

Interview with Gunther Teubner Frankfurt (Germany), December 2010

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It is said that a house often mirrors its owner and his soul. When I was invited by Gunther Teubner to interview him at his flat several days before Christmas in 2010, this tale came to my mind as the conversation came to a close. Teubner lives in a beautiful historical apartment, typical of the turn of the 19th century, located in the heart of Frankfurt, namely one of the world's leading financial centers. Its interior decoration is a perfect mix of original antique pieces (some going back to the Roman time) and modern furniture. Looking back at this interview, it is easy to find this parallel between Teubner's flat and his work: Teubner is not afraid of emerging himself in the classical dilemmas of legal thinking and when doing so, he does not refrain from rearranging certain basic ideas coming from German and European legal traditions. For instance, he tackles without hesitation one of the most classical (and therefore controversial) ideas for legal thinking, namely that of justice; and, in order to do so, he enters without much fear the classical debate of rationality vs. irrationality in law.

However, Teubner neither simply reinterprets classical issues nor merely sheds light on the traditional debates: Teubner is also a master at finding links between the traditional and modern designs of legal ideas and of making such connections relevant for legal thinking. An illustrative example is his use of Derrida's idea of capillary constitutions and its insertion into the legal discourse, i.e. in making it »accessible« to lawyers so that they can better understand the world in which they live.

Based on this relation to classical issues and their links to the modern debate, Teubner goes a step further, the step which makes him one of the European legal

1 I would like to thank Laura Carlson (Faculty of Law, Stockholm University, Sweden), for her work in transcribing and proof-reading this interview. I am also profoundly thankful to Andreas Maurer (University of Bremen, Germany) for his help through Teubner's immense bibliography and Alf Petter Høgberg (Faculty of Law, Oslo University, Norway) for always supporting and encouraging me in this task. Finally, a special thanks goes to the *Cassel Foundation* for financially contributing to my travels to Frankfurt as well as the *Stockholm Law Faculty's Trust Fund for Publications* and *DJØF Publisher* for financing the work of transcription and proof-reading. The footnotes in this article were added by the interviewer (after approval by Gunther Teubner) in order to clarify certain concepts, give bibliographically complete extended references of works named during the interview, or simply in order to suggest further reading.

thinkers who is known around the world regardless of legal culture and legal system. Similar to his flat, which is placed at the crossroads of the modern world financial market, Teubner has the gift of being able to locate and apply such a mixture of classics and modern within the heart of the contemporary phenomena affecting the legal world. Exemplary in this sense is his use of system theory in order to better understand (and therefore to better use) the shifting of modern law from being state-based into being a mixture of state and non-state regulations.

In this sense, our interview confirms one of the major qualities of Teubner's works, namely their capacity of acting as a bridge: a temporal bridge, since they allow lawyers to better understand the present and also contribute to a better future by using past knowledge; and a geographical bridge, since his work permits the East, West, North, and South of the legal world to discuss with each other, regardless of the position taken, the same issues and on the same terms.

Zamboni: *Prof. Teubner, I would like to start by describing your perspective when analyzing law and its interactions with the surrounding world. In order to do so, I pose a quite simple (and pretty unsophisticated) question: by looking at your work, do you consider yourself more as a legal theoretician, with a normative or prescriptive task (e.g. the one of providing lawyers and judges with directions in difficult cases) or a legal sociologist, with a more descriptive ambition of designing the actual relations between law and the social?*² *In other words, if you were forced to choose between two boxes, one with the label »external perspective of the law« and other the »internal perspective of the law,« where would you put your books and articles?*³

Teubner: I could answer that my books and articles are intended to be both a contribution to legal theory and to legal sociology, or in the alternative that none of these labels actually fully grasp the basic intention behind my work. But it would perhaps be better to say that my position is not purely theory or purely legal doctrine: my perspective is the one endorsed by sociological jurisprudence. However, your asking me to choose between legal theory and legal sociology actually brings to the surface a kind of paradoxical problem, i.e. the *impossible necessity of sociological jurisprudence*. It is impossible to choose in favor of legal sociology because law is a closed discourse and cannot be directly influenced by sociology: however, at the

2 A comprehensive and updated list of works by Teubner (with downloads) can be found at his web-page, namely http://www.jura.uni-frankfurt.de/l_Personal/em_profs/teubner/dokumente/pub_english.pdf. See also the list of Teubner's publications and editorials in Graf-Peter Calliess, Peer Zumbansen, Dan Wielsch, and Andreas Fischer-Lescano, *Soziologische Jurisprudenz – Festschrift für Gunther Teubner zum 65. GEBURTSTAG AM 30. APRIL 2009* 905-933 (Berlin: De Gruyter Rechtswissenschaften Verlag, 2009).

3 As to the distinction between the external and internal perspectives of law as used in this interview, see Herbert L. A. Hart, *Postscript*, in H. L. A. Hart, *The Concept of Law* 255-256 (2nd ed., Oxford: Oxford University Press, 1994).

same time, the law and its discourse are in urgent need of sociological illumination. So in this sense, my point of view as looking at the law is not a mixture of both legal theory and legal sociology, but is a hybrid, a hybrid orientation that respects the autonomy of both law and sociology, while working with a kind of division of labor. Sociology discovers structures and problems of law and society, giving certain directions for possible solutions, and then the law comes in with its own traditional way of thinking, namely legal doctrine, and then tries to develop normative perspectives.

This hybrid point of view is a paradoxical hybrid of both legal sociology and legal theory, but it is this very area of mutual irritation between the two, i.e. the indirect influences in the respect of their autonomies, that fascinates me: What happens when sociological analysis provokes or »irritates« legal doctrine?⁴ How does legal doctrine then react?

To give an example, the phenomenon of »networks« is pretty common both in sociology and economics. However, if we shift our attention to law, there we notice how law and its world cannot deal with networks because contract law does not fit into it, as neither does organizational law nor association law fit. So the question is: What do we do with it? This is a »provocation«, both by the reality of networks, but also by sociological and economic analyses: the law is provoked, or in other terms irritated, and it does not know how to react, or, if it does, it begins to react only with punctual exceptions to existing rules and doctrines. Actually, in the case of the network, the provocation is more profound, in the sense that this concept challenges the very way of how law develops concepts within its own tradition: law and its world simply cannot take over the network concept either from sociology or from economics.⁵ Law has to develop a conceptual construction of its own, which perhaps works for instance with the concept of connected contracts, and it has to rework the manifold problems posed by networks within the terms of legal doctrine.

4 As to Teubner's idea of »irritants« and how it works among different spheres, see, e.g., Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Differences*, 61 *Modern Law Review* 11-32 (1998).

5 As to the necessity of constructing a specific »legal« concept of network, see, e.g., Gunther Teubner, *Networks as Connected Contracts* (Oxford: Hart Publishing, 2011); Gunther Teubner, *Sociological Jurisprudence – Impossible but Necessary: The Case of Contractual Networks*, in R. Gordon and M. Horwitz (eds.), *Law, Society, and History: Essays on Themes in the Legal History and Legal Sociology of Lawrence M. Friedman* 367-394 (Cambridge: Cambridge University Press, 2011); Gunther Teubner, *Hybrid Laws: Constitutionalizing Private Governance Networks*, in R. Kagan and K. Winston (EDS.), *Legality and Community: On the Intellectual Legacy of Philip Selznick* 311-331 (Berkeley: Berkeley Public Policy Press, 2002); or Gunther Teubner, »*And if I by Beelzebub cast out Devils, ...*«: *An Essay on the Diabolics of Network Failure*, 10 *German Law Journal* 115-136 (2009), in particular as a criticism of the work by Karl-Heinz Ladeur.

And this, I think, is the creative moment characterizing the work of law in general and legal doctrine in specific.

Zamboni: *If I understand you correctly, your positioning is as a sort of connecting point between legal thinking and legal sociology. A question then forms in my mind: is a plausible explanation of your success in the transnational community the fact that your work brings to the surface that which international and transnational lawyers experience every day, i.e. their being constantly forced to push their thinking as lawyers to the borders of acting as sociologists or economists?*

Teubner: Well, this is a plausible explanation. As I have pointed out several times, I consider globalization as the great deconstructor, not only in law but also in politics and sociology: globalization is the great irritant perpetrator for all these disciplines. More specifically as to the legal phenomenon, the deconstruction produced by globalization is not simply limited to the position of law in regulating social fields, but is also extended to the inner structure of law. For example, the famous hierarchy of rules is now just destroyed.⁶ We have the famous *lex mercatoria* as the standard example of what happens with globalization, where the old Kelsenian hierarchy simply breaks down: here you have a deconstruction of the law which is not done either by Derrida or by Luhmann, but is done by globalization itself. In other words, the central focus of my work is, on one side, the observation of this deconstruction of law as produced by globalization, and on the other side, the identification and analysis of the new structures that are emerging. In performing this task, I think the combination of this double *optique*, of sociological analysis and legal analysis, can be quite helpful.

Zamboni: *You were speaking about globalization as the real deconstructor of the law. As to this point, I would like to ask you a quite straightforward question: if globalization deconstructs the law so much, what remains of the law itself as we traditionally have intended it? In other terms, does globalization deconstruct the law so much that in the end, law becomes something else?*

Teubner: One could think that globalization with its deconstructivist force has created this kind of potential peril for the law. One could think that the old strong position of law in all European societies will perhaps vanish and more or less wither away. However, I do not share this vision. One should just look at what happens at

6 See, e.g., Gunther Teubner, *The King's Many Bodies: The Self-Deconstruction of Law's Hierarchy*, 31 *Law and Society Review* 763-787 (1997); or Andreas Fischer-Lescano and Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 *Michigan Journal of International Law* 999-1046 (2004).

the global level: there one can observe instead a tremendous proliferation of law in its manifold realizations. We have the traditional public side, public international law, then we have new types of »private« law, which I in my view is an autonomous law that comes from the different globalized spheres themselves, and this is a kind of self-created law which now dominates the international scene. The law undergoes a process of transformation from a state centric law that was realized in the nation state (although it was never totally only state-centric), to a new global pluralism where new types of law, different from the old state-type laws, are emerging. Just think of the great role, soft law is playing today. And perhaps more important is what you may call the corruption aspects of the global law, because it is developing in such a close relation to the different social fields. It is so much influenced by them, that it becomes quite difficult to distinguish between »the corruption of the law« and its being »socially adequately responsive.« There is a very fine line between these two phenomena as attached to contemporary globalized law and, though some people may speak of the crisis of the law, I would rather see it in terms of transformation processes. In the end, in the age of globalization I think law will continue to play a very strong part, though a different one.

Zamboni: *You are certainly considered as one of the pioneers of the scholarship dedicated to the investigation of transnational non-state law, at least in the terms we discuss nowadays. Already during the late seventies a considerable part of your work was devoted to a systematic approach as to non-state law.⁷ Therefore I am curious about one thing: what in the late seventies made you believe in the idea that non-state law will become so dominant? And what were the signals that you could perceive so early that globalization was going to change so radically the way we nowadays perceive and use the law?*

Teubner: It was the glasses of autopoiesis theory which led me to view law in the interrelation between legal pluralism and the functional differentiation of society. If you put these two things together, one can see not only new aspects of law on the national scale; one can also notice, especially in the tendencies of transnationalization and globalization of law, how the pluralism in law and the functional differentiation of society make a new marriage. To answer your curiosity, I think that these two aspects somehow forced me into a sensitivity towards transnational law and its new qualities. So in a sense, it was a theory-guided exploration: Where is law an autopoietic system? Where are social norms transformed into these strange phenome-

7 See, e.g., Gunther Teubner, *Zu den Regelungsproblemen der Verbände: Neo-Korporatismus und inner-verbandliche Opposition*, 33 *Juristenzeitung* 545-548 (1978); or Gunther Teubner, *Neo-korporatistische Strategien rechtlicher Organisationssteuerung: Staatliche Strukturvorgaben für gesellschaftliche Verarbeitung politischer Konflikte*, 10 *Zeitschrift für Parlamentsfragen* 487-502 (1979).

na of non-state law, for example the internal law of groups or law of associations? While to other lawyers this was not law, if considered through the optics of system theory, I would have rather said »no, this is law, though a strange type of law.« It is here then that the *lex mercatoria* comes into sight as a genuine legal phenomenon on the global level.

It is true, from the very start of the discussion, one could easily notice the huge dynamic of globalization and everybody talked about it. However, the majority of scholars participating in the debate tended to look at legal globalization in different terms, as a consequence of either economic or technological globalization. For most scholars, it simply was a question of globalizing capitalism, that everything, particularly law and politics, depended on the globalization of the economy. For others, globalization was strongly connected with new ways of communication, where all the distances disappeared and we could communicate with everyone. When I started to look at the globalization of law, I realized that these economic and technological aspects were certainly present in globalization, but they were only partial aspects of it. Globalization also means the takeover of functional differentiation over the entire world, which means that law's globalization is a phenomenon in its own right. Then you can then easily witness its relation to legal pluralism.

Zamboni: *This reference to functional differentiation as a feature of modern globalization leads me to another, and more general, question. As you probably know, among your readers there is a huge hotbed of debate, namely your relationship to Luhmann and his theory. One could say that your readers are divided in two groups. For one group, you are the intellectual son of Luhmann, that is they claim that your theory of law is somehow a transformed application of Luhmann's general ideas.⁸ The members of the other group see it more instead as a brotherhood, that is they also recognize that there are obviously similarities and common elements between your and Luhmann's works, but these overlappings are due to the fact of your sharing a common environmental and cultural heritage.⁹ My question is then pretty simple: when it comes to the theoretical underpinnings of your work, do you feel more as a son or brother to Luhmann?*

Teubner: Well, to answer this question quite straightforwardly, I consider my relation to Luhmann as an intellectual father-son relationship, in the sense that in my

8 See, e.g., Sharyn L. Roach Anleu, *Law and Social Change* 45-47 (2nd ed., London: SAGE Publications, 2010); and also Hugh Baxter, *Habermas: The Discourse Theory of Law and Democracy* 187 (Stanford: Stanford University Press, 2011).

9 See, e.g., Christian Joerges, *Socio-Theoretically Based Legal Science and Critical Legal Studies: Points of Contract and Divergencies*, 12 *German Law Journal* 586-588 (2011) (in particular in the footnotes apparatus); or Brian Z. Tamanaha, *Understanding Law in Micronesia: An Interpretive Approach to Transplanted Law* 178-180 (Leiden: E. J. Brill, 1993).

work there is a clear element of taking Luhmann's theory as the basis. However, like for many father-son relationships, my bond to Luhmann is also characterized by ambivalence: it is a working with the father, against the father, and beyond the father. While the basis of my work is Luhmann's system theory, one should also immediately point out that there are deep differences between our ways of approaching the law. The most evident difference probably is my strong normative orientation, my ideas about sociological jurisprudence, in contrast to Luhmann's detached observational position. Moreover, on the theoretical level, there are perhaps even stronger differences when it comes to questions like justice. Both Luhmann and I agree in refuting Habermas' and Rawl's positions, and we both agree that the right way is to think about justice as a contingency formula. The break between us comes with what I call the transcendence of law, namely the idea that justice means self-transcendence of law. Here I am moving very close to Derrida's thinking, though I give Derrida a rather unusual system theoretical interpretation. For me what Derrida is doing at the end of his life, is creating a deconstructive analysis of functional differentiation, in particular when he looks at all the different institutions of modernity, law, politics, morality, and the economy. In my view, what he discovers everywhere is the self-transcendence of these institutions in a non-religious sense. This is where I move very close to Derrida, namely by considering justice as the non-religious self-transcendence of law.¹⁰ This feature of justice in relation to law leads then, in a strange loop backwards, to a kind of reverse effect that I call self-subversive justice: it leads back from justice into law and ends in a kind of problematic oscillation between the two poles of transcendence and immanence. So here I see strong differences between my and Luhmann's ideas of justice. More concretely, Luhmann has been quite skeptical of my ideas on reflexive law, the gradualization of autopoiesis, the hypercycle and the ultracycle in law and organization, and he would be skeptical of societal constitutionalism, horizontal effects of constitutional rights, democratization of social subsystems etc. But at the same time, I think I develop my concepts on the firm basis of Luhmann's system theory. One can observe that there are the *Luhmannites* and *Luhmannlings*, just like when it comes to Hegel and his followers, there had been the *Hegelites* and *Hegelings*.¹¹ In both cases, these are in-

10 See, e.g., Gunther Teubner, *Self-Subversive Justice: Contingency or Transcendence Formula of Law?*, 72 *Modern Law Review* 1-23 (2009); Gunther Teubner, *Dealing with Paradoxes of Law: Derrida, Luhmann, Wiethölter*, in O. Perez, G. Teubner (eds.), *Paradoxes and Inconsistencies in Law* 41-64 (Oxford: Hart Publishing, 2006).

11 *Hegelites* (or »Old Hegelians« or »Right Hegelians«) is the name attached to Hegel's followers that considered their main task to be the thorough application of his major ideas (e.g. Heinrich Gustav Hotho). *Hegelings* (or »Young Hegelians«) is the term identifying the group of thinkers who, inspired by Hegel's work, developed his ideas into new directions (e.g. Ludwig Feuerbach, Karl Marx or Bruno Bauer). See Karl Löwith, *From Hegel to Nietz-*

tellectual movements based upon these great masters and their ideas, trying to continue their work, with, against or beyond them.

Zamboni: *Moving now to your being the master of generations of legal scholars, my impression is that you have many more intellectual sons and daughters outside of Germany than in Germany. For example, you have very deep Teubnerian studies in Scandinavia, Benelux, France, Italy and England. Even in the US, for example, leading scholars like Duncan Kennedy and Lawrence Friedman have paid much attention to your work. In case I am right, besides the obvious academic fights, what are the intellectual and theoretical reasons behind the fact that you have much more success abroad?*

Teubner: I think you are right: I get, how shall I say it, a more responsive reception in countries other than Germany. I would also distinguish between different national cultures. For example, in South America, Mexico, Spain, and also Italy, there is a tremendous sensitivity to all the aspects I underline in my work. I would dare to say this has something to do with the Catholic culture: they are used to thinking in terms of impersonal forces, and not attributing everything to individual actors. I feel a much higher skepticism both in England and the United States, where the methodological individualism is entrenched in the culture. So it comes quite natural that scholars operating in the Anglo-American culture tend to resist taking seriously the autonomy of »systems« or »discourses.« One should not forget that in these countries, although they received the European tradition, they translated it at once into their individual-based culture. In the Anglo-American world, they do not take up the concept of discourse in its profound sense; the concept of system is also for them anathema. Looking at different legal cultural traditions, I see that there are strong differences as to the attention I have received.

Germany, as always, is a special case and looking at it, and the reception of my work, I think we have to start by considering it somewhat in terms of our dealing with a dark past. After the second world war, a kind of Habermasian metacoding governs the discourse and this metacode reasons in the following terms: »Is this a theoretical tradition which was contaminated by Nazi ideology or not?« This way of approaching and evaluating the different theories then leads to a kind of typical German exclusionary tendency, a kind of political censorship since the Nazis had amalgamated a huge part of German thought traditions into their crude ideology. For instance, it was impossible to take Nietzsche seriously for years, and he could only be rehabilitated via Foucault and Derrida. So I think we have this problem that we cannot open ourselves up enough to many valuable traditions in German thought because they had been usurped and perverted by the Nazis. Particularly the

sche: *The Revolution in Nineteenth Century Thought* ch. II (New York: Columbia University Press, 1964).

collective dimension of societies has especially been considered as being one of these traditions. Perhaps taboo is a too strong word, but I would say that the reluctance of thinking of societies in a non-individualist collective dimension has always been one of the strongest strands in German post-war thought. Systems theory in my view is the most advanced attempt to reformulate the old collectivist tradition, trying to bypass its historically discredited elements which have been couched in organicistic terms, for example. Luhmann was the person who, with his fundamental distinction between communication and consciousness as two independent sources of meaning, reformulated the collective identity of society, as against methodological individualism, in a new and fascinating way that had not been tried before in this radicality. And I think that here is one of the problems, if not paradoxes: while the recent German culture has been so reluctant in accepting Luhmann, giving rise to an almost spontaneous resistance against his system theory, his theory is deeply grounded in the very German tradition.

To conclude my answer, let us be clear on one point. This ideological rejection, both in Germany and abroad, of systems theory is due to a widespread misperception: I remember people saying in Germany and outside of Germany that systems theory is a theory of the concentration camp!

Zamboni: *The third point I would like to discuss with you is the focus of your work. To be purposefully provocative, after reading your work I have the impression that the usual targets of your theories are the economic segments of society, and their complex relations to legal regulation. For example, you have written books and articles on contract law, labor law, corporate law, and so on. Then my spontaneous question is the following: would your theories, for example on reflexive law, also be applicable to the legal regulation of non-directly economic areas of law such as family law or gender or race issues?*

Teubner: A superficial answer would be that I am a private lawyer and therefore my theories almost »naturally« tend to deal more with economic questions. However, at the more profound level, I would not accept the very premises of your provocative question, namely my focusing exclusively or mainly upon economic issues. Take for instance the case of expert liability, a theme I treat in my work.¹² An architect is to write an expert opinion as to a house being sold and is paid by the seller. The buyer is then harmed, and the question is whether he can get damages from the architect. This is simple economic law, one would imagine. My view of this is pretty different. It is a misperception that when facing expertise contracts we are dealing

12 See, e.g., Gunther Teubner, *Expertise as Social Institution: Internalising Third Parties into the Contract*, in D. Campbell, H. Collins and J. Wightman (eds.), *Implicit Dimensions of Contract: Discrete, Relational and Network Contracts* 333-364 (Oxford: Hart Publishing, 2003).

exclusively with economic problems. What I do instead is to analyze this case in its non-economic dimensions. Systems theory and reflexive law would lead us to fight the dominance of economic concepts in these cases: this is not simply a problem caused by incomplete contracting, weighing the economic interests between the actors involved, or »free-riding,« where the buyer free rides on the architect's expertise. Systems theory and reflexive law identify in expertise contracts the problem of the integrity of the expertise which is jeopardized by economic rationality. They would bring forth the basic idea that the architect is a part of the quasi-scientific community of experts who had to develop an expertise on the basis of neutrality and non-corruption. The argument then would be the other way around: the expertise contract is a phenomenon where there is corruption of expertise by the economic elements and where the expertise as a social institution, that is a non-economic institution, has to be protected against the corruption by economic rationality. If the law intervenes and imposes a quasi-contractual liability of the architect toward the buyer, it then creates a situation of double liability, a symmetrical liability, and it does this by correcting the asymmetrical liability of the seller paying the architect and to whom then the architect has a duty of loyalty.

Most of my dealings with law and economics go in the opposite way of the one you suggested in your question: my goal is that the law takes into consideration the non-economic rationalities that are present in these cases as against the current predominance of economic thinking in private law. The law needs to be liberated from this predominance and has to protect and strengthen the non-economic, the productive, the artistic, the scientific, the cultural, the expertise aspects in these cases. So usually, these are cases of colliding rationalities with dominant tendencies, today of the economic analysis of the law. My argument is that law is to resist and has to be responsive to the non-economic rationalities.

Zamboni: *I have another question related to this major goal of your work, namely bringing to the surface other rationalities in cases where the law appears to be molded exclusively around the paradigms of economic thinking. Your theories allow people who are interested in economic issues, for instance lawyers and legal scholars, to fall neither into the law and economics tradition nor into a critical legal studies approach. Is your systems theory popular because it allows lawyers and scholars to have an approach on economic matters that does not reduce the law either as a cost-benefit calculation or as »it is all politics« statement?*

Teubner: Yes, this may be one reason why lawyers respond to some of my ideas. I have my sympathies with the critical approach, but I then intend »critique« more in the Kantian tradition rather than, let's say, in the meaning elaborated by the Frankfurt school of the 1920ies and 1930ies. My goal is to develop what we could call the critique of functionalist reason, especially the critique of economic reason as the dominant functional reason today. This approach is based on a critique of the con-

temporary unilateral, one-sided domination of the private law discourse through economics. However, I do not just move to the other side, as many critical legal scholars do, in other words, I would like to overcome the wrong placed alternative: either law is economics or law is politics. It is more fruitful to think of law as being exposed to the collision of a whole variety of different rationalities in society. One should attempt, not a »solution« (that would go too far in overestimating the potential of law), but a way of coping with these different rationalities and of realizing legal justice in this relation among such different rationalities.

Zamboni: *Continuing as to the reception of your work by both the academic and practitioners' environment, I have heard at times criticism about your depiction of the law and its role in society, of being at the end of the day functional to a »conservative« program, i.e. by picturing and defending the role of the law, as the guardian of the status quo and by that, not leaving too much room for any radical legal reforms. As I have understood the criticism, nothing negative is meant by »conservative,« they simply stress that according to your theory, radical reforms in society are to take place within or through other systems, such as political or cultural systems.*¹³

Teubner: The problem, of course, is what is radical? If »radical« means a theory going to the roots of a phenomenon, then I would be a bit skeptical of this criticism. If we paint this whole discussion in somewhat problematical political colors, I tend to go in the direction of a clear idea of social democratic reform and revisionism: reform is the approach of social democracy that I think is the right way to go. By doing this, of course, I refute the Marxist radicalism of the revolution. It is true that Marx is »radical« in his diagnosis, but he »eradicates« the whole thing by his romantic ideas of the fusion of the different aspects of life. I should also add that social democracy is not radical enough insofar as it relies on the old idea of conquering the state apparatus via democratic voting, and then reforming society through the power of the state apparatus. This approach, I think, is the wrong way of tackling social democracy and it needs to be corrected by a more radical thinking. If one goes back in time a bit, already Antonio Gramsci said that social democracy and progressive thinking rely much too much on this conquering of the state apparatus; it is culture and the society that counts, this is there where the battle for the hegemony takes

13 See, e.g., from the classical critical piece by Erhard Blankenburg, *The Poverty of Evolutionism: A Critique of Teubner's Case for »Reflexive Law«*, 18 *Law and Society Review* 273-289 (1984), to the more recent one of Günter Frankenberg, *Down by Law: Irony, Seriousness, and Reason*, 12 *German Law Journal* 321 (2011) (speaking of a »secret passion for the status quo« by those embracing a theory of autopoietic systems).

place.¹⁴ Culture and society are the fields where the real things happen and, once again, the reformist agenda would then say yes, this is the crucial point: constitutionalizing society and its different social fields, and not simply relying on the political constitution of the state and then trying to reform society through the power of the state.¹⁵ Societal constitutionalism will lead in the end not only to constitutionality but to democracy. When I speak here of democracy, I do not mean it in the usual narrow sense, namely democracy in the state institutions, but in a broader and somehow deeper meaning, that is democracy in all the different societal institutions which, however, in their democratic structures and processes would be so different from the political ones. With this idea of societal constitutionalism I come close to the early Habermas. My ideas of societal constitutionalism are not so far from those Habermas promoted around the 1960ies in his structural transformation of the public sphere, in particular when he criticized parliamentary democracy for its undemocratic features and put all the expectations and hopes in the democratization of different institutions outside politics within society.¹⁶ However, since then, it appears to me that Habermas abandoned this program, perhaps as a reaction to badly conceived universities reforms, while I think this is the program to follow, though not in Habermasian discourse theory terms, but within with the theory of functional differentiation. Now, whether this is a radical agenda or not, I leave this judgment to the readers.

Zamboni: *Your recent work has clearly stressed your idea that the constitutionalization of different aspects of society is the way forward for democracy, rather than operating on state or political constitutions.¹⁷ Then my spontaneous question would be: has the state really lost most of its appeal, both to lawyers and legal scholars?*

14 See, e.g., Antonio Gramsci, *Selections from the Prison Notebooks of Antonio Gramsci* 12, 235-267 (London: Lawrence and Wishart, 1971).

15 See, e.g., Gunther Teubner, *Societal constitutionalism: Alternative to state-centred constitutional Theory*, in C. Joerges, I.-J. Sand and G. Teubner (eds.), *Transnational Governance and Constitutionalism* 15-20 (Oxford: Hart Publishing, 2004).

16 See, e.g., Jürgen Habermas, *Strukturwandel der Öffentlichkeit. Untersuchungen zu einer Kategorie der bürgerlichen Gesellschaft* (Berlin: Luchterhand Verlag, 1962), translated later in English in *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (Cambridge: Polity, 1989).

17 See, e.g., Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism in the Globalization* (Oxford: Oxford University Press, 2012); Gunther Teubner, *Self-constitutionalizing Transnational Corporations? On the Linkage of »Private« and »Public« Corporate Codes of Conduct*, 17 *Indiana Journal of Global Legal Studies* 617-638 (2011); Gunther Teubner, *Fragmented Foundations: Societal Constitutionalism Beyond the Nation State*, in P. Dobner and M. Loughlin (eds.), *The Twilight of Constitutionalism?* 327-341 (Oxford: Oxford University Press 2010); or Gunther Teubner, , 19 *Social and Legal Studies* 17-38 (2011).

Teubner: No, it has not, and I think here there are some exaggerations at work, and I am also partially responsible for them. Despite that in all my works I take for granted that the tradition of law is to a great extent a state phenomenon, and I take it for granted that in a globalization process, the nation states still play an important role and will continue to play an important role. There is no doubt about this and so I am underlining the fact that, even in the age of globalization, there is not at all withering away of the state. What I rather stress in my work is that one can observe a rearrangement of the relative weight of different institutions, on one side, the state and the political institutions, on the other side, the market, culture, science, education, art, the new media and different segments of society. There is a rearrangement of these arenas, and that is it. All the criticism of my writings in terms of »Teubner is throwing the state out of the picture,« and similar claims, this misunderstands my work and I think it is a great exaggeration. This misunderstanding probably has to do with my concentration mainly on non-state phenomenon, for example, *lex mercatoria*. I am fully aware of the other side of the coin, that is that there are many state law elements in the economic law of transnational relations: the nation states and their role in the development of commercial law, for instance through the 1958 New York's *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, all these elements of course play a role in the legal regulation of transnational economic relations, no doubt about it. However, these contributions by the states to the economic law of transnational relations are not so much what interests me: this is what we already know, and I am much more interested in the unknown part. This is the reason why I focus on the autonomous law that does not come from a state source, but this does not mean that I want to ignore or neglect the state part in the legal regulation of transnational economic relations.

In this respect, I think that legal pluralism is the right perspective from which to evaluate my work: there are many legal orders outside of the state legal orders, but this stressing does not imply that the state law has no meaning or no power at all over non-state legal orders. It is true that, as some critics have pointed out, I sometimes use the idea of »stateless« law, i.e. the idea of a law without a state order. However, this appears to me as some type of polemical exaggeration: if you read the text attentively, I think, then you will see that the use of the term »stateless law« is meant as a provocation from my side, but I certainly do not imply that state law is withering away.

Zamboni: *Since, as you said, you sometimes like to provoke your readers, my next question will attempt in its turn to provoke you. You have repeatedly stressed over the years, sometimes explicitly, sometimes implicitly, the positive contribution coming out of self-regulation in many legal areas. Do you still think in such positive terms, both in your proposal and your description about self-regulation, particularly after the financial crisis afflicting the Western countries and the heavy consequent intervention by the states and state agencies in the regulation of*

the economy? In a provocative way, has the twenty-first century proven you right or wrong as to self-regulation?

Teubner: Thank you for the provocation. Here we can clearly observe how some authors create a caricature of their colleagues' concepts. To describe »reflexive law« as the epitome of self-regulation is one of these caricatures. In order to get a true picture of what I intend for reflexive law, one should start by considering how reflexive law has always fought on two fronts.¹⁸ One front, as I have mentioned just above, was obviously the old social democracy, with its ideas of direct state intervention and command-and-control type of regulation. However, there is also a second front on which the reflexive law fights its battle: I have always stressed that reflexive law is at the same time directed against deregulation and against the dominance of the neoliberal concept of market self-regulation. This second »anti-«aspect is what people who criticize reflexive law systematically, and perhaps even intentionally, ignore about the concept.

Reflexive law was written as an attempt to modernize social democratic regulation of society. It was written from the perspective of the state and of state law. It was an attempt to direct to a »third way« of regulation, which corrects the failures of direct state regulation, and at the same time, corrects the failures of pure economic self-regulation. Reflexive law is a concept of indirect regulation, a concept of state regulation that tries to exploit the potential of self-regulation in society. It is a caricature to simply reduce this concept of reflexive law to a concept of pure self-regulation.

If one looks in particular to the eighties and nineties, one can notice parallel attempts to the idea of reflexive law, both in theory, as for instance, Rudolf Wiethölter's proceduralization of the law, and in regulatory practice.¹⁹ As to the latter, if you think of different areas of state regulation, you will see that indirect state regulation, the regulation of self-regulation, i.e. the idea of reflexive law, has become a very popular practical concept, for example in environmental matters.²⁰ If one reads the president of the American EPA, about reflexive environmental regulation, one can easily notice how much the discussion relied on this interplay of state regulation, indirect state regulation, and self-regulation. If one looks at forestry certification or at consumer law or different ecological areas, I think that, apart from the neoliberal strand of the eighties and nineties, there was quite a strong wave of these

18 See, e.g., Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 *Law & Society Review* 270-285 (1983).

19 See Rudolf Wiethölter, *Materialization and Proceduralization in Modern Law*, in G. Teubner (ed.), *Dilemmas of Law in the Welfare State* 221-249 (Berlin: De Gruyter, 1986).

20 See, e.g., Eric W. Orts, *A Reflexive Model of Environmental Regulation*, 5 *Business Ethics Quarterly* 779-794 (1995).

reflexive modes of regulation. If you open Lexis-Nexis and search for reflexive law, many practical examples can be found, some of them without mentioning my name, where the concept of reflexive law is translated into practice here; and for these practical applications, it is always clear that reflexive law is not used for market self-regulation but in order to identify an indirect method of state regulation.

Going back now to one point of your question, namely the alleged failure of my theory when faced with the reality of the 21st century financial crisis, I think that in the financial crisis one sees a failure of everything. Certainly, it is a failure of the markets, especially of the financial markets, perhaps the most dramatic and most evident failure; however, the recent crisis is also a failure of state regulation of these financial markets and a failure of reflexive modes of regulation. Actually, what the financial crisis indicates is a deeper problem, to which I try to react by using the concept of societal constitutionalism.

Some people say this is now the time for a renewed government regulation; to them I would answer that they are right but only to a certain extent, since we can already now see the new failures of a renewed government intervention. There is not enough power and motivation involved and, perhaps more importantly, there is not enough competence. This is the great problem, the motivation-competence-dilemma: where we find the motivation to change the economy, namely in the state, in politics, in the civil society institutions, and in the social movements, adequate competence is missing; where we find the competence, that is in the economic sphere, especially in the corporations there is not enough motivation for change. The great problem then is how to find a combination of both motivation and competence, these two being located in different spheres.

Actually, as I said before, the financial crisis of the 21st century goes deeper: it has to do with the dark side of functional differentiation, namely what I call *social addiction*. It is the consequence of unleashing a multitude of social rationalities which have a compulsion to growth and which dispose of no internal limitation. By *social addiction* I mean to identify an internal dependency mechanism, different from individual addiction, which exists within those autonomized social structures, mainly in the economy, but also in science and the healthcare sector, in politics and of course also in law. By *addiction* I mean that such internal mechanisms have properties reminiscent of addiction, namely an increasing and repeated activity that has self-destructive effects, and, despite knowledge and observation of such self-destructive effects, it continues nevertheless. I would like to stress here that I define this dark side of functional differentiation as *social addiction* because it is very different from individual addiction, despite the common word: social addiction identifies not individual behaviors but social practices, a distinction which only autopoiesis theory can enlighten to its full extent.

Social addiction is the core problem of the financial crisis, a relentless growth without internal limitations. This is the reason why the crisis demands not only reg-

ulation but internal constitutionalization. At stake is, as Derrida said, a »capillary constitution«,²¹ which reaches into the internal, the finest vessels of the blood circulation of the social body. External state regulation has a problem here which has to do with the question of how is it possible to both brake and break this addictive dynamic.

This is the »constitutional question« of late modernity. Early modernity's constitutional question had to do with the autonomization of the different social fields. One of the promises of modernity was constituting of their autonomy; and one can see the civilisatory achievements that have come out in art and science, medicine, politics, law, and also the economy. However, today we are directly confronted with the negative, the dark side, the terrible consequences of several social systems running amok. The burning problem is whether society is in a position to self-limit the growth compulsion, to create self-limitations of the internal dynamics of several social spheres, and this is not a question of state regulation but of societal constitutionalism. Within each of these different social systems, there is a potential of self-limitation that needs to be induced by strong outside pressures, which are a *conditio sine qua non*.

The greatest potential for self-limitation lies in what I call medial reflexivity. You can identify this medial reflexivity already in the traditional state constitution. In its constitutive aspect, power becomes reflexive: it is power which applied to itself creates the autonomy of the political process, democratic procedures, voting, parliamentarism etc. In addition, from the very beginning medial reflexivity had these self-limiting aspects, for instance the division of power and the creation of constitutional rights, which means the application of the medium of power to the medium of power in a reflexive way. This is, in a concrete example, what I mean by medium reflexivity and I think this is where constitutions start: in this medium reflexivity, where you fight power by power, law by law, money by money.

In the financial crisis, the crucial mechanism is the money mechanism itself, and how the money streams are controlled via the money streams. The central banks come then into the center and suddenly one can see that one of the great constitutional problems of the modern financial economy is the money creating role of the private banks, via paperless money. For instance, via paperless money, private banks are responsible today for eighty percent of the money amount in the world. As one can easily understand from this example, the deeper revelation of the 21st century's financial crisis is a lack of public (but non-state) institutions that control, modify, mitigate, and break the addictive tendency within the financial markets. One can

21 See Gunther Teubner, *A Constitutional Moment? The Logics of »Hitting the Bottom«*, in P. Kjaer, G. Teubner and A. Febbrajo (eds.), *Financial Crisis in Constitutional Perspective: The 2Dark Side of Functional Differentiation* 9-51 (Oxford: Hart Publishing, 2011), both as to his idea of »social addiction« and as to his use of Derrida's »capillary constitution.«

now see the tendency: it is no longer a problem of regulating here and there, it is a problem of the capillary constitution of the different social fields.

Zamboni: *As far as I have understood from your work and from what you say now, »knowledge« is somehow the implicit background of these capillary constitutions of each social field: they are »good,« as there is more knowledge behind them, or more competence as you stated earlier. Is it possible then to say that, since »knowledge« is the key word for the reflexive law, it is also the key word for starting to understand the crisis?*

Teubner: To this question I would answer with a qualified yes. The problem with the political guidance of the economic society is knowledge: the political process does not possess the knowledge that has the capacity to reach certain economic goals, it can only work within the creation of political knowledge within politics and the images that politics develops about the economy. Then it becomes a question of a voyage into the blue, what happens to political interventions in the economic society (or in the other social spheres for that matter), while the necessary knowledge can only be developed within these very social institutions.

Now the critical point is that this internal creation of knowledge, which is not scientific knowledge but is contextual knowledge within the different social spheres, is not something that once it is developed leads quasi-automatically to the solution of problems. Rather, the creation of knowledge opens a space of non-knowledge, of ignorance, and this ignorance increases with this growth of knowledge. So this creation of knowledge, and at the same time of non-knowledge, opens within each social sphere a space that I would call »political,« though one should be extremely conscious and careful with the use of this term. By the term »political space« I do not mean that now the state institutions have to come in and the parliamentary, democratically legitimated processes should fill this space within the different social fields. Rather, the idea is that a »political space« indicates an internal politicization of the different spheres of society where the people who are gaining and producing knowledge fight, contest, and create conflicts about this knowledge and how to deal with it. So the opening of a political space within different social fields opens political alternatives within each of these fields that cannot be judged from the outside, and this is the reason why I speak of »internal constitutionalization« and »internal democratization.«²²

Once again, this issue reminds us that we have to be clear about the dual aspects of the concept of »political.« One is institutionalized politics taking place in parliaments, governments, and lobby groups. Politics in this sense is important, and I am

22 See, e.g., Gunther Teubner, *Globale Zivilverfassungen: Alternativen zur staatszentrierten Verfassungstheorie*, 63 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 1-28 (2003).

certainly not critical to it; however, this institutionalized politics is just one of the social fields where specific knowledge is developed, and then politically fought about. The second meaning of the political points to be the diffusion of political alternatives and questions into society. Politics in this sense is not directed to a large societal problem but to its fragmentation into different social fields, opening then a chance for what I called decentered »reflection politics.«

As I said, these are two types of the political and though there are of course interrelations, they should be neither confused nor unified, representing each a different type of politics that is taking place. In this differentiation of the political lies one of the most important messages of societal constitutionalism, contesting technocratic concepts of how systemic processes are run. Instead of promoting technocracy, it is possible to reveal a political space open within each of the social spheres, a space which needs to be filled by political processes and with the potential for democratization.

Zamboni: *As to the last question, it is quite simple and somehow personal: what are you most proud of as a scholar? In other words, if I have to save something from the fires of hell, which article or book of yours would it be?*

Teubner: Instead of answering the question of what I am most proud of, I would rather take a step back and answer the following question: Which was my most painful piece of work? If I consider which piece made me suffered most from self-doubts, these were the articles I wrote on justice.²³ In particular, I am referring here again to *self-subversive justice*, a concept that I experienced as quite painful because it opens a space for the non-rational in law, which is anathema to self-confident legal scholarship. Most legal scholars and practitioners, and not just those who are into critical rationalism or critical theory or argumentation theory, try to reduce the space of the non-rational (or irrational) in law to an absolute minimum. However, I think it is an important task to bring this point to the fore: law is certainly not an irrational process as a whole, rational argumentation plays a crucial role, in particular in modern times; however, there is this (in-)famous *hiatus* between structure and event, between rules and decision. Rejecting Habermas and Rawls in their optimistic rationalism we need to thinking of justice as the contingency formula of law. In this respect, I think even Luhmann is not radical enough, because he downplays, or retreats from, the aporia within legal practice as represented by the idea of justice and simply recommends to invent a new distinction. While I think Derrida, again, is strong here, in confronting us with the possibility, but also the necessity, of facing the irrational in law. He has the metaphorical formula »going through the desert«,

23 See, e.g., Gunther Teubner, *Self-Subversive Justice: Contingency or Transcendence Formula of Law?*, 72 *Modern Law Review* 1-23 (2009).

which are reminiscent of Kierkegaard, and the transcendence of law without religion. Here I think is the most painful aspect of the whole thing, but we cannot avoid facing this, even if we know that the self-transcendence of the law does not lead to a »happy end«. Rather it is in itself a process with perverse effects.

Zamboni: *Thank you very much.*

Teubner: You are welcome.