

Constitutional sociology and corporations

A conversation with Gunther Teubner

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Introduction

Probably in one of his most pessimistic descriptions of the state of contemporary society and its possibilities of self-control, the German sociologist Niklas Luhmann wrote:

Today, the problem is much worse than before. We may continue with our habits and resort to moral claims that are as justified as ever. But who will hear these complaints and who can react to them, if the society is not in control of itself? And what can we expect when we know that the very success of the function systems depends upon neglect? When evolution has differentiated systems whose very complexity depends upon operational closure (and the paradigmatic case is, of course, the human brain), how can we expect to include all kinds of concerns into the system? (Luhmann, 1997, pp. 74-75).

Twenty years later, this situation has intensified. Society faces a crisis of transversal rationality that dilutes any attempt to orient social evolution from a given center. In this context, different social systems, organizations and transnational regimes (the fragments of the world society) operate globally and with high degrees of autonomy and indifference regarding the negative consequences of their operations on the socio-environmental environment. And although there are different normative at-

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tempts of building the unity of society in the global realm (Habermas, 2008; Höffe, 2010), the roots of this global rationality crisis do not rest, precisely, in the absence of political-democratic institutions capable of discipline the “transnational exercise of private power” (Watt, 2015). The problems of the orientation of the world society goes much further and lies in the intrinsically polytheistic character of modernity (Weber), that is, in non-reflexive social processes that derives from the different and particularistic rationalities that allow today to speak of functional differentiation (Luhmann, 1998; Teubner, 2012; Macareño 2018).

From a reformulated legal pluralism, Gunther Teubner has highlighted the relevance of constitutional devices when we have to deal with the negative consequences that derive from the operations of the functional systems (Teubner, 2012). From this perspective, each social system develops its own constitutional self-limitative elements in order to limit the compulsive growth of its partial communications. In this sense, his theory is concerned with the relationships between social systems and their socio-environmental environments. How do these constitutional processes arise? What elements promote their development in different systemic rationalities? How the sociology of constitutions can contribute to the understanding of these phenomena? These are some of the questions that will be addressed in this interview.

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Professor, thank you very much for your time. I would like to start with a general question. Twenty years after this diagnosis, how do you see the current situation of the world society regarding its possibilities of orientation or self-control?

Indeed, my earlier analyses focused on the fragmentation of society and the collision of different rationalities, which are today still major problems¹. However, I guess at the moment two different problems are taking over. One problem is the anti-global renationalization movement from both the radical right and from the radical left which I find quite disastrous regressive movements. Trump, Orban, Putin, Mélenchon are symbolic actors for this trend. Related to this is the decline of the United States, the decline of Russia and the success of China. Of course, the renationalization movements have some good reasons for their globalization critique. They have to do with great inequalities in different societies which are created by globalization. But you can't deal with the manifold problems of the globe by renationalization.

1. On the collision problems in the world society, see: “Regime-collisions: the vain search for legal unity in the fragmentation of global law” (Fischer-Lescano e Teubner, 2004).

What is necessary, instead, is social democratization of globalization itself. This is the new challenge.

The second problem is that the collision of rationalities is now translated into the digital sphere. You find in the internet and in many other digital activities conflicts between an economic orientation, a political orientation, a scientific orientation, a military orientation. And they are all trying to take over the digital field. “Net neutrality” is an interesting example. Economists would like to see here competition and price differentiation while for political reasons, for scientific reasons and for cultural reasons it’s rather destructive. Net neutrality is thus a hot constitutional issue in the digital area.

Digital constitutionalism is something which needs to be developed. Of course, we should not overestimate constitutionalism. It is not a panacea. It is difficult to assess what kind of effect digital constitutionalism will have on society and we need to develop a sober attitude toward constitutionalism. The historical example of the political constitutions can make us aware of what constitutionalism can achieve and what not. There are many failures of constitutionalism. South America knows those painful experiences of the so-called formal constitutions which failed also in other areas of the world. Political constitutions are a good guide for our assessment what we can expect from constitutions beyond the nation state and what they cannot achieve.

With notable exceptions sociology remained for a long time absent from disciplinary discussions concerning the constitutional phenomenon. However, in recent years, this topic has re-emerged as a field of sociological interest. Could you give us your opinion regarding this emerging field of research within sociology?

It is important to overcome the severe limitations of purely political theories as well as purely legal theories of constitutionalism. Sociology has important messages for constitutionalism. The relevant sociological messages come less from the Marxist tradition, today for example Hirshl and his concept of “juristocracy”, that sees in constitutions nothing but a historic compromise between conflicting forces in the class struggle (Hirschl, 2004). This is not wrong but trivial. Sociology has more important messages.

First message: functional differentiation as the overarching structure of modern societies is now expanding over the whole globe. What does this mean for constitutionalism? Nation state constitutions, the pride of the enlightenment, are shrinking today into partial constitutions in a whole array of different social areas of world society, which develop their own global constitutions: the economy, science, education, the internet.

Second message: autopoietic closure. Traditional political constitutionalism gave the wrong impression that politics could govern the whole of society, while sociology tells us that political constitutions can only constitutionalize the field of power politics. That's it. The point of autopoietic closure contradicts political and legal theories of constitutions. "Autoconstitutionalization" means that different social fields constitutionalize themselves via their own rationality and normativity and create their own institutional realities. Moreover, against the mainstream in constitutional law, it needs to be said, that the law is not the most important part of constitutions. Law has only a secondary role to play, it is only supportive for the self-constitutionalization of different social fields.

Third message: the role of paradoxes. Of course, the constitutional paradox of self-foundation has been present in political theories of constitution, but I think the sociology of paradoxes has brought about an enormous richness of ideas and analyses of how paradoxes are coming about and how they are dealt with in different social contexts. For example, the role of traditional rule hierarchies to overcome the paradox of self-reference and their replacement by the center/periphery in global contexts. Another example, the role of externalization: how law gets over its own paradox of self-referential normativity by externalizing it via the constitution into politics, and vice versa, how politics externalize its paradox of unconstrained sovereignty into the law and its procedures. Such a mutual externalization of paradoxes takes place not only in the state constitutions, coupling law and politics but also in various societal constitutions coupling law and the economy, law and science and so on.

I think these are just three important avenues how sociological analysis brings new impulses to constitutionalism.

Professor Teubner, I would like to address some specific points about your theory. We could start with the definition and explanation that you provide about the phenomenon of constitutionalization. If I understood correctly, you affirm that societal constitutionalization is a process of double reflexivity through which the reflexivity of a given social system is structurally coupled with the reflexivity of law (Teubner, 2012). In this aspect: What do you understand by reflexivity? According to what logic or principle does reflexive self-control proceed in systemic rationalities if they can only think about themselves?

You pose a good question: "If they only think about themselves". This gives the impression as if constitutionalization would be exclusively inward looking, would be almost autistic, narcissistic, egoistic, in short, only self-centered. In my view this is a misunderstanding. What is meant by reflexivity from the times of idealism? German idealism theorized about the individual human subject which reflects upon the

subjects' position in the context of the whole society and upon the question of how the subject reconstructs society in its inner world with the subject's concomitant duties toward society. This is meant by reflexivity, but it cannot be limited only to the reflecting human subject but needs to be expanded to collective actors and other communicative processes that begin to think about themselves, to talk about themselves and their responsibility within society.

Moreover, I would suggest distinguishing different types of reflexivity in the context of constitutionalization. The first type is cognitive reflexivity: one is trying to understand the world from one's own perspective and give a cognitive analysis of the world and one's role in it. The second is normative reflection: what should be the role of a social system in the broader context of society? What should be the contribution to other systems, to other people, to the environment? And what is its role in the whole society. Normative reflexivity is important for constitutions, however, the third type called medial reflexivity is the decisive thing. When the medium of communication which is specific to each social system (power in politics, money in the economy, rules in law, digital operations in the internet) begin to communicate about themselves in a reflexive way, this is the starting point for constitutions. Power applied on power: the division of powers within the state, or human rights as a limitation of power. Or money on money: the central banks are not primarily using power or rules but monetary operations upon the ordinary monetary operations. Law on law: supreme courts use secondary rules in order to influence the primary rules that ordinary courts are applying. This medial reflexivity is the central aspect of constitutions. Whenever a medium of communication is formalized in the sense of reflectively applying its medium of communication upon itself, then we see the beginning of a constitution.

In order to understand the social crises derived from the infamous tendencies of expansion of function systems – the diabolic side of the medium as would say Luhmann – you have developed a thesis about the compulsive self-destructive growth of communication. In this regard, how is it possible to distinguish between “necessary growth-dynamics and pathological growth-excesses” in social systems (Teubner, 2011)? How and under what structural conditions the “dark side” of a medium (money, power) is distributed in a system?²

There is the temptation of scientism toward this problem. Science is supposed to be in a position to make a precise diagnosis: from which moment on are the expan-

2. For a theory of the crisis in complex social systems, see Mascareño (2017).

sionary tendencies of social systems become pathological? Not only diagnosis but also therapy. Science is supposed to be in a position to prescribe a therapy against expansionism. But I think this is an overestimation of what science can do. Draw the parallel to addiction, to excessive drinking, smoking and drugs. Then you will see that it is not an objective analysis, rather the subjective experience of the addicted person which defines the dividing lines of a pathological as opposed to a healthy development. Neither sociology nor economics nor law have the capacity to determine the limits of healthy growth. Rather this is a political experience of social practice. We experience collectively the pathological effects of systemic expansion and we experience them as different from one situation to the other. "Hit the bottom" is the idiosyncratic experience for individuals and for collectives when they suffer from addiction. They have to go down, down, down, until they experience the worst pains until they are able to develop the counter forces. This is a political or historical experience – it is a subjective experience if you want. The social sciences are not in a position to analyze objectively the point of return, they only can accompany the subjective perception. The social sciences can learn from the past of other pathologies, but they cannot really deliver objective criteria distinguishing healthy from pathological growth.

If constitutions are second-order norms, that is, norms for the creation of norms, how do the constitutions deal with the structural changes of their environment, and, in particular, with the contingency of the crisis? Can constitutionalization processes exclude the possibility of future crises?

I think the answer is no: you cannot exclude it. This would be again an overestimation of science: whenever we develop the analytical tools then we also can foresee the crisis will happen and develop adequate remedies. It is like in evolution. Evolution theories cannot predict. But what they can do is to learn from past catastrophes and to learn how potential catastrophes have been avoided in the past. We are able to reflect upon how in certain cases constitutions have learnt from the failures of past societies. Human rights as an antidote against totalitarian tendencies as we have experienced with Hitler and Stalin are part of these learning experiences. For the future a kind of extrapolation of existing trends is possible so that we can identify certain crisis tendencies and then try to fight them. Social theory can deliver interpretation schemes, for example, the theorem of expanding autopoietic systems, to analyze certain dangers within functional differentiation. But the future is not foreseeable.

The second part of your question concerns second order norms: can they really achieve something because they are only secondary rules, i.e. procedural rules and not

substantive primary rules? Indeed, secondary rules have no direct effect on human conduct: they influence processes only indirectly via procedures. Moreover, they tend to be rather abstract. Nevertheless, they can contribute to the responsiveness of a social system. One prominent example is the self-limitation of politics which is not achieved via primary norms telling politics where to draw the concrete limits of its expansion. Division of powers or human rights are second-order rules that delimit in an abstract way the realm of power application. Now, division of powers and human rights are constitutional impulses to transform a repressive state a liberal state. But the welfare state has different constitutional problems. For example, the tendencies of welfare politics to expand into society and spend money as much as possible. Thus, constitutional rules are needed (which many social democrats don't like at all), i.e. to create a ceiling on state expenditures. I think they are necessary antidotes against certain expansionist tendencies of the welfare state and they have constitutional value. Again, you see it is second-order rules, which create this self-limitation of politics. Another example is the digital world. Does it make sense to apply rules of economic constitutionalism to the new powerholder of the internet, particularly antitrust law? These rules are designed to fight self-destructive tendencies of markets that destroy themselves via monopolistic practices. Antitrust law is an interesting self-limiting mechanism of the economic constitution. Today we ask whether these second-order rules can be adapted to the new realities of the digital world. Amazon, Google, Facebook are obviously digital quasi-monopolies. But in difference to the off-line world these quasi-monopolies will out of necessity develop within the network structure of the digital world. Thus, economic constitutionalism would need to develop different tools against digital monopolies. Probably, it will not make sense to artificially reintroduce competitive structures, rather we need new rules for the public control of those powerful monopolistic intermediaries as the new constitutional reaction to new realities.

In a very interesting article about the relationship between social theory and law you wonder if, after the crisis of 2008, the imperialism of economic theory in the law would end (Teubner, 2014). Could you refer to this relationship between economic theory and law, and how does it particularly influence the processes of corporate constitutionalization?

I think the imperialism of certain social science theories in relation to other fields especially to law is not primarily a matter of scholarly disciplines but is induced by outside realities. If society is dominated by neoliberal economic practices, then this will lead to an intrusion of neoliberal economic theories into the law. But after the

financial crisis of 2008 you could observe a breakdown of this imperialism. Economic theories lost their credibility, public choice in political science, economic analysis of law in legal doctrine and rational choice in philosophy. In all these fields you had this domination of economic theories and suddenly after 2008 occurred the theory catastrophe: the interdisciplinary domination of economic theory was breaking down.

After this theory catastrophe a new orientation in law and legal theory is gradually developing – transversality. Law does not return to a solipsistic positivism but opens itself to a broader spectrum of social theories. You can observe this in the corporate world, for example in stakeholder theories. Under the domination of economic theory, nexus of contract theories of the corporation had reduced the complex institution of a corporation contracts between the different actors thus neglecting collective and organizational aspects as well as the public dimension of economic enterprises. Today we observe a return to institutional, i.e. sociological and political theories of corporate governance where the participation of stakeholders and the public responsibility of corporations play a more important role. But this is always connected to processes outside of social and legal theories. A similar theory catastrophe happened to Marxism. With the breakdown of the communist regimes in 1989 in the Soviet Union and China, Marxist theories in all their variations have lost a lot of their appeal in social theory as well as in law.

How does a self-destructive firm become reflexive and develop self-limiting structures in response to its environment? Alternatively, in Polanyian terms: how the re-embedding process occurs in the realm of corporations when what is “good” for a corporation is not necessarily good for society?

Here, a grave misunderstanding needs to be corrected. Self-limitation of corporations is never voluntary. It's totally unrealistic. Only some moral philosophers insist that out of their internal morality corporations should develop self-imitation³. My argument begins with what I call the “motivation–competence–dilemma”. It is only within the cooperation that professional competence, the technical knowledge and the organizational power exists to change things. But corporate actors have no motivation at all to change toward self-limitation. The natural tendency is expansion of the activities of the corporation, expansion of production, market share, power, profit. On the other side, outsiders, i.e. social movements, public opinion, political actors, possess a lot of motivation for limiting corporate expansionism but there is

3. About this argument, see Valentinov (2017).

a lack of competence. Which politician, which scientist, which protester is able to change the corporate structure? The consequence of this dilemma is the necessity of outside pressures for internal self-limitation. Without outside pressures nothing will move. This is the central role for the protest movements.

You call this learning pressures.

Learning pressure means compulsion to change. The role of the outside pressures in this learning process cannot be underestimated. But outside pressures as such don't help; they alone cannot produce constitutional change. Constitutional change is a capillary process; it needs to be done from the inside and here critical professionalism plays a role. Also, the universities have a role when they give the instruction to students not only about how the corporations work but also about the public role the corporations and about human rights and the corporations and all that. So, if the teachers educate students in this respect, the result may be the emergence of critical professionalism, a kind of opposition within the firm.

What function does moral communication play in this process? In what way do moral norms influence constitutionalization in the corporations? Or is this process, finally, developed only through positive law?

Neither morality nor law are the central institutions for corporate change; both are only supportive. Under favorable conditions morality itself, as I said, may play a role in critical professionalism, if the firm develops a culture of deviation such that whistleblowers are tolerated, and dissent is possible and internal opposition is appreciated.

The same is true for law. Law cannot create corporate responsibility. Since I am a lawyer, I always look to the role that law could play, but this should not be misunderstood. Habermas tends to criticize me: "Teubner thinks that the law is the dominant social system". This is nonsense. For me law has only a supportive role to play and the important things are social and economic learning processes within the corporation that may be supported by legal rules.

Why and how might the elements of Sinzheimer's conception of labour law, for example, can be respecified for current conditions of the corporations?

Sinzheimer is indeed important for economic and for corporate constitutionalism. He had rather radical ideas about transforming society, but at the same time, there

are elements in his thinking which are still important today. He is an early supporter of societal constitutionalism. He argued for an autonomous labor law and for a labor constitution. He even wrote elements of a labor constitution into the German state constitution in the 1920s. Moreover, Sinzheimer stressed the role of human rights, not only in the traditional sense invoking them against the state but with horizontal effects within the corporation. Finally, he developed ideas on society wide council democracy. He wanted to institutionalize those social councils on every level of society in a very formalistic way. His proposals for a society-wide institutionalization of social councils have been only partially realized by today. But if you look today into neocorporatist countries in Scandinavia you'll find something similar. It is not so much the institutionalization of social councils, rather it is cooperative arrangements in the triangle between the state, the labor unions and the economic enterprises which has a certain similarity to Sinzheimer's ideas. In a sense his heritage is present in European industrial democracy. If Northern Europe develops further its neocorporatist arrangements, Sinzheimer's ideas could still play an important role.

Could you explain what you understand by "self-limitative structures" in the context of corporations?

It is the internalization of public interests – societal interests but also interests of different social actors – within the profit-maximizing corporation. We talk about workers' participation and the involvement of other stakeholders. An important element is institutionalization of certain departments within the firm that are responsible for the ecology, for labor, or for compliance, or for the public interest of course, the "codes of conduct". This is an important institutionalization. And here again we have this ambivalence code of conduct can be just a pure window dressing without any effect whatsoever on the behavior of the firm. Just selling them as green or something. So again, the role of the outside pressure is so important so monitoring of codes of conduct by the NGO or a public interest litigation before that state's courts in order to check whether those codes of conduct are realized or not. This is an important thing to institutionalize self-limitative structure in the firm.

In your work you have recognized the influence of socio-economic contexts in the formulation and compliance of corporate norms. Could these socio-economic variables have an influence not only in terms of varieties of law but also in different types of constitutionalization? Can we talk about varieties of constitutions?

There are not one-size-fits-all constitutions which are suited to all types of social

contexts but an extreme variety of constitutions in correlation to the wide variety of the social contexts. The theories of “varieties of capitalism” are a good starting point for identifying concrete connections between the types of capitalism, which is developing in this or that region of the globe, and the type of economic constitutions or corporate constitution. For example, it is not by chance that in the European context bargaining participation was the core of corporate constitutionalism. While codes of conduct are more than American invention and are due to the more neo-liberal organizations of the markets and the competitive structures and all that so I’m sure that for each that’s the culture of capitalism in our world a different type of corporate constitution. And then comes in the kind of conflict collusion and competition between different constitutions like you have in the competition between the different varieties of capitalism today and so there is possible the possibility of learning of mixture of competition between different institutions.

Professor, thank you very much for this opportunity.

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Abstract

Constitutional sociology and corporations: a conversation with Gunther Teubner

The present work corresponds to a conversation held with the German sociologist Gunther Teubner. In it, the author addresses central aspects related to the sociology of constitutions and their contribution to the understanding of the negative effects of the dark side of functional differentiation. Gunther Teubner is professor emeritus of private law and sociology of law at the prestigious Goethe University. His work is widely known for his contributions to the field of the sociology of law, particularly for his theory of autopoietic law, the concept of reflexive law, and, currently, for his theory of societal constitutionalization.

Keywords: Constitutional sociology; Corporations; Functional differentiation; Reflexivity.

Resumo

Sociologia constitucional e corporações: uma conversa com Gunther Teubner

O presente trabalho corresponde a uma entrevista realizada com o sociólogo alemão Gunther Teubner. Nele, o autor aborda aspectos centrais relacionados à sociologia das constituições e sua contribuição para a compreensão dos efeitos negativos do lado negro da diferenciação funcional. Gunther Teubner é professor emérito de direito privado e sociologia do direito na prestigiosa Universidade Goethe. Seu trabalho é amplamente conhecido por suas contribuições para o campo da sociologia do direito, particularmente por sua teoria do direito autopoietico, o conceito de direito reflexivo e, atualmente, por sua teoria da constitucionalização da sociedade.

Palavras-chave: Sociologia constitucional; Corporações; Diferenciação funcional; Reflexividade.

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