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## TRANSNATIONAL LAW, FUNCTIONAL DIFFERENTIATION AND EVOLUTION

## DIREITO TRANSNACIONAL, DIFERENCIAÇÃO FUNCIONAL E EVOLUÇÃO

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**Abstract:** The label “transnational law” is deployed to address a pressing problem in international and domestic lives: in a different number of arenas, citizens have to abide by standards and rules which they have neither voted for, contributed to nor can easily change or dispute. To address the legitimacy gap of transnational legal practices academics have proposed two main strategies: (i) creation of global political institutions and principles; and, (ii) self-regulation. This article argues that the global constitutionalism/self-regulation set of alternatives is premised on too strong theoretical assumptions about the nature of world society and functional differentiation. Focusing primarily on a detailed analysis of Teubner's societal constitutionalism and its systems theory's assumptions, the article claims that the functional differentiation thesis at the core of autonomous transnational law is unconvincing and that there are resources at the domestic and regional (e.g. European Union) levels to address some of the challenges of transnational law.

**Abstract:** O rótulo “direito transnacional” é usado para resolver um problema premente nas vidas internacional e doméstica: num número diferente de arenas, os cidadãos têm de respeitar normas que não tenham nelas votado, contribuído para a respectiva criação, nem podem facilmente mudá-las ou coloca-las em causa. Para colmatar o défice de legitimidade das práticas jurídicas transnacionais, a doutrina propôs duas estratégias principais: (i) criação de instituições políticas princípios globais; e (ii) auto-regulação.

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1. Lecturer in Law, Xi'an Jiaotong University and Guest Research Fellow at the Research Centre for Public Law, University of Lisbon. This article uses (and builds on) material from my unpublished PhD thesis, *Law as Ouroboros*, European University Institute – Social and Political Science Department. I have presented and discussed earlier versions of this article at the Helsinki Seminar for Governance and Institutions, University of Helsinki, Helsinki, January 15 (2014), the Silk Road International and Comparative Law Seminar Series, Xi'an Jiaotong University, Xi'an, November 4 (2014) and the Symposium of the CASS Forum & Eleventh International Law Forum ‘Opportunities and Challenges for International Law: Crisis, Order, and Law’, Chinese Academy of Social Sciences & Institute of International Law, Beijing, November 15-16 (2014). The paper also benefited from discussions at the Lisbon Workshop on Global Administrative Law, Lisbon Centre for Research in Public Law, Lisbon, November 28 (2014). I thank all the participants and organisers in these venues for the feedback and criticism as well as to two anonymous referees for their sharp remarks. This article would never have seen the light of day without Gabriële Escoffier's inspiration and support.

Neste artigo argumenta-se que a alternativa entre constitucionalismo e auto-regulação global tem como premissa pressupostos teóricos muito sólidos sobre a natureza da sociedade mundial e diferenciação funcional. Focando-se principalmente numa análise detalhada do constitucionalismo societal de Teubner e das premissas da sua teoria dos sistemas, defende-se no artigo que a tese de diferenciação funcional que se encontra no cerne do direito transnacional autónomo não é convincente e que existem recursos nos níveis nacional e regional (por exemplo, União Europeia) para enfrentar alguns dos desafios do direito transnacional.

**Keywords:** transnational law, systems theory, evolution, regionalism, globalization

**Palavras-chave:** direito transnacional, teoria dos sistemas, evolução, regionalismo, globalização

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## 1. Introduction

The label “transnational law” is deployed to address an urgent and current problem in international and domestic lives: in a different number of arenas, citizens have to abide by standards and rules which they have neither voted for, contributed to nor can easily change or dispute. Furthermore, despite the fact that such rules do guide behaviour and thus are sociologically relevant, they can hardly be called proper law according to the canonical list of sources of international law either because they lack the appropriate form of law (they are soft) or because they are produced by bodies who are not recognized law-makers.<sup>2</sup> This is often taken to mean that transnational regulations on education, financial instruments, food, chemicals, construction and product quality and so on may ignore or go against domestic and international values, laws and social, ideological and political traditions. They can also bring about undesirable externalities given their functional-regime specific nature.<sup>3</sup>

We can find in the literature two main strategies to cope with the challenges triggered by transnational law: either we “go global” and devise global principles and/or institutions as in Global Constitutionalism, Global Administrative Law and Cosmopolitanism or we place our hopes in a re-imagined “self-regulation” *à la* Teubner’s societal constitutionalism.

In this article I show that the global constitutionalism/self-regulation set of alternatives is premised on a shared assumption according to which the site where transnational law needs to be addressed is, after the demise of the nation-state, the world. Focusing primarily on a detailed analysis of Teubner’s societal constitutionalism and its systems theory’s assumptions, the article claims that the functional differentiation thesis at the core of autonomous transnational law is unconvincing and that there are resources at the domestic and regional (e.g. European Union) levels to address transnational law. In other words, I suggest that the choice between “doing nothing” or “going global” depends on too strong theoretical assumptions about the nature of world society, globalization and functional differentiation.

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2. This is a well-rehearsed theme. For a good exposition, see MATTHIAS GOLDMANN, We Need to Cut Off the Head of the King: Past, Present, and Future Approaches to International Soft Law, *Leiden Journal of International Law*, 25, 2, 2012, pp. 335-368. The label “transnational law” follows Jessup’s seminal work through which he already highlighted both the open-endedness of legal forms and normative actors, “Both public and private international law are included, as are other rules who do not wholly fit into such standard categories” and “Transnational situations, then, may involve individuals, corporations, states, organizations of states, or other groups.” PHILIP C. JESSUP, *Transnational Law*, New Haven, 1956, p. 2.

3. Examples of rules established by international private actors include international contracts, model laws and *lex mercatoria*. Soft rules produced by international public bodies comprise PISA tests or the standards set by the Codex Alimentarius Commission and Doing Business reports. Decisions by private international bodies include international arbitration awards, ICAAN or online dispute resolution mechanisms such as the one employed by E-bay. For a rich list of examples of transnational regulation across subject-areas, see FABRIZIO CAFAGGI, New Foundations of Transnational Private Regulation, *Journal of Law & Society*, 38, 1, 2011, 20-49.

I proceed as follows.

In section 2, I briefly map the mentioned positions in the literature noticing how they both share a commitment towards the idea that the solution to transnational law has to be “global” and premised on a world society. I then highlight the main problems that the “let’s go global” project” has to face due to its reliance on world-level solutions. Section 3 is devoted to the explanation of Teubner’s societal constitutionalism as well as the main tenets of systems theory for, I argue, one cannot understand the full substance of the former without the latter. Section 4 offers three critiques to the evolutionary foundations of Teubner’s program emphasizing how its conceptual apparatus is blind to constitutive choices in transnational affairs, mystifies the relationship between systems and organizations, does not articulate well transnational and territorially integrated regional spaces and unjustifiably restricts agency by assuming that autopoietic systems maintenance is *the* goal to achieve. Instead, it is shown that social systems lack “biological death” and therefore plenty of normative benchmarks can be imagined and pursued. Section 5 confirms by means of empirical examples, international arbitration and European case-law, that it is not true to claim that transnational systems are autonomous normative spaces outside of the purview of official legal systems, i.e. some degree of control and vertical, external pressure is being, and can be, applied to transnational systems. It is suggested that fundamental rights empower territorially integrated normative spaces like states and the EU to subject “transnational communication” to a “rights” or public policy test. Section 6 concludes by reminding how the focus of current approaches to transnational law forgets the regional level, which is both more amenable to political and ethical construction and more capable to exert hierarchical control over transnational normative arenas.

Before proceeding with the analysis I would like to address a valid objection posed by one of the anonymous reviewers of this paper. According to the critique, it is distracting and detrimental to my examination of the systems theory approach to transnational law to start the paper by offering a simplistic analysis of the “let’s go global project”. I acknowledge the non-exhaustiveness of my analysis and admit that the different “global” projects are insufficiently distinguished and articulated. But at the same time, such a sketch is necessary because I aim to highlight a point little noticed so far: how two very different strategies to approach the transnational forget the *regional* level. By analysing both strategies’ engagement with the global, the “let’s go global” project failure to deliver and the detailed conceptual problems of systems theory transnational law, I hope to show that one does not need to think that everything goes and all attempts to guide transnational law are lost. Instead it is more a question of recovering agency and finding the right level of analysis. Finally, contrasting these two strategies while focusing on the systems theoretical approach aims to address a word of caution against the current trend in international relations and transnational studies towards the adoption of the conceptualization of world society and functional differentiation.

## 2. The Literature & The Shared Assumption

As announced before, the problem of transnational law understood as a normative space that escapes domestic and international law and yet regulates many instances of life has found two main answers in the literature. In section 2.1., I schematically identify these positions without however aiming to be comprehensive and thus I will not do justice to the full variety of positions found in the literature.<sup>4</sup> The goal is simply to prepare the terrain for section 2.2. in which I suggest that both stances can be fruitfully juxtaposed because they assume that the solution to transnational law has to be found within the “global”. I then conclude by showing that such an emphasis creates unsurmountable problems for the “let’s go global” project leaving us in the hand of Teubner’s societal constitutionalism *à la* systems theory which in turn launches the need for a full-fledged investigation of that proposal to be carried out from section 3 onwards.

### 2.1. Solutions

The first response claims: “let’s go global”. Different proposals became readily available.

Cosmopolitans working in an explicitly ethical framework can be said to be speaking about the need to make the world “one” in such a way that both organizations, individuals and states become responsible for the consequences of their actions before everyone irrespective of borders, religious beliefs and other held-to-be morally irrelevant categories.<sup>5</sup> All in all, an actualization and globalization of Dostoyevsky’s existentialist maxim “We are responsible for everything before everyone” in *The House of the Dead*, later used by Simone de Beauvoir as the opening quote to her novel *Le Sang Des Autres*.

“Global constitutionalists” in turn propose that we need to devise a global constitution and/or identify core values and principles to discipline social life such as the rule of law, global democracy and the respect for basic human rights.<sup>6</sup>

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4. For a more nuanced analysis but prone to excessive taxonomical emphasis, see NEIL WALKER, *Intimations of Global Law*, Cambridge, 2015.

5. For a recent comprehensive cosmopolitan manifesto, see SIMON CANEY, *Justice Beyond Borders: A Global Political Theory*, New York, 2005. See also DANIELE ARCHIBUGI, Cosmopolitan Democracy: A Restatement, *Cambridge Journal of Education*, 42, 1, 2012, pp. 9-20 (on cosmopolitan democracy and the “affectedness principle”); JOHN CHARVET, The Possibility of a Cosmopolitan Ethical Order Based on the Idea of Universal Human Rights, *Millennium – Journal of International Studies*, 27, 3, 1998, pp. 523-542 (on the idea of a cosmopolitan ethical order based on universal human rights) and THOMAS POGGE, Eradicating Systemic Poverty: Brief For a Global Resources Dividend, *Journal of Human Development* 2, 2001, pp. 59-77 (proposing a global resource dividend to redress systemic poverty produced by an unfair global economic order).

6. See JEFFREY L. DUNOFF / JOEL P. TRACHTMAN (Eds.), *Ruling the World: Constitutionalism, International Law, and Global Governance*, New York, 2009; JAN KLABBERS / ANNE PETERS / GEIR ULFSTEIN (Eds.), *The Constitutionalization of International Law*, New York, 2009 and JURGEN HABERMAS, Does the Constitutionalization of International Law Still Have a Chance?, in *The Divided West*, Malden, 2006, pp. 115-193.

Finally, the “Global Administrative Law” project follows similar lines but down-grades the global common rules and values to the area of administrative law. In one of its proponents’ words,

Endeavouring to take account of these phenomena, one approach understands global administrative law as the legal mechanisms, principles and practices, along with supporting social understandings, that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring that these bodies meet adequate standards of transparency, consultation, participation, rationality and legality, and by providing effective review of the rules and decisions these bodies make.<sup>7</sup>

The second response suggests we ought to do nothing or, more fairly put, that we can’t do much. In its most well-known version, systems theorists argue that due to the functional differentiation of world society, social systems cannot be guided from the outside as they code external interventions in their own language and operations. Instead, systems theorists claim, we have to rely on the systems’ self-regulation capacities and the most we can do is to irritate and create external pressures in order to trigger further learning opportunities (which, however, may well not be taken up). This project can be readily identified with Teubner and other fellow systems-theorists.<sup>8</sup> Teubner has even advocated for a new discipline – constitutional sociology – to speak about the way in which the theory of society impacts our understanding of the role and place of constitutions. First, he argues that the new constitutional question has to acknowledge that the site of constitutionalism is the globe, not the nation-state.<sup>9</sup> Then, he argues, constitutionalism has to overcome the classical idea (of the “let’s go global project”) that it should target only the legal and political system (securing rights and regulating separation of powers) and have them imposing the very same constitution on all

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7. BENEDICT KINGSBURY, The Concept of ‘Law’ in Global Administrative Law, *The European Journal of International Law*, 20, 1, 2009, pp. 23-57.

8. MATHIAS ALBERT, Beyond Legalization: Reading the Increase, Variation and Differentiation of Legal and Law-like arrangements in International Relations Through World Society Theory, in *Law and Legalization in Transnational Relations*, New York, 2007, pp. 185-201; ANDREAS FISCHER-LESCANO / GUNTHER TEUBNER, Regime-Collisions: The Vain Search For Legal Unity in the Fragmentation of Global Law, *Michigan Journal of International Law*, 25, 2004, pp. 999-1046; GUNTHER TEUBNER, “Global Bukowina”: Legal Pluralism in the World Society, in *Global Law Without a State*, Aldershot; Brookfield, 1997, pp. 3-28, and GUNTHER TEUBNER, *Constitutional Fragments: Societal Constitutionalism and Globalization*, Oxford, 2014). All these works and authors follow the main tenets of modern systems theory as developed by Luhmann (detailed analysis to follow in later sections of the paper).

9. GUNTHER TEUBNER, *Constitutional Fragments*, pp. 1-2, “Today, these [social] energies – both productive and destructive – are being unleashed in social spheres beyond the nation state. The above scandals exceed the borders of the nation state in two ways. Constitutionalism beyond the nation state means two different things: constitutional problems arising outside the borders of the nation state in transnational political processes, and at the same time outside the institutionalized political sector, in the ‘private’ sectors of global society.”

other social systems.<sup>10</sup> Consequently, Teubner argues that a version of constitutionalism that takes seriously the functional differentiation of modern societies has to accept that is up to each social system to produce its own constitution and thus self-limit its destructive tendencies.<sup>11</sup> Ultimately, systems theory rejects the feasibility and adequacy of traditional *political* constitutionalism both at the national and the global levels.

## 2.2. Common Assumption: Global as a Space or as Content

Yet, as much as there is substantial disagreement in the content of the prescription as well as in the belief on the powers of human agency, both the “let’s go global” project and the “let us leave it to the systems themselves” enterprise share a similar problematic assumption: their theory or conception of globalization which evidences the conviction that globalization triggers an almost necessary jump from the nation-state to the world-level, i.e. a normative space that escapes existing normative and legal “technologies” and “solutions” and thus requires either new unifying common principles (ethical or legal) or reliance on system-specific values.<sup>12</sup>

Indeed, both projects and the vast majority of the literature seems to accept the idea that transnational affairs and organizations are functionally-oriented. For almost every author relies on the idea that the global sphere is populated by institutions that pursue freely and naturally their self-interest or institutional biases. Whether or not authors subscribe to strict systems-theory concepts, the truth is that it has become common currency to speak of the transnational world as one in which different bodies pursue their functional imperatives and differentiate themselves according to their functional logics, i.e. sports, intellectual property, trade, finance, food... Along these lines, the narrative of globalization becomes tied to the idea of some sort of *natural growth and development* of functionally specialized bodies that emerge spontaneously as needed responses in an increasingly complex world.

It only becomes logical then that these narratives end up, willingly or not, emphasizing the autonomy of transnational bodies in pursuing their logics, rules and institutional biases outside of normative and legal frameworks as if disconnected

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10. Dieter Grimm sustains that the idea of constitution is historical, an achievement that should be preserved and that is always normative not just an induction from how things are. For him constitutionalism “presupposes the concentration of all ruling authority within a territory, and is distinguished by a certain standard of juridification. This standard includes a democratic origin, supremacy and comprehensiveness.” See, DIETER GRIMM, The Constitution in the Process of Denationalization, *Constellations*, 12, 4, 2005, p. 458.

11. In other words, the problem of constitutional sociology is how to tame and discipline the power of the different social systems not just the political one. See GUNTHER TEUBNER, *Constitutional Fragments*, Chapter 1. Teubner takes explicit inspiration from RICCARDO PRANDINI, The Morphogenesis of Constitutionalism, in *The Twilight of Constitutionalism?*, Oxford; New York, 2010, pp. 309-326.

12. WILLIAM TWINING, *General Jurisprudence: Understanding Law from a Global Perspective*, New York, 2009, p. 15, “... the literature on globalisation tends to move from the very local (or the national) straight to the global, leaving out all intermediate levels.”



from hierarchy-based mechanisms and structures. Because many transnational bodies transcend the borders of states and seemingly produce their own rules and practices that are *de facto* followed, they are easily assumed to exist in an institutional vacuum as if their operations and their decisions do not enter existing networks of decisions and rules. *Ergo*, our double prescription: either a return to big politics and/or ethics or the “do nothing” mantra.<sup>13</sup> And yet, let us pause for a second and imagine the outcome of this background conceptualization.

a)

The cosmopolitan project appears as irredeemably utopian,<sup>14</sup> since it shares the burden that not enough developed political or legal institutions capable of translating global political preferences and dispensing justice in the way that we got used to within nation states have emerged so far.<sup>15</sup> Thus, the normative program which often stays at the level of ideal theory,<sup>16</sup> both lacks the necessary empirical conditions to be fulfilled and does not often specify institutional reform conducive to the pursuit of the worthy values. What is more, despite decades of hard work in political theory and global ethics, very little agreement has emerged on what should count as shared values. This happens not only within Western thinking but is even made more acute whenever we make cosmopolitan thinking truly cosmopolitan (both theoretically and historically) by considering ethical reflection from the most varied civilizational and cultural traditions.<sup>17</sup> And whenever we step down from theoretical clarification and discussion of values, then disagreement only grows more rampant. Thus, even if one could harmonize Confucianism and Kantianism to name but two examples of ethical traditions,<sup>18</sup> one would still have to solve the problem successively pointed out by Pragmatists in the American tradition: how to agree on how to apply these values in

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13. For a framing of this state of affairs from the point of view of international law's metaphysical-theological worldview(s), see WALTER RECH, *The Death of God, Systemic Evolution, and the Event: A Triangular Temporality for International Law*, forthcoming 2015 (on file with the author).

14. To be sure, critical analysts of international law and politics like advocating for the need for politics share the same burden because the publics they want to rely on for the return of the big politics are largely absent and of difficult constitution. See MARTTI KOSKENNIEMI, The Fate of Public International Law: Between Technique and Politics, *The Modern Law Review*, 70, 1, 2007, pp. 1-30 and FRIEDRICH KRATOCHWIL, *The Status of Law in World Society: Meditations on the Role and Rule of Law*, New York, 2014.

15. I am not saying this is the only model we should envision but merely reminding that this is the model we are habituated and socialized into.

16. For a reminder of the difficulties to move from ideal theory to non-ideal theory, see MICHAEL PHILLIPS, Reflections on the Transition From Ideal to Non-Ideal Theory, *Noûs*, 19, 4, 1985, pp. 551-570.

17. Starting by discovering whether different cultures have similar concepts and how to supplement their absence. For the case of human rights, see RAIMUNDO PANIKKAR, Is the Notion of Human Rights a Western Concept?, *Diogenes*, 30, 1982, pp. 75-102.

18. For example, reminding that article 1 of the Universal Declaration of Human Rights “All human beings are born free and equal in dignity and rights” is premised on the idea of human dignity which is not readily available in Confucian thought, but needs to be constructed, see, NI PEIMIN, Seek and You Will Find It; Let Go and You Will Lose It: Exploring a Confucian Approach to Human Dignity, *Dao*, 13, 2014, p. 713.

concrete situations?<sup>19</sup> These disagreements, as Onora O'Neill has pointed out concerning the "rights discourse" always require political choices concerning who interprets common values, who allocates duties and obligations and on which basis, thus turning the apparent triumphalism of ethical reflection into a political discourse to be administered and dispensed by very real and necessarily biased institutions.<sup>20</sup> Hence the true problem, "Can Western-designed and led institutions meaningfully apply Chinese or African values respecting their tradition of thinking and practices while harmonizing them together with the Western canon?" This is a common concern voiced also against GAL which in its rush to identify and develop *global* administrative principles forgets that the meaning of specific doctrines and their actual application will always depend on local factors.<sup>21</sup> Furthermore, because GAL principles are mostly Western products,<sup>22</sup> GAL risks, as Somek put it, turning into NAL or Natural Administrative Law, i.e. "those necessary principles without which there would be no law".<sup>23</sup>

b)

But there is more here than meets the eye as the dissociation between the ontological and the pragmatic question can also arise in concrete, or positive, manifestations of legal and political argument. For instance, whereas the 1949 Universal Declaration of Human Rights is considered as a hallmark of global values consensus having met a very limited number of abstentions, this narrative can quickly be rewritten once focus is placed in the series of *regional* Human Rights Declarations that have appeared later on. It goes without saying that these documents are often based on contradictory axiological foundations. The Cairo Declaration of Human Rights in Islam assigns priority to Shari'ah law by stipulating in articles 24<sup>o</sup> and 25<sup>o</sup> respectively,

All the rights and freedoms stipulated in this Declaration are subject to the Islamic Shari'ah.

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19. See JOSEPH MARGOLIS, *Life Without Principles: Reconciling Theory and Practice*, Cambridge; Oxford, 1996, and FRIEDRICH KRATOCHWIL, International Law as an Approach to International Ethics: A Plea for a Jurisprudential Diagnostics, in *Ethics and International Affairs: Extent and Limits*, New York, 2001, pp. 14-41.

20. ONORA O'NEILL, The Dark Side of Human Rights, *International Affairs*, 81, 2, 2005, pp. 427-439. For an example of the universalistic stance based on the culture of human rights as a central topic of transnational law (and a defence of its compatibility with normative pluralism), see MATTHIAS MAHLMANN, Theorizing Transnational Law – Varieties of Transnational Law and the Universalistic Stance, *The German Law Journal*, 10, 2009, pp. 1325-1336.

21. CAROL HARLOW, Global Administrative Law: The Quest For Principles and Values, *European Journal of International Law*, 17, 1, 2006, pp. 187-214 and FRIEDRICH KRATOCHWIL, *The Status*, Meditation 6.

22. On the need to overcome the Western bias and the political nature of GAL principles, see SUSAN MARKS, Naming Global Administrative Law, *International Law And Politics*, 37, 2006, pp. 995-1001.

23. See ALEXANDER SOMEK, The Concept of 'Law' in Global Administrative Law: A Reply to Benedict Kingsbury, *The European Journal of International Law*, 20, 4, 2009, p. 990.

“The Islamic Shari’ah is the only source of reference for the explanation or clarification of any of the articles of this Declaration.”<sup>24</sup>

What these pragmatic issues, application and interpretation problems, quickly evince is that the cosmopolitan project is one that needs to be fulfilled in daily practice and not settled by means of ontological argument. Which in turns brings back the already mentioned political problems of knowing who decides and in whose name.

The loss of the belief in a social discourse that can pierce through the specialized languages of different social systems also makes universal moral arguments clearly unsupported. As Mahlmann has recently put it, ours is a paradoxical predicament: we have universal positivist normative materials and yet our philosophical *Zeitgeist*, e.g. in systems theory<sup>25</sup> or the recent wave of scepticism towards ethical analysis,<sup>26</sup> does not allow us to believe in them, i.e. that they can be universal in any coherent and consistent way.<sup>27</sup>

Even those like Grimm that believe that there is no such thing (and there won’t be in the near and mid-run future) as a global constitutional order due to the absence of the traditional elements of state constitutions, implicitly contribute to the idea that without such a global constitution – without global politics – transnational law will expand in power and domestic constitutions shrink.<sup>28</sup> Here, conceptual conservatism makes it adamant that controlling transnational law can only occur by politics which because absent in proper form in regional and global spheres, leaves us with nothing more than a typical *ideal theory* solution.

The conclusion is that the “let’s go global” project is too ideally settled in feet of clay at odds with the current predicament. And part of the issue seems to have to do with its reliance on the assumption that in the post-national world we need global solutions and global values or alternatively a return to politics. In turn, reliance on global solutions shows their obvious political underdevelopment and ethical disagreement challenges or forces us to renounce to meaningful political agency.

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24. Available at <http://www.fmreview.org/en/FMRpdfs/Human-Rights/cairo.pdf>.

25. NIKLAS LUHMANN, *The Code of the Moral*, *Cardozo Law Review*, 14, 1993, pp. 995-1109.

26. See BERNARD WILLIAMS, *Ethics and the Limits of Philosophy*, London; New York, 2006. ALAIN BADIOU, *Ethics: An Essay on the Understanding of Evil*, London; New York, 2001 and CHANTAL MOUFFE, *On the Political*, New York, 2005, argue, to my mind, that politics and political action should replace ethics. When examining and criticizing Badiou’s conceptual innovation in ethical thinking, I show how difficult it is to conceive the latter in a post-modern context in GUILHERME VASCONCELOS VILAÇA, *Badiou’s Ethics: A Return to Ideal Theory*, *Badiou Studies*, 3, 1, 2014, pp. 271-321.

27. MATTHIAS MAHLMANN, *Theorizing Transnational Law – Varieties of Transnational Law and the Universalistic Stance*, *The German Law Journal*, 10, 2009, p. 1331.

28. DIETER GRIMM, *The Constitution in the Process of Denationalization*, *Constellations*, 12, 4, 2005, pp. 447-463.

c)

Since the “go global” project has been widely discussed in the literature I shall not develop it further. What is more, we have already achieved the conclusion that allows us to move onto the next step of the analysis: If the “let’s go global” project proves unconvincing due to its focus on the global and the absence of global forms of politics and values, are we condemned to have to accept Teubner’s systems theory proposal? The remainder of the paper evaluates the systems theory answer looking at its *conceptual strategy* and how it both seems to accommodate the features that underlie the failures of the “let’s go global” project and, at the same time, betray some of our deepest intuitions.

Indeed, the alternative project of “let us do nothing” or “be irritants only” suggests conceptual over-determination as it is hard to throw away the suspicion that the only reason why we can’t hope for more agency in today’s world has to do with the strict conceptualization of society as functionally differentiated. It remains mysterious how much of our current predicament can be *explained* by the theory of social functional differentiation and how much the latter *fits* current descriptions and events in the world and is not simply assumed by logical *fiat*. In analysing this assumption, I hope to illuminate too some of the dangers of theory over-determination across disciplines; namely, that the international juridification of the world according to transnational law necessarily follows from the functional differentiation of society which then necessarily requires a botched view of the alternatives available: because politics is inviable, we can’t do much other than societal constitutionalism and the latter ties our hands before the autopoietic power of systems. And yet, we often cannot avoid musing on what the Book of Master Mo says,

Nevertheless, at the present time, among the officers and noble men of the world, there are some who take there to be fate. How can they not look to the past and consider the affairs of the sage kings? In ancient times, the disorder of Jie was inherited by Tang who brought order to it. The disorder of Zhou was inherited by King Wu who brought order to it. The world never changed and the people never changed, but under Jie and Zhou the world was in disorder, whereas under Tang and Wu the world was well ordered. How can they say there is fate?<sup>29</sup>

A similar theory over-determination gut feeling applies to the apparent *a priori* necessary jump from nation-states to the world level as if the affairs of the transnational society could go on outside of the operations of domestic and regional systems. I will try to show that reading transnational law and developments in this light is problematic from different angles and incoherent with the theory itself of autopoiesis and the idea that systems operate on the basis of decisions that connect to other decisions. In this respect, the analysis has to be complemented with specific institutional achievements that put in place hierarchical controls that force us to reconsider the idea that only autonomy exists in the transnational

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29. Mozi, *The Book of Master Mo*, London, 2013, p. 172.

sphere and that the organizations that arise spontaneously magically operate at the global level in independence from other non-global arrangements and forces. Thus, the point of the article is to show that the reliance on a functional differentiation theory of society and globalization implicitly makes it easy to overlook non-global solutions. Whereas the “let’s go global project” is not guilty of espousing the full-fledged system theory program, I hope that the article helps to call attention to the importance of the background assumptions about globalization and society when approaching transnational normative systems from whatever point of view. In order to do that, we first need to become familiar with the terms of the systems theory proposal.

### 3. Teubner’s Program & Systems Theory

I have suggested that systems theory conceptualization of society as functionally differentiated is narrowing down the way in which the problem of transnational law is being constructed and dealt with. In this section, I start by delivering the essence of Teubner’s societal constitutionalism (section 3.1.). Then, in section 3.2., I move one step back and explain the core ideas of systems theory and provide a brief overview of the functional differentiation thesis showing the entanglement of the functional differentiation thesis and systems-theories conceptualizations of transnational law. In particular, Teubner’s proposal cannot be understood without keeping in mind (i) the functional differentiation thesis; (ii) the role of organizations and their relation to social systems; (iii) autopoiesis as the internalization of the conditions for evolution and thus the limited role for agency; and, (iv) how social functional differentiation shapes the discourse on transnational law. These are necessary steps for the critique that shall follow in section 4 of the article.

#### 3.1. Teubner

Teubner’s description of transnational social affairs is the following,

New constitutional subjects have emerged in the course of globalization: international organization, transnational regimes and networks. They are characterized by denationalization and fragmentation, a high-level of autonomy, and an issue-specific orientation ... if we want to do justice to global realities, we will have to take on board three points: (1) The nation state can no longer be regarded as the only possible constitutional subject. (2) The fragmentation of global society into functionally defined regimes is today a reality. (3) It is not only public institutions in the narrow sense that are constitutionalized; this must also be conceded to institutions in the private sector.<sup>30</sup>

It is easy to see that for Teubner it is the nature of social functional differentia-

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30. GUNTHER TEUBNER, *Constitutional Fragments*, p. 73.

tion and the autonomy of transnational organizations and networks that justifies a new style of constitutionalism. This is because “[u]nburdened by nation-state restrictions, the systems are now placed to follow, globally, a programme of *maximizing their partial rationality*.” As Teubner adds, this is a concern shared by different past sociologists, “all [Marx, Weber and Luhmann] identify the destructive energies created by the one-sided function-orientation of a social sector” in Luhmann’s case stemming from “the dynamics of social differentiation”.<sup>31</sup>

Against this background, societal constitutionalism is a proposal that suggests that each social system ought to develop its own constitution in a material sense. Constitutions for Teubner are not defined by a territorial politico-legal project that is imposed on all social forces and sectors but instead by the existence of rules that both constitute and self-limit a specific social system. In a nutshell,

Why self-limitation and not outside limitation, though? ... At this point societal constitutionalism does a difficult balancing act between external intervention and self-direction. A ‘hybrid constitutionalization’ is required in the sense that in addition to state power, external social forces – that is, formal legal norms and ‘civil society’s counter-power from other contexts (media, public discussion, spontaneous protest, intellectuals, protest movements, NGOs, trade unions, professions and their organisations) – exert such massive pressure on the expansionist function system so that it will be constrained to build up internal self-limitations that actually work.<sup>32</sup>

Curiously though, the question that Teubner never really answers is the one right at the beginning of the quotation: “Why self-limitation and not outside limitation though?” But in order to understand this point we need to dig deeper in systems theory’s assumptions because they are hardly touched upon in his most recent work.

### 3.2. *The Functional Differentiation Thesis & Systems Theory’s Formulations of Transnational Law*

a)

Systems theorists propose a *developmental narrative* of social evolution. According to their view, modern society is functionally differentiated having overcome former principles of stratification and segmentation.<sup>33</sup> In this new configuration, society has no control tower; no centre. Instead, society is formed by

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31. GUNTHER TEUBNER, *Constitutional Fragments*, p. 179.

32. GUNTHER TEUBNER, *Constitutional Fragments*, p. 84.

33. NIKLAS LUHMANN, Globalization or World Society: How To Conceive Modern Society, *International Review of Sociology*, 7, 1, 1997, p. 70, “Functional differentiation is a specific historical arrangement that has developed since the late Middle Ages and was recognized as disruptive only in the second half of the 18th century.” For a more detailed explanation of system differentiation and the different forms of systems differentiation, see NIKLAS LUHMANN, *Theory of Society. Volume 2*, Stanford, 2013, Chapter 4.

communication that is produced and managed autonomously by each functional system according to their system-specific codes and rationalities. Functional systems like law, art, science, economics or politics work according to their own operations which code social communication according to a specific binary value. Systems become autopoietic when their elements connect *only* to other system-specific elements.<sup>34</sup> The autopoietic form of organization is central to the functional differentiation hypothesis because it ensures that each system carries out its function through operational closure, i.e. it filters communication from the environment (other systems) according to a binary code that ensures the system only learns according to its own categories and through its own operations elements while being impervious to direct heteronomous control by other systems.

For example, the legal system is said to be autopoietic when it decides only on the basis of legal elements or acts such as court decisions, legislation and legal rules. In other words, this means that in an *autopoietic* legal system, a judge cannot (legitimately) decide on the basis of either the money that parties offer her or direct orders from politicians. By the same token, the value of communication received by the legal system always has to be coded according to law's distinctive binary logic: legal/illegal or law/non-law. Thus, the legal system filters its own understanding of economic theory or history when deciding monopoly cases or ancient land title disputes. Simply put, economics and history cannot be applied *qua* economics and history. In the same way that outside the legal system, (legal) communication will necessarily be coded by other social systems. This is what happens when, for instance, a given law fails to achieve its goals because its targets reinterpret it or simply ignore it. This brief description is crucial to understand a major postulate of functional differentiation. As Luhmann writes,

This means that the overall system renounces imposing an order (e.g. a hierarchy) on relations between functional systems. The metaphor of "equilibrium" is also of no use and only obscures the fact that society can no longer regulate relations between its subsystems but has to abandon them to evolution, and thus to history.<sup>35</sup>

Another important point of the functional differentiation conceptualization of society is that it constitutes, for systems theorists, an evolutionary achievement

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34. NIKLAS LUHMANN, *Theory of Society. Volume 1*, Stanford, 2012, p. 78. For the definition by the authors of the concept, see HUMBERTO R. MATURANA / FRANCISCO J. VARELA, *Autopoiesis and Cognition: The Realization of the Living*, Dordrecht; Boston, 1980, pp. 78-79, "An autopoiesis machine is a machine organised (defined as a unity) as a network of processes of production (transformation and destruction) of components that produces the components which: (i) through their interaction and transformations continuously regenerate and realize the network of processes (relations) that produce them; and (ii) constitute it (the machine) as a concrete unity in the space in which they (the components) exist by specifying the topological domain of its realization as such a network."

35. NIKLAS LUHMANN, *Theory of Society. Volume 2*, p. 89.



that allows functional systems to cope with ever growing complexity.<sup>36</sup> Through operational closure, systems escape succumbing to the informational overload in their environment while being able to productively use the filtered information to increase internal complexity, i.e. they learn selectively but they learn. As a consequence, over time, functional systems also differentiate themselves internally. For example, new courts and dispute resolution mechanisms or novel branches of law or even new dogmatic tools and concepts appear as the result of the irritations triggered by other social systems, e.g. demands for more cost-effective justice by economic actors and citizens or social protests for elder care or consumer protection that reach the political system and are passed as law.

b)

Yet, society is not formed only by communication between social functional systems like law or politics. Increased complexity has led to the emergence of *organizations*. Organizations, in Luhmann's conceptual architecture, are centers of decisions. They communicate decisions. A decision is always a choice between possibilities, foreclosing ones, opening up new ones.<sup>37</sup> Yet, most importantly, a decision connects past and future decisions. Through a chain of decisions, organizations develop a life of its own (i.e. they are also autopoietic); they constantly reshape their direction. And yet it is impossible to say that they *factually* direct the system toward a rationally designed goal or plan.<sup>38</sup> While organizations do not exhaust functional systems and do not have to be necessarily associated to a functional system, the autopoiesis of each functional system is closely connected to the autopoiesis of organizations like courts, central banks or schools because these are the ones that "take over the binary code of the given functional system."<sup>39</sup>

For instance, in the legal system, *courts are the organization* that selects and validates as law/non-law the communication in the periphery of the legal system such as political statements, protests in the streets against austerity or all sorts of regulations. Furthermore, courts connect their present legal decisions to past legal decisions all of which will be connected to future ones. Overall then, organizations are crucial for the performance of autopoietic reproduction and thus the maintenance of the boundary between system and environment by means of the application of the code of the system.

c)

Altogether, increased complexity, functional differentiation and systems internal differentiation enforce the above quoted thesis that society *can no longer*

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36. But Luhmann is clear about the absence of any eschatology of progress "Autopoiesis is no guarantee for survival, let alone a formula for progress." See, NIKLAS LUHMANN, *Law as a Social System*, Oxford; New York, 2008, p. 466.

37. NIKLAS LUHMANN, *Law as a Social System*, p. 283.

38. This paragraph is taken from GUILHERME VASCONCELOS VILAÇA, From Hayek's Spontaneous Orders to Luhmann's Autopoietic Systems, *Studies in Emergent Order*, 3, 2010, p. 72.

39. NIKLAS LUHMANN, *Theory of Society. Volume 2*, p. 149.



*be ruled according to a hierarchical principle* since systems are operationally closed. Therefore, according to this conceptualization, no system can rule over other systems as the need for retranslating external interferences prevents the assumption that there is a 1-1 impact on the target system. Rather, systems co-evolve side by side. The paramount political implication behind this conceptualization is thus that steering attempts are to be distrusted<sup>40</sup> as futile emotional or idealistic attempts to act based on an outdated theory and conceptualization of society. Luhmann wrote,

The world society has reached a higher level of complexity with higher structural contingencies, more unexpected and unpredictable changes (some people call this ‘chaos’) and, above all, more interlinked dependencies and interdependencies. This means that causal constructions, (calculations, planings) are no longer possible from a central and therefore ‘objective’ point of view. They differ, depending upon observing systems, that attribute effects to causes and causes to effects, and this destroys the ontological and the logical assumptions of central guidance. We have to live with a polycentric, poly-contextural society.<sup>41</sup>

It is clear that Luhmannian systems theory offers an *evolutionary account* of social systems and social differentiation that, in addition, is written explicitly in evolutionary biology parlance. Evolutionary accounts typically offer a patterned explanation of history and systems theory tells us that *after the emergence* of the autopoietic form of organization, evolution of social systems became fundamentally endogenous because determined by each system’s recursivity, i.e. each system’s operations connecting exclusively to the same system past operations. Notice that Luhmann is not endorsing *adaptationism* (or at least so he says) or the belief that social systems can react to the demands of society directly; instead based on the biology of Maturana and Varela, Luhmann gives priority to the perpetuation of the autopoietic form of organization.<sup>42</sup> Interaction with the environment, adaption, natural selection and other themes of Neo-Darwinism can now only apply on already existing autopoietic systems.<sup>43</sup> In any case, it is quite clear that what systems theorists want from evolutionary theory is to “reconstruct history from the perspective of functional equivalents, of possible alternatives”<sup>44</sup> allowing us to see actual developments as fulfilling functional necessities. This

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40. Hayek, another author that wrote about complex social systems, shares such a stance though for different reasons. See GUILHERME VASCONCELOS VILAÇA, From Hayek’s Spontaneous Orders to Luhmann’s Autopoietic Systems, *Studies in Emergent Order*, 3, 2010, p. 53.

41. NIKLAS LUHMANN, Globalization or World Society: How To Conceive Modern Society, *International Review of Sociology*, 7, 1, 1997, p. 75.

42. For more on autopoiesis from a biological point of view, see HUMBERTO R. MATURANA / FRANCISCO J. VARELA, *The Tree of Knowledge: The Biological Roots of Human Understanding*, Boston, 1998, pp. 108-117 and HUMBERTO R. MATURANA / FRANCISCO J. VARELA, *Autopoiesis*. See also ARANTZA ETXEBERRIA, Autopoiesis and Natural Drift: Genetic Information, Reproduction, and Evolution Revisited, *Artificial Life*, 10, 3, 2004, pp. 347-360.

43. GUILHERME VASCONCELOS VILAÇA, *Law as Ouroboros*, Florence, 2012, p. 101 (unpublished PhD thesis on file with author).

44. GUNTHER TEUBNER, *Law as an Autopoietic System*, Oxford; Cambridge, 1993, p. 50.

is true for the functions fulfilled by systems, which are stable adaptations to the conditions of social complexity.

Overall, then, the evolutionary narrative as told by systems theorists suggests that once systems become autopoietic they internalize the conditions for their own evolution, i.e., they control their own evolution. In other words, functional differentiation emerges and systems start to evolve autonomously according to their own logics and fulfilling functional imperatives. Social evolution becomes *spontaneous* (not really wanted or planned) and unguidable. While I do not wish to pursue this point further now, I would like to call attention to the fact that the use of evolutionary narratives is often linked to clear political projects, especially in what regards the undesirability of state intervention in private affairs (Hayek) or the opposite prong of intentional adaptationism or infamous evolutionism.<sup>45</sup>

d)

Luhmann's systems theory as deployed by Teubner became the backbone of a leading conceptualization of world society, transnational relations and their juridification. Its appeal and persuasiveness seem to be linked to its capacity to offer an account of world *society* (to the international relations discipline)<sup>46</sup> and a theory of law not dependent on the nation-state (to the legal discipline). In other words, systems theory offers the vocabulary to shift our attention from the binomial *international society/law* to *world society/global law*.<sup>47</sup>

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45. For the hidden normative agenda of evolutionary social accounts, see GUILHERME VASCONCELOS VILAÇA, *Law as Ouroboros* and ERHARD BLANKENBURG, *The Poverty of Evolutionism: A Critique of Teubner's Case for 'Reflexive Law'*, *Law & Society Review*, 18, 2, 1984, pp. 273-290 (criticizing Teubner's early work on the concept of reflexive law).

46. In particular, one that does not assume normative and territorial but rather functional integration. For the differences between systems theory's understanding of society and competing international relations conceptualizations, see MATHIAS ALBERT / LENA HILKERMEIER, *Organizations in/and World Society: A Theoretical Prolegomenon*, in *Observing International Relations: Niklas Luhmann and World Politics*, London; New York, 2004, pp. 177-195; CHRIS BROWN, *The English School and the World Society*, in *Observing International Relations: Niklas Luhmann and World Politics*, London; New York, 2004, pp. 59-71; THOMAS DIEZ, *Politics, Modern Systems Theory and International Relations Theory*, in *Observing International Relations: Niklas Luhmann and World Politics*, London; New York, 2004, pp. 30-43 and JOHN W. MEYER et al., *World Society and the Nation-State*, *American Journal of Sociology*, 103, 1, 1997, pp. 144-181.

47. A distinction needs to be made. If Luhmann effectively theorized the concept of world society, he said nothing about global law. In fact, he insisted that both law and politics remained territorially not functionally differentiated. Indeed, he was criticized by some of his followers for not justifying such proposition. See, MATHIAS ALBERT, *Observing World Politics: Luhmann's Systems Theory of Society and International Relations*, *Millennium - Journal of International Studies*, 28, 1999, pp. 239-265. It was Teubner, and co-authors, then who tried to adapt the systems theory program in order to speak of global law. Even if Teubner's position is not entirely clear. He both speaks of a Global Bukowina – transnational law without the state – and “[r]eligion, science, and the economy are well-established as global systems, while politics and law still remain mainly focussed on the nation state ... International political relations, international public law, and international private law are only slowly being over-layered by transnational political and legal processes.” See GUNTHER TEUBNER, *Constitutional Fragments*, p. 42.

Systems theorists advance two claims regarding world society and world law.<sup>48</sup> First, and as we have seen, they claim that world society is functionally differentiated in different autonomous self-reproducing systems which fulfil a particular function by means of their own rationality/discourse. Accordingly the expansion of law is seen as triggered by each autonomous system's self-reproducing operations. Second, and as a consequence, law is expanding and becoming transnational/global beyond and in isolation from domestic and international law. Therefore, the international expansion of law is seen as intimately connected to its fragmentation and transnationalization;<sup>49</sup> both aspects emphasizing the background assumption of autonomous self-reproducing systems pursuing their own logics/rationality and establishing true "normative islands". Teubner wrote,

The autonomy of the subject acquires meaning not merely from the pursuit of individual interests or the desire for self-realization, Rather, autonomy is constitutively linked to responsibility vis-a-vis the whole and others; *a responsibility which is not imposed from outside, but which can only be formulated by individuals themselves via the autonomous reconstruction of the world.* The link to autonomy / responsibility is equally constitutive for the autonomy of social systems ... How can a social system bring its overall societal function into balance with its contribution to others?<sup>50</sup>

And

The difficult task of co-ordinating the function of a social system and its environmental tasks at a sufficiently high level can be tackled only through system-internal reflection, which can certainly be prompted from the outside but cannot be replaced.<sup>51</sup>

In more prosaic words, systems theorists see sports, financial markets, food regulation, commerce and trade affairs (just to name some examples) as autonomous

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48. GUNTHER TEUBNER, "Global Bukowina": Legal Pluralism in the World Society, in *Global Law Without a State*, Aldershot; Brookfield, 1997, pp. 3-28 and ANDREAS FISCHER-LESCANO / GUNTHER TEUBNER, Regime-Collisions: The Vain Search For Legal Unity in the Fragmentation of Global Law, *Michigan Journal of International Law*, 25, 2004, pp. 999-1046.

49. ANDREAS FISCHER-LESCANO / GUNTHER TEUBNER, Regime-Collisions: The Vain Search For Legal Unity in the Fragmentation of Global Law, *Michigan Journal of International Law*, 25, 2004, p. 1005. Sometimes this is seen as a question of attitude. Critical authors emphasize legal cacophony whereas more optimistic ones focus on *internal* legal convergence through judicial globalization, cross-fertilization of principles and the expansion of a common legal culture based on a common socialization in law. For the issue of how attitude matters in legal debates around impossible empirical questions, see LIAM MURPHY, Better to See Law this Way, *New York University Law Review*, 83, 2008, pp. 1088-1108.

50. GUNTHER TEUBNER, *Constitutional Fragments*, p. 71, emphasis added. In such a framework, it is difficult to justify the jump from autonomy to responsibility on grounds other than mere wishful thinking of the same kind Teubner denies to the proponents of constitutionalism or ethical integration.

51. GUNTHER TEUBNER, *Constitutional Fragments*, p. 84.

systems going on pushing their sectorial rationality, refractory to external regulation and producing a law of its own. The metaphor is of clear evolutionary pedigree as we had seen above: autonomous systems evolving spontaneously and unstoppably towards growing complexity. Thus transnationalization of law as well as the legalization of transnational relations become but a natural product of a functionally differentiated society. It is this *naturalness* that Teubner so wants to curb in light of the catastrophic externalities the autopoietic logics can unleash.

Notice however, that it is difficult to discern where the inevitability of such a natural evolution comes from. After all, we are told that it stems from a functionally differentiated society that *emerged* together with the *emergence* of autopoietic social systems,

Functional differentiation is not a question of a basic political choice, but a complicated evolutionary process in which fundamental *différences directrices* gradually crystallize and specialized institutions emerge in accordance with them. During this process, function systems themselves stipulate their own identity via elaborate semantics. The state can if necessary link to such developments and to a certain extent intervene in a corrective manner, but cannot shape their fundamental norms.<sup>52</sup>

But if that is the case, doesn't functional differentiation explain everything and thus nothing? Rather than focusing directly on Teubner's normative proposal, I propose we ponder on whether it is really the case that a natural evolution of society triggering a natural evolution of transnational law too towards an autonomous system is *a necessary starting point for analysis*? And what exactly does it mean to say transnational law is evolving autonomously? Where does such a conclusion really come from: *theoretical fiat* or conceptual analysis and careful description of what goes on?

#### 4. On Evolutionism, Agency And Functional Differentiation: Three Critiques

Now that we have gathered the necessary vocabulary and systems theoretical background, it is time to address *the* question: is this an adequate conceptualization of the legalization of transnational relations and law?<sup>53</sup>

In this section, I develop three critiques against Teubner's program. Overall, the central thrust of the critiques is an attack on the *evolutionist* nature of systems theory's conceptualization of transnational law which hides existing agentive possibilities and narrows down future alternatives. By means of a close reading

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52. GUNTHER TEUBNER, *Constitutional Fragments*, p. 28, emphasis added.

53. For an earlier critique, see FRIEDRICH KRATOCHWIL, Of Maps, Law and Politics: An Inquiry into the Changing Meaning of Territoriality, *DIIS Working Paper*, 3, 2011.

of some of Teubner's propositions applied to the economic and banking systems, sections 4.1. and 4.2. demonstrate how the use of systems theory parlance confuses and distorts rather than illuminates the relationship between economic, legal and political systems as well as the relationship between different organizations within a regional (European) territorial system. Logic rather than history, empirical study and context drive Teubner's analysis. In Section 4.3., I demonstrate how systems theory's complexity teleology justifying the priority it assigns to system-maintenance is unwarranted given that there are endless normative benchmarks in social life.

#### 4.1. Evolutionary Narrative I: Natural Emergence of Systems and Systems Boundaries

Systems theorists like to remember Luhmann's words "The sin of differentiation can never be undone. Paradise is lost."<sup>54</sup> Read along the lines provided above, this sentence highlights our radical impotence both in bringing about and trying to curb functional differentiation.

a)

The first problem with the functional differentiation account along evolutionary lines is that it insufficiently recognizes agency in constituting the international and transnational systems. More precisely, the evolutionary metaphor fails to explain how social differentiation transmutes automatically and naturally into institutional and legal fragmentation. In other words, it cannot explain the origin of different systems like FIFA, WTO or WHO as well as it fails to account for the way in which their initial constitutive rules constrain or fail to constrain (e.g. for bad design), but in any case *determine* their future development.<sup>55</sup>

Assuming that such systems simply emerge and freely develop an agenda of their own, like biological organisms do, seems unescapably reductive. Recently Mathias Albert gave the example of the establishment of the International Criminal Court, notwithstanding American opposition, as paradigmatic of the international legal system's robustness "given that it can turn out major structural innovation even *without* (or more precisely: even against) *the will* of major powers."<sup>56</sup> Yet, can one really say that it was the *legal* system turning it out? It seems rather strange that here the legal system is interpreted as including the political bodies responsible for the establishment of the court. Instead, it seems that the causal arrow is reversed. The robustness of the international legal system

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54. *Apud* ANDREAS FISCHER-LESCANO / GUNTHER TEUBNER, Regime-Collisions: The Vain Search For Legal Unity in the Fragmentation of Global Law, *Michigan Journal of International Law*, 25, 2004, p. 1007.

55. Quickly dismissing the point, see ANDREAS FISCHER-LESCANO / GUNTHER TEUBNER, Regime-Collisions: The Vain Search For Legal Unity in the Fragmentation of Global Law, *Michigan Journal of International Law*, 25, 2004, p. 1008.

56. MATHIAS ALBERT, Beyond Legalization: Reading the Increase, Variation and Differentiation of Legal and Law-like arrangements in International Relations Through World Society Theory, in *Law and Legalization in Transnational Relations*, New York, 2007, p. 193, emphasis added.

is a consequence of an evaluative statement derived from the establishment of the court. It appears that, in the international realm, politics is artificially brushed aside, and a political decision transmuted *ex post* into a simple mechanical legal communication. It is enough to verify how different functional bodies from the WTO to the *Codex Alimentarius* Commission were set up by means of clear-cut political decisions. For example, the XVI World Health Assembly created the *Codex Alimentarius* in 1963 within a joint program of FAO and WHO. This points to the fact that the legal and political system of the world society are not spontaneous. And yet, if this point is conceded, one has to conclude that the *theory* of social differentiation *over-determines* analyses of legal and institutional differentiation.<sup>57</sup> In a strategy that resembles how pre-Socratic philosophers escaped the idea of death by eliminating creation or birth, systems theorists' thesis of functional differentiation seems to eliminate the idea that systems can be extinguished or fundamentally changed by positing that they were never created or that such a creation should not be read as a constitutive political/agentive moment but rather as a mere effect in/for the legal system.

b)

Another example is offered by Teubner when suggesting in a critique of turbo-capitalism that the "constitutive constitutional politics of the Washington Consensus" overrode traditional national protective apparatuses. Yet, no argument is given as to why the Washington Consensus *had to* emerge as the expression of the maximizing logics of a social system. To be sure, it is not even clear at all which system or organization pursuing its partial rationality or maximizing imperative is Teubner referring to. It is equally impossible to specify the *natural flight* from the Washington Consensus as determined internationally to domestic constitutional politics, i.e. How does such a political agenda *naturally* change domestic regulations? As my description of systems theory should have made clear, this particular conceptual apparatus is very rigorous in the need for the identification of decisions connecting to other decisions (or operations to other operations) within a specific system applying its binary code or the organization's own logics. Interestingly, Teubner uses the same critique I just made to his example against theses advocating for the "extraterritorial effect of national constitutional rights",

This however tells us nothing about whether – and if so how – fundamental rights actually achieve normative validity in transnational regimes. This requires a decision, an act of validation within an institutionalized law production, the need for which cannot be concealed by referring to substantive similarities in national and transnational contexts ... A legally structured and constitutionally(!) legitimized process must be identified that positivizes fundamental rights as valid and binding within a transnational regime.<sup>58</sup>

57. For an early remark on theory over-determination in the field of biology, see NILES EL-DREDGE / STEPHEN JAY GOULD, *Punctuated Equilibria: An Alternative to Phyletic Gradualism*, in *Models in Paleobiology*, San Francisco, 1972, pp. 82-115.

58. GUNTHER TEUBNER, *Constitutional Fragments*, p. 126.

Without the process-tracing of Teubner's own claim regarding the autopoietic effect of the Washington Consensus and its natural emergence, one cannot avoid perceiving it as a magical and mysterious phenomenon. Furthermore, in the absence of a description of the decision - "an act of validation" - and identification of the system and organizations at stake, it is impossible to assign the spread of the Washington Consensus to the normal and natural autopoiesis of a system rather than to politically agentive and ideologically committed groups.

c)

Teubner recognizes that "transnational organizations" like the WTO were indeed "formed through international treaties" but at the same time are an example of "self-constitutionalization ... insofar as organizations *tend to emancipate from the original agreement of their founding members*".<sup>59</sup> In this line of argument, the point seems to be that transnational organizations constitutive rules cannot limit the autopoietic maximizing imperatives of each system.

This dynamic pointedly raises the question of whether functional differentiation necessarily transforms the 'normal' self-reproduction of function systems into a compulsion towards unlimited growth. The theory of autopoietic systems has long broken with the axiom of classical structural functionalism, namely, the imperative of sheer system maintenance. Connectivity of recursive operations has become the new imperative – the autopoiesis is either continued or it is not. Beyond this, however, the disturbing question arises of whether functional differentiation secretly implies a peculiar growth compulsion. Since function systems orient themselves towards now and only one binary code, they destroy the inherent self-limitations which worked effectively in the multifunctional institutions in traditional societies. As a consequence, the self-reproduction of function systems and formal organizations follow an inexorable growth imperative.<sup>60</sup>

Teubner's discussion of the self-destructive tendencies of our current banking system proves instructive at several levels in what regards the natural emergence of autopoietic systems that maximize their rationalities and free themselves from their initial constitutional mandates. Based on other authors, Teubner blames the excesses of our banking system on commercial banks' capacity to create money "via current account credits". Because these loans massively exceed bank reserves, we witness genuine creation of money without any account for the external and systemic effects: over-borrowing when economic cycle is positive leading to bubbles and illusionary over-growth in economy and conversely money drain when the cycle or expectations reverse.<sup>61</sup> As a remedy, Teubner proposes that article 16° of the European Central Bank's statute ought to be amended to make sure that only national and European central banks should be allowed to

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59 GUNTHER TEUBNER, *Constitutional Fragments*, p. 55, emphasis added.

60 GUNTHER TEUBNER, *Constitutional Fragments*, p. 79.

61 GUNTHER TEUBNER, *Constitutional Fragments*, pp. 96 ff..



create money through “sight deposits”.<sup>62</sup> This is puzzling on different accounts.

First, contrary to Teubner’s model of constitutional fragments, what he proposes is a change of a constitutional legal rule in a way that directly binds economic institutions of a given *regional* space. This is no mere learning pressure or irritation but rather a command and control regulation that arguably, according to systems theory’s own premises, ought to be distrusted.

Second, it is interesting to read that he chooses as example a regional territorial political and legal system like the EU. He does mention that the ideal would be a “global financial constitutional regime emerging from co-operation between the central banks in a ‘coalition of the willing’”.<sup>63</sup> But this is confusing. After all we are told that global society is functionally differentiated and that transnational processes cannot be controlled or guided and that beautiful and well-intentioned global values are naive hopes when the sin of differentiation cannot be undone. Furthermore, we are informed that global society is a reality but also that we should look into a regional alternative that apparently allows the steering of the banking system through a *political* intervention that imposes a clear *legal* rule.

Third, and as a consequence of the point just made, it becomes difficult to believe that the so-called destructive tendencies of the banking system are naturally system-produced due to their maximizing partial rationality. If the solution lies in an intervention by the political system, then it seems clear that the problem is created by a previous political choice (even if by omission). At play here, there seems to be a fatal confusion between ideological political options that bring about undesirable outcomes and the natural functional systems’ march towards “socially harmful growth pressures”. In other words, why do we need the limitative rules such as the new version of article 16<sup>o</sup>? Is it because the capitalist flavoured legislation we adopted produces excesses or because left to its own the autopoietic banking system will *necessarily* produce this state of affairs? Is it the autopoietic form of organization that triggers abuses (hardware) or the specific ideological content of the rules that were adopted and thus chosen (software)?

Fourth, this point also demonstrates how misleading it is to talk about the banking system as something autonomous that emerged as an autopoietic system and follows its own course and rules, i.e. “purely economic orientations”. Instead, it was constituted by a political decision and shaped by it (a decision embodied in legal form) and Teubner classically proposes changing the original constitutional rules.

d)

Teubner could still reply pointing out that he acknowledged the way in which social systems are always legally and politically created. For example, When a social system gives itself a legal constitution, it finds an escape from the

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62. GUNTHER TEUBNER, *Constitutional Fragments*, pp. 100-101.

63. GUNTHER TEUBNER, *Constitutional Fragments*, p. 101.



deficiencies of self-foundation and its paradoxes. Thus the autonomy of a social constitution is never autonomy in pure form; it always contains elements of heteronomy. The Self must first be defined heteronomously through legal norms in order to be able to define itself.<sup>64</sup>

And yet, this only hides the following fact: the banking system under analysis is a set of organizations that acts within different functional systems which operate in the *territorially integrated European Union space*.<sup>65</sup> Meaning that it is subject to clear vertical commands and authority. Thus, there is nothing natural about the emergence of a banking system that threatens the stability of the economic functional system as there is also nothing natural about looking at this question from the banking and/or economic systems rather than the political: this is a *researcher's choice*. And one that enforces horizontal co-evolution of systems eliminating the traces of hierarchy in transnational social life.<sup>66</sup>

By the same token, Teubner's unconvincing claim that the "economic constitutional code assumes hierarchical precedence over both legal and economic binary codings ..." <sup>67</sup> leads to the following statement,

*Under a plain money regime money creation by private banks, for example, would violate the economic constitution and not only ordinary law. The judgement would be supported not by the ordinary legal code but by the economic constitutional code and by the programs of economic reflection developed in association with it.*<sup>68</sup>

But which economic constitution? The statute of the European Central Bank is a *legal* document that if prescribing that commercial banks cannot create money through "sight deposits" can trigger legal enforcement. Irrespective of the *élan* in saying that the economic constitution shapes the autopoiesis of the banking system, precisely because this economic constitution is *European positive law*, the authority of the legal system can be called at any time to trample the banking system operations. Of course, this says nothing on whether agents will follow the law, enforce it or mobilize it against banks that breach the legal imperative. And yet, even if the law remains under-used in our current situation, every lawyer knows that, *if deployed*, the legal code is hierarchically superior to any other code.

It is easy to see that the analysis stops at the legislative moment and thus becomes *static*, i.e. what happens to the life of legal norms and how do they interact and

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64. GUNTHER TEUBNER, *Constitutional Fragments*, pp. 107-108.

65. This is not to say that the European Union constitutional debates are entirely settled. For conflicts on fundamental rights, fiscal autonomy and constitutional identity among others, see NEIL WALKER, *Intimations*, p. 111.

66. By "researcher's choice" I mean that the framing of research questions and the point of view adopted are always subjectively determined depending on research interests, theoretical frameworks and goals.

67. GUNTHER TEUBNER, *Constitutional Fragments*, p. 111.

68. GUNTHER TEUBNER, *Constitutional Fragments*, p. 113, emphasis added.

possibly restrain the autopoiesis of other systems? Equally, Teubner contrasts *organizations* and *systems* without (accurately) describing the interaction between functional and territorially integrated systems, between horizontal and vertical principles of organization. Notice that the question is not whether systems lose their *autonomy* in the systems theory sense (determining their operations by their own operations) but about what does it mean to say they are autonomous in the first place. To be fair, Teubner discusses this objection in the following passage,

To this extent, we can certainly say that independent constitutions in society are politically imposed. However, whether or not an independent constitution is being effectively set up and will function in the long term depends on the social system itself. Here, the decisions are made, whether the external political impulses are accepted and transformed internally on a continuous basis. Without these, the constitutional irritations from politics dissipate and there is no chance of any lasting change in the economic constitution. It is not the external 'big decision' of politics, the mythical founding act that creates the constitution, but rather internal 'long-lasting chains of interconnecting communicative acts which successfully establish a constitution as the 'supreme authority'. The irritations by political legislation need to be taken up by the economy in such a way that they can be fed into the capillaries of money circulation; only then does a constitution literally 'come into force' beyond its merely formal validity. The political constitutional impulse is limited to the founding act and to fundamental changes; otherwise, constitutional autonomy towards politics is required.<sup>69</sup>

Systems theory's conceptual strategy of interpreting interventions from different systems as mere effects that have to be processed by the incumbent system in the normal autopoietic performance both neutralizes and naturalizes the fact that systems neither emerge nor are constituted spontaneously. In addition, it hides external/heteronomous constitutional agentive/political moments that change the space of possibilities<sup>70</sup> that are available for systems operations.<sup>71</sup> This is obvious here,

Plain money reform, too, needs the sanctions of law backed by political power if any unauthorized money creation by commercial banks has to be banned and any evasion strategies to be thwarted. However, such support

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69. GUNTHER TEUBNER, *Constitutional Fragments*, p. 118.

70. This is an expression developed in DANIEL C. DENNETT, *Darwin's Dangerous Idea: Evolution and the Meanings of Life*, London, 1996. It is in this specific way that systems theory risks forgetting human agency and not in the radical claim that society is constituted by communication, not persons.

71. For a detailed application of this reasoning focusing on the emergence of judicial review and its transformative power of the relationship between law and politics, see GUILHERME VASCONCELOS VILAÇA, *Law as Ouroboros*, Chapters 6-7.

by the law of the state does not transform an economic constitution into a state constitution. All that occurs is that the state's power is mediatized through the law; it is de-politicized to a certain extent and placed at the disposal of the economy's independent constitution.<sup>72</sup>

In the case of the banking system, Teubner further hides that the introduction of a "constitutional limitative rule" came from a different system and benefits from legal authority in such a way that it can never be romantically portrayed as providing an irritation/indirect learning pressures to the banking system. Finally, Teubner forgets that the banking system he discusses does not exist in a vacuum but is deeply embedded in a territorially political and legal regional space which only reflects the lack of empirical detail in the description of the problem under analysis and a rush in mingling world society and regional realities. Once again, one cannot but avoid to think that the conclusions of Teubner's analysis of the banking system merely flow logically from the premises of functional differentiation. Is there anything about functional differentiation and the form of organization rather than a specific ideological content (thus the historical content of specific functional systems) that determines the outcomes described (why marketization of society colonizes politics, through which recursive operations)?<sup>73</sup>

#### 4.2. *Evolutionary Narrative II: Natural Pigeon-Holing of Issues*

a)

Systems theorists' naturalist narrative also assumes that differentiation magically arranges all communication according to sectorial/issue areas. Accordingly, one would have trade institutions pursuing trade issues and sports agencies dealing with sports matters. This picture impresses for its simplicity but is hardly convincing that issues are just *naturally* pigeonholed in functionally differentiated systems following their own sectorial logic. In this context processes of securitization of different issues, the most recent being intellectual property, immediately show otherwise. Friedrich Kratochwil offers two additional examples showing in detailed fashion (i) how domestic political issues dictate that copyright concerns jump from WIPO to TRIPS becoming along the way economic; and, (ii) how the EU, and not any sectorial logic, is *driving* the regulation of chemical products through its REACH initiative.<sup>74</sup> The conclusion is that the naming of issues is dynamic, politically contingent and dependent on human agency.

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72. GUNTHER TEUBNER, *Constitutional Fragments*, p. 118.

73. It is worth repeating that I don't disagree with Teubner's attack on "turbo-capitalism" but the question is what do autopoietic theory and modern systems theory add to existing discussions and at what price?

74. See FRIEDRICH KRATOCHWIL, Of Maps, Law and Politics: An Inquiry into the Changing Meaning of Territoriality, *DIIS Working Paper*, 3, 2011. Seeing this as evidence against systems autopoietic closure, see Kratochwil in the article just cited and GERALDINE HIKAKA / JOHN PREBBLE, Autopoiesis and General Anti-avoidance Rules, *Critical Perspectives on Accounting*, 21, 2010, pp. 545-559. For a different conclusion, see GUILHERME VASCONCELOS VILAÇA, Interdisciplinarity and Tax Law: The Case of Legal Autopoiesis, *Critical Perspectives on Accounting*, 23, 6, 2012, pp. 483-492.

Once again the problem is inbuilt in the evolutionary metaphor. Focusing on the autopoietic form of organization does not tell us how do issues fall and are assigned to a particular system because the important moment of analysis, for systems theory, is that of studying how the autopoietic recursivity can take place.<sup>75</sup> But then the whole idea that functionally differentiated bodies and agencies develop to deal with functional needs (e.g. to cope with complexity) seems to be vitiated from the beginning. Problems and functional needs are articulated by individuals and groups that choose the systems and organizations where to carry on their plans, whatever their goals and interests are. Here, the most flagrant mistake comes from the assumption that only a single principle of organization subsists: *horizontal* functional differentiation.

The crux of the problem behind knowing whether law is evolving territorially or functionally depends, to my mind, on the questions: “What counts as a system?” and “Which is the system under analysis?” While these are the guiding questions that systems theory needs to address, its practitioners almost never do so and one is left with a strange comparison between a full-fledged analysis of a legal system that is part of the state apparatus and its authoritative claims,<sup>76</sup> and an analysis of individual loose international organizations as autonomous systems. This is puzzling because at the domestic level, system theorists would not analyze a single organization, such as a *corporation*, as lying outside broader functional systems. Therefore, while a corporation is a system of its own in autopoietic theory,<sup>77</sup> its communication connects it to the broader functional systems such as the legal, the political and economic. Furthermore, while corporations may have their own internal dispute resolution arrangements, systems theorists would not deny that these do not convert corporations into legal organizations. Corporations, or other organizations, would still see their uses of the legal code evaluated by the *official* courts connecting *sub-systems* with the broader *functional social systems*. In other words, systems theorists analyze systems that operate within the state and systems that operate outside the state according to different methodological principles. I contend that this choice is not based on justified empirical differences but *conceptual reductionism*. Three questions in particular illustrate this misfit: (i) how can the function of law be ensured by single and loose organizations that are at the same time political, executive and judicial *fora*?; (ii) has the function that sectorial organizations pursue anything to do with the function of social systems?; and, (iii) how do these connect in domestic and transnational spheres?

b)

My comments on law evolving territorially not functionally take the above remarks further and question whether the EU, often given as a great example of a functionally evolving transnational legal system, is not just a larger and more

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75. On the systems theory's incapacity to tackle genetic questions, see JÜRGEN HABERMAS, *History and Evolution*, *Telos*, 39, 1979, pp. 5-44.

76. Not to mention a given traditionality. See MARTIN KRYGIER, *Law as Tradition*, *Law and Philosophy*, 5, 2, 1986, pp. 237-262.

77. GUNTHER TEUBNER, *Law as an Autopoietic System*, pp. 123-158.

encompassing domestic legal system. If we consider Raz's three key features of a domestic legal system, i.e., *claim to authority*, *comprehensiveness* and *universal scope*, it is difficult to see how the EU fails to meet these criteria.<sup>78</sup> Furthermore, when it is discussed that important regulations such as REACH attest to the functional logics of a given sectorial system, commentators forget that the latter is part of a broader political and legal system that are its center (the sectorial systems would act as the *periphery*; as irritants providing stimulus for new regulations for example). I suspect that the problem of current systems theory applications to transnational law has to do precisely with the lack of rigor in identifying: (i) the system under analysis; and, (ii) the connections and systems to which the latter belongs. For these reasons, the true dichotomy is not between domestic/non-domestic systems, but between territorial/non-territorial systems and how these interact.

In earlier work, I have shown the role of EU developing state liability in the domestic laws of Member States as part of a broader argument that EU courts are acting as higher courts of the European legal system.<sup>79</sup> Similarly, the discussion that European political ideas impact domestic legislation tries to make the case that there is a legal system at play that is not just functional. Instead, a *regional arrangement* concentrates, as the nation-state once did, comprehensive, authoritative and universal scope (or at least claims to). The outcome, which will be clearer after section 5., is a system that is capable of distinguishing itself from the outside based on its territorial borders and not functional imperatives, i.e. a system capable of operating according to a *vertical* principle of social differentiation. Consequently, I maintain that there is no contradiction between European legal influence and law evolving territorially not functionally. The mistake of contemporary systems theory lies in its assumption that outside the state there is only the functionally differentiated global society. This is a mistake stemming from a misunderstanding of the theory's basic assumptions. Contrary to most theories on social order, systems theory starts with the global society and then sees states as an historical contingent form of organization. One wonders then why systems theorists do not accept that some other *infra-global* historically contingent political community may arise following territorial, not functional, forms of differentiation.

#### 4.3. Evolutionary Narrative III: Why Complexity and Management of Complexity if No Death?

The previous sections highlight the fact that it is *history*, not theory, which accounts for evolution.<sup>80</sup> Even if something similar to an evolutionary process seems to lurk behind social evolution, it is hardly the case that the former provides much explanatory power to the latter. In addition, given that I have shown how

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78. JOSEPH RAZ, *The Authority of Law: Essays on Law and Morality*, Oxford, 2002, pp. 103-121.

79. GUILHERME VASCONCELOS VILAÇA, *Law as Ouroboros*.

80. For a scathing critique of Darwinism on a similar charge, see JERRY A. FODOR / MASSIMO PIATTELLI-PALMARINI, *What Darwin Got Wrong*, New York, 2010.

transnational law and relations may obey different principles of organisation, the selection among different evolutionary principles becomes the *researcher's* choice, i.e. it is not natural. Altogether, these remarks show how the hypotheses postulated by theories of evolutionary processes are only established *after* the analysis of historical data, subverting the idea of a theory in the first place. In this section, I wish to explore another limitation of the systems theory conceptual apparatus: even if we are not persuaded of the evolutionist shortcomings of transnational law based on the functional differentiation conceptual apparatus, there is still no good reason to believe that autopoietic systems-maintenance should be the normative priority as systems theorists lead us to think. If that is the case, however, we also lose the justification for societal constitutionalism's "do nothing/irritate only" prescription.

a)

Against this background, systems theory "natural" teleology towards complexity hides important constitutive human choices. While Luhmann may be right in saying that "the sin of differentiation cannot be undone", the examples provided have shown that differentiation can certainly be "created". This opens up a new problem that again shows the overall inadequacy of evolutionary accounts in social sciences: the choice of evolution's normative benchmark.

Social evolution is not primarily determined by the problem of survival or at least the "survival" we speak of in social life is not restricted to pure biological terms (*pace* Jared Diamond's theses on the collapse of civilisations). This opens an embarrassing question for evolutionary theory: in the absence of a single normative goal that could easily *evaluate* "traits" and "behaviours", social analysis is left with as many normative benchmarks as imagination can provide, e.g. GDP, happiness indexes, the efficiency of laws, rights protection, *maximin* among many others.<sup>81</sup> Furthermore, these benchmarks are all but natural, being set up and picked up according to the observer's preferred set of values.<sup>82</sup>

If I am right, then the functional narrative of systems theory becomes just but one among many narratives forcing us to question why the management of complexity should be the primary value from which to evaluate social and legal evolution. There is a second consequence stemming from systems theory's adherence to the complexity teleology thesis. In particular, the latter allows systems theorists to claim that autopoietic social and legal organisation is necessary for the survival of social systems. It is, however, doubtful that a system incapable of maintaining autopoiesis would simply perish. It would instead change identity, not just die. Thus, ultimately, systems theorists' account is *essentialist* because their in-

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81. The problem can also be stated in the following way: what counts as a mistake and/or innovation now that *many* adaptations are possible? For the standard critique of adaptationism, see STEPHEN J. GOULD / RICHARD C. LEWONTIN, *The Spandrels of San Marco and the Panglossian Paradigm: A Critique of the Adaptationist Programme*, *Proceedings of the Royal Society of London. Series B, Biological Sciences*, 205, 1161, 1979, pp. 581-598.

82. HUMBERTO R. MATURANA / FRANCISCO J. VARELA, *Autopoiesis*, p.138, "The success or failure of a behaviour is always defined by the expectations that the observer specifies."

sistence on the fact that autopoiesis ensures systems' survival is only required if you deem *lethal* any change to the system's organisational principle. Their account is also "adaptationist" because it suggests that systems survived this far because they were autopoietic. Therefore, while it is true that Luhmann and Teubner avoid an easy formulation of a teleology towards progress, i.e. the history of human evolution has led to greater moral and social achievement, they fall in another version of it. This is particularly clear in Teubner's latest work that, as explained before, focuses on correcting the destructive tendencies of autopoietic systems. In doing so, however, he is implicitly assuming that autopoiesis of systems *ought to be maintained, never short-circuited*. Thereby forbidding radical agency that challenges the foundations of social differentiation. Once we are reminded that maintenance of this form of organization is not the unique normative benchmark (because not natural), then affirmations such as the following one should be read with a critical eye,

The punch-line to the theory, however, is this: the alternative cannot be zero growth, but rather a constraint on the excesses of the growth imperative. This is because 'stability and zero growth are not tenable in today's monetary system' ... The alternative would be economic shrinkage, which in the long term is not compatible with the current economic system based on money. A functioning money economy rests upon a certain imperative to grow. In this scheme, though, it is not the growth imperative that becomes the centre of attention, but rather the *difference between necessary growth and self-destructive growth excesses*, which trigger adverse developments.<sup>83</sup>

b)

The above propositions illustrate how difficult it is to apply meaningfully natural sciences' understanding of evolution to social phenomena. It is somehow ironical that Darwin's greatest achievement<sup>84</sup> – to make evolution *natural* – is now reversed in order to include not the plans of God but those of human beings. Dewey saw it with clarity,

The Darwinian principle of natural selection cut straight under this philosophy. If all organic adaptations are due simply to constant variation and the elimination of those variations which are harmful in the struggle for existence that is brought about by excessive reproduction, *there is no call for a prior intelligent causal force to plan and preordain them*.<sup>85</sup>

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83. GUNTHER TEUBNER, *Constitutional Fragments*, p. 99. Indeed, and without choosing sides on the issue, why maintaining the grow-or-die capitalist mantra rather than pursuing "de-growth"? See SERGE LATOUCHE, *L'Invenzione dell'Economia*, Torino, 2010.

84. See FRANCISCO J. AYALA, Teleological Explanations in Evolutionary Biology, *Philosophy of Science*, 37, 1, 1970, p. 2.

85. JOHN DEWEY, The Influence of Darwinism on Philosophy, in *The Middle Works*, 1899-



Put simply, the picture of evolutionary *social* sciences is based on *non*-random variation as well as *non*-natural selection (because as we have seen there is no single social “survival”), making any analogy with biological evolutionary metaphors probably meaningless.<sup>86</sup> For this reason, even in the case authors would try to stick to the naturalistic metaphor by claiming that some ideas and institutions are somehow selected from a pool and passed on, the story of such evolution would not be given by natural sciences’ theories and methods. Whereas one could still counter-argue that evolutionary accounts do not focus on individual human decisions but on aggregate numbers, social evolutionists would fail to explain the role of human agency and how cognition is mixed in the evolutionary process. Therefore, it would still be difficult to show exactly which *distinctive role* evolutionary *theory* plays in explanations of social evolution.<sup>87</sup>

## 5. Empirical Critique

In addition to the conceptual problems reported in the last section, the transnational law picture painted under the light of autopoiesis and functional differentiation also hides important *empirical evidence* that shows how hierarchical or vertical controls can be imposed from the outside. In the following sections, I focus on the case of international arbitration (section 5.2.) as well as the role of the EU as a territorial order both based on the power of fundamental rights to reach and discipline (potentially) all behaviours (section 5.3.). In the last section, 5.4., I synthesize empirical and conceptual arguments. But first we need to understand how the fundamental rights can carry out the role that I impose on them. That is the task of section 5.1. to which I now turn.

### 5.1. The Role of Fundamental Rights

Implicit on the role I assign to fundamental rights lie what I perceive to be the changes they brought about to the public/private divide. Fundamental rights change the terms of this divide by enabling the legal system to pierce through any other social and normative system. It is also because of fundamental rights that, as we will see, domestic and regional legal systems can supervise supposedly autonomous private law regimes (domestic and international alike). How can rights play this role? I don’t have space to show in detail the historical process that created rights-based social orders and the way in which these potentially juridify all aspects of social life. In earlier work, I postulated that the domestic

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1924, Carbondale, 1910, p 9, emphasis added.

86. In blatant contradiction with the theory of natural selection in which variation is random but natural selection is not, because over time it selects those units with increased fitness. See CHARLES DARWIN, *The Origin of Species*, New York, 2003; ERNST MAYR, *What Evolution Is*, New York, 2002; RICHARD DAWKINS, *The Selfish Gene*, Oxford, 2006, and FRANCISCO J. AYALA, Teleological Explanations in Evolutionary Biology, *Philosophy of Science*, 37, 1, 1970, pp. 1-15.

87. Confer JOHN R. SEARLE, *The Construction of Social Reality*, London, 1996, pp. 143-144, claiming that Darwin discarded teleological action because according to his theory whatever is selected is a mere *effect*, not a cause.



process of coupling between rights and judicial review created the necessary capabilities for the legal system to pierce through any other social system. This domestic process has now transcended into the European Union normative space.<sup>88</sup>

I suggest that fundamental rights alter the public/private divide because they dissolve it. This does not occur, however, in an *essentialist* fashion as feminist jurisprudence or critical legal studies seem to uphold. In other words, with fundamental rights there is no such thing as *solid* private and public spheres. Rather, because fundamental rights establish a normative horizon that must be respected and achieved, they justify *potentially* all sorts of encroachments on both public and private spheres. This, however, does not entitle the claim that the divide ceases to exist. Rather than speaking in materialistic terms, one should say that fundamental rights introduce *potentiality* into the divide, i.e. all behaviour can be private but in the shadow of a future potential public intervention. Therefore, fundamental rights allow public authority to *emerge* whenever basic values are threatened, while at the same time, allowing private spheres to go on according to their own logics.

Law is both a normative and an institutional order and the rise of the “rights discourse” placed courts at the centre of the legal system deciding what counts as law/non-law. This power to code communication became omnipresent with the emergence of fundamental rights. The proximate cause was the specific way in which rights discourse broaches the public/private spheres of social life and therefore prevents an aprioristic determination of which social domains are law-free. The identification of a proximate cause dissolving the public/private divide is necessary to correct some abstract formulations available in the literature. For example, Calliess and Zumbansen have recently revived the idea that social systems are embedded in law to argue that systems autonomy cannot be maintained despite liberal efforts to assert markets’ free-floating nature.<sup>89</sup> My account tries to provide a clear mechanism describing and explaining this embeddedness in law. Defined like this though, embeddedness becomes a background cause (a structure) independent of history. Postulating rights discourse as the contemporary vehicle of this embeddedness identifies a local historical mechanism specifying the process through which embeddedness works its way.

Why does all this talk about rights matter? Put shortly, because fundamental rights enable the courts of territorially integrated spaces like states and regions to code potentially all communications legal/illegal and thus make the operations of so-called autonomous systems subject to their own. This means that whereas transnational normative orders like international arbitration often rely, and can do so rather freely, on their own logics and elements (privately-made rules and privately appointed adjudicators) they cannot evade being subject to the authority of the official legal system in case a dispute (or a request for recognition of the award) arises.

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88. GUILHERME VASCONCELOS VILAÇA, *Law as Ouroboros*.

89. GERALF-PETER CALLIESS / PEER ZUMBANSEN, *Rough Consensus and Running Code: A Theory of Transnational Private Law*, Oxford, 2010.

## 5.2. International Arbitration

a)

Teubner's conceptualization of international arbitration and *lex mercatoria* of systems theory was recently praised in the following terms,

... the recent understanding of *lex mercatoria* based on systems theory paves the way for an innovative interpretation of the normative regulation of transnational private actor interactions, *raising it to an unprecedented conceptual level.*" The *lex mercatoria* of systems theory for the first time coherently detaches the private law regime from any axiological priority of reflexively formulated common interests and from any public institution aiming to implement these interests. Accordingly, the private law subsystem which globally regulates the interactions between non-public actors and their interests operates exclusively according to its own rationality and is not subordinated to any other legal or institutional dimension.<sup>90</sup>

The case of arbitration in transnational contracting is revealing because it allows the combined study of the domestic and the transnational arenas. Even though what goes on within arbitration procedures may appear mysterious to outsiders, the shadow of the law works like a night watchman in two interrelated ways. First, states are the enforcers of arbitral awards. Secondly, the recognition and enforcement of the decisions depends on their conformity with national public order. Thus, assigning domestic courts the power to perform judicial review of arbitral decisions.<sup>91</sup>

The central background role of national authorities in the recognition and enforcement is manifest in the 1958 New York Convention or *the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*.<sup>92</sup> In general, contracting States are obliged to recognise and enforce arbitration awards. However, article V lists the situations in which States can refuse to do so. These involve *formal* reasons (article V(1)) such as, for example, lack of capacity of the parties, *ultra vires* decision or illegal composition of the arbitral court and/or procedure; and *substantial* reasons (article V(2)) having to do with decisions on subject matters not capable of settlement or that breach domestic public policy.

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90. ARMIN VON BOGDANDY / SERGIO DELLAVALLE, The *Lex Mercatoria* of Systems Theory: Localisation, Reconstruction and Criticism from a Public Law Perspective, *Transnational Legal Theory*, 4, 1, 2012, p. 61. I shall try to show how the authors seem to be praising conceptual sophistication for the sake of conceptual sophistication given that the next sections of the present article discuss several ways in which it is inadequate to speak of a system "operating exclusively according to its own rationality".

91. Agreeing, stating, however, that the "devil is in the details", see AUKJE VAN HOEK, Private Enforcement and the Multiplication of Legal Orders, in *Multilevel Governance in Enforcement and Adjudication*, Antwerpen, 2006, p. 318.

92. The full text is available at [http://www.uncitral.org/pdf/07-87406\\_Ebook\\_ALL.pdf](http://www.uncitral.org/pdf/07-87406_Ebook_ALL.pdf).

These provisions subject arbitral decisions to mandatory norms of domestic jurisdictions.<sup>93</sup> If not, even though the decision was made autonomously it cannot be enforced or recognised as valid legal communication (though of course they can bind individuals outside the legal system and therefore be *effective*). The application of these *mandatory norms* is a direct expression of the thesis that the rise of fundamental rights allows courts to exercise legal intervention in a much wider, if perhaps thinner, fashion. Indeed, most mandatory norms embody fundamental rights and principles of domestic legal orders such as the right to a fair hearing, due process but also more substantive values such as the prohibition of discrimination on several grounds. This means that private autonomy cannot resort to arbitration to place the contract and a future legal dispute in a lawless realm because of those points-of-entry in domestic systems.<sup>94</sup>

b)

Against this background, the discussion moved towards the role of arbitrators regarding the application of mandatory norms.<sup>95</sup> For example, the 1989 International Law Institute Resolution “Arbitration Between States, State Enterprises, or State Entities, and Foreign Enterprises” explicitly mentioned in article 2° (emphasis added),

In no case shall an arbitrator violate *principles of international public policy* as to which a broad consensus has emerged in the international community.

Indeed, arbitrators are now increasingly understood as having the duty to apply mandatory norms that emanate from domestic legal orders as well as the international order (known as transnational public policy rules).<sup>96</sup> The trend is expected to keep developing in this direction. Increasingly, mandatory norms are recognised as the “rights discourse” becomes more entrenched. In addition, mandatory norms are being recognised in intellectual property, competition policy and other commercial activities with public law relevance often connected to the protection of uninformed parties and trade goals.<sup>97</sup>

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93. Defining a mandatory rule as “an imperative provision of law which must be applied to an international relationship irrespective of the law that governs that relationship”, see PIERRE MAYER, Mandatory Rules of Law in International Arbitration, *Arbitration International*, 2, 4, 1986, p. 275.

94. See article 6° of the International Court of Arbitration Internal Rules and article 9° of the International Law Institute 1991 Resolution “The Autonomy of the Parties in International Contracts Between Private Persons or Entities”.

95. For two classical works, see PIERRE MAYER, Mandatory Rules of Law in International Arbitration, *Arbitration International*, 2, 4, 1986, pp. 275-294 and NATHALIE VOSER, Mandatory Rules of Law as a Limitation on the Law Applicable in International Arbitration, *The American Review of International Arbitration*, 7, 3, 1996, pp. 319-357.

96. For some scant examples (few arbitral decisions are published), see PIERRE MAYER, Mandatory Rules of Law in International Arbitration, *Arbitration International*, 2, 4, 1986, p. 286.

97. See ANDREW T. GUZMAN, Arbitrator Liability: Reconciling Arbitration and Mandatory Rules, *Duke Law Journal*, 49, 2000, pp. 1291 ff. and PIERRE MAYER, Mandatory Rules of Law

Given all existing arrangements allowing some degree of judicial review of arbitral awards or discretion in their enforcement, it is likely that arbitration accommodates these concerns by having arbitrators applying mandatory norms. Indeed, as Guzman recalls, the problem of mandatory norms in arbitration could lead to the prohibition *tout court* of arbitration clauses in legal matters involving mandatory norms whenever the interests and values of states they embody are not enforced.<sup>98</sup>

The point concerns the evolution of the arbitration system towards its insertion in a dense network of rules and interactions in which domestic and state institutions have their say. These institutional connections are both: (i) *explicit* and *formal* (government) through the possibility of arbitral decisions being denied enforcement or being judicially reviewed;<sup>99</sup> and, (ii) implicit and *internal* (governmentality) due to the socialisation arbitrators undergo regarding soft and hard legal rules, e.g. arbitrator liability. Together, they encourage arbitrators to take into account mandatory norms as part of different discourses on the survival of arbitration.<sup>100</sup>

In addition, Hoek offers an instructive view on how European Union legal requirements for the formation of consensus in the choice of arbitration are much stricter than those Dutch law requires.<sup>101</sup> Therefore, whereas the Dutch *Hoge Raad* does not require specific consent for a party to be bound by an arbitration clause, EU law explicitly does. Furthermore, Landolt claims that arbitration awards have to be in conformity with EU mandatory norms and that Member States courts can make use of article 234<sup>o</sup> enabling a preliminary reference to the European Court of Justice.<sup>102</sup> Member State courts can then ignore an arbitral

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in International Arbitration, *Arbitration International*, 2, 4, 1986, pp. 275-294.

98. See ANDREW T. GUZMAN, Arbitrator Liability: Reconciling Arbitration and Mandatory Rules, *Duke Law Journal*, 49, 2000, p. 1285. See also NATHALIE VOSER, Mandatory Rules of Law as a Limitation on the Law Applicable in International Arbitration, *The American Review of International Arbitration*, 7, 3, 1996, pp. 319-357.

99. Showing for the US, that in the post-award period there was substantial judicial participation and that fewer decisions than expected were enforced, hypothesising this might have to do with the judicial review performed by domestic courts, CHRISTOPHER A. WHYTECK, The Arbitration-Litigation Relationship in Transnational Dispute Resolution: Empirical Insights from the U.S. Federal Courts, *World Arbitration & Mediation Review*, 2, 2009, pp. 39-82.

100. NATHALIE VOSER, Mandatory Rules of Law as a Limitation on the Law Applicable in International Arbitration, *The American Review of International Arbitration*, 7, 3, 1996, p. 356, "In the long run, more important than the interests of the individual parties in having an unchallengeable and enforceable award is that the legitimising of the resolution of disputes through arbitration depends on whether the arbitrators are prepared to respect certain mandatory rules of concerned states." Along the same lines speaking of the "survival of international arbitration as an institution", see PIERRE MAYER, Mandatory Rules of Law in International Arbitration, *Arbitration International*, 2, 4, 1986, pp. 285 ff.. See also PHILLIP LANDOLT, Limits on Court Review of International Arbitration Awards Assessed in light of States' Interests and in particular in light of EU Law Requirements, *Arbitration International*, 23, 1, 2007, pp. 63-92.

101. With relevant case law on commercial disputes but also extending the analysis to industrial relations, see AUKJE VAN HOEK, Private Enforcement and the Multiplication of Legal Orders, in *Multilevel Governance in Enforcement and Adjudication*, Antwerpen, 2006, pp. 318 ff..

102. PHILLIP LANDOLT, Limits on Court Review of International Arbitration Awards Assessed in light of States' Interests and in particular in light of EU Law Requirements, *Arbitra-*

award that conflicts with the ECJ understanding. And Renner notices that “[i]t is recognized that disputes involving competition law are arbitrable, but at the same time arbitral awards disregarding the relevant EU law will not be enforced by the courts of EU Member States.”<sup>103</sup> In all cases, the arbitration decision has to comply with fundamental values of existing legal orders, which seems to compromise the view that arbitration can actually represent an autonomous form of private justice. Hoek goes as far as claiming that this type of intervention is an intrusion and a cause of imbalance between an autonomous private order and the state. I believe she fails to grasp that despite the autonomy granted *ex ante* to arbitration decision-making, the state, and its strongest preferences, is always in the shadow and therefore, from a *descriptive* point of view, purely autonomous readings of arbitration are inadequate.<sup>104</sup>

### 5.3. The EU Territorial Transnational Normative Order

Recent European case law offers diverse but equally rich examples of processes of international juridification, i.e. how legal systems through their courts deploy fundamental rights to make claims about their sphere of authority vis-à-vis *competing* normative spheres. Two examples, each one dealing with a particular conflict between particular legal orders, shall suffice here.

In the now famous *Kadi* case, the European Court of Justice has asserted a true European legal system vis-à-vis the United Nations international legal order.<sup>105</sup> The ECJ affirmed the autonomy of the European Union legal order by declaring invalid a community regulation implementing a Security Council resolution. The interesting point is that the ECJ did not deem the UN resolution invalid but only the measure that implemented the resolution within the EC legal order. While this decision respects, at first glance, the validity of international law it is easy to see how its power lies elsewhere. Indeed, the *Kadi* judgment implicitly embodies the idea that fundamental rights can create a buffer zone that can be activated whenever the values of the regional legal order are jeopardised.<sup>106</sup> This way, the ECJ ruling introduces a principle of *hierarchy* in transnational relations and law further expanding the legal system’s capacity of controlling its own reach. It is true that the ECJ formulated its decision as if stemming directly from the EC treaty. The first point of the summary reads,

The Community is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the conformity of their

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*tion International*, 23, 1, 2007, pp. 63-92.

103. See with relevant case law, MORITZ RENNER, Towards a Hierarchy of Norms in Transnational Law?, *Journal of International Arbitration*, 26, 4, 2009, p. 538.

104. AUKJE VAN HOEK, Private Enforcement and the Multiplication of Legal Orders, in *Multilevel Governance in Enforcement and Adjudication*, Antwerpen, 2006, p. 320.

105. Joined Cases C-402/05 P & C-415/05 P, Yassin Abdullah Kadi & Al Barakaat Int’l Found. v. Council & Commission, 2008 E.C.R. I-6351.

106. A buffer zone is commonly understood as *an area that separates* fighting armies and here I use the expression to convey a similar meaning when applied to conflicts of jurisdiction between two different courts.

acts with the basic constitutional charter, the Treaty, which established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions. An international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the Community legal system, observance of which is ensured by the Court by virtue of the exclusive jurisdiction conferred on it by Article 220 EC, jurisdiction that forms part of the very foundations of the community.<sup>107</sup>

On similar terms, Advocate-General Maduro relied, in its opinion, on seminal European cases *Van Gend en Loos* and *Les Verts*,

It considered that the Treaty had established a ‘new legal order’, beholden to, but distinct from the existing order of public international law. In other words, the Treaty has created a municipal legal order of trans-national dimensions, of which it forms the ‘basic constitutional charter’.<sup>108</sup>

While paragraph 288 says that the ruling “would not entail any challenge to the primacy of that resolution in international law”, the truth is that the *Kadi* ruling establishes for now, the primacy of community law over international law whenever the legal situation involves community law.

Similarly, in *Bosman*,<sup>109</sup> the ECJ has asserted its authority over what is traditionally taken to be (together with *lex mercatoria*) a paradigmatic example of autonomy from state-law like arrangements: the world of sports.<sup>110</sup> Here, the European Court of Justice changed footballers’ transfer rules allowing players to look freely for a new team when their contract is over. Thereby, the ECJ protected the player’s *freedom of movement* impaired by the previous transfer rules requiring an agreement – transfer fee – between the old and the new teams. This case is interesting because UEFA has argued in favour of sports autonomy,

UEFA argued, inter alia, that the Community authorities have always respected the *autonomy of sport*, that it is extremely difficult to distinguish between the economic and the sporting aspects of football and that a decision of the Court concerning the situation of professional players might call in question *the organisation of football as a whole*. For that reason,

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107. Joined Cases C-402/05 P & C-415/05 P, Yassin Abdullah Kadi & Al Barakaat Int’l Found. v. Council & Commission, 2008 E.C.R. I-6351.

108. European Court of Justice, Opinion of Advocate-General Pöiares Maduro, C-402/05, *Kadi*, 2008, paragraph 21.

109. Case C-415/93 *Union Royale Belge des Sociétés de Football Association ASBL v Jean-Marc Bosman* [1995] ECR I-4921.

110. CESARINI SFORZA, La Teoria degli Ordinamenti Sportivi e il Diritto Sportivo, *Foro Italiano*, 58, 18, 1933, pp. 1381-1400. And GUNTHER TEUBNER, “Global Bukowina”: Legal Pluralism in the World Society, in *Global Law Without a State*, Aldershot; Brookfield, 1997, pp. 3-28. For a more skeptical take along the lines defended throughout this section, see LORENZO CASINI, The Making of a *Lex Sportiva* by the Court of Arbitration for Sport, *German Law Journal*, 12, 5, 2011, pp. 1317-1340.

even if Article 48 of the Treaty were to apply to professional players, a degree of flexibility would be essential because of the particular nature of the sport.<sup>111</sup>

To which the Court replied upholding the applicability of the fundamental freedom of movement to “associations or organisations not governed by public law.”<sup>112</sup>

#### 5.4. *Synthesis: Horizontal and Vertical Principles of Social Organization*

It is now easy to see how misconceived systems theorists’ claims are. The examples of international arbitration and European case law show that there is not a single principle - horizontal - of social differentiation in world society. Rather, even if we accept that society is functionally differentiated, the legal system still seems to be based on *territorial differentiation* which has now jumped to the European level. As we have seen, fundamental rights allow territory-based legal orders to assert hierarchical claims over supposed autonomous normative orders. This takes us to a related point.

a)

The conceptualisation of global law by systems theorists is fundamentally *static* because it derives systems autonomy from their capacity to produce and enforce law of its own in normative isolation and insulation. Teubner provides a typical statement,

Thus transnational contracting has created *ex nihilo* an institutional triangle of private ‘adjudication’, ‘legislation’ and ‘contracting’.<sup>113</sup>

It is patent how a persuasive theory of law needs to account for dynamic aspects. Whereas systems theorists are right in emphasising that much law is privately produced and enforced,<sup>114</sup> they assume too much from it. Indeed, they analyse each system’s claim for autonomy without further engagement with counter and hierarchical claims by other normative systems. The fact that normative spheres follow logics of their own is of no excuse to fail to consider how the communication they generate connects to the existing functional legal system. In similar vein, Calliess & Zumbansen wrote,

As noted above, a private legal system which is able to assume the functions of a public legal system in enabling market governance, should bun-

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111. Case C-415/93 *Union Royale Belge des Sociétés de Football Association ASBL v Jean-Marc Bosman* [1995] ECR I-4921, paragraph 71, emphasis added.

112. Case C-415/93 *Union Royale Belge des Sociétés de Football Association ASBL v Jean-Marc Bosman* [1995] ECR I-4921, paragraph 10, emphasis added.

113. GUNTHER TEUBNER, “Global Bukowina”: Legal Pluralism in the World Society, in *Global Law Without a State*, Aldershot; Brookfield, 1997, p. 17.

114. More examples in GUNTHER TEUBNER, *Constitutional Fragments*, p. 55.



dle private governance mechanisms, which fulfil legislative, adjudicative, and enforcement functions into an effective and operational regime. Among these three functions, the enforcement mechanism is crucial for the contention that a private legal system operates autonomously from state law.<sup>115</sup>

They fail to mention, however, that even if private legal systems have their enforcement mechanisms, this does not do away with the fact that their communication can still be coded by the *official* legal system.<sup>116</sup> Authors writing on “new” legal phenomena seem to forget old lessons since they fail to realise that their attempts legitimise the understanding of Mafia-like normative orders as properly legal. While this could satisfy taxonomy *aficionados* it would do little to describe the current role rights and substantive values play in the idea of a legal system. Furthermore, it would ignore the way in which a rights-based order works *ex post* as a sort of liability rule, i.e. encroachments are not limited *ex ante* as in property rules.<sup>117</sup> Therefore, it is difficult to deny the *publicness* of the state’s legal system intervention.

b)

Teubner seems to admit that constitutional law and “substantive constitutional principles” like fundamental rights or limits to competition exert an irritation function as legislative limits but today the most important action is that exercised by courts precisely because rights and constitutional principles are tokens of the potentiality of legal intervention. At any time, system operations can be disrupted and reshaped by active courts applying the constitutional, or just legal, code of law. Teubner wrote on the power of the state to refuse enforcing awards,

The courts decisions are and remain operations of the relevant national law, but they participate at the same time in the lawmaking of the autonomous regime. This dual membership in different chains of operations is not unusual ... This leads to an entwinement – but not a fusion – of national and transnational legal orders. The judicial sequences only ‘meet’ for a moment in the concrete judicial ruling; their validity operations otherwise have very different pasts and futures in their respective legal orders.<sup>118</sup>

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115. GRAF-PETER CALLIESS / PEER ZUMBANSEN, *Rough Consensus*, p. 120. See also THOMAS SCHULTZ, *Transnational Legality: Stateless Law and International Arbitration*, Oxford, 2014, p. 146, “Enforcement jurisdiction ... is clearly the trickiest part for stateless orders.”

116. Again, the central question becomes, “what is the relevant system for the purposes of the analysis?”. Systems theorists do not seem to realise that territorially integrated legal systems claim authority over any other system’s legal communication. Contrary to systems theorists’ belief, systems are not *a priori* horizontally integrated or this fact does not preclude their potential episodic integration in a vertical order.

117. I am alluding to the notorious distinction between liability and property rules elaborated by GUIDO CALABRESI / DOUGLAS MELAMED, Property Rules, Liability Rules and Inalienability: One View of the Cathedral, *Harvard Law Review*, 85, 1972, pp. 1089-1128.

118. GUNTHER TEUBNER, *Constitutional Fragments*, p. 130.



The question of course is a different one: they both apply their decisions but at stake there is a question of authority in the exchange with the official legal system and possibilities for control. The legal code ensures that the decision can be scrutinized by local courts and thus that *hierarchy* can be injected in the system at any time whenever necessary to uphold basic values. Nothing could be more different than the neutral horizontal apolitical perspective painted by Teubner. With such an attitude what arises is a downgrading of control possibilities in favour of the understanding that they live separate lives.

This is so, first, because by picturing transnational/global law as a normative space located outside of domestic and international law systems theorists assume that enforced global law cannot be connected to other normative spheres.<sup>119</sup> Secondly, and in related fashion, systems theoretical accounts dislocate the debate from legal pluralism to pluralism of legal orders. The difference being that the latter emphasises competition among different normative orders, grounded on distinctive institutional apparatuses.<sup>120</sup> Since this was the situation when canon and civil law constituted the *ius commune*, authors now speak of a new medievalism. However, because the state was not omnipresent and unitary then (as it is now), this immediately points to a conceptual problem: once the state exists and can be resorted to, global law ceases to exist in a vacuum.

To be sure, Teubner acknowledges that recognition needs to be sought from other normative systems but the latter is not constitutive of their existence.<sup>121</sup> Once again, this depends on the system one has in mind. It is obvious that social norms *exist* without any official recognition but that is hardly an interesting and novel question, i.e. there was always a great deal of privately made law.<sup>122</sup> The controversial point is whether these private normative spheres are independent or not from external regulation and how they are managed and connected to networks of decisions by territorially integrated legal systems.

The examples advanced here have illustrated how fundamental rights ensure that the communication produced in these transnational bodies *can* be subject to legal oversight. However, this is only visible, if one accepts that the global legal order can also abide by hierarchical principles of organisation. Teubner's view, over-determined by the theory of social differentiation, cannot. Therefore, by reifying global order's spontaneous and private origins as refractory to external control, he thereby frames the scope for agency in artificially narrow terms: either self-regulation or the still unfeasible alternative of global constitutionalism.

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119. In other words, spatial and materialistic representations of normative spheres should be abandoned. For the relationship between cartography and conceptualisations of law, see FRIEDRICH KRATOCHWIL, *Of Maps, Law and Politics: An Inquiry into the Changing Meaning of Territoriality*, *DIIS Working Paper*, 3, 2011.

120. For an historical example, see PAOLO PRODI, *Una Storia della Giustizia: Dal Pluralismo dei Fori al Moderno Dualismo tra Coscienza e Diritto*, Bologna, 2000.

121. GUNTHER TEUBNER, "Global Bukowina": Legal Pluralism in the World Society, in *Global Law Without a State*, Aldershot; Brookfield, 1997, p. 19.

122. DAVID V. SNYDER, Private Lawmaking, *Ohio State Law Journal*, 64, 2003, pp. 371-448.

## 6. Conclusion

Problems are never natural since they need to be constructed by means of concepts and thus language. In this article, I have strived to examine the ways in which the problem of transnational law is built from a systems theory of world society standpoint and how such a conceptualization readily imposes on us that global legitimation through politics or ethical reflection is a noble dream and that only system self-regulation through the increase of external pressure is possible.

By means of conceptual argument, I have shown how the evolutionistic account of both the functional differentiation of society and the emergence and autopoietic reproduction of transnational organizations and law are not in any way natural. Furthermore, I have demonstrated how the interaction between transnational organizations and regional territorially integrated legal and political systems (like the EU) provides for different control opportunities of the transnational world. While this is certainly no absolute novelty, calling attention for the role of regional bodies in the regulation of transnational bodies hopefully favours rescaling the place of agency in our current debates on the transnational, i.e. there is no need to jump straight from the state to the world level. Obviously the solution proposed is no panacea for the full range of problems plaguing transnational normativity. As a judicial solution premised on strong domestic and regional courts, it clearly does not deal with the law-making aspects that some of the criticized projects want to deal with. Instead, it relies on an avowedly *ex post* approach. But it does so for justified reasons. Absent inclusive institutions and deep consensus on values, procedures and application cultures, any “global” project, such as Global Administrative Law, will risk becoming international law 2.0 or, in other words, another Western product. Furthermore, appeals to politics may well crystallize the old institutions in place. Thus, mine is an interim solution that aims at reminding that courts have the privileged position for meaningful agency.

At the same time, the EU is proposed as a model to emphasize not its contents but the functional role it has been developing: creating a buffer zone that subjects global values or autonomous spheres to regional ones. This ensures a middle step between state and world and thus allows a more realistic and thicker integration and experimentation in common values. Once again, this is no panacea. There is no regional institution quite like the EU (and the latter is heavily contested these days) but again the point is to stress regional alternatives to the apparent necessity of global solutions. Furthermore, recent regionalist impetus embodied in the New Development Bank, the Asian Infrastructure Bank, discussions on the ASEAN court or the Arab Court of Justice and the 2014 BRICS Fortaleza Declaration all point to a recrudescence of *the regional*. Only a pluralist approach that develops regional characteristics over time can create a regime of trust and equality in transnational affairs and create the conditions for impartial and reciprocal learning among regions. Or, at least, simple acceptance of regional pluralism in the control and monitoring of the transnational normative space. One that cannot certainly take place within our existing arrangements supplemented by global values.

Finally, this article wishes to say something too on the task of conceptualization and method in studying social phenomena. As much as we always rely on frameworks and an array of assumptions when carrying out research, I hope to have highlighted some of the dangers of replacing mere deduction of a given theory's logical consequences for careful conceptual analysis. At the same time, and on the other end of the spectre, this article tries to alert too to the dangers of conceptualism and conceptual inflation. While conceptual sophistication is needed and it is indispensable to make sense of social and academic discourse, we should also hold close to Latour's advice – "Just describe" – addressed to the graduate student that consults him on the framework he ought to adopt for his thesis,

S: He [the thesis supervisor] always says: 'Student, you need a framework.'

P: Maybe your supervisor is in the business of selling pictures! It's true that frames are nice for showing: gilded, white, carved, baroque, aluminum, etc. But have you ever met a painter who began his masterpiece by first choosing the frame? That would be a bit odd, wouldn't it?

S: You're playing with words. By 'frame' I mean a theory, an argument, a general point, a concept—something for making sense of the data. You always need one.

...

S: But you always need to put things into a context, don't you?

P: I have never understood what context meant, no. A frame makes a picture look nicer, it may direct the gaze better, increase the value, allows to date it, but it doesn't add anything to the picture. The frame, or the context, is precisely the sum of factors that make no difference to the data, what is common knowledge about it. If I were you, I would abstain from frameworks altogether. Just describe the state of affairs at hand.

S: 'Just describe'. Sorry to ask, but is this not terribly naive? Is this not exactly the sort of empiricism, or realism, that we have been warned

against? I thought your argument was, um, more sophisticated than that.<sup>123</sup>

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123. BRUNO LATOUR, *Reassembling the Social: An Introduction to Actor-Network-Theory*, Oxford, 2007, pp. 143-144.