean Constitution’, transconstitutionalism points to the need to tackle the many-headed Hydra of constitutional problems by articulating reciprocal observations among the various legal orders of world society.

3. Asymmetries by Comparing Transconstitutionalism:

The transconstitutional entanglements do not occur in normatively idealized terms in the deeply asymmetric world society we live in. Of course, although the transconstitutional problems are widely arising, there are empirical limitations to normatively satisfactory solutions of them. It can be also said that transconstitutionalism bears within itself a positive dimension, the development of transversal rationality among legal orders, and a negative dimension, the blocking and...
The asymmetries of legal forms create obstacles or impairments to transconstitutionalism by virtue of the fact that in certain contexts one is stronger than another and ignores the other’s claims and demands. This superimposition of one legal form over another does not imply the formation of a hierarchical order or organisation in the traditional sense of a stepped structure, but instead leads to diffuse mechanisms of oppression or negation of the autonomy of some legal forms by others.

In international relations, expansion of the power code to the detriment of the legal code is associated with the immunisation and untouchability of the legal orders of the so-called ‘great powers’ in the sphere of public international law. A significant aspect is the impotence of international organisations to control US legal practices and impose appropriate sanctions on the US. For example, international arms control by law is rejected by the US (as well as China and Russia) as unacceptable, as if it constituted an illegitimate interference in the country’s internal affairs. Yet arms control is demanded, especially by the US, when it is a matter of the weakest countries in the international constellation, and is indeed imposed by the competent international bodies. Moreover, as far as jurisdictional competence is concerned, US courts are unwilling to acknowledge the competence of international courts to judge cases in which public international law claims are brought against the US and, in exceptional cases, against US official bodies, organisations or citizens. The Guantanamo Bay Detention Camp is exemplary in this regard. The US judiciary has categorically refused to admit any possibility of a decision by an international court, even though the characteristics of the litigation show that the case involves not only an internal matter relating to violations of the US Constitution or the rule of law, but also an important question relating to violations of public international law. Thus, anti-constitutional practices develop in the interior of constitutional states and their ‘migration’ underlines the normative claim for transconstitutional case solutions.

This situation is closely linked to the problem of the asymmetries of the forms of law among state legal orders. In this regard, it is necessary to take a step beyond noting that the operative autonomy of law in face of its social environment has been realised only in a few consolidated constitutional states. This means facing the question of determining to what extent the legal orders and legal cultures of strong states in the context of world society have destructive effects on the development of legal forms by other states. The most evident problem here is that of ‘post-colonial’ or ‘neo-colonial’ oppression of positive experiences with law in peripheral countries. When deviant forms of legal relations emerge with regard to the market, the distribution of power, cultural identity, education and so on, intervention is frequently proposed and executed, so that the legal understanding of the dominant state again prevails. This implies a markedly asymmetrical conception of ‘sovereignty’. While sovereignty is almost absolute for the bearer of certain legal forms, it is highly relativised or entirely ignored in the case of legal forms that deviate from the dominant forms in their experiences with power, money, and knowledge.

Analogously, the relations of private regimes with forms of law in peripheral countries are distant from the transconstitutional model in most cases. Systematic corruption of the forms of law in fragile states via private self-regulation in the transnational plane, benefiting large, multinational corporations, is not something to be considered only from the perspective of a left-wing critique of capitalism. This problem should also be taken seriously with a view to recognising or strengthening the discursive autonomy of the plural spheres of world society. Transnational private legal orders, in which the law is a ‘medium’ for the economy, develop a type of instrumental rationality in the legal sphere according to which all emergent normative claims of the forms of law in weaker countries tend to be judged as disruptions of their expansionary dynamics. In this regard Christodoulidis justifiably points out criticising Teubner that “[r]elations between core and peripheral states are a vital part of the “rationalization” of the transnational, an edifice which is premised on power asymmetries. This is why such orders tend to ignore the claims in question, with destructive effects for the respective forms of law. In the field of patent protection, this problem is evidenced by the example of biopiracy. In this case, the developmentalist argument may be merely a cover for forms of misappropriation of material and immaterial assets by transnational groups, to the detriment of the citizens of the respective states and also of members of the corresponding native communities.
In connection with this problem, it is also important to stress that the central instances of the state are often unwilling to support or collaborate with local forms of law. This results in oppression of local legal claims in the name of state unity. The opposite is not unusual: blind separatism on the part of local communities that are unwilling to coexist with the heterogeneity of a people and the plurality of the public sphere in a constitutional state. Destructive reciprocal effects often derive from conflicts between the claim to unity of a federal, regional, or unitary state and the claims to autonomy of their respective Member States, regions, provinces, or departments. However, unofficial forms of law are also making increasingly strong claims to legal autonomy, often associated with oppressive measures by the state, as well as non-negotiable conflicts originating in local demands for autonomy. In this case, it is rather a question of negative entanglements, because no room is left for reciprocal learning in terms of transconstitutionalism. On the contrary, the situation is dominated by conflicts of intolerance, which ultimately cannot be treated or resolved by means of legal forms and in the last instance may lead to armed violence and a refusal of the rule of law.

It is also important to highlight the asymmetries of legal forms with regard to the various functional spheres of the legal system. Certain forms of law become dominant through tightly consolidated structural couplings with other partial spheres of society. Thus, for example, contracts and property serve as structural couplings between law and the economy and constitute strong, if not the strongest, forms of law in world society. In other areas, couplings remain in the operative plane or, when they extend to the structural level, are very weak. Examples include environmental law, which concerns the relations between human beings and nature, and social law, oriented to inclusion of the person. The legal forms of contract and property affirm themselves expansively against the legal forms of environment and inclusion. In the context of new developments in world society, the functionally determined forms of economic law are increasingly stronger than the territorially conditioned forms of political law in the constitutional state. Environmental law and social law, directed to inclusion, constituted secondary forms of law in world society compared with both the legal forms relating to the economy and those relating to state politics. Associated with this is the fact that the legal forms of human rights also remain very fragile compared with the legal forms of political power and the economy: to the extent that their coupling with the moral discourses of the inclusion of persons is blocked by the discourses of the market and power in a regular and systematic manner, they continue to belong to one of the predominantly symbolic forms of law in the plane of world society.27

From what has been expounded above, it can be inferred that transconstitutionalism is a scarce resource of world society. Stable transconstitutional entanglements among legal orders have so far occurred only in very limited portions of the ‘multilevel’ world system in territorial or functional terms. The outlook remains unfavourable to positive developments. Nothing could be more illusory than the idea that experiences of transversal rationality in transconstitutionalism among legal orders are generalised or in a position to become so in the short or medium term. These experiences are part of the privileges of some legal spheres in an acutely asymmetrical world society.

In sum, it can be seen that strong forms of law superimpose themselves oppressively on fragile forms of law in the ‘multilevel’ world system. Thus the state forms of law of the ‘great powers’ remain untouchable by public international law and immunised against it. These legal forms also behave oppressively towards the legal forms of the weaker countries in the international constellation. This is evident, above all, when the latter take steps that deviate from the dominant pattern in introducing social changes. Similarly, the transnational legal orders instrumentalised by the major business corporations have a destructive effect on the legal forms of the so-called developing countries, as well as non-state local communities. In the sphere of conflict between the state unit and local autonomies, there is frequent repression of local forms of law by central forms on one hand, as well as blind reactions by local legal forms against the central forms of the respective state on the other. Last, the asymmetries of legal forms lead to repression of the fragile legal forms of environmental law, social law, and human rights, permanently suppressed by the strong forms of contract law, property law, market law, and
power-related law. The same rule applies to all these cases: there can be no transconstitutionalism without relative symmetry of the forms of law.

Transconstitutionalism is part of the functional requirements and hence of the normative claims of world society, as discussed below. Nevertheless, from an empirical standpoint the persistent exploitations of legal discourses in the context of asymmetrical forms of law impose themselves very solidly against such requirements and claims. These exploitations of law drive growth of the exclusion sectors of world society in a manner incompatible with the development of transconstitutionalism.

4. Comparing two Transconstitutional Cases on the Right to Political Participation: UK versus Nicaragua

The asymmetry between legal systems faced with transconstitutional cases can present so many different levels and forms. This might be seen as a result of the fact that certain legal orders or legal bodies are rather ‘receivers’ and other rather ‘givers’ of legal standards. That may also be viewed as arising of the fact that some legal orders or legal bodies, instead of ‘engaging’ in transconstitutional conversations, are unilaterally ‘convergent’ or ‘resistant’ towards the solutions offered by others. But this question can be seen from a perspective considering the strength and soundness of the involved legal orders in its ability to influence and let be influenced when confronted with transconstitutional issues. I will concentrate here on two cases that concern the right to political participation, the one related to Nicaragua (YATAMA v Nicaragua), the other pertaining to the United Kingdom (Hirst v United Kingdom), in order to ask if it is possible to draw from them some inferences about key differences in regard to constitutional questions.

YATAMA v Nicaragua is a case which dealt with the right to democratic participation by members of the indigenous community belonging to YATAMA, a political party, who were forbidden to stand in the municipal elections of 5 November 2000, by a ruling of Nicaragua’s Supreme Electoral Council. The IACHR not only ordered the State of Nicaragua to pay compensation for pecuniary and non-pecuniary damages, but also ordered Nicaragua to reform the electoral law in question, concluding:

“The State shall reform the regulation of the requirements established in Electoral Act No 331 of 2000 that, it has been declared, violate the American Convention on Human Rights and adopt, within a reasonable time, the necessary measures to ensure that the members of the indigenous and ethnic communities may participate in the electoral processes effectively and according to their traditions, practices and customs, in the terms of paragraph 259 of this judgment.”

This is a clear example in which a norm of the international order is invoked to settle a dispute and support the extension of constitutionally ordained fundamental rights: the application of internal law regarding active citizenship, an intrinsically constitutional matter, is linked to international norms and becomes dependent on the interpretation of an international court. Moreover, this decision was fully complied and enforced in the Nicaraguan domestic legal system. Nowadays, YATAMA (Yapti Tasba Masraka Nanh Aslatakanka: ‘Sons of Mother Earth’) is a very active party in the Nicaraguan Politics, as several news and information in website have showed. The Decision of the Nicaraguan electoral body that was domestically competent to decide on formation and activity of political parties was practically overruled by an international court. The question can be interpreted from two perspectives: on the one hand one might raise the argument that the compliance and enforcement of the international decision arose from a learning capacity of the Nicaraguan State; on the other hand, one can argue that the ‘convergence’ or ‘receiving’ feature of Nicaragua in this case is rather related to the weakness of this peripheral State in constellation of world society as well as its feeble democratic and rule-of-law structure. I will come back to this theme in the final remarks (5).

Turning, now, to the other side of the Atlantic, we are faced with the Judgment by the European Court on Human Rights of the Case of Hirst v United Kingdom, which shows a very different way in which a State deals with an international court of human rights. The applicant, a British citizen, was convicted of the offense of manslaughter, sentenced to a term of discretionary life imprisonment, and barred by section 3 of the Representation of the People Act 1983 from voting, even after his sentence had expired. This provision provides:

“(1) A convicted person during the time that he is detained in a penal institution in pursuance of his sentence ... is legally incapable of voting at any parliamentary or local election.”
This ban on voting does not reach persons imprisoned for contempt of court [section 3(2)(a)] or to those imprisoned only for default in his sentence [section 3(2)(c)]. Moreover, the Representation of the People Act 2000 excluded from disfranchisement remand prisoners and non-convicted mental patients. Nevertheless, in general, the convicted prisoner, even the post-tariff discretionary life sentence prisoners, remained barred from voting by section 3(1) RAP 1983.

The applicant issued proceedings in the High Court of Justice of England and Wales under section 4 of the Human Rights Act 1998 (declaration of incompatibility), seeking a declaration that the provision was inconsistent with the European Convention on Human Rights. In the Divisional Court judgment dated 4 April 2001, the Divisional Court dismissed the applicant’s claim according the concluding opinion of Lord Justice Kennedy in regard to the general ban imposed by section 3 RPA 1983 on the right of a convicted prisoner to vote:

“In course of time this position may move, either by way of further fine tuning, as was recently done in relation to remand prisoners and others, or more radically, but its position in the spectrum is plainly a matter for Parliament not for the courts. That applies even to the ‘hard cases’ of post-tariff discretionary life sentence prisoners…”

The main argument that only the Parliament is competent in this matter, so that the courts have nothing to say thereupon, leaves the applicant to the last European judicial instance that has authority to decide on his claim, the European Court of Human Rights. He insisted to seek a declaration that the section 3 RPA 1983 was incompatible, inter alia, with art. 3 of Protocol No. 1 which provides:

“The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”

After a Chamber of Fourth Section of the ECHR held unanimously that there had been a violation of Article 3 of Protocol No. 1 through the application of the section 3 RPA, the Grand Chamber, requested for a referral by the British Government, confirmed this position, holding by twelve votes to five that there had been a violation of Article 3 of Protocol No. 1, justifying it mainly in the following terms:

“…while the Court reiterates that the margin of appreciation is wide, it is not all-embracing. Further, although the situation was somewhat improved by the 2000 Act which for the first time granted the vote to persons detained on remand, section 3 of the 1983 Act remains a blunt instrument. It strips of their Convention right to vote a significant category of persons and it does so in a way which is indiscriminate. The provision imposes a blanket restriction on all convicted prisoners in prison. It applies automatically to such prisoners, irrespective of the length of their sentence and irrespective of the nature or gravity of their offence and their individual circumstances. Such a general, automatic and indiscriminate restriction on a vitally important Convention right must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be, and as being incompatible with Article 3 of Protocol No. 1.”

This decision has not lead to any change in the section 3 RPA 1983 yet. The British House of Commons rather reinforced the High Court of Justice’s understanding that this matter belongs to the political power of the Parliament, as in a debate on 10 February 2011 – ‘with a view to exploring the issue: not with a view to changing the law’ – ‘MPs voted overwhelmingly in favour of maintaining the general ban on prisoners’ voting and, moreover, in favour of the view that the matter should be decided by Parliament and not by a court of law.’ In this way, the position of the ECHR on the matter was purposely defied.

Later the theme was resumed by the Supreme Court of Justice in judgment of the case of R (Chester) v Secretary of State for Justice and McGeoch v Lord President [2013] UKSC 63 and the position held in Hirst by the HCJ was reiterated. On that occasion, Lord Mance referred to the importance of a dialogue with the ECHR, but it seems that this concerns a dialogue related rather to influence the latter than to let
be influenced by its decisions, as one can infer from this passage of his opinion:

“...In relation to authority consisting of one or more simple Chamber decisions, dialogue with Strasbourg by national courts, including the Supreme Court, has proved valuable in recent years. The process enables national courts to express their concerns and, in an appropriate case such as R v Horncastle, to refuse to follow Strasbourg case-law in the confidence that the reasoned expression of a diverging national viewpoint will lead to a serious review of the position in Strasbourg...”

He recognized, however, that there are limits to this orientation:

“But there are limits to this process, particularly where the matter has been already to a Grand Chamber once or, even more so, as in this case, twice. It would have then to involve some truly fundamental principle of our law or some most egregious oversight or misunderstanding before it could be appropriate for this Court to contemplate an outright refusal to follow Strasbourg authority at the Grand Chamber level.”

Despite this caveat, the position of the Supreme Court of Justice did not reverse the previous understanding of the Divisional Chamber in judging the submission of Hirst. Something new relates rather to the explanation of the scope of the decision of the ECtHR in judging both Hirst (no. 2) and Scoppola, as Lord Mance asserted that “[i]t is clear from both Hirst (No 2) and Scoppola that, under the principles established by those cases, a ban on eligibility will be justified in respect of a very significant number of convicted prisoners.” As regards this point, Tomkins comments:

“Of importance in Chester and McGeoch was the fact that, even if Parliament amends the law to allow some convicted prisoners to vote, it will surely not amend the law — and will surely not be required by European human rights law to amend the law — so as to extend the franchise to all convicted prisoners. Those convicted of the most serious offences, and those sentenced to the longest terms of imprisonment, will continue to be disenfranchised. This will include murderers such as the two claimants in this case.”

But he recognizes that ‘the decision of the Supreme Court in Chester and McGeoch leaves the law as the Court found it.” The ECtHR decision in Hirst, maintaining that the section 3 RPA 1983 imposes a blanket ban on convicted prisoners voting in elections, which is incompatible with art. 3 of Protocol No. 1, has not produced any effect in the British law after almost ten years since the ruling. The British Judiciary has dismissed individual claims arguing that the matter falls within the political jurisdiction of the Parliament and Government. The Parliament reacts negatively against any change in the legislation that, without itemising the cases, bars convicted prisoner from voting. Such an approach underlies the idea that the House of Commons (representatives) expresses the sovereignty of the people. Moreover, in so far as the courts have no jurisdiction over the disputes regarding rights claimed on the grounds of the incompatibility of British laws with the ERCHR, leaving this matter exclusively to the struggle between political parties in Parliament and to the Government, one may argue that this standpoint is related with a theory that elevates a supposedly democratic politics over the rule of law. According to this understanding of unlimited political freeway, the British Parliament is bound to neither domestic nor international law.

5. Final Remarks

YATAMA v Nicaragua and Hirst v United Kingdom with their different impacts on the respective domestic legal and political orders would be not worth special attention in the perspective of transconstitutionalism, if each was considered in isolation. There exists a plurality of perspectives of the state constitutional orders concerning their collisions with the international and other legal orders. That is an implication of the heterarchic feature of the world society and multicentric arrangement of the world legal processes.

The problem arises if we compare the very diverse answers and reactions the two states gave to the decision grounded in international conventions on human rights by each of them as contracting party at the corresponding regional level. Although the judgement case of Yatama v Nicaragua is more impressive and not disputable, as it barred ‘an ethnic minority’ from organising as political party and thus from standing to election, and the ruling in Hirst was controversial, as the opinion of the minority has shown, one may infer that the very different domestic reactions to international courts on human rights are associated with the asymmetry of the respective countries in the international power arrangement. There is a remarkable tendency to rely on human rights to the detriment of both people and state sovereignty in the case of decisions not complied by weak states in the...
international power constellation, while sovereignty is the shield used by the strong states in the international power constellation when confronted with decision of international courts that declare the inconsistency of the domestic law with international standards of human right. And whether the former are cast out from the international or compelled to denounce the treaty or convention when they are recalcitrant (no to say on the cases of intervention), the latter tend to stay in the organisation keeping not abiding the concerned decisions or standards.

This asymmetry counters the normative dimension of transconstitutionalism, in so far as it impairs the readiness to a genuine reciprocal learning between the parties involved with common constitutional cases or problems. Anyway, the negative site of the constitutional entanglements shall not to leave us to overlook the challenge of increasingly emerging transconstitutional problems, whose processing and eventual solution are not to be expected in a discursive ultima ratio of a privileged observation point, but in the precarious transversal rationality not only of ‘dialogues’ or ‘conversations’ but also of dealing constructively with collisions. However, this requires an improvement of the up to now very scarce symmetrical (or at least less asymmetrical) legal and political relations in today’s world society, a change that is not likely to take place in the next future, unless we bet on the emancipating potentials of a legal ‘revolution’ at stake in world-wide ‘evolutionary’ processes.42

Notes
7. Aristotle, Politics, with an English translation by H Rackham (Cambridge, MA/London: Harvard University Press, 1944), 173 (III, 1, 1274b), 201 (III, 6, 1278b) and 281 (IV, 1, 1289a).
8. Stouzh, Gerald, ’Vom aristotelischen zum libe-
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34. Ibid., Paragraph 82.


36. R (Chester) and McGeoch, paragraph 27.

37. Ibid.

38. Ibid., paragraph 73. Cf. also paragraphs 40 and 71.


40. Ibid. He concludes: ‘The unwelcome, unwise and unnecessary ruling in Hirst is left intact; EU law is kept firmly away from the agonies of prisoners’ right to vote in the UK; no definitive UK judicial statement is offered as to whether (or which) convicted prisoners should be enfranchised; the matter is left for Government and Parliament. On that front, the Government’s Draft Voting Eligibility (Prisoners) Bill, published in November 2012, continues its detailed and time-consuming (foot-dragging?) pre-legislative scrutiny before a specially convened Joint Committee in Parliament. If you can bear it, watch this space, as the saga grinds on.’ (Ibid.)

41. But for instance, despite the withdrawal of Trinidad and Tobago from the American Convention on Human Rights – resulting from a refusal to comply with the decision issued by the Inter-American Court of Human Right concerning the Case Caesar v Trinidad and Tobago, Judgment of March 11, 2005, Inter-Am-Phil. H.R., (Ser. C) No 1 –, the Court has maintained, under the article 78, paragraph 2 of the Convention, that ‘Such a denunciation shall not have the effect of releasing the State Party concerned from the obligations contained in this Convention with respect to any act that may constitute a violation of those obligations and that has been taken by that state prior to the effective date of denunciation’. Such decision obliges the State to revoke the Corporal Punishment Act of 1953, at odds with the Convention (Calabria, Carina, A Eficácia da Corte Interamericana de Direitos Humanos: Ensaios a partir de Medidas de Não Repetição relacionadas ao Sistema Cárceo Regional, Dissertation, Brasilia: University of Brasilia, 2014, section 5.7.2).

42. In this regard, see Brunkhorst, Hauke, Critical Theory of Legal Revolutions: Evolutionary Perspectives, New York: Bloomsbury, 2014.