Oñati Socio-Legal Series (ISSN: 2079-5971)
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Between social science and cognitive science: Gunther Teubner on fundamental rights

OÑATI SOCIO-LEGAL SERIES VOLUME 16, ISSUE 2 (2026), 487-514: A COLLOQUIUM AT THE INTERSECTION OF LAW, SOCIETY, AND COGNITION: INTEGRATING SOCIOLOGICAL AND PHILOSOPHICAL PARADIGMS WITH THE COGNITIVE SCIENCES
DOI LINK: HTTPS://DOI.ORG/10.35295/OSLS.IISL.2319
RECEIVED 1 APRIL 2025, ACCEPTED 5 SEPTEMBER 2025, FIRST-ONLINE PUBLISHED 27 NOVEMBER 2025, VERSION OF RECORD PUBLISHED 1 APRIL 2026

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Abstract

Teubner's theory of law and fundamental rights, between social science and cognitive science, originates in the transfer of the neurobiological notion of autopoiesis to the domain of social science in the social systems theory of Niklas Luhmann. This transfer involves the fundamental reconsideration of the framework of classical sociology for the analysis of society and social life. The further Teubnerian development of social systems theory arises from the consideration of the social reality of the legal person: the character and position of the legal person within the autopoietic social system of law. For Teubner, the legal person is the creation of the internal communicative processes of the legal system. As a communicative effect, the legal subject reveals that the operation of law, as an autopoietic social subsystem has a dynamic, expansive character. The negative effects of this general expansive dynamic lead to the thematization of fundamental rights as transnational fundamental rights.

Key words

Autopoiesis; fundamental rights; Luhmann; social systems; Teubner

Resumen

La teoría del derecho y los derechos fundamentales de Teubner, entre la ciencia social y la ciencia cognitiva, tiene su origen en la transferencia del concepto neurobiológico de autopoiesis al ámbito de la ciencia social en la teoría de los sistemas sociales de Niklas Luhmann. Esta transferencia implica una reconsideración

I would like to thank Luigi Cominelli (University of Milan), Daniele Velo Dalbrenta (University of Verona) and Giovanni Bombelli (Catholic University of Milan) for the invitation to participate in, and the organization of, the Oñati International Institute for the Sociology of Law Workshop, *A colloquium at the intersection of law, society, and cognition: integrating sociological and philosophical paradigms with the cognitive sciences*, in June 2024 where a first version of this article was presented.
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fundamental del marco de la sociología clásica para el análisis de la sociedad y la vida social. El desarrollo posterior de Teubner de la teoría de los sistemas sociales surge de la consideración de la realidad social de la persona jurídica: el carácter y la posición de la persona jurídica dentro del sistema social autopoético del derecho. Para Teubner, la persona jurídica es la creación de los procesos comunicativos internos del sistema jurídico. Como efecto comunicativo, el sujeto jurídico revela que el funcionamiento del derecho, como subsistema social autopoético, tiene un carácter dinámico y expansivo. Los efectos negativos de esta dinámica expansiva general conducen a la tematización de los derechos fundamentales como derechos fundamentales transnacionales.

Palabras clave

Autopoiesis; derechos fundamentales; Luhmann; sistemas sociales; Teubner

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1. Introduction

The position of Teubner's social systems theory of law, between social science and cognitive science, is preceded by indicating the particular aspect of cognitive science in relation to which Teubner's theory of law and fundamental rights is to be situated. This involves reference to the neurobiological work (biology of cognition) of Maturana and Varela and, in particular, their central notion of autopoiesis. Here, the origin of this relationship between social science and cognitive science is located in the transfer and adoption of this neurobiological notion of autopoiesis to the domain of social science in the social systems theory of Niklas Luhmann. In Luhmannian social systems theory, the adoption of autopoiesis becomes the fundamental reconsideration of the conceptual vocabulary and approach of classical sociology to the description and analysis of society and social life. This reconsideration extends to the social systems theory of Talcott Parsons in relation to which the Luhmannian adoption of autopoiesis marks the divergence between their respective conceptions of social systems theory.[1]

Luhmann proposes a refined constructivist theory of knowledge which replaces the conventional logico-epistemological framework for its elaboration with the operation of a system separated from an environment. The separation is understood through the generalisation, beyond the initial parameters of Maturana and Varela's neurobiology, of the concept of autopoiesis: a separation which involves both the closure and openness of the system to the environment.[2]

The transformation in the theoretical orientation of Luhmannian social systems theory is reflected in the conception of the character and position of rights within the legal subsystem. This is exemplified by the comparison of the pre-autopoietic sociological approach, in the *Grundrechte als Institution Ein Beitrag zur politischen Soziologie* (1965/2019), with later autopoietic, reorientation. In the *Grundrechte*, rights are attributed to human persons as an integral aspect of both the guarantee of subjective rights and freedoms and the guarantee of process of societal differentiation. The subsequent development of Luhmannian social systems theory involves, in its reorientation to a theory of autopoietic social systems, replacing the relationship between individual and society with that between psychic and social systems. It is then this relationship between psychic and social systems within which rights, as subjective rights, are present as an instance of structural coupling between the legal system and the psychic system (Luhmann 1993/2004).

The further Teubnerian development of social systems theory arises from within the general framework of Luhmann's autopoietic social systems theory. The Teubnerian focus is upon the legal system, as an autopoietic social subsystem, and is initially

[1] See Luhmann 1980, for the critical discussion of the future of the Parsonian sociological project. For a broader discussion of the relationship between the social systems theories of Parsons and Luhmann, see Vanderstraeten 2021. From a Parsonian perspective, the engagement with Freudian psychoanalysis (Treviño 2016, 2023, Hechl 2022) and the elaboration of a personality system, differs from the Luhmannian engagement, in the autopoietic turn, with psychology and the description of a psychic system in its relationship with a social system (Luhmann 1995d). See, also the critical remarks in Luhmann 1995c, 146ff with regard to the psychoanalytic concept of the unconscious. Compare, also, in Parsons, 1977, the distinct conception of the position of law within the Parsonian theory of social systems with regard to the approach of both Luhmann (pre-autopoietic and autopoietic) and Teubner.

[2] This is developed and elaborated as a general autopoietic theory of social systems in Luhmann 1995e.

elaborated through a critical engagement with this Luhmannian autopoietic framework (Teubner 1987, 1993). In the Teubnerian social systems theory of law, the legal person is considered *within* this autopoietic social subsystem. as a social reality resulting from the position of the legal person within the autopoietic social system of law. The legal person is held to be the result of the *internal* operation of the legal system law which, as a social system, is "an autonomous epistemic subject that constructs a social reality of its own" (Teubner 1989, 730). This indicates that the legal person is a creation of the internal communicative processes of the legal system. It is the creation of the legal subject as communicative effect of the operation of the legal system which reveals that law, as an autopoietic social system, has a dynamic, expansive character.

The negative effects of this general expansive dynamic of autopoietic social systems become a more central and insistent focus of Teubner's later thought. From this focus, fundamental rights are thematized, as transnational fundamental rights, in relation to the "endangerment of individual's integrity of body and mind by a multiplicity of anonymous and today globalised communicative processes" (Teubner 2011, 211). This approach is then, further supplemented, with the notion of counter-rights (Teubner 2022). In parallel, with the thematization of fundamental rights and counter-rights, there is also a concern with non-human entities and, in particular, with digital technology and its potential social risks (Teubner 2006, 2018, forthcoming; Beckers and Teubner 2022). Here, in contrast, legal personality is extended to digital technology, but in a differentiated manner as the corollary of the type of civil liability attributable to the social risk which inheres in the particular form of digital technology (Teubner 2006, 2018, forthcoming; Beckers and Teubner 2022). In this manner, the emphasis is upon the general function of law, as an operation of social immunization, from the social risk of digital technology.

2. *Grundrechte als Institution:* An excursus on Luhmann's initial sociological reflection on fundamental rights

Fundamental rights, as a focus for Luhmann's sociological reflection, are first accorded sustained consideration in *Grundrechte als Institution* (1965/2019).[3] This work is situated after earlier work at the Higher Administrative Court in Lüneberg[4] and at the German University of Administrative Sciences Speyer and before his theoretical development towards the autopoietic turn (Luhmann 1984/1995e).[5] The *Grundrechte* is an explicit sociological intervention in the consideration of fundamental rights. Beyond the disciplinary considerations,[6] it is also an intervention in the wider debate concerning the constitution of the German Federal Republic and the position of fundamental rights within it (see Wöhrle 2022). Hence, from this perspective, it is a sociological reflection upon fundamental rights within the framework of a national constitution.

[3] For a more general overview of fundamental rights in Luhmann, see Guibentif 2013.

[4] On this period, see Warnke *et al.* 2021, and, more generally, on the theoretical approach of Luhmann's sociology in his early pre-autopoietic period, Tyrell 2006.

[5] For the emphasis upon the continued importance and relevance of this pre-autopoietic work, see Nichelmann 2020 and Japp 2015.

[6] For a reflection on the underlying approach and theoretical orientation of the *Grundrechte*, see Dammann 2011.

Luhmann's sociological reflection, oriented by a structural-functionalist sociology, considers fundamental rights, as positivised legal rights in a constitution,[7] as an institution. This entails that fundamental rights are not simply a set of norms, but express a set of generalised expectations of social behaviour. As an institution, these generalised expectations then provide a structure for the social system (Luhmann 1965/2019, 7-13). It is, therefore, in terms of their function in the social system, through their institutionalisation within the constitution, that Luhmann describes and analyses fundamental rights.

The further analysis of fundamental rights as an institution involves situating them in a wider process of differentiation in which the political system becomes autonomous. It is the autonomy of the political system which contains the risk of dedifferentiation – politicisation – of the social system. In relation to this risk, fundamental rights operate as an institution which prevents this risk of dedifferentiation by holding open the potential for communication, and social behaviour, beyond the imperatives of the political system. Thus, fundamental rights are an integral element in the process of maintaining and protecting a differentiated social order centred upon communication.(Luhmann 1965/2019, 23-25). This encompasses not only the subsystem of individual action but extends to the relationship between the fundamental rights of freedom and equality and other subsystems (Luhmann 1965/2019, 82-83; 84-185).

The protective role of fundamental rights is, as an institution, intertwined with the differentiation of the social order. Fundamental rights both maintain and are maintained by the differentiation of the social order. This, in turn, entails that, as an institution of positive law, fundamental rights are not conferred with the expectation of operating as the sole institution protecting the differentiated social order. Fundamental rights operate, or function, to provide a supplementary or enhanced safeguard to the wider differentiation of the social order (Luhmann 1965/2019, 184-85). In addition, this differentiation, as a non-synchronous process which generates interdependences, requires a spectrum of fundamental rights, in order for their protective function to extend throughout the social system (Luhmann 1965/2019, 200).

In this sociological reflection, is an explicit intention to supersede the framework of fundamental rights and values (Luhmann 1965/2019, 201-218), and in this supersession the functional comprehension of fundamental rights introduces the concept of cultural fiction. Within this concept, fundamental rights are held to be the type of fictions which, despite the functional revelation of their fictitious character, continue to orientate action and behaviour. A sociological approach to fundamental rights will, therefore, continue, despite the explicit functional description of fundamental rights, to describe them as subjective rights (Luhmann 1965/2019, 210-211). Here, the introduction of this concept of fiction leads, through the development of a sociological approach to decision-making and litigation, to reinforce the sociological alternative to the framework of fundamental rights and value (Luhmann 1965/2019, 212-216). Thus, concluding within the parameters of a national constitution.

[7] See Luhmann 1965/2019, 38-52, for the broader discussion of the adequacy of theoretical foundation for the social function of fundamental rights.

Although, Luhmann's autopoietic turn leads away from the concept of fiction, it will return and be reconsidered in Teubner's further development of an autopoietic social systems theory. It will be in the Teubnerian focus upon the legal person, that a concept of fiction, as legal fiction, will return and be reconsidered. This, in turn, will be the preliminary stage for the subsequent consideration of fundamental rights, beyond the national parameters of Luhmann's *Grundrechte*, as *transnational*, counter-rights.

3. The initial appropriation of the biology of cognition in the Luhmannian social systems theory

The later social systems theory of Niklas Luhmann incorporates certain insights of neuroscience, from the field of neurobiology, drawing from the work of Maturana and Varela in the biology of cognition (Maturana 1978, 1980, 1981, Maturana and Varela 1980, 1998). In this appropriation, neurobiology is considered to be a relevant field of "systems-theoretical research" (Luhmann 2002, 131)[8] whose insights are utilised as part of the wider elaboration of a "refined constructivist theory of knowledge" (Luhmann 2002, 139) which is simultaneously the "development of a sociological theory of knowledge" (Luhmann 2002, 148). This particular articulation of a constructivist theory of knowledge is not orientated by an interest in furnishing a foundation for knowledge, but to "the possibility of observation operations being carried out by very different empirical systems – living systems, systems of consciousness, systems of communication" (Luhmann 2002, 147). The emphasis upon the maintenance of the possibility of observation operations entails the separation of cognition from an essential location in the human being. Human consciousness, "as a designation for the bearer and guarantor of knowledge", is, thereby rejected, and, for Luhmann,

> the reality of cognition is to be found in the current operations of the various autopoietic systems. The unity of a structure of cognition (of the "system" in the sense of transcendental theory) can lie only in the unity of an autopoietic system that reproduces itself within its boundaries, its structures, and its elements. (Luhmann 2002, 147)

From this rejection, this human locus, "man", is displaced by "the communication-system called society" (Luhmann 2002, 148) and, in this displacement, the understanding of "psychological epistemologies" is itself altered to become the generalised process of "socio-communicative observation" within a plethora of psychological systems (Luhmann 2002, 148).[9]

The emphasis of the Luhmannian position, as one of constructivism, is that it leaves the separation between cognition and the external world – reality – unaffected, and that its focus is upon a distinct question. This distinct question is itself the product of a transformation in which the concentration upon "the foundation of knowledge" becomes, instead, the question of distinguishing or the operation of difference (Luhmann 2002, 130). Here, constructivism concentrates upon "internal theoretical distinctions" (Luhmann 2002, 129) within socio-communicative observation, and the accompanying acceptance of the centrality of "circularity and paradoxes" (Luhmann 2002, 130).

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[8] For, further discussion of Luhmann's constructivism, see Thyssen 2004, Herting and Stein 2007, Buchinger 2012). For Maturana's reservations with regard to considering social systems as autopoietic systems of communication, see Maturana 2014.

[9] See, also Tosini 2017.

In this manner, Maturana's neurobiological conception of cognition and the brain is presented as relevant systems-theoretical research as it indicates that the brain has "absolutely no qualitative and only a very slight quantitative contact with the external world" (Luhmann 2002, 132). It provides an exemplary instance which is formulable in more general system theoretical terms: "only closed systems can know" (Luhmann 2002, 132).

Closure is the neither the return to nor the resumption of solipsism or skepticism, but, rather, is to be understood as an aspect of a wider "*de-ontologisation of reality*" (Luhmann 2002, 132).[10] The external world remains, but the system-environment distinction is applied to it in place of the distinction between being and non-being (Luhmann 2002, 132-33). Thus, for Luhmann, in place of the epistemological question, "How is knowledge possible?", there is the different question of the "operation of a system separated from an environment" (Luhmann 2002, 133).

It is from this different question that the notion of autopoiesis, in the neurobiology of Maturana and Varela, is appropriated and transferred into this conceptualisation of the relationship between a system and an environment. From the position of the system, its operation is itself composed of "a network of operations of the same system toward which they point and on which they are founded" (Luhmann 2002, 133). Each operation produces the continuity of the system, as the reproduction of its unity and its limits: "closure and containment" (Luhmann 2002, 133). This closure and containment – the boundaries of the system – remain and are reproduced irrespective of whether "new operations are integrated" (Luhmann 2002, 133): the operations of the system cannot overcome the distinction between system and environment.

Within the operation of a system separated from an environment, knowledge becomes observation of this systemic operation, as, in its separation from the environment, an operation is "incapable of contact with the external world" (Luhmann 2002, 134). The incapability of contact is, however, not the denial or skepticism with regard to "the reality of the external world" (Luhmann 2002, 135), but the essential delimitation of distinctions and designations as "purely internal recursive operations of a system" (Luhmann 2002, 135). Hence,

> [t]hese are operations that are not able to go beyond the system and, as if at a distant remove, pull something into it. As a result, all achievements following from these operations, above all what is usually called 'information', are purely internal achievements. There is no information that moves from without to within the system. For even the difference and the horizon of possibilities on the basis of which the information can be seen as selection (that is, information) does not exist in the external world, but is a construct – that is, internal to the system. (Luhmann 2002, 135)

The operation of a system separated from an environment enables Luhmann to provide further precision for the neurobiological attribution of 'blindness' to the operation of cognitive systems (Luhmann 2002, 135). For Luhmann, the system operates with the essential presumption of the reality of an external environment from which it is separated. It is the distinctions with which the system operates in relation to the observation of its separate environment that generate an internal systemic knowledge in

[10] Italics in the original.

and through these distinctions. In this manner, "knowing systems are real (empirical – that is, observable) systems in a real world. Without a world they could neither exist nor know. It is only cognitively that the world is unapproachable for them" (Luhmann 2002, 136).

Cognition cannot, therefore, copy, map or represent the external world within the system (Luhmann 2002, 136). For the possibility of cognition is the existence of the system in its separation from the environment, and this separation generates the creation of distinctions within the system "to which nothing in the environment corresponds" (Luhmann 2002, 136). This reformulation, by social systems theory, of the question of knowledge, leads to a "refined constructivist theory of knowledge" (Luhmann 2002, 139). In its refinement, the constructivist theory of knowledge insists upon "the recursivity of observation and cognition" (Luhmann 2002, 139); and, in this insistence, relinquishes the "continuum between being and thinking" together with the subsequent recourse to "the theoretical transcendental position" as "the assumption of a subjective faculty of consciousness that can guarantee a priori the conditions of the possibility of cognition" (Luhmann 2002, 139).

The recursivity of social systems is held to be analogous with the function of the brain, as a neurophysiological system, in relation to perception and memory. The analogy is with a recursive process in which the results of prior operations partly determine the "basis for future operations" (Luhmann 2002, 139). This degree of prior determination involves " a binary schematisation […] which holds in readiness the possibilities of acceptance and rejection": "the continuous self-evaluation of the system – which always operates in a state of irritation or agitation by means of a code that permits acceptance or rejection with regard to the adoption of further operations" (Luhmann 2002, 139). The further development of this recursivity, schematised in this binary manner, is the "observations of observations"; and the cumulative effect of these observations is "the meaningful construction of a world" within the system: "no correspondence between the system and the environment is presupposed" (Luhmann 2002, 140). The process of a meaningful construction of a world is held to be analogous to Maturana and Varela's concept of "conservation of adaptation",[11] but with the additional precision that a system's adaptation – "the processing of its autopoiesis in its environment" – "can only be preserved not improved" (Luhmann 2002, 140 fn24). The absence of improvement refers to the essential presence of paradox within a "theory of autopoietic systems" (Luhmann 2002, 143).

Paradox becomes central to, rather than to be excluded from, a constructivist theory of knowledge. For Luhmann, this centrality arises from the dependence of every observation on a distinction, and, thus, that all observation is "recursive observation" (Luhmann 2002, 143). Hence,

> every observer involves himself in a paradox because has to found his observing on a distinction. As a result, he is unable to observe either the beginning or the ending of his observing – unless it be by means of another distinction that he has already begun to make or by continuing with a new distinction after having ended. (Luhmann 2002, 143)

[11] Here, Luhmann refers to Maturana 1988, Maturana and Varela 1998, 113-4.

This enduring paradox then becomes, within the autopoietic system, the manner in which the autopoietic system produces and reproduces itself through recourse to recursivity: "there is no operation without reference to other operations of the system" (Luhmann 2002, 143).

From this enduring paradox, multiplicity, conventionally understood in epistemological terms, as perspectivism and its accompanying difficulties, becomes "a product of cognition, resulting from certain types of distinctions, which, as distinctions, are instruments of cognition" (Luhmann 2002, 144). These distinctions separate the domain or field of cognition and, in this separation, demarcate that which remains independent of cognition – the environment or reality. In this separation, the distinctions operate independently "because there are not and cannot be any equivalents for them in the external world" (Luhmann 2002, 144). The domain from which cognition is separated is not one, thereby designated as 'unknowable', but merely that the dependence of cognition on distinctions, and their "combinatorial possibilities", result from autopoiesis: "the operational closure specific for the given system" (Luhmann 2002, 145).

The refined constructivist theory of knowledge generalises its application, beyond the conventional parameters of epistemology, psychology and biology, and situates it sociologically through reference to a society differentiated into autopoietic systems.

4. Excursus on the individual as a psychic system

The Luhmannian general systems theory of society, as a theory of the differentiation of society into autopoietic systems, involves a reconfiguration of the understanding of the individual in relation to society. The individual is, through a critique of the sociological tradition, reconfigured as a psychic system, and, as a psychic system, is engaged in a relationship with social systems.[12] The psychic system becomes the framework for sociological observation through which further distinctions and determinations are introduced and described. In this manner, the psychic system is internally differentiated, and these internal differentiations are also described as an aspect of the relationship with social systems.

In the sociological observation and description of the psychic system, Luhmann indicates that the psychic system to be distinguished from a direct extension of the neurobiological work of Maturana and Varela. For, Luhmann, psychic and social systems cannot simply be presumed to be generic living systems whose autonomy is described with the concept of autopoiesis (Luhmann 1995b, 55-56). In place of a generic origin in life, the autonomy of psychic and social systems, is centred upon the notions of production and reproduction. Here, a system is described as autopoietic to the extent that it produces and reproduces itself from the elements of which it consists (Luhmann 1995b, 56). It is then the manner in which the system operates – the mode in which production and reproduction are combined – that constitutes the differential unity of the particular system (1995d, 26-27; 1995c, 142-143). This, in turn, provides for the separate, distinct autopoietic existence of psychic and social systems (Luhmann 1995d, 36).

[12] See, Luhmann 2013, 180-211, for a condensed overview of this critique of the relationship between individual and society in the sociological tradition and its ensuing reconfiguration as the relationship between psychic and social systems.

The differential unity of the psychic system is produced and reproduced *internally* through a two-sided form. The form is two-sided because it consists of the entirely separate points of self-reference and other-reference. The adoption of one of these points will then shape the production and reproduction of the psychic system (Luhmann 1995c, 143). The form or differential unity of the psychic system is the distinction between self-reference and other-reference (Luhmann 1995c, 144). From this two-sided form of the psychic system, Luhmann then distinguishes the form of the psychic system from the form of the person.

The form of the person is distinct because it exists as the form through which the social system, through a process of structural coupling, is connected to the psychic system (Luhmann 1995c, 152). The connection, as structural coupling, involves, through the introduction of the form of the person, into the psychic system, the addition of a further form to that of initial form of self-reference and other-reference. It introduces social expectations – parameters or limits of behaviour – of the particular system into the psychic system (Luhmann 1995c, 154). This analysis introduces, through the general theory of autopoietic systems, a different context in which to consider the internalisation of social constraints (Luhmann 1995c, 154 fn.26).

From this conception of the person, as the form of structural coupling between psychic system, and social system, arises the question of the more particular structural coupling between the psychic system and the legal system. In particular, the character and position of rights within this structural coupling. The approach of Luhmann to human rights, in this later, general theory of autopoietic systems, is to describe the irretrievable collapse of the natural law tradition (Luhmann 1984, 1995a) and the transformation of law into positive law (Luhmann 1993/2004). Human rights are, within this fully positivised system of law, meta-positive law, which "can be translated onto the level of the global legal system only with great difficulty and with many inadequacies" (Luhmann 1993/2004, 483).

5. The further development of social systems theory: Teubner and the social reality of the legal person

The interdependence of a constructivist theory of knowledge and a theory of social systems presented by Luhmann is maintained in Gunther Teubner's approach to law as a social system. The initial delineation of the Teubnerian approach involves an explicit, critical appropriation and deployment of the notion of autopoiesis in the articulation of a theory of law as an autopoietic social system (Teubner 1993).[13]

The Teubnerian approach involves reconfiguring the notion of autopoiesis and, in this reconfiguration, introducing the notion of hypercycle (Teubner 1988; 1993, 13-46) in order to respond to the limitations of its formulation by Luhmann. The reconfiguration, which concerns the autopoiesis of the legal subsystem, understands "legal autopoiesis as hypercyclical self-closure" (Teubner 1993, 47). This entails describing legal autopoiesis as a three-stage process (Teubner 1993, 36-42) through which the autonomy of the legal system is developed. The final stage, the autopoietic legal system,

[13] See, also, the earlier edited collection, Teubner 1987.

commences when "the system has created the necessary conditions for hypercyclical linking by describing and producing its own components" (Teubner 1993, 42).

This approach to the conceptualisation of law has a particular effect upon the notion of a legal subject, as a distinct entity whose actions are attributed with a determinate rationality. It is the social reality of the legal person, simultaneously inside and outside the legal system, which forms an aspect of the further development of this theory of law as an autopoietic social system (Teubner and Hutter 2000).

The notion of the legal subject – *homo juridicus*, in its Teubnerian designation – is delineated by detaching the legal subject from both an entirely real existence and an entirely fictional existence and, in this detachment, to reposition the legal subject, as a real legal fiction. This apparently contradictory formulation is the expression of the rejection of the predominant understanding of the legal subject as either a psychic-empirical reality or as entirely heuristic construct

This apparently contradictory formulation is the expression of the rejection of the predominant understanding of the legal subject as either a psychic-empirical reality or as entirely heuristic construct. The rejection is, in turn, the interruption of empirical social research and its identification of the legal subject in regularities of its psychic motivation. It is also the interruption of the legal subject as "an analytical construct of science" (Teubner and Hutter 2000, 569), without any independent existence, and whose predictive and prescriptive capacity, is predicated upon an extraneous existence: a rationality projected onto a system of legal norms.

In relation to the determination, by the empirical social sciences, of the rationality of the legal actor, through their "actually observed behaviour", and by "recourse to empirically observable psychic motivations for the actions of the people involved" (Teubner and Hutter 2000, 571), Teubner introduces a double distinction. The initial distinction is created by introducing "social mediatory mechanisms between actors and aggregate outcomes" (Teubner and Hutter 2000, 571) which is then supplemented by considering the reality of "legal actors themselves as a social construct" (Teubner and Hutter 2000, 571). It is the double distinction which renders the reality of the legal subject, as a rational actor, one which contains a tension between "actual psychic motivations, on the one hand, and actual social behaviour on the other" (Teubner and Hutter 2000, 572). For Teubner, "[t]he decisive thing is to distinguish between the social 'fiction' of the rational actor and the ongoing 'reality' of psychic motivations" (Teubner and Hutter 2000, 571).

The introduction of this double distinction then leads to the rejection of the origin of the 'fiction', as the product of a methodological operation of legal science which, in its detachment from reality, generates a "normative counter-programme to *de facto* behaviour" (Teubner and Hutter 2000, 572). The 'fiction' is, therefore, to be understood, as a distinct, but integral element of reality: a real fiction. From this position, the real fiction is situated "in a symbolic space 'between' mind and science" (Teubner and Hutter 2000, 572). The real fiction,

> produces meaning independent and different from psychic operations, on the one hand, and scientific operations, on the other. They [real fictions] exist as a mode of observation through which economic and legal operations construct the psychic operations that surround them. The fictitious actors ensure the structural linkage

> between communicative operations in economics and in law and the psychic operations that take place simultaneously with them. (Teubner and Hutter 2000, 572)

The structural linkage, as that revealed by the preceding critique of concept of the legal person, is the passage to the presentation of the legal subject – the real fiction – in the legal system: a specialised communicative subsystem within the wider framework of social systems theory.

In this passage to the wider framework of social systems theory, the concept of autopoiesis re-emerges as the characterisation of the reproduction of the subsystem of law. As a social subsystem, law differentiates itself from all other social communication, through the instigation and operation of a specific distinction. For Teubner, the specific distinction of the legal subsystem is the "recursive application of rules to cases in legal acts" (Teubner and Hutter 2000, 573). The reproduction – "self-continuation" (Teubner and Hutter 2000, 573) – of the subsystem of law is a process of "autopoietic closure": a simultaneous openness and closure in which the position of the individual legal subject arises (Teubner and Hutter 2000, 573).

The individual legal subject is, therefore, both within and outside the legal subsystem. The real fiction of the legal subject results from a "process of the social construction of persons" in which the operations of social subsystems "produce the autonomous social realty of actor fictions" (Teubner and Hutter 2000, 574). The legal subject is the institutional fiction created by the operation of the legal subsystem. As an institutional fiction it is "attributed with a specific rationality" and has a distinct reality differentiated from "the psychic reality of the motivations and actions of the people, nor is it linked with them through simple causal relationships" (Teubner and Hutter 2000, 574).

The real legal fiction of the legal subject, within the broader framework of social systems theory, is attributed with three aspects. The legal subsystem, as a specialised communicative subsystem, requires it to engage in continued communication, and the legal subject is the addressee of the "highly specialised communication" of the legal subsystem(Teubner and Hutter 2000, 574). The legal subject, as an addressee of the legal subsystem, is a "semantic artifact" (Teubner and Hutter 2000, 573).

> The person is the name for the logical locus at which a social system creates 'character masks' which internally refer to psychic processes in its environment, creating the possibility of being perturbed by them, without ever being able to reach out for them or to incorporate them. (Teubner and Hutter 2000, 573-4)

The legal subject, through its creation as a semantic artifact, enables the legal subsystem to bridge, but never dissolve, the gap between the entirely internal, inaccessible psychic processes of subjects in its environment. The construction of the legal subject, within the legal subsystem, produces an addressee of the specialised communication of the legal subsystem. The legal subject is then "observable" within the legal subsystem through the legal actions which flow from it as the addressee of the communication of the legal subsystem (Teubner and Hutter 2000, 574).

The bridge also creates "interaction between the internal and external role of the 'person'" (Teubner and Hutter 2000, 574). The interaction, from the perspective of the legal subsystem, is one which "utilises the self-continuation of the psycho-selves for the self-continuation of the socio-selves" (Teubner and Hutter 2000, 575). The bridge opens

the legal system, through the device of the real fiction of the legal subject, to a very specific form of dependence upon the psychic comportments of the individuals within its environment. This form of dependence facilitates, rather than constrains, a detached, but not indifferent, selectivity on the part of the legal subsystem which, in turn, indirectly influences the broader psychic processes of these individuals (Teubner and Hutter 2000, 575).[14]

> The mind's processes of thought and of decision are tapped into by the social subsystem in order cream off surplus value for producing and expanding their worlds of meaning. This involves a circular process across system boundaries of the psychic and the social. (Teubner and Hutter 2000, 575)

The indirect influence upon the broader psychic processes of the mind arises from the effect upon the mind of the real fiction of the legal person. The mind perceives the real fiction of the legal person, as a social or societal presentation of a form of personhood, which, in turn, becomes a potential source of orientation in the mind's process of socialisation (Teubner and Hutter 2000, 575).

The bridge establishes a selective, "structural linkage with consciousness" (Teubner and Hutter 2000, 576) through the specialised medium of communication of legal norms. It is this selective linkage, through the real fiction of the legal subject, which generates and shapes a 'lust for conflict' (Teubner and Hutter 2000, 575). It is from this 'lust for conflict' that, in a parasitic manner, the legal subsystem develops further "possibilities for the future production of norms" (Teubner and Hutter 2000, 575).

The structural linkage with consciousness creates a particular rationality of the legal subsystem. The rationality, as that of the real fiction of the legal subject, reflects the extent to which the legal subsystem allows itself to be affected by the individuals within its environment. For Teubner, "[e]ach subsystem, as it were, invents its own social psychology, with its own criteria of relevance, in order to provide views on the people involved" (Teubner and Hutter 2000, 576). Hence, within the legal subsystem, the 'lust for conflict', becomes the "interplay" (Teubner and Hutter 2000, 576) between the "undefined norm projections, formulations of individual interests, 'sense of justice'" of individual minds and "the legal transformation of normative expectations" (Teubner and Hutter 2000, 577).

The consideration of the real legal fiction of the legal person, as an integral element of a "process of constituting legal actors" (Teubner and Hutter 2000, 582), introduces a distinction between the legal system, its production of legal norms, and the disputes between legal actors. The distinction also marks a parallel process in which legal persons, through the pursuit, protection, and enforcement of their individual rights, simultaneously advance the production of legal norms as the "functionaries of the legal system" (Teubner and Hutter 2000, 582). The parallel process, through which legal norms are produced, introduces the divergence between the legal actors and the legal system; and this divergence is also the disparity between the legal system, as a social system, and the individual, as a legal actor within the legal system. It is this disparity –

[14] Here, emphasising, in conformity with Luhmann, the presupposition of "the constant internal self-reproduction of both society and minds, not as ontological entities but as chains of difference creating differences" (Teubner and Hutter 2000, 575).

initially designated as the "parasitic relationship" (Teubner and Hutter 2000, 582) of the legal system to the legal actor – which Teubner, in subsequent work, attributes with a stronger and more problematic negative characterisation.

6. From the legal person to transnational fundamental rights: Teubner and the negative dynamics of social systems.

The legal subsystem, as one social subsystem within the wider social system, reflects the more general process of social differentiation and specialisation which transforms a stratified society into an individualised society (Teubner and Hutter 2000, 576). In place of the "one-to-one relation between person and the social stratum" in a stratified society, the individualised society is characterised by a "multiplicity of constructs of persons, with which the subsystems can gain access to difference capacities of individual consciousness" (Teubner and Hutter 2000, 576). This, in turn, entails that the divergence between legal actors and the legal subsystem, exemplifies a general divergence between the consciousness of individuals, the construction of the real fiction of the subject of each of the subsystems and the subsystem itself. The parasitic relationship, which this divergence embeds within each subsystem, facilitates a dysfunction in the interplay between the individual and each subsystem: the selectivity of the subsystem becomes exclusionary and expansionary.

The negative tendencies of the selectivity of social subsystems have the potential for a concomitant effect upon both the real fiction of the person, within the subsystem, and the wider individual mind and its psychology outside the subsystem. In relation to these negative systemic tendencies, the comparative structural weakness of real fiction of the person, leads to the question, for a social systems theory of law, of the status and character of fundamental rights. This, in turn, involves a reconsideration of both the foundation and normative space of fundamental rights.

The Teubnerian social systems theory of law commences from the presumption that rights, as fundamental rights, are universal and this universality "also demands worldwide validity in legal terms" (Teubner 2011, 191). It is a universality which extends to "non-state areas of the global against private transnational actors" (Teubner 2011, 191). The universality is one, however, for this social systems theory of law, only to be derived by relinquishing a reliance or return to natural or positive law combined with focus upon "global private law regimes" (Teubner 2011, 192). From these initial parameters, the reconsideration, as a question of legal validity, is pursued in two distinct dimensions:

> (1) How starting from the catalogue of nation states' fundamental rights and the positivisation of human rights in public international law agreements, can fundamental rights be enforced in transnational regimes, whether these are public, hybrid or private?
> (2) Are fundamental rights also valid within such regimes with regard to private actors, i.e., do fundamental rights also have a third-party or a horizontal effect in the transnational sphere? (Teubner 2011, 192)

In relation to the first dimension, Teubner considers that fundamental rights arise in transnational regimes, through a process of positivisation irreducible to either "an expansion of national fundamental rights or designating social norms as legal rules" (Teubner 2011, 195). This process involves an internal positivisation which is specific to

each transnational regime and results from "the decision-making practices of transnational regimes themselves" (Teubner 2011, 195). From this broader perspective, in these private transnational regimes, it involves an active, incremental process of positivisation, as fundamental rights, of the standards within the particular transnational regime. This is, therefore, distinct from the "established public international law regimes" in which the "agreements themselves guarantee the protection of fundamental rights" (Teubner 2011, 196).

Within these private transnational regimes, the positivisation of fundamental rights involves both the regime's selective decision-making process and the further recognition and enforcement by national courts (Teubner 2011, 196). At the regime level, the process of positivisation is one which is simultaneously open and closed: the decision-making of the regime's designated conflict resolution body is affected by "protest movements, NGOs and the media" entailing "secondary standardisations, integrated into the world legal system that goes far beyond national law and comprehends even social law" (Teubner 2011, 196). This is also reflected in the position of national courts: "their legal acts have dual membership in two different chains of validity decisions by autonomous legal orders […] This leads to an entwinement – but not a fusion – of national and transnational legal orders" (Teubner 2011, 197).

The wider "pattern" resulting from this incremental process of positivisation of fundamental rights is characterised as a "'common law constitution'" of "transnational public and private regimes by means of an iterative decision-making process that occurs between the decisions of arbitral tribunals, national courts, contracts between private actors, social standardisations and the scandalisation actions of protest movements and NGOs" (Teubner 2011, 197). This constitution remains a framework composed of "a myriad of colliding sector-based constitutions" in which any 'higher' unity, is punctual or temporary, and will always repeatedly dissolve and return to this myriad (Teubner 2011, 198).

The delineation of the processual foundation of fundamental rights, through an internal, transnational regime-specific positivisation, opens on to the further question of the extent to which "these fundamental rights bind only state actors or whether they also apply to private actors" (Teubner 2011, 198). In order to extend and, thereby, reconceive the purview of fundamental rights, these rights have to be detached from any necessary association with the nation state and its constitution, and reconsidered in terms of a horizontal relationship to global social systems and subsystems. This detachment and reconsideration also entail the reinterpretation of the concepts of generalisation and respecification in regard to the configuration of the horizontal extension of fundamental rights (Teubner 2011, 199).

The reinterpretation of the generalisation of fundamental rights involves their detachment from an exclusive confinement to "the system-specific medium of political power" (Teubner 2011, 199-200) as the juridification of the political system through its formal differentiation into "juridified power positions" (Teubner 2011, 200). The focus, for Teubner, is upon the operation of fundamental rights – the "legal forms of the power

medium" – as both "inclusionary and exclusionary" (Teubner 2011, 200).[15] This dual function of fundamental rights reproduces the "functional differentiation of society as regards politics" (Teubner 2011, 201). The horizontal extension of fundamental rights, from this origin in the political system, requires their redirection from "the state to fundamental rights in society" (Teubner 2011, 201). In this redirection,

> the guarantee provided by fundamental rights supports the inclusion of the overall population in the relevant social sphere. In this case, fundamental rights contribute to the constitutive function of civil constitutions when they support the autonomisation of social sub-areas […] [F]undamental rights are also significantly involved in the limitative function of social constitutions when it is a matter of creating self-limitations on the relevant system dynamics. Fundamental rights then serve to set the boundaries of the respective social spheres with regard to their environments, giving individuals and institutions outside of the social sphere guarantees of autonomy in regard to the latter's expansionist tendencies. (Teubner 2011, 201)

The generalisation is the dual response, through the horizontal extension of fundamental rights, to the negative potential which inheres in the autopoietic character of social systems: the selectivity inherent in the separation between system and environment.

The reinterpretation of respecification, as the essential complement to that of generalisation, detaches itself from an exclusive concentration upon the simple and immediate appropriation of private law (Teubner 2011, 201). The expansion of fundamental rights into society requires a more sophisticated and complex 'introduction' of fundamental rights which acknowledges the distinctiveness of each sub-system. This acknowledgement is rendered more complex to the extent that certain social sub-systems have engaged in a process of legal formalisation of their specific forms of communication. In response, the respecification of fundamental rights operates to legally fragment the subsystem's specific form of communication into a framework composed of rights and duties.

The framework of rights and duties is not to be orientated to an exclusively "protective function" (Teubner 2011, 203) as the process of respecification must respond to "the inclusion paradox of functional differentiation": "the very internal dynamics of function systems cause entire population groups to be excluded" (Teubner 2011, 204).[16] The 'introduction' of fundamental rights, as the process of their horizontal extension, into the social sub-systems outside the political system involves ensuring that these fundamental rights "not only act as boundaries to the function systems in relation to the autonomy of individuals, but also as elementary structures of the function systems themselves that must be considered inviolable" (Teubner 2011, 204). Hence, respecification, as this process of 'introduction', is to be orientated "to formulate the function-system specific conditions in such a way as to permit access to social

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[15] See, for alternative social systems approach to inclusion and exclusion Stäheli and Stichweh 2002, Stichweh 2021.

[16] Here, Teubner poses, but leaves open, "the disturbing question of whether it is inherent to the development logic of functional differentiation that the difference of inclusion/exclusion sets itself above the binary codes of global functional systems. Will inclusion/exclusion become the meta-code of the 21st century, mediating all other codes, yet at the same time itself undermining functional differentiation, with the shattering effect of the exclusion of whole population groups dominating other socio-political problems?" (Teubner 2011, 204).

institutions" (Teubner 2011, 205). In this formulation, the 'introduction' of fundamental rights is guided by a transformative purpose of these rights themselves: "to transform rights of inclusion into social active citizen's rights within the social sub-areas" (Teubner 2011, 206).

The exclusionary, protective aspect of fundamental rights is maintained, but also respecified in terms of a horizontal extension. The horizontal extension is to decentre and detach the protective aspect of fundamental rights from an exclusive, vertical relationship with the state. For Teubner, the exclusivity of this relationship declines with the emergence and increased functional autonomy of other sub-systems, and the concomitant formalisation of "other highly specialised communication media", in addition to that of political power (Teubner 2011, 207). Thus, whilst the protective aspect of fundamental rights is retained – the delimitation of "areas of autonomy allotted either to social institutions or to persons as social constructs" and, in this delimitation, the "self-limitation of politics vis-à-vis people as psycho-physical entities" – it is expanded into a process of delimitation in relation to these other sub-systems (Teubner 2011, 207).

In this horizontal extension, fundamental rights are distinguished from subjective rights between persons. The origin of the breaches and resultant harm to which fundamental rights relate and respond is located in the dynamics of the social systems and not in the capacity of individuals to inflict harm upon each other. In this manner, civil law, arising as the realm subjective rights which delimit spheres of protected individual (inter-)action, is an inappropriate normative framework. Fundamental rights, in contrast, arise in relation to

> the dangers to the integrity of institutions, persons and individuals that are created by anonymous communicative matrices (institutions, discourses, systems). Fundamental rights are not defined by the fundamentality of the affected legal interest or of its privileged status in the constitutional texts, but rather as social and legal counter-institutions to the expansionist tendencies of social systems. (Teubner 2011, 210)[17]

The perpetration of the harm arises from the "*anonymous matrix of an autonomised communicative medium*" (Teubner 2011, 211) in relation to which the protective function of fundamental rights is differentiated into the dimensions of institutional rights, personal rights and human rights.[18] A specific fundamental right is internally differentiated and further delineated by its attribution to these dimensions.

The reconsideration of fundamental rights involves a reconsideration of their horizontal relationship: a detachment from interpersonal conflicts between individuals to that between "anonymous communicative processes […] and concrete people" (Teubner 2011, 212). In this reconsideration, there is the further question of imputation: "[u]nder

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[17] Emphasis in original.

[18] These dimensions are designated by Teubner in the following manner:
" – *institutional rights* that protect the autonomy of social processes against their subjugation by the totalising tendencies of the communicative matrix. By protecting, for instance, the integrity of art, family or religion against totalitarian tendencies of science, media or economy, fundamental rights take effect as 'conflict of law rules' between partial rationalities in society.
– *personal rights* that protect autonomous spaces of communication within society, attributed not to institutions, but to the societal artifacts called 'persons'.
– *human rights* as negative bounds on societal communication where the integrity of individual's body and mind is endangered by a communicative matrix that crosses boundaries." (Teubner 2011, 211-2)

what conditions can the concrete endangerment of integrity be attributed not to persons or individuals, but to anonymous communication processes?" (Teubner 2011, 213). Here, Teubner returns to legal concepts and alights, pragmatically, upon the concept of institution as that which can be deployed to enable imputation and the attribution of responsibility to these anonymous communication processes.

This pragmatism is the acknowledgment of imperfection not simply in the limitations of the available conceptual vocabulary of law, but of a more profound gap in this project of reconsideration and reconfiguration of fundamental rights. The gap expresses the distance between the concept of justice and the potential for injustice lodged in the operation of a social system separated from its environment. The potential for injustice arises from this "deep dimension of conflicts between communication on the one hand and human beings on the other [which] can at best be surmised by law" (Teubner 2011, 215).

7. From transnational rights to transnational counter-rights

The distinctive reconfiguration of fundamental rights is the corollary of a further element of the Teubnerian social systems theory of law. For Teubner, the reconfiguration expresses the constitutive absence of a theory of justice within a social systems theory of law. The absence arises from transposing a theory of justice into the development dynamics of a social systems theory as the process of societal differentiation of distinct social systems, themselves differentiated between the domain of each particular social system or subsystem and their external environment. In this transposition, the theory of justice becomes the determination, within this wider developmental process of system differentiation, of the "relation between social structures and the semantics of justice" (Teubner 2009, 3). The process of societal differentiation which social systems theory describes emerges from a relatively stable relationship between social structures and the semantics of justice in which

> the structures of segmentary and stratified societies possessed an affinity with the semantics of distributive and commutative justice, orienting them towards the equality of segments and to the ranking of social hierarchies. (Teubner 2009, 3)

The further process of societal differentiation, resulting in the differentiation of distinct social systems and subsystems, effectively dissolves the preceding relationship between social structures and the semantics of justice. Thus, the Teubnerian social systems theory of law commences from the fundamental disruption of the relationship between social structures and the semantics of justice.

The disruption is then thematised as the condition of polycontextuality resulting from the differentiation of social systems and subsystems. Polycontextuality describes the

> emergence of highly fragmented intermediary social structures based on binary distinctions, society can no longer be thought of as directly resulting from individual interactions, and justice can no longer be plausibly based on universalising the principle of reciprocity between individuals. (Teubner 2009, 4)

It is from the irreducible contemporary condition of polycontextuality that the relationship between social structures, as differentiated social systems and subsystems, and the semantics of justice has then to be reconceived.

The reconceptualization involves the adoption and adaptation – generalisation and respecification – of transnational fundamental rights which are orientated to respond to the negative effects of the contemporary condition of polycontextuality. The character of this response of Teubnerian fundamental rights is also one which leads to their most recent designation as counter-rights (Teubner 2022). The designation results from a modification and reinterpretation of Menke's critique of subjective rights and elaboration of a notion of counter-rights (Menke 2020). The purpose, through the incorporation of Menke's critical orientation into a social systems theory of law, is confer "greater depth of focus to the analysis and critique of subjective rights in late modernity, but also expand the prospects for possible counter-rights in a future law" (Teubner 2022, 376).

The critique of subjective rights, initiated and developed by Menke, is furnished with greater depth by understanding that their "political relevance" is derived from recentring the focus upon "their transsubjective potential" (Teubner 2022, 372). The potential involves considering this trans-subjectivity in three dimensions: "the communicative, the collective, and the institutional" (Teubner 2022, 372). These "three non-individual dimensions of subjective rights" are derived from the description and response to the negative effects of "functional differentiation" (Teubner 2022, 376).

The trans-subjective potential in the communicative dimension arises through the revelation that the individual consciousness, as the stable, empirical foundation for the attribution of the legal form of subjective rights, is always already social – a trans-subjective phenomenon of "social communication" (Teubner 2022, 376). The subjective foundation of the will is essentially indeterminate as it is the subsequent effect of social communication – the attribution of personhood – which is necessarily "'reified' in relation to the inner life of the individual people concerned" (Teubner 2022, 376). The focus upon the social communication entails that

> what remains of law's reference to the will is therefore not actually a question of the 'form' of the law, but rather a question of the 'form' of society, namely, how this will is understood in social communication under contingent historical circumstances, which, in turn, influences the legal construction of the will. (Teubner 2022, 377)

The further trans-subjective dimension emerges once it is acknowledged that legal personhood, and its associated will, extend beyond the individual to formal organisations and collective actors. The attribution of legal personhood and rights, by detaching subjective rights from the exclusive domain of individual persons, creates a distinct level of organisational rights. This, in turn, designates a legal personality – a "supra-individual 'collective' dimension" – separable from both that of the organisation's individual members and their aggregation (Teubner 2022, 377). The extension of legal personhood to collective actors is the juridical acknowledgment of their existence "as centres of private power" which simultaneously reinforces the 'reification' of the notion of the will (Teubner 2022, 378).

The final trans-subjective dimension is that of social institutions – "mere ensembles of norms" – in which "subjective rights become 'subject-less rights', and the institutions become 'subjects without rights'" (Teubner 2022, 378). These social institutions remain without the attribution of legal personhood as it is their autonomy, their broader existence as "social domains of action", which is accorded juridical existence through the

form of constitutional rights (Teubner 2022, 379). At this level of constitutional rights, the trans-subjective focus reaches the 'background' of the social systems and subsystems and their exclusive concentration on "a partial aspect of individual will-formation" (Teubner 2022, 380). The partial aspect expresses the essential selectivity of each social system or subsystem. The legal person – "[t]he 'will' of subjective rights" – is "always directed to the binary code of one of the functional systems, limited by its programmes, orientated towards its rationality maximisation and motivated for acceptance by the communicative medium in question" (Teubner 2022, 380).

The background of the social systems and subsystems is then revealed, through the selectivity of their communicative media – "money, power, law, truth" (Teubner 2022, 380) – to "form social motives and exercise an indirect influence on intra-psychological will-formation" (Teubner 2022, 381). The indirect influence represents the "motivational force of communicative media": the "one-sided formation of motives controlled by either power, money, law or knowledge" (Teubner 2022, 381). It is a one-sided formation which selectively motivates towards the maximization of the rationality of the communicative medium of the particular system or subsystem.

The passage through the three dimensions of trans-subjective potential of subjective rights enables a comprehensive understanding of the character of the socialisation of the individual will: it brings to the foreground the central relationship of social systems and subsystems to subjective rights. For Teubner, "even though individuals officially remain the subjects of subjective rights, their secret subjects in late modernity are instead social processes of interaction, of organisation and of the communicative media" (Teubner 2022, 382).

It is then the relationship between subjective rights and social systems, progressively revealed by the passage through these three dimensions of the trans-subjective potential of subjective rights, which becomes the central focus for the elaboration of transnational counter-rights.

The earlier work of reconfiguration and horizontal extension of fundamental rights (Teubner 2011) – through the operations of generalisation and respecification – is now supplemented by recourse to the framework of constitutional rights. The horizontal configuration of fundamental rights is retained, but as constitutional counter-rights "against constellations of power" (Teubner 2022, 385). In this manner, counter-rights are reinserted into the "three dimensions of sociality: communicative, collective, and medial" revealed by the preceding stage of critical social systems analysis of subjective rights (Teubner 2022, 386).

The designation of fundamental rights as counter-rights also marks the emergence of a difference of emphasis between the Luhmannian and Teubnerian approach to the presence of paradox within social systems theory. For Teubner, it involves a direct assumption, rather than veiling, of paradox, and, in particular, of the paradox of a reality or world which can only ever be mediated through the distinction between system and environment (Teubner 2022, 382ff). The insistence of this paradox is explicitly acknowledged and held to inform the character and operation of counter-rights which

> would allow access to the 'world' through concept-less intuition, but they would also enable a normative judgment, which frees itself from judgments one-sidedly controlled by money, power or science. Here, the analogy to Kant's analysis of aesthetic judgment

> comes to the fore, as suggested by Menke and others, which, as such, represents nothing less than a squaring of the circle in its mediation of affect and reason. And it is not only jurists but indeed all professions that are haunted by this squaring problem, at least for those from which judgment is expected under the imperatives of decision making – assisted by, and simultaneously abandoned by, science – in situations of *non-liquet*. (Teubner 2022, 385)[19]

The further elaboration of Teubnerian counter-rights involves the institutionalisation of this paradox within the contemporary polycontextual condition resulting from the differentiation of social systems and subsystems.

This requires the elaboration of individual, collective and institutional counter-rights which preserve and reintroduce the paradox at the levels of individual affectivity, collective actors and the communicative media of social systems (Teubner 2022, 386-390). Counter-rights supplement subjective rights "as their co-originary components" (Teubner 2022, 393), and operate to interrupt the negative effects of the differentiation of social systems and subsystems.

8. Excursus on digital technology

The Teubnerian elaboration of fundamental rights as counter-rights is accompanied by the acknowledgment of the emergence and increasing, potential negative effects of digital technology (Teubner 2006, 2018, forthcoming, Beckers and Teubner 2022). The initial consideration (Teubner 2006) of digital technology, within the Teubnerian social systems theory of law, is as a new legal subject – the extension of the legal system to encompass digital technology as part of its environment. The extension, undertaken through the process of personification, is the designation of digital technology as a collective actor, to whom the status of a legal subject can then be attributed. In this extension, Teubner indicates the limits of Luhmannian conception of personification, and draws upon the work of Latour (2004), to develop a notion of personification beyond both Luhmann and Latour (Teubner 2006, 505-521). Teubner introduces different degrees of personification to produce a differentiated legal subject whose distinct statuses enable digital technology to be acknowledged, as a communicative artifact, within the legal system.

This acknowledgement of digital technology, in contrast to animals (also, by extension, the natural world/natural environment), which are the other non-human entity included in the initial consideration (Teubner 2006),[20] is the inclusion, within the legal system, of the social risk that digital technology poses (Teubner 2006, 521). From this initial approach, Teubner proceeds (Teubner 2018), in parallel with the subsequent development of digital technology, to further elaborate upon the character of both the different degrees of legal personality and to designate these as the corollary of the particular social risk posed by the forms of digital technology. This, in turn, leads to the construction of a framework of liability, in civil law, which defines forms of civil liability

[19] Emphasis in the original.

[20] For Teubner, "Animal rights and similar constructs create basically defensive institutions. Paradoxically, they incorporate animals into human society in order to create defences against the destructive tendencies of human society against animals. The old formula of the social domination of nature is replaced by the new social contract with nature" (Teubner 2006, 521).

for the particular social risk held to arise from the form of legal person attributed to the specific digital technology (Beckers and Teubner 2022).[21]

The most recent consideration of digital technology (Teubner forthcoming), concerns the distinct dynamics of the communication, through the communicative artifact of legal personality, between the legal system and digital technology. As a non-human entity, digital technology is described as an emergent phenomenon; and distinguished from other emergent phenomena by its emergence as an entirely new level, without relation to any pre-existing hierarchy, establishing an entirely new parallel hierarchy in a digital realm. In relation to this digital realm, the pertinence of the attribution of legal personhood, in its Teubnerian understanding, is reemphasised, and, by implication, the preceding development of the framework of civil liability (Beckers and Teubner 2022).

Here, however, the focus is upon the communicative effect, through the attribution of legal personhood, upon the realm of digital technology. This involves the consideration of the relationship between the attribution of legal personality, by the legal system, and the reaction to this attribution by the realm of digital technology. The character of digital technology, as a non-human, emergent phenomenon, entails that the effect of legal norms, addressed to the digital legal person, cannot be analogous to that of humans attributed with legal personality. The communicative relationship between legal system, through the attribution of legal personhood, and the realm of digital technology is one of *mutual* irritation. For digital technology is not merely a passive recipient of the normative communication of the legal system, but includes and responds to this communication within the wider realm of the digital. Thus, rendering the description and understanding of conformity to legal norms, by digital technology, more complex.

For Teubner, it is the social risks of digital technology, as a distinctive non-human entity, orientates the approach of a social systems theory of law. In this response, rather than recourse to counter-rights, there appears to be an underlying affinity with the manner in which the legal system is described by Luhmann in *Social Systems* (Luhmann 1984/1995e, 373-376) in its function as an operation of "social immunization" (Luhmann 1984/1995e, 373; see also Luhmann 1993/2004, 475-477). It is an affinity, rather than a more direct influence, as the Teubnerian emphasis is upon both a broader and more internally differentiated notion of immunization as inclusionary exclusion. Teubner, through the communicative artifact of legal personality, explicitly extends, and thereby includes digital technology within the purview of the legal system. This inclusion is the corollary of the exclusion – social immunization – from the social risks of digital technology through the attribution of a differentiated framework of civil liability.

9. Conclusion

The social systems theory of Luhmann elaborates a refined constructivist theory of knowledge through the appropriation of the neurobiological work of Maturana and Varela, in particular the concept of autopoiesis. The refinement is predicated upon the displacement of the question of knowledge by the operation of the system separated from an environment. In this displacement, Luhmann connects this constructivist theory of knowledge to a theory of autopoietic social systems.

[21] Compare the approach to legal regulation, through civil law, in Femia 2020.

This constructivist theory of knowledge, with its distinction between system and environment, informs Teubner's approach to a social systems theory of law. The real fiction of the legal person or legal subject expresses the internal systemic construct of the legal subsystem. This construct is the structural linkage of the legal subsystem with the environment – the subsystem's reality – from which it is separated. The separation – the autopoietic character of the legal subsystem – is simultaneously a closure and openness to its environment in which the real fiction of the legal person reflects the interplay between system and environment. The interplay is, however, one which is structured, through the capacity of the legal subsystem to operate selectively in relation to the individuals within its environment.

In this selective capacity, the reproduction of the system through internal operations of the system, is the locus of a negativity generative of a selectivity within the subsystem which becomes exclusionary and expansionary. In response, Teubner engages in a reconsideration of fundamental rights which, through the preparatory stages of generalisation and respecification, reorientates the thematization of fundamental rights to a horizontal extension. In this horizontal extension, fundamental rights cease to be confined to the vertical relationship with the state and extend to the other autonomous subsystems and their respective media of communication. This horizontal extension is simultaneously the acknowledgement that harm, beyond the state, is not confined to the realm of interpersonal relationships within the realm of civil law demarcated by subjective rights and duties.

Fundamental rights, in their horizontal extension, are entirely distinct from subjective rights, as they are the juridical expression of the relationship between the negative potential of anonymous communication processes of social systems and concrete individuals. This harm, lodged in these anonymous communication processes, involves the reconfiguration of fundamental rights – a reconfiguration of both their inclusionary and exclusionary function – and, in this reconfiguration, an internal differentiation into the three dimensions of institutional, personal and human rights.

The reconfigurative effort confronts the difficulty, in its horizontal re-elaboration, of imputation – the legal conceptualisation of an anonymous communication process as attributable with responsibility in relation to a concrete individual or individuals.

The difficulties of imputation, for Teubner, have only a pragmatic resolution in the concept of an institution for these anonymous communication processes which reflect a more enduring injustice.

For the injustice which is lodged in the negative potential of the separation between system and environment: the gap between operations of subsystems and the concrete individuals who are located outside them in the reality of their external environment. Fundamental rights, in their Teubnerian reconfiguration, "are aimed at removing unjust situations, not creating just ones" (Teubner 2011, 215).

The limits encountered with the concept of institution and its accompanying orientation of imputation are displaced by the later designation of fundamental rights as counter-rights. The predominant orientation is now towards the interruption, through counter-rights, of the negative potential of the separation between system and environment. The horizonal re-elaboration of the earlier work becomes the preliminary stage for the further

horizontal elaboration of constitutional rights which contain the trans-subjective potential of subjective rights.

References

Beckers, A., and Teubner, G. 2022. *Three Liability Regimes for Artificial Intelligence. Algorithmic Actants, Hybrids, Crowds* [online]. London: Hart. Available at: https://doi.org/10.5040/9781509949366

Buchinger, E., 2012. Luhmann and the Constructivist Heritage A Critical Reflection. *Constructivist Foundations*, 8(1), 19-28.

Dammann, K., 2011. Niklas Luhmanns These zur Funktion der Grundrechte. Verfassungspatriotismus, Menschenrechtsphilosophie oder schlicht Soziologie? *In:* V. Mehde, U. Ramsauer and M. Seckelmann, eds., *Staat, Verwaltung, Information. Festschrift für Hans Peter Bull zum 75. Geburtstag*. Berlin: Duncker and Humblot, 89-105.

Femia, P., 2020. Logopoeia: Normative Typification and Granular Norm's Informational Differentiation. *In:* C. Busch and A. De Franceschi, eds., *Algorithmic Regulation and Personalized Law. A Handbook*. London: Beck/Hart, 155-171.

Guibentif, P., 2013. Rights in Niklas Luhmann's Systems Theory. *In:* G. Harste and A. Febbrajo, eds., *Law and Intersystemic Communication. Understanding 'Structural Coupling'*. Abingdon: Routledge, 255-288.

Hechl, K., 2022. The sociological reception of psychoanalysis in Parsons's 'The superego and the theory of social system. *In:* A.J. Treviño and H. Staubmann, eds., *The Routledge international handbook of Talcott Parsons studies* [online]. Abingdon: Routledge, 145-154. Available at: https://doi.org/10.4324/9780429321139-13

Herting, S., and Stein, L., 2007. The evolution of Luhmann's systems theory with focus on the constructivist influence. *International Journal of General Systems* [online], 36(1), 1–17. Available at: https://doi.org/10.1080/03081070600899412

Japp, K.P., 2015. Zur Funktion der Menschenrechte in der Weltgesellschaft – Niklas Luhmanns „Grundrechte als Institution" revisited. *In:* B. Heintz and B. Leisering, eds., *Menschenrechte in der Weltgesellschaft. Deutungswandel und Wirkungsweise eines globalen Leitwerts.* Frankfurt a.M: Campus, 65-97.

Latour, B., 2004. *Politics of Nature: How to Bring the Sciences into Democracy.* Cambridge, MA: Harvard University Press.

Luhmann, N., 1980. Talcott Parsons – Zur Zukunft eines Theorie-programms. *Zeitschrift für Soziologie* [online], 9(1), 5-17. Available at: https://doi.org/10.1515/zfsoz-1980-0101

Luhmann, N., 1984. Die Theorie der Ordnung und die natürlichen Rechte. *Rechtshistorisches Journal*, 3, 1984, 133-149.

Luhmann, N., 1995a. Das Paradox der Menschenrechte und drei Formen seiner Entfaltung, *In:* N. Luhmann, *Soziologische Aufklärung 6. Die Soziologie und der Mensch*. Opladen: Westdeutscher Verlag, 229-236.

Luhmann, N., 1995b. Die Autopoiesis des Bewußtseins. *In*: N. Luhmann, *Soziologische Aufklärung 6. Die Soziologie und der Mensch.* Opladen: Westdeutscher Verlag, 55-112.

Luhmann, N., 1995c. Die Form „Person". *In:* N. Luhmann, *Soziologische Aufklärung 6. Die Soziologie und der Mensch.* Opladen: Westdeutscher Verlag, 142-154.

Luhmann, N., 1995d. Die operative Geschlossenheit psychischer und sozialer Systeme. *In:* N. Luhmann, *Soziologische Aufklärung 6. Die Soziologie und der Mensch.* Opladen: Westdeutscher Verlag, 25-36.

Luhmann, N., 1995e. *Social Systems.* Stanford University Press. (German original 1984).

Luhmann, N., 2002. The Cognitive Programme of Constructivism and the Reality That Remains Unknown. *In:* N. Luhmann (with W. Rasch, ed.), *Theories of Distinction. Redescribing the Descriptions of Modernity* [online]. Stanford University Press, 128-152. Available at: https://doi.org/10.1515/9781503619340-008

Luhmann, N., 2004. *Law as Social System* [online]. Oxford University Press.(German original 1993). Available at: https://doi.org/10.1093/oso/9780198262381.001.0001

Luhmann, N., 2013. *Introduction to Systems Theory*. Cambridge: Polity Press. (German original 2002).

Luhmann, N., 2019. *Grundrechte als Institution. Ein Beitrag zur politischen Soziologie* [online]. 6th ed. Berlin: Duncker & Humblot. (Originally published 1965). Available at: https://doi.org/10.3790/978-3-428-40959-4

Maturana, H.R., 1978. Cognition. *In:* P.M. Hejl, ed., *Wahrnehmung und Kommunikation*. Frankfurt: Lang, 29-49.

Maturana, H.R., 1980. Man and Society. *In:* F. Benseler, P. M. Hejl and W. Köck, eds., *Autopoiesis, Communication and Society: The Theory of Autopoietic System in the Social Sciences.* Frankfurt: Campus, 11-31.

Maturana, H.R., 1981. Autopoiesis. *In:* M. Zeleny, ed., *Autopoiesis: A Theory of Living Organization.* New York: North Holland, 21-30.

Maturana, H.R., 1988. Ontology of observing: The biological foundations of self-consciousness and the physical domain of existence. *In:* R.E. Donaldson, ed., *Conference workbook for Texts in cybernetic theory: An in-depth exploration of the thought of Humberto Maturana, William T. Powers, and Ernst von Glasersfeld*. American Society for Cybernetics (ASC), October 18-23, Felton, CA.

Maturana, H.R., 2014. Understanding social systems. *Constructivist Foundations*, 9(2), 187-188.

Maturana, H.R., and Varela, F.J., 1980. *Autopoiesis and Cognition: The Realization of the Living* [online]. Dordrecht: Riedel. Available at: https://doi.org/10.1007/978-94-009-8947-4

Maturana, H.R., and Varela, F.J., 1998. *The Tree of Knowledge: The Biological Roots of Human Understanding*. Revised ed. Boston: Shambhala.

Menke, S., 2020. *Critique of Rights.* Cambridge: Polity.

Nichelmann, R., 2020. Differenzierungsschutz durch Grundrechte. Theoretische und methodologische Überlegungen zu Niklas Luhmanns „Grundrechte als Institution“. *Rechtstheorie* [online], 51(2), 193–233. Available at: https://doi.org/10.3790/rth.51.2.193

Parsons, T., 1977. Law as an Intellectual Stepchild. *Sociological Inquiry* , [online]47(3/4), 11-58. Available at: https://doi.org/10.1111/j.1475-682X.1977.tb00792.x

Stäheli, U., and Stichweh, R., 2002. Introduction: Inclusion/Exclusion – Systems Theoretical and Poststructuralist Perspectives. *Soziale Systeme* [online], 8(1), 3-8. Available at: https://doi.org/10.1515/sosys-2002-0102

Stichweh, R., 2021. How Do Divided Societies Come About? Persistent Inequalities, Pervasive Asymmetrical Dependencies, and Sociocultural Polarization as Divisive Forces in Contemporary Society. *Global Perspectives* [online], 2(1), 1-9. Available at: https://doi.org/10.1525/gp.2021.25658

Teubner, G., 1988. Hypercycle in law and organisation: the relationship between self-observation, self-constitution and autopoiesis. *In:* A. Febbrajo, ed., *European Yearbook in the Sociology of Law*. Milan: Giuffre, 43-70.

Teubner, G., 1989. How the Law Thinks: Toward a Constructivist Epistemology of Law. *Law & Society Review* [online], 23(5), 727-758. Available at: https://doi.org/10.2307/3053760

Teubner, G., 1993. *Law as an Autopoietic System.* Oxford: Blackwell.

Teubner, G., 2006. Rights of Non-Humans? Electronic Agents and Animals as New Actors in Politics and Law. *Journal of Law and Society* [online], 33(4), 497-521. Available at: https://doi.org/10.1111/j.1467-6478.2006.00368.x

Teubner, G., 2009. Self-Subversive Justice: Contingency or Transcendence Formula of Law. *Modern Law Review* [online], 72(1), 1-23. Available at: https://doi.org/10.1111/j.1468-2230.2009.00731.x

Teubner, G., 2011. Transnational Fundamental Rights: Horizontal Effect? *Netherlands Journal of Legal Philosophy*, 40(3), 191-215.

Teubner, G., 2018. Digital Personhood? The Status of Autonomous Software Agents in Private Law. *Ancilla Iuris* [online], 107-149. Available at: https://doi.org/10.2139/ssrn.3177096

Teubner, G., 2022. Counter-Rights. On the Trans-Subjective Potential of Subjective Rights. *In:* P.F. Kjaer, ed., *The Law of Political Economy. Transformations in the Function of Law* [online]. Cambridge University Press, 372-393. Available at: https://doi.org/10.1017/9781108675635.015

Teubner, G., and Hutter, M., 2000. Homo Economicus and Homo Juridicus – Communicative Fictions. *In:* T. Baums, K.J. Hopt and N. Horn, eds., *Corporations, Capital Markets and Business in Law.* The Hague: Kluwer, 569-584.

Teubner, G., ed., 1987. *Autopoietic Law: A New Approach To Law And Society* [online]. Berlin: De Gruyter. Available at: https://doi.org/10.1515/9783110876451

Teubner, G., forthcoming. Emergence and personification: How the law makes non-human entities speak. *In:* R. Rogowski, ed., *Research Handbook on Law and Systems Theory*. Cheltenham: Edward Elgar.

Thyssen, O., 2004. Luhmann and Epistemology. *Cybernetics & Human Knowing*, 11(1), 7-22.

Tosini, D., 2017. Why Communication? On the Theoretical Principles and Consequences of Luhmann's Systems Theory. R*evue Européenne Des Sciences Sociales*, 55(1), 191-211.

Treviño, A.J. 2016. Parsons, psychoanalysis, and the therapeutic relationship. *In:* A.J. Treviño, ed., *The Anthem companion to Talcott Parsons* [online]. London/New York: Anthem, 73–90. Available at: https://doi.org/10.2307/j.ctt1ffjqd3.7

Treviño, A.J., 2023. Talcott Parsons on building personality system theory via psychoanalysis. *History of the Behavioural Sciences* [online], 59(4), 417-432. Available at: https://doi.org/10.1002/jhbs.22257

Tyrell, H., 2006. Zweierlei Differenzierung: Funktionale und Ebenendifferenzierung im Frühwerk Niklas Luhmanns. *Soziale Systeme* [online], 12(2), 294-310. Available at: https://doi.org/10.1515/sosys-2006-0207

Vanderstraeten, R., 2021. Niklas Luhmann and Talcott Parsons. *In:* A.J. Treviño and H. Staubmann, eds., *The Routledge International Handbook of Talcott Parsons Studies* [online]. London: Routledge, 271-280. Available at: https://doi.org/10.4324/9780429321139-25

Warnke, M., *et al*., eds., 2021. *Niklas Luhmann am OVG Lüneburg Zur Entstehung der Systemtheorie* [online]. Berlin: Dunkler and Humblot. Available at: https://doi.org/10.3790/978-3-428-55932-9

Wöhrle, P., 2022. Verfassungspatriotismus als Differenzierungstheorie. Eine (auch) historisierende Lektüre von Niklas Luhmanns „Grundrechte als Institution". *In:* A. Höntsch and P. Wöhrle, eds., *Provisorische Ewigkeit. Staatstheoretische Reflexionen der frühen Bundesrepublik* [online]. Baden-Baden: Nomos, 95-115. Available at: https://doi.org/10.5771/9783748929499-95