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Número 3, 2015  
ISSN 2183-184x

**E-PÚBLICA  
REVISTA ELECTRÓNICA DE DIREITO PÚBLICO**

**[www.e-publica.pt](http://www.e-publica.pt)**

## THE SINS OF FUNCTIONAL DIFFERENTIATION: A COMMENT

### OS PECADOS DA DIFERENCIAÇÃO FUNCIONAL: UM COMENTÁRIO

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**Abstract:** In his paper Gonçalo Vasconcelos Vilaça addresses several critiques concerning the systems theory's answer to the legitimacy problem of transnational law. This answer, according to him, could be summarized by the by the label "let's do nothing" (or "let us leave it to the systems themselves"). The critique I find particularly worth of exploring is the pointing out the social systems theory's allegedly implicit normative claim that functional differentiation and autopoietic systems "ought to be maintained, never short-circuited". Can we adequately confront global risks and the expansive tendencies of the economic system just by means of such a modest normative claim?

**Keywords:** international and transnational systems of law; functional differentiation; Niklas Luhmann; social systems theory.

**Sumário:** No seu texto, Gonçalo Vasconcelos Vilaça aborda diversas críticas à resposta dada pela teoria dos sistemas sociais ao problema da legitimidade do direito internacional e transnacional. Tal resposta poderia ser resumida, segundo o autor, através do dito "não façamos nada" (ou "deixemos que o problema seja resolvido pelos próprios sistemas sociais"). Talvez a crítica mais relevante desenvolvida pelo autor consista na alegada pretensão normativa implícita na teoria dos sistemas sociais segundo a qual os sistemas autopoieticos e a diferenciação funcional "devem ser mantidos e nunca sujeito a curto-circuito". Mas poderão os riscos globais e as tendências expansivas do sistema económico ser confrontadas adequadamente apenas na base de tal pretensão normativa?

**Palavras-chave:** sistemas jurídicos internacional e transnacionais; diferenciação funcional; Niklas Luhmann; teoria dos sistemas sociais.

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1. In his paper Guilherme Vasconcelos Vilaça intends to address one of the two main strategies by means of which, according to him, academics have proposed to deal with the legitimacy gap of transnational legal practices. This is self-regulation, as explored by Gunther Teubner from a system theory's perspective. The other strategy consists of the creation of global political institutions and principles. The author summarizes the two projects, respectively, by the labels "let's do nothing" (or "let us leave it to the systems themselves"), and "let's go global".

As underscored by GVV the "let's go global" project "is too ideally settled" since it premises the need of global values and politics in a context of political underdevelopment and profound ethical disagreement. In fact, the "let's go global" project is still trapped under the quandaries of cosmopolitanism. Being that as it may, GVV chooses to concentrate on the systems theory answer to the legitimacy problems of transnational law.

I shall concentrate my comments on the critiques GVV addresses to social systems theory. These are fourfold: (i) first of all functional differentiation insufficiently recognizes agency in constituting the international and transnational systems; (ii) second, functional differentiation assumes horizontal coordination as the only principle of social organization, disregarding the possibility of social differentiation according to a territorial-vertical principle; (iii) third, functional differentiation does not acknowledge that a transnational system of law can impose hierarchical order; (iv) fourth, social systems theory fails to see the fact that it is history, not theory, which accounts for evolution.

These critiques are specifically addressed to social systems theory view of the international and transnational orders but they have a larger scope. They can be presented as critiques of functional differentiation as a theory of law and society in general. Let me consider each of the aforementioned critiques in turn.

2. Concerning the first critique GVV argues that for social systems theorists institutions like FIFA, WTO or WHO "simply emerge" and develop an agenda of their own, like biological organisms. These institutions were never really created or, at least, "such a creation should never be read as constitutive/political/agentive moment but rather as a mere effect in/for the legal system". Social differentiation cannot be avoided or undone. In Luhmann's words, "the sin of differentiation can never be undone. Paradise is lost"<sup>2</sup>. This seems to GVV to be "inescapably reductive".

At a later point in his career Niklas Luhmann described his conception of society as "radical anti-humanist"<sup>3</sup>. By this he certainly meant a dismissal of human

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2. Cf. NIKLAS LUHMANN, *Die Wirtschaft der Gesellschaft*, Frankfurt am Main, Suhrkamp, 1988, p. 344.

3. Cf. NIKLAS LUHMANN, *Die Gesellschaft der Gesellschaft*, Frankfurt am Main, Suhrkamp, 1997, p. 35. On this see also HANS-GEORG MOELLER, *The Radical Luhmann*, Columbia University Press, New York, 2012, pp. 5 e 19 e ss.; ESTELLE FERRARESE, *Niklas Luhmann, Une Intro-*

agency. However Luhmann, and social systems theorists in general, reject the individual as a transcendental, not as an empirical phenomenon<sup>4</sup>. Theories of public deliberation, for instance, are criticized by systems theory because even if they claim to include every individual in a free and equal way, they cannot succeed in avoiding exclusion. Those theories place themselves on a transcendental level but cannot avoid that on an empirical level the exclusion of many individuals exists in a large scale. Regarding Habermas' theory of political deliberation open to all participants, Luhmann asks "where are the many who simply do not want; who cannot want; who suffer from depression; who assess their prospects negatively; who want to be left alone; who have to struggle to their physical survival to such a degree that there is no time or energy left for anything else"<sup>5</sup>.

Functional differentiation is perhaps the price to be paid for the disappearance, with modernity, of a principle of differentiation based on social stratification, or hierarchy. But this also means that the individual is no longer in control of society. The very category of control is eradicated from Luhmann's conception of society because there is simply no entity of which such control can be predicated. In fact Luhmann conceives social systems, such as politics, economy, religion, etc. as self-producing by taking a nonhuman-centered approach. This means that only social systems act, not individuals. On this respect it is tempting to see social systems theory as a kind of social Darwinism. But there is a fundamental difference here: although functional differentiation is an effect of social evolution it is not in any way "better" than stratified differentiation. There is no progress in social evolution, as in the Enlightenment narratives of progress. For this reason it is more correct to see Luhmann as a post-Darwinian evolutionary theory, be it biologically or sociologically, for which development is contingent, rather than necessary<sup>6</sup>.

**3.** The second mistake of social systems theory, according to GVV, comes "from the assumption that only a single principle of organization subsists: horizontal functional differentiation". In other words, GVV criticizes the "assumption that outside the state there is only the functionally differentiated global society". Systems theorists claim that the process of accelerated differentiation of society into autonomous social systems encompasses not only the markets but also "science, culture, technology, health, the military, transport, tourism and sport, as well as, albeit in a clearly somewhat retarded form, politics, law and welfare; each of whose current developmental logic has today carved out an autonomous

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duction, Pocket, Paris, 2007, pp. 57 e ss.; IGNACIO IZUZQUIZA, *La Sociedad Sin Hombres: Niklas Luhmann o la Teoría como Escándalo*, Anthropos, Barcelona, 1990, pp. 229 e ss.

4. Cf. NIKLAS LUHMANN, The Individuality of the Individual: Historical Meanings and Contemporary Problems, *Essay on Self-Reference*, Columbia University Press, New York, 1990, pp. 113 e ss.

5. Cf. NIKLAS LUHMANN, Quod Omnes Tangit: Remarks on Jürgen Habermas' Legal Theory, MICHAEL ROSENFELD and ANDREW ARATO (eds.), *Habermas on Law and Democracy: Critical Exchanges*, University of California Press, Berkeley, 1998, p. 170.

6. Cf. HANS-GEORG MOELLER, *The Radical Luhmann*, pp. 74-75.

global system”<sup>7</sup>. But this cannot be the all story, GVV argues, because there are infra-global political communities, such as the EU, which follow territorial-vertical, not functional-horizontal, forms of differentiation.

I have my doubts that it’s possible to point out the EU as the basis of an argument against global functional differentiation, for two main reasons. First of all one can certainly ask how long will the Union be able to maintain itself without evolving into some kind of a federalist state (assuming it does not disaggregate itself in the meantime)<sup>8</sup>. But as far as it does not so evolve it can be argued that the EU has developed a specific type of constitutionalism as a way of connecting (by means of “structural couplings”) the systems of politics and law on a supra-national level. Furthermore the fact that the EU lacks a comprehensive political power favors the development of sectoral constitutions. As emphasized by Kaarlo Tuori “the two framing constitutions – the political and the juridical – are complemented by three sectoral constitutions: the economic, social and security constitutions”<sup>9</sup>. In this light European constitutionalism is a functionally differentiated constitutionalism.

4. GVV focuses next “on the case of international arbitration as well as the role of EU as territorial order both based on the power of fundamental rights to reach and discipline (potentially) all behaviors”. Transnational arbitration courts, as well as the European Court of Justice, can hierarchically impose the respect of human rights on the states. The problem is that the states can as well refuse to comply with those arbitral awards or judicial decisions by opposing to them competing constitutional claims. So such conflicts cannot be accurately described as manifesting a hierarchical relation but only a heterarchical one, according to which the coordination among the various actors is based on constitutional considerations<sup>10</sup>.

5. Finally, GVV criticizes functional differentiation on the count that it presupposes the dismissal of history in favor of theory in the explanation of evolution. Once again systems theory faces the accusation that it “hides important constitutive human choices”. In fact social systems theory rejects the view that we are self-conscious authors of our social achievements, as above mentioned. Luhmann, for example, considered the idea that the great political revolutions of

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7. Cf. ANDREAS FISCHER-LESCANO and GUNTHER TEUBNER, “Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law”, *Michigan Journal of International Law*, Vol. 25, 2004, p. 1006.

8. On this, see MARCELO NEVES, *Transconstitucionalismo*, Martins Fontes, São Paulo, 2009, pp. 107 e ss.

9. Cf. KAARLO TUORI, *European Constitutionalism*, Cambridge University Press, 2015, pp. 22-23. Tuori specifically acknowledges the influence of Luhmann’s ideas on this.

10. On the idea of heterarchy see DANIEL HALBERSTAM, *Constitutional Heterarchy: Constitutional Conflict in the European Union and the United States*, JEFFREY L. DUNOFF and JOEL P. TRACHTMAN (eds.), *Ruling the World? Constitutionalism, International Law and Global Governance*, Cambridge University Press, 2009, p. 337; see also MARCELO NEVES, *Transconstitucionalismo*, cit., p. 142, who speaks of “tangled hierarchies” in the sense of Hofstadter.

the Eighteenth Century were the deliberate product of a *pouvoir constituant* as an “illusion of feasibility” (“Machbarkeitillusion”)<sup>11</sup>. He sought to demonstrate that many major conquests of the French and American Revolutions in fact preceded them, just as Tocqueville has demonstrated that all major transformations in the state and administration attributed to the French Revolution were already a reality in the last years of the *Ancien Régime*. Luhmann would most probably agree with Tocqueville’s assertion that the main purpose of the French Revolution was to “accroître la puissance et les droits de l’autorité publique”, not to introduce and stabilize disorder<sup>12</sup>. The concept of constitution is presented by Luhmann as a reaction to the differentiation between politics and law, but this differentiation makes possible an “immense expansion of political power’s application range”<sup>13</sup>.

GVV finds particularly troubling systems theory’s claim that functional differentiation and autopoietic organization are necessary for the survival of social systems. On his view the motto of systems theory could read as follows: differentiate or perish. But could it not be the reverse? Too much differentiation can lead as well to perishing. As GVV notes, this fear is very much present in Teubner’s latest work, in which he “focuses on correcting the destructive tendencies of autopoietic systems”, particularly evident in the operation of the economic system and its expansive proclivity.

6. To sum up GVV presents functional differentiation in the context of systems theory as an example of a theoretical approach to the study of social phenomena which relies too much on conceptualization and deduction and too less on careful descriptive analysis. The final remarks on Bruno Latour are intended to stress this theoretical overburdening of social systems theory. However one could also point out that observation is precisely one of the main endeavors of systems theory, with the particularity that herein we have not only one point of view, but as many as there are different social systems<sup>14</sup>.

These critiques are, in a way, up to the point even if some of them rather summarize the main tenets of social systems theory, instead of revealing the inner flaws they may suffer from. From this last perspective what I find particularly worth of exploring is GVV pointing out the systems theory’s implicit normative claim that functional differentiation and autopoietic systems “ought to be maintained, nev-

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11. Cf. NIKLAS LUHMANN, *Verfassung als evolutionäre Errungenschaft*, *Rechtshistorisches Journal*, 9, 1990, p. 176.

12. Cf. ALEXIS DE TOCQUEVILLE, *L’Ancien Régime et la Revolution*, Préface, notes, bibliographie, chronologie par FRANÇOISE MÉLONIO, Flammarion, Paris, 1988, p. 114.

13. Cf. NIKLAS LUHMANN, *Verfassung als evolutionäre Errungenschaft*, p. 201. On a social systems’ perspective, see LUÍS HELENO TERRINHA, *The Under-Complexity of Social Rights*, *Lisbon Law Review*, 2015, p. 39: “Important to acknowledge is precisely this inner-political origin and nature of the Constitution: its legal form and the embodiment of legitimating principles are resources for the political system and for power to unburden from further justification. Power will, therefore, gladly submit to constitutional determinations in order to assure its own effectiveness and reproduction”.

14. Cf. NIKLAS LUHMANN, *Ich sehe was, was Du nicht siehst*, *Soziologische Aufklärung* 5, Westdeutscher Verlag, Opladen, 1990, pp. 228 e ss.

er short-circuited”. Social functional differentiation is, in fact, seen by systems theorists as a kind of invisible hand which, if left undisturbed, would generate by itself a general equilibrium between social systems and allow a harmonious development of society. But doesn’t the present economic and financial crisis evince a colonizing tendency of the economic system’s inner logic towards all other social systems? And is it possible to confront this colonizing drive of the economic system without a strong political reaction?

The fact is that Luhmann himself was much aware of these problems. As he wrote in an article published in 1997 (a year before his death), given the fact that we live in a polycentric society

“there is no longer a quasi-cosmological guarantee that structural developments within function systems remain compatible with each other. Science does not add knowledge to power but uncertainty and risk to decisions. Physics made it possible to produce the atomic bomb; the economy finds it profitable to use high risk technologies – both with enormous impacts on the political system. The free press changes politics into a turmoil of scandals and enforces and reveals hypocrisy as the typical style of political talk, and this leads to a widespread critique of the «political class» and to a decline of political trust. The highly efficient modern medicine has demographic consequences. The new centrality of international financial markets, the corresponding marginalization of production, labour and trade, and the transfer of economic security from real assets and first rate debtors to speculation itself, leads to a loss of jobs and seduces politicians to «promise» jobs (without markets?). The welfare state produces completely new problems for the legal supervision of politics and leads to deformations of legal doctrine that undermine the predictability of legal decisions. On the other hand, the corresponding judicial «legislation» of constitutional courts affects politics in a way that can hardly be called «democratic» (the degree of centralization of the emerging European Union will not be decided by the governments in London, Paris or Berlin but by the European Court in Luxembourg).”<sup>15</sup>

Several years before the financial crisis of 2008 Luhmann gave a very realistic picture of the economic system when he wrote: “The economic system has shifted its bases of security from property and reliable debtors (such as states or large corporations) to speculation itself. He who tries to maintain his property will lose his fortune, and he who tries to maintain and increase his wealth will have to change his investments one day to the next. He can either use new derivative instruments or must trust some of the many funds that do this for him”<sup>16</sup>. Even if he was able to see the “dark side of functional differentiation”<sup>17</sup> he was unde-

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15. Cf. NIKLAS LUHMANN, Globalization or World Society? How to Conceive of Modern Society, *International Review of Sociology*, Vol. 7 Issue 1, March 1997, p. 76.

16. Cf. NIKLAS LUHMANN, Globalization or World Society? How to Conceive of Modern Society, p. 67.

17. Cf. POUL F. KJAER, GUNTHER TEUBNER E ALBERTO FEBBRAJO (eds.), *The Financial Crisis*

tered in his conception of the role of sociology: “sociologists are not supposed to play the role of the lay-priests of modernity”<sup>18</sup>. Instead of letting themselves be dominated by the idea of a good or a better society, sociologists ought only to contribute to the self-description of society.

And what about global risks? According to Ulrich Beck if one considers that “modern society consists of functionally differentiated systems that can cope with self-generated risks only in the terms of their own specific systemic logics – the economy in terms of prices, politics in terms of majorities, law in terms of guilt, science in terms of truth, etc. – modern society cannot cope with environmental and other global risks”. Beck’s conclusion is that “contemporary society and its subsystems are incapable of coping with their most urgent, self-generated problems”<sup>19</sup>. At the same time Beck’s answer to environmental global risks, that is, the enabling of contesting movements does not seem much promising. On the contrary, systems theorists believe that enabling the smooth functioning of each social system’s inner logic is the only answer to these problems. Ecological problems must be, in a way, translated in each social system’s logic in order to be properly dealt within the logic of each system<sup>20</sup>. Even if global risks are not functionally differentiated society’s response to them must be so.

Perhaps global risks and the expansive tendencies of the economic system are the real sins of differentiation. But this does not mean that dealing with these problems by means of “a central and therefore ‘objective’ point of view” is still a possibility for us in the context of world society<sup>21</sup>. Once again, “paradise is lost”, perhaps specially here on Earth.

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in *Constitutional Perspective: The Dark Side of Functional Differentiation*, Hart Publishing, Oxford, 2011.

18. Cf. NIKLAS LUHMANN, *Globalization or World Society? How to Conceive of Modern Society*, p. 77.

19. Cf. ULRICH BECK, *World at Risk*, Polity Press, Cambridge, 2009, p. 193.

20. Cf. NIKLAS LUHMANN, *Ecological Communication*, The University of Chicago Press, 1989, pp. 115 e ss.

21. Cf. NIKLAS LUHMANN, *Globalization or World Society? How to Conceive of Modern Society*, p. 70.