

## INTRODUCTION

# The Normative Turn in Teubner's Systems Theory of Law

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Niklas Luhmann once warned of the 'high entry costs' that systems theory imposes on the reader, and there can be little doubt that the somewhat cool reception of his work in the Dutch academy has to do with the highly abstract theoretical nature of the theory, its distinctive 'language game', and the relentless conceptual distinctions that it deploys. This is what scholars such as Van der Eyden, Wilt-hagen, Van Twist and Schaap, argue has contributed to the fact that social systems theory, especially in the Luhmannian version, has been less at the centre of the debate here than elsewhere, as for example in Germany and Italy.<sup>1</sup> Notably the social systems theoretical approach found its way into Dutch legal academia mainly through the work of Gunther Teubner whose theory of reflexive law, in particular, has been received with interest and appreciation.<sup>2</sup> In the tradition of social systems theory but pushing the normative argument a good deal further than more orthodox approaches were prepared to go, and often combining it with quite incongruous theoretical perspectives (Derrida most surprisingly) Teubner, it may be argued, has introduced something of a paradigm shift in social systems theory. This 'normative turn' may also account for the renewed and deepened attention to Teubner's recent work in Dutch legal theory.<sup>3</sup>

- 1 Ton van der Eyden, "Overheid en interdisciplinaire theorievorming. Het werk van Niklas Luhmann" in: *Bestuurskunde – Hoofdfiguren en kernthema's*, ed. Arnold Korsten & Theo Toonen (Leiden: Stenfert/Kroese 1988), 143. Linze Schaap, "Bestuurskunde als bestudering van sociale systemen", *Bestuurskunde*, nr.6 (1997), 277-290. Mark Van Twist, *Verbale vernieuwing – aantekeningen over de kunst van de bestuurskunde* (Den Haag: VUGA Uitgeverij 1994) 186, 192. Ton Wilt-hagen, "Recht in een gesloten samenleving – het debat over reflexief recht en autopiesis" *Recht der Werkelijkheid 1* (1992): 118-137.
- 2 Nick Huls & Heleen Stout (Ed.), *Reflecties op reflexief recht*, (Zwolle: Tjeenk Willink 1992). Heleen Stout & Josien Stoop, "Het falen van de wet – Een inleiding tot het autopoietische denken van Gunther Teubner", in *RegelMaat* (1991). The fact that Dutch legal Academia gives more attention to Teubner instead of Luhmann, is according to Wilt-hagen owed to the more elegant and more tractable formulation of his ideas: Cf. Ton Wilt-hagen, "Recht in een gesloten samenleving – het debat over reflexief recht en autopiesis" in *Recht der Werkelijkheid 1*(1992): 126.
- 3 Fischer-Lescano argues that Teubner's work could be understood as Critical Systems Theory Frankfurter Style. See: Andreas Fischer-Lescano, "Kritische Systemtheorie Frankfurter Schule" in *Soziologische Jurisprudenz – Festschrift für Gunther Teubner*, eds. Graf-Peter Callies, Andreas Fischer-Lescano, Dan Wielsch, Peer Zumbansen (Berlin: de Gruyter 2009), 49-68.

Teubner's contribution to this volume is a clear instance of this 'normative turn', a new step in a project that now spans a number of articles on human rights.<sup>4</sup> The concern with human vulnerability which is at the core of human rights also goes back to the concerns that motivated the discussion of reflexive law, understood as regulation that might be effectively responsive to societal demands to meet human needs. The concern, now, finds expression in the theory of societal constitutionalism as attentive to social dynamics under conditions of complexity, and the self-constitution of spheres. And it is renewed in a theory of human rights as a line of defence against the structural violence of the logics of systems running amok. Amidst so much talk of the horizontal application of human rights as extending to interpersonal legal relations, this is horizontality with a difference, that involves turning the medium upon itself in a reflexive move that sustains proper boundaries and reins in the 'excesses' of functional differentiation. This point is powerfully argued in the article in this volume. Putting a significant distance between the paradigm of the State, and the regimes of State-sanctioned human rights, and his own conception of societal constitutionalism, Teubner argues here for abstracting rights out of the State context and re-specifying them in terms of the new demands of the protection of the autonomy and integrity of social spheres. Teubner is careful throughout to variably circumvent and contest the 'politicisation' of human rights, by which he means their understanding in terms of the old categories and 'guiding distinctions' of the political system. Released from political 'oversight' in that sense, human rights are re-oriented to the 'independent logic and independent rationality' of diverse social contexts.

*Rechtsfilosofie & Rechtstheorie* has invited responses from four academics, with different theoretical perspectives and backgrounds, offering critiques both internal and external.

Gert Verschraegen contribution re-centres the State in the debate. While sympathetic to Teubner's critique of 'state-and -politics-centricity' (an approach that still characterizes the majority of theorizing about fundamental rights) and while appreciative of Teubner's suggestion for a transition from a political constitution to a societal constitution for fundamental rights in a fully fragmented global society, Verschraegen argues that although processes of globalization, fragmentation and functional differentiation may indeed have changed the outlook of the state, they have not rendered it obsolete. They rather shift its function and position. Verschraegen stresses this point in arguing for the inclusionary effects of fundamental rights, and that a functioning State plays an important role herein and is in fact a presupposition for a societal constitution.

4 Indicatively: "Societal Constitutionalism: Alternatives to State-centred Constitutional theory?" (Storrs Lectures 2003/04 Yale Law School). In *Constitutionalism and Transnational Governance*, eds. Christian Joerges, Inger-Johanne Sand and Gunther Teubner (Hart, Oxford 2004), 3-28; "The Anonymous Matrix: Human Rights Violations by 'Private' Transnational Actors" in the *Modern Law Review* 69 (2006); "Rights of Non-humans? Electronic Agents and Animals as New Actors in Politics and Law", in *Journal of Law and Society* 33 (2006): 497-521; "Horizontal Effects of Transnational Human Rights", in *Contemporary Constitutional Readings*, eds. Felipe Asensi and Daniel Giotti, Rio de Janeiro 2011 (forthcoming).

In the second response, Bart van Klink engages essentially with three points of criticism from, what could be deemed, an approach external to social systems theory and closer to a more traditional legal theoretical perspective in the vein of Kelsen and Oakeshott. From his critical-positivist point of view, Van Klink first deals with two classical social systems theoretical issues: the ambivalent position of human beings *vis-à-vis* social systems in systems-theory,<sup>5</sup> and the conception of sociality in the exclusive terms of communications. The latter, Van Klink argues, entails a reduction of social problems to communicative problems. The third criticism Van Klink levels, pertains to what he qualifies as the problem of the 'institutional design', i.e. the difficulty, if not impossibility, of realising a societal constitution without the existing institutional back-up of politics and law.

Wil Martens argues from a social systems theory internal perspective that however challenges key categorical concepts. The criticism offered by Wil Martens questions Teubner's take on human rights on a fundamental level, highlighting the problems concerning inclusion and exclusion with regard to human rights. After criticizing Teubner's description of society as a system of one-sided communication subsystems, Martens turns the focus on inclusion and elucidates a paradox: on the one hand human rights are geared to guaranteeing access to function systems but at the same time human rights should protect from the exploitation that accompanies inclusion. Revealing the emptiness of the concept of inclusion, Martens formulates his own account of inclusion.

Pasquale Femia's analysis involves taking Teubner's argument further in the direction of deploying human rights as registers of excess, as limits to the expansionist tendencies of social systems with the massive destructive potential that inheres in these tendencies for the integrity of persons and institutions. Femia uses the language of 'political moments' to track forms of disruption that are neither contained nor rendered rational by the political system proper, triggers of political reflection that do not simply replicate the dominant distinctions of the political system in the subsystems in question, but *catch it out*, as it were, generating incongruous opportunities for self-reflection. Femia develops an argument about the disruptive potential of human rights as both (inevitably) short-circuited to systemic logics and as opportunities to redress what Femia calls 'para-

5 The issue of the so-called exclusion of the human being of society was also hotly debated in connection with Luhmann's autopoietic turn, during the 1980's-1990's. See for example Walter Kargl, "Kommunikation kommuniziert?", *Rechtstheorie* (1990), 352-373; Walter Kargl, "Gesellschaft ohne Subjekte oder Subjekte ohne Gesellschaft – Kritik der rechtssoziologischen Autopoiese-Kritik", *Zeitschrift für Rechtssoziologie* 21 (1991), 352-373; Joachim Nocke, "Autopoiesis: Rechtssoziologie in seltsamen Schleifen", *Kritische Justiz* 19 (1986), 363-389; Hans-Peter Krüger, "Luhmanns autopoietische Wende. Eine Kommunikations-orientierte Grenzbestimmung" in *Selbstorganisation Jahrbuch für Komplexität in die Natur-, Sozial- und Geisteswissenschaften*, Vol. 1 (Berlin: Duncker & Humblot, 1990), 129-147. One might conjecture that the debate will be reopened due to a normative and critical turn in social systems theory. Whereas for example Fischer-Lescano is adamant: people belong to the environment, Fuchs & Hofkirchner represent a different take on the question. See: Christian Fuchs & Wolfgang Hofkirchner, "Autopoiesis and Critical Social Systems Theory" in: *Autopoiesis in Organization Theory and Practice*, eds. Rodrigo Magalhães and Ron Sanchez, (Bingley: Emerald, 2009), 111-129.

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nomic' functioning, by which he means the effects of pathological closure of the system and the loss of any adequate notion of responsiveness to the world.

The respondents met with Teubner in a seminar organised by the research group in legal philosophy at the Tilburg University in October 2011 to discuss the issues at stake. In the final contribution to this special issue, Teubner offers a reply to his critics. We would like to thank the journal, its editor Hans Lindahl for his intellectual generosity and hospitality, our anonymous reviewers as well as Bald de Vries for incisive and helpful comments, the four respondents for some fine critical arguments and, finally, Gunther Teubner for his characteristically robust and profound engagement.