

Horizontal Effect Revisited

A Reply to Four Comments

Gunther Teubner

I

Gert Verschraegen argues forcefully for expanding human rights into different spheres of world society but he insists that the state and institutionalised politics do play a prominent role in polycontextural human rights, and observes that I underestimate the contribution of the state to societal constitutionalism. I freely admit that this is one of the most difficult points in my argument. It may be that my relatively low appreciation of the role of states may be due to the fact that I concentrate on societal forces in constitutionalism. Moreover, since my specialisation is private law, I do not exclude a certain *déformation professionnelle*.

Verschraegen's main argument is this: 'The old institution of political membership in the state (citizenship) still plays a crucial role in mediating the balance between inclusion and exclusion in global society.' I appreciate the subtle observations that lead Verschraegen to his thesis of a strong role of politics/state in non-state human rights. They advance the debate and encourage me to distinguish different situations of state influence which may, in turn, relativise Verschraegen's relativisations:

1. A functioning political system and a well-established state are a precondition for a functioning society and thus for negative and positive human rights in different social fields. Examples are the old *pax et iustitia*, and the more recent welfare state provisions. – I agree, but it is not a special role of politics/state to realise a precondition for society's life, but rather something that is true for any social system. Every social system produces preconditions for the well-functioning of others and for the protection of human rights.

2. Politics plays an important role in the mutual reinforcement of social exclusion. – Indeed, the contamination of human rights exclusion may be caused by badly working politics/state, but no less so by other function systems. Poverty, lack of education, the refusal of access to media, and the like make human rights protection meaningless, even if politics and law provide a model catalogue of human rights.

3. Polycontextural human rights need the state's power for their implementation and enforcement. – This is indeed one of the special roles of the state which are indispensable. However, this role of the state does not transform societal human rights into the human rights of states. Consider the historical example of Judaic law in the Diaspora. When, in some cases, state law lent its support for the

Gunther Teubner

enforcement of Judaic law, the latter was not transformed into the official law of the state, but remained religious law which was assisted by the power of the state.

4. The sheer existence of human rights in state constitutions has certain radiation effects into different sectors of society. – Indeed, this radiation is an important driving force for expanding human rights into other fields. However, one should not overlook the dangers of ‘direct’ horizontal effect, when state law begins to define pervasively the parameters of social life.

5. It is the state’s judiciary that guarantees human rights, and it does so not only against the state but against centres of social power, as well. – Here one should be aware of the differentiation between the political and the legal systems which is reinforced under conditions of globalisation. It is somewhat misleading to view the judiciary only as a branch of government. An alternative view would define constitutional courts not only as the guardian of the state constitution but as the guardian of different societal constitutions as well.

6. There is a wide-spread preference for citizens and discrimination of strangers in non-political contexts after globalisation. – I agree. The background is not so much legally defined nationality but ‘glocalisation’, i.e. the local character of globalisation. Any global activity is coloured by its local context, which defines the border between ‘us’ and ‘them’. Language, bodily appearance, mentality, territorial origin and such are decisive for this discrimination. The political definition of nationality or citizenship is less influential here.

7. The ‘birthright lottery’ of citizenship restricts access to territory, and thus to highly developed societies where human rights protection is relatively well-developed. The internal segmental differentiation of politics creates obstacles for inclusion in other social fields. – However, does this create a special role for states? What about the internal differentiation in the economy and other fields? Think of extreme poverty, stratification of education, differential access to the new media. All of these have similar exclusionary effects. Verschraegen writes: ‘Any theory of fundamental rights in modern society has to account more systematically for the crucial and specific role of state membership or citizenship.’ May I add to that it has to take account of the crucial role of education, monetary resources, family origin and religious affiliation?

8. In legal practice, protective duties of states for the realisation of polycontextural human rights have been developed. – This is one of the strongest arguments for the state’s dominant role. I accept it fully, but I would like to point to certain deficiencies of this doctrine. Why are duties established exclusively vis-à-vis the state and why are private actors not themselves under obligation? Moreover, is it acceptable that the political system has a monopoly on defining the scope of human rights in different spheres of society?

9. Welfare state benefits are basically restricted to national citizens. Welfare state benefits are societal human rights granted by state institutions. – Again, this is a strong argument for the state’s special role. My scepticism comes from the wel-

fare state's colonisation tendencies and the dangers of mismatches between welfare activities and their hierarchical state organisation.

If we look at these different situations, we become aware that we need a carefully calibrated theory which would be able to grasp the subtle interplay between the state and other social systems. In this context Verschraegen remains somewhat sceptical with regard to what I call the 'auto-constitutionalisation of transnational regimes'. He prefers 'hybrid constitutionalisation' as a blend of public law-making and societal law-making. I agree that auto-constitutionalisation is a somewhat exaggerated formulation because it creates the impression that there are exclusively internal causes for societal constitutions.¹ But why do I prefer societal constitutionalisation 'in the shadow of the state' against 'hybrid constitutions'? What would be the difference? I borrow, to this effect, from Foucault and Derida's idea of a '*constitution capillaire*'. I tend to distinguish between internal constitutionalisation and its external impulses. But why exclude the state's design of societal constitutions from the inner constitution, and ban them to external impulses? This is not to say that those political impulses are less important than internal constitutional changes. But the decisive criterion for the distinction is what I call 'medial reflexivity'. When power regulates power, when monetary operations regulate the flow of money, when meta-theories, epistemology and methodology regulate what is a scientific operation and what is superstition, when secondary rules regulate primary rules – more generally, when the special communication medium of a function system becomes reflexive and regulates in a second-order operation its first-order operations – only then have we reached the *proprium* of a constitution. External impulses from politics and law are not in a position to produce this medial reflexivity for other social fields, but of course they exert an influence on it.

Here the shadow of the state comes in. Not only in the sense that an external power exists as a threat and will strike if one does not comply (the famous British fleet in being). Rather it manifests itself in the sense of the Kornhauser/Mnookin article 'In the Shadow of the Law'. The authors argue that law's decisive influence on the behaviour of people is not whether legal commands are obeyed or enforced. Rather, the interaction between the apposite social actors reconstructs, transforms, translates the politico-legal command into an internal 'negotiation chip', into a power position within a power game. In other contexts it reconstructs legal rules into internal factors, for example into a cost factor within an economic transaction. Societal constitutionalism in the shadow of the state would imply that the constitutional impulses of the state are relevant only once they are reconstructed within the social sector concerned as elements of its medial reflexivity.

1 It resembles the situation of the self-reproduction of social systems, which does not mean that everything is caused by internal conditions. External causes are manifold, but they work as irritations and will be reconstructed within the system.

Gunther Teubner

II

In responding to *Bart van Klink's* comment, I first need to clarify some misunderstandings about my argument before I can deal with an objection in his comment which indeed advances the debate. Let me first briefly list his major misreadings:

1. Van Klink seems to misunderstand my main argument when I argue against the established doctrine of horizontal effects of human rights. In my view, the doctrine constructs them as a symmetrical relation between individuals and their rights which need to be balanced against each other. I seek to reformulate them as an asymmetric relation between individuals, persons and institutions on the side of the 'victims', and the 'matrix' – i.e. anonymous social forces: formal organisations and function systems – on the side of the 'perpetrator'. In Van Klink's presentation of my argument, the traditional doctrine applies human rights in the relation between individuals or between individuals and collectives, and I am supposed to change this into a relation between social systems. This sets the scene for his objections against a position which is not mine.

2. Do I arbitrarily superimpose a 'crypto-humanistic' concept of the human being full of 'pathos' onto Luhmann's 'clinical' systems theory, which has effectively thrown the individual out of scientific inquiry? Van Klink seems to misunderstand the role of the human being in Luhmann's theory when he argues that the individual is a 'no go area'. We need to distinguish carefully between general systems theory and the special theory of social systems. Indeed, in social systems, the human being appears only as a 'person', i.e. a semantic artefact, a point of attribution of action. But in Luhmann's version of general systems theory, which gives us the whole picture, the human individual reappears in all its aspects, physical, biological, psychic and social. What is relevant in our context is that meaning is produced in parallel chains of distinctions by both social and psychic systems, via separate processes, and that the problematic, sometimes violent, 'interpenetration' of these two worlds of meaning becomes a main concern for a theory of human rights.²

3. Van Klink discovers in my argument a contradiction: first arguing a natural rights position and then jumping into crude positivism. My position is not that of natural law because neither latent rights nor living law have a binding effect on positive law. Nor is it pure positivism because the freedom of the decision is constrained by latent rights and living law. The relevant debate begins only once we overcome the sterile alternative and attempt to understand institutions as a complex interplay between different worlds of meaning.

2 Van Klink misrepresents Luhmann again when he describes consciousness as a 'channel' through which social systems are communicating. Instead of Luhmann's book on risk, which only marginally deals with the relation between society and consciousness, he should have referred to the relevant texts, e.g. *Social Systems*. Then he would have understood that social and psychic processes produce meaning separately but are connected via 'interpenetration'.

4. Van Klink teaches systems theory a philosophical lesson: 'it does not follow from his social systems theory and will necessarily conflict with its basic premise that our knowledge of the world is always partial and mediated by various system-specific codes'. Obviously, he is not acquainted with the extensive discussion among systems theorists on constructivism and the 'reality' of the environment. To put it succinctly, social systems cannot 'reach out' to the outside world, neither to psychic processes nor to biological and physical processes. But this does not transform those into a 'no go area'. Here, the literature on 're-entry' comes in, the repetition of a difference within a difference, which makes it possible that social systems, and science in particular, successfully deal with psychic, biological and physical processes.

5. Does my 'institutional design' neglect the is/ought difference when I argue that – among numerous other legal institutions – transnational private arbitration positivises human rights standards? Van Klink does not seem to be aware of my numerous articles on legal pluralism; otherwise his counter-arguments would start from a somewhat more ambitious level.

6. He accuses me of not answering the question: 'against whom should fundamental rights be invoked?' He seems to ignore the answer which I give explicitly. My answer: suing individual or collective actors in existing procedures of individual human rights litigation, and translating the questions of individual rights into institutional issues within this individual litigation. This method has a long history in constitutional law, private law and competition law, and my suggestion is to extend it to horizontal effects of human rights.

7. Do I recommend that courts use the introspection of suffering souls as a criterion for their verdicts on human rights? This is not how my remarks on the unbridgeable cleavage between the individual experience of suffering and its reconstruction in court rooms via the poor language of law should be understood. I do not want to declare introspection as the final criterion of legal decisions when I argue that only my introspection can judge whether my human rights have been violated. For consciousness as such, introspection is indeed the final arbiter, while for society and law it is a long argumentation process for which the expressions of introspection are only the starting point of reasoning.

8. As a viable alternative to my simultaneously 'regressive' arguments he recommends: (1) 'to prevent that people are dominated by one medium only'; (2) 'freedom is (...) the presence of a plurality of forces'; (3) 'Law contributes to the separation of powers' (in society)... 'For the rest it has to be left to society, as part of the public debate, to develop a multitude of discourses'; (4) let us create 'islands of peace and quiet in the overwhelming sea of chaos, not by rejecting or bypassing the institutions'. This sounds more than convincing. The only thing is that I have been preaching those four messages already for many years. At the end of the day, Van Klink turns out to defend the case for societal constitutionalism. Welcome to the club.

Gunther Teubner

What about his objection that does advance the debate?

It is his question: ‘what constitutes the “proper space” that should be attributed to a given system within the communicative world order?’ This indeed is a fundamental problem which plagues the world of functional differentiation from its very beginning (think of Martin Luther vs. Johannes Tetzl in their controversy on *Ablasshandel*, that is, money for salvation). And there is no easy answer to it. At the outset it needs to be said that traditional individual human rights concepts are confronted with the same question: what constitutes the ‘proper space’ of an individual’s integrity that needs to be protected against the intrusions of power? Where is the proper limit between individual autonomy and society’s concerns? Constitutional law has no general answer to this, not to speak of a full-fledged constitutional theory. Instead, constitutional law decides from case to case according to ad hoc arguments and creates a ‘common law’ of individual human rights. Similarly, in an institutional version of human rights there is no general theory available that would define the proper boundaries between different social institutions. Systems theory does not pretend to do this work; it poses the problem, produces some abstract arguments and analyses the boundaries that are defined by existing operations and self-descriptions, but cannot determine the boundaries concretely. Nor does any other sociological or philosophical theory, for that matter. Economic theory does, but it cannot be trusted. Legal doctrine will not be able to produce abstract and general criteria that determine the decision. This however is good news, since the law should not be the super-instance for this question. There cannot be a legal ‘super-discourse’ that regulates the boundaries between various communicative processes composing society worldwide. Instead, we enter the hotly contested field of ‘reflexive politics’, which is neither a monopoly of the parliamentary, nor of the judicial process, but which needs to take place in many sites of society.

III

Wil Martens raises important critical questions against the background of the grand theories confrontation – systems vs. action theory –, and makes a plea for the superiority of action theory. I will not enter this broad debate. Instead, I will concentrate on the substantive human rights issues. He formulates four clear-cut alternatives, and demands that a decision be taken for the one or the other term of the alternatives. May I respond to this stern appeal with Melville’s *Bartleby the Scrivener*: ‘I would prefer not to’?

1. Expansion vs. exclusion

Martens’ formulates a strict alternative as to how one should conceive of modern society as a threat for human beings. While in his view I make the one-sided function orientation of communication systems responsible, he sees the threat of society in terms of inclusion/exclusion.

My answer is: *Es kommt darauf an!* I refuse to decide between the alternatives, and argue that it depends. Expansion and exclusion are not opposites, but rather two

dimensions of threats to human rights under functional differentiation. It depends whether we are talking about the institutional or the individual/personal dimension of human rights. In the institutional dimension, the integrity of art, science and law are threatened by the expansion of one-sided function systems, particularly politics and the economy. In the individual dimension, exclusion from one field of action, often accompanied by the exclusion from others, is the main threat.

But this is only a first approximation. More important than this distinction are the interrelations between expansion and exclusion. When expansion shows totalitarian tendencies, particularly in politics or in the economy, it tends toward an exclusion of different rationalities, of different logics of action. Persons are effectively excluded from other social roles, and individuals suffer from social influences which repress many other aspects of their inner life. *Bartleby the Scrivener: A Story of Wall Street* returns once again at this point: what would his answer be if he were asked: do you suffer from exclusion or from the tunnel vision of economic action when you are asked to perform Wall Street activities?

2. Society vs. individual

Here the alternative is that human rights protect either the differentiation of society or the integrity of the individual. Martens argues that demanding justice is not just a matter of saving conditions of communicative systems. He contests the necessary coincidence between the demands for justice on the side of certain categories of humans, and the endangerment of the presuppositions of this society.

My answer is that there is no necessary coincidence, but rather a considerable overlap of these different aspects. Justice and functional rationality are clearly diverse orientations. In this aspect I differ from Thornhill, with whom I otherwise agree. We cannot reduce the independent role of individual protection to the requirement of the political system that it not to be overburdened.

3. Functional specialisation vs. impurity of societal action

Martens argues that 'discrimination of women and blacks, and the priority of the rich in, for example, the judiciary and the health system, can be interpreted as a consequence of the specific rationality of these systems. Dominance of a problem-oriented rationality does not automatically imply blindness for other meanings than those that are central for a system in question'. Thus he formulates the alternative: what is the specific human right endangerment in modernity – the one-sidedness of function or non-function related actions that occur within function contexts, despite of their functional specification?

My answer: neither the one nor the other, but a third form of endangerment. I agree that in corporations, hospitals and courts, discrimination and other human rights violations occur as a matter of course that are not an expression of their one-sided functional orientation (e.g. race or gender discrimination). But my argument is different. Whether a human rights violation is committed by acts of

Gunther Teubner

power, monetary transactions, cognitive statements, medical treatments, judicial decisions or acts of the new media, this creates the decisive difference between those non-function-related human rights violations in function contexts. Not the one-sided functional orientation of the violation, but the highly specialised *medium of communication* in which the violation occurs, creates the system specific endangerments to human rights. In fact, the juridical distinction between vertical and horizontal effects needs to be traced to this difference between different media of communication. And, in the end, the political and legal reaction to human rights violations in its turn cannot be uniform but must be carefully tailored to the specificities of the medium.

4. Communication vs. action

Finally, Martens confronts us with the alternative: where does the threat to human rights in modernity lie: in communications or in physical actions? He finds it confusing if one tries to *reduce* the indicated violations to communications. 'A "chain of commands" or "market forces" can be weighty reasons for violations, but as such they are really unable to hurt anybody.'

Again, I refuse to be forced into this alternative. Of course, I see the role of physical acts as independent and at the same time as related to communications. But the question I am asking is different when I stress the role of communication. My question is not whether communications or physical acts cause the human rights violation, which is a problem of causation. Instead, my question is to which 'entities' we ascribe responsibility: whether we ascribe it exclusively to individual actors who commit the physical acts, or also to anonymous structures and processes in social communication. The ideas about an organisational surplus in organised crime point in this direction but they trivialise the problem by appealing to the attribution of responsibility to a collective actor. Galtung's structural violence comes closer to the problems posed by anonymity, but it remains too static. Foucault's strategies without actor seem closest to what I mean by the violence of communicative processes in their eigen-value. And here we find the background of my thesis: the emergence of fundamental rights is a counter-reaction to the emergence of the 'matrix', an unleashed social dynamics which is guided by a one-sided, reckless and limitless rationality, first the rationality of politicisation, later of the monetarisation, juridification, medicalisation and medialisation of modern society.

IV

I am intrigued by the concept of 'semiospheres' which *Pasquale Femia* presents: 'what is "shared" between systems as common resource, as medium, and the modalities of that sharing. Building an intertext and setting boundaries are recursive operations: not only a specific internal functioning of each system. A bare semiotics of human rights, a semiosphere, works within and outside systems.'

I entertained a certain scepticism with regard to theories of signs. They seemed to me too close to structuralism, and the dynamics of *discours*, *différance* and auto-

poiesis seemed to be missing. But Femia's argument suggests that 'semiosphere' might shed some light on the great enigma: what do we find in the interstices between closed meaning universes? Semiospheres might play a similar role as the *réseau des propres noms* do in Lyotard's hermetically closed discourses, or as networks create connections between isolated entities or as 'essentially contested concepts' create separation and connection between competing theories.

I find it particularly promising that in semiospheres the boundaries between texts appear as 'translation dispositives'. The translation metaphor reflects very aptly how the closure of meaning-worlds relate to their simultaneous openness. However, which boundary, which texts? If we follow Femia and tentatively define human rights as a 'semiosphere' – which would be the common ground for them in different worlds of meaning –, then we would not just deal with the interrelation of different *social* rhetorics. Rather, we need to localise human rights in a much broader intertextuality, and have to translate them into fundamentally different 'texts'. Indeed, human rights 'move' between different 'ontological levels': mind/body (the world of 'latent rights') communication, politics (the world of 'living rights'), law (the world of 'positive rights'). Human rights are then a particular case of 'essentially contested concepts', but the contests no longer take place only in conflicts between different theories but also between different ontological levels.

Level 1. The 'intercommunicative' translation between different social rhetorics is difficult enough. What changes do political human rights undergo when they are invoked against economic action? Legal doctrines of freedom of art and freedom of science have been developed against the threats of political power; thus, they cannot be used in the same way against the intrusion of the profit principle. In my view, Gotthard Günther's model of 'translation' in polycontextuality is the most promising one. 'Rejection values' govern the moves between different binarily coded mono-textures. Human rights norms in different societal contexts would need to develop a language that rejects the binary code of politics and replaces it by different binary codes and their concomitant programs. This requires reformulating the human rights question for each binary code involved. To concretise human rights principles in terms of subjective rights which can be used as claims of autonomy in litigation surely makes sense in the context of political power, but not in the context of profit making. This is why I favour an 'indirect' horizontal effect of human rights. I do not mean conformity with systemic principles, which Femia rightly criticises, but rather effective counter-strategies against systemic mechanisms, which only work once you give up the 'direct' application of human rights which were originally developed against political power mechanisms.

Level 2. It is much more difficult to understand how human rights 'translate' between society and mind, between communication and consciousness, between social and psychic systems. Luhmann borrowed from Parsons the idea of 'interpenetration', which signals a more intense and more complex interrelation than mere structural coupling, irritation, etc. I doubt whether something parallel to

Gunther Teubner

translation from one language to the other takes place between mind and society. Instead, I would distinguish what happens within each level and what happens between the levels. Consider human rights protection of 'individual conscience'. *Within* communication and within consciousness two parallel translations take place. In consciousness we translate between our introspection of what we experience as our conscience and what we internally experience about how society, on the one hand, and the law-talk about our inner life and what we feel as harmful intrusions, on the other, i.e. we translate our psychic language into the psychic reconstruction of communicative language and vice versa. In communication we treat conscience as a semantic artefact which is an object of legal protection, and reconstruct how individuals experience the intrusions of political power and the seductions of economic action upon their conscience, i.e. we translate from communicative language into a communicative reconstruction of psychic language. To that extent the translation metaphor makes sense within each level. But *between* the two levels it is probably not translation, i.e. a item-by-item transformation of words into thoughts and vice versa, but rather a co-evolution of separate and parallel simultaneous chains of meaning events which develops over time a space of synchronisation and compatibility. This creates nothing but a series of misunderstandings, some of them destructive, some of them productive. '*Vieles ist zu zart, um gedacht, noch mehreres, um besprochen zu werden.*' (Many things are too delicate to be imagined as thoughts, and even more things to be expressed in words) (Novalis, *Blütenstaub* § 23).

Level 3. It is even more difficult to conceive of how human rights are reconstructed in the body/mind relation and in the relation between body and communication. A theory of human rights would have to participate in the debate about these eternal questions. I do not want to attempt to go into this mine-field right now.

What I would like to stress in addition to Femia's argument is the surprise element, the creative, the arbitrary, the violent moment in translating human rights from one *Sinnprovinz* (Karl Mannheim) to the other. When ideas about what constitutes norm violations, and how possible counter-reactions could look like, 'move' from one meaning world to the other, something new is created in each of these translations. We do not deal with Chomsky's transformational grammar, which creates predictable results after the application of genetically predetermined translation rules, but rather with a high degree of contingency, even with violence and power in these transformations, which has – as we learn from Foucault – productive as well as repressive aspects. The German expression *Gewalt* contains both brute force and *Walten*, which may be translated as shaping the world. This is the challenge for human rights in societal contexts: not to come up with a mechanical translation from the political into the economic, medical or scientific vocabulary, but rather to see the tasks for what Unger called 'institutional imagination'.

On a different matter, Femia argues that once the matrix argument is used as a methodological concept it should not be misunderstood as a variation of the bal-

ancing method. - When I argue that horizontal human rights should move from individual rights to institutional issues of the matrix, the impression is created that in both cases a similar balancing takes place. It seems as if at the institutional level the 'rights' of institutions are balanced against each other. Against this impression Femia rightly insists on a clear difference between the traditional method of balancing rights at the individual level and the method of assessing consequences at the institutional level. Indeed, there are two different evaluations involved. In balancing rights one determines values that are involved on both sides and weighs them against each other before giving priority to one or the other. In contrast, when one protects spaces of autonomy from matrix intrusions one makes *ex ante* valuations and *ex post* judgements about the damaging effects on the integrity of autonomy. Both are of course normative judgements based on factual statements, but balancing evaluates rules of preferences, while matrix arguments are based on predictions and observations and evaluate them normatively.