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"But his sense of justice turned him into a brigand and a murderer." On Gunther Teubner's "Self-subversive Justice: Contingency or Transcendence Formula of Law?"

"But his sense of justice turned him into a brigand and a murderer." Über Gunther Teubners "Self-subversive Justice: Contingency or Transcendence Formula of Law?"

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Abstract: Teubner's article on self-subversive justice is an inspiring example of the way in which he tries to move forward Luhmann's sociological endeavour of understanding law in terms of how it understands itself. Moving Luhmann's autopoietic systems theory forward is something that Teubner significantly does in many of his writings. Here he contrasts various social and legal philosophical accounts with a potential sociological account of justice that utilises the contrasting versions of both Luhmann's autopoietic systems theory and Derrida's deconstruction theory. To appreciate how justice operates self-subversively is to appreciate how law cannot avoid striving to overcome itself, and how justice both in its many universal and alterity forms enables this. Teubner gets close to marrying not only Luhmann and Derrida, but also sociological theory and literary or poetic theory; also marrying judicial creativity with that of other creative arts. Law constantly looks to justice

Article note: The quote in our title is from Heinrich von Kleist's 1810 novella *Michael Kohlhass*, set out in Teubner's article (Teubner 2009: 1). Teubner starts his article with a summary of that novella and ends by returning to it. This novella was, apparently, read and admired by Franz Kafka among others. Teubner himself uses Kafka to explore further some of the themes of this article (Teubner 2012).

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within its own practices, but at the same time beyond those practices and thereby challengingly confronting itself and its search for justice in doing so.

Zusammenfassung: Teubners Artikel über „Self-subversive Justice“ kann als inspirierendes Beispiel dafür dienen, wie er Luhmanns soziologisches Interesse daran weiterverfolgt, wie das das Recht sich selbst reflektiert. Teubner hat die Weiterentwicklung von Luhmanns autopoietischer Systemtheorie in vielen seiner Schriften maßgeblich vorangebracht. Im vorliegenden Text kontrastiert er verschiedene sozial- und rechtsphilosophische Darstellungen mit einer potenziellen soziologischen Darstellung des Rechts, die sich die gegensätzlichen Versionen sowohl von Luhmanns autopoietischer Systemtheorie als auch von Derridas Dekonstruktionstheorie zunutze macht. Zu verstehen, wie das Recht selbst-subversiv operiert, bedeutet zu verstehen, wie das Recht nicht umhinkommt, sich selbst zu überwinden, und wie das Recht sowohl in seinen vielen universellen als auch in seinen Alteritätsformen dies ermöglicht. Teubner ist nahe dran, nicht nur Luhmann und Derrida, sondern auch soziologische Theorie und literarische oder poetische Theorie miteinander zu verbinden; er verbindet juristische Kreativität mit der anderer kreativer Künste. Das Recht sucht ständig nach Gerechtigkeit innerhalb seiner eigenen Praktiken, aber gleichzeitig auch jenseits dieser Praktiken. Es konfrontiert dabei herausfordernd sich selbst und seine Suche nach Gerechtigkeit.

Keywords: Justice, self-subversive justice, law’s contingency formula, law’s transcendence formula, Luhmann, Derrida, Teubner

1 Introduction

The question in the title of Teubner’s article, published in 2009, and given as the Chorley Lecture at the LSE (London School of Economics and Political Science) in 2008, suggests a choice, an either/or selection: self-subversive justice as contingency or transcendence formula of law; perhaps, in the light of what he analyses, this could be reformulated as: Luhmann or Derrida? The article itself embodies no such choice – it demonstrates that justice is both a contingency and a transcendence formula of law, and self-subversive justice (which is what Teubner specifically explores and indeed adds to what those other theorists illuminate) their consequence, or if not justice itself, then at least how the search for justice in relation to law is self-subversive.[1] As Teubner demonstrates, these formulae of contingency

1 There is some similarity between justice as self-subversive, and the paradoxical self-rejection of the legal code “based on a claim of lawfulness for the rejection (not that it is contrary to the law)” (Luhmann 2004: 186).

and transcendence contribute to the condition that Luhmann delineates as justice, namely "[an] *adequate complexity* of consistent decision-making" (Teubner 2009: 9; Luhmann 2004: 219).[2] With this condition in mind, he attempts to clarify justice's self-subversive character as it operates within and in relation to the legal system. This construction is what links this paper, and others written by Teubner concerning the subject of justice,[3] with many of the topics addressed by other papers discussed in this volume: non-human actors; conflicting discourses; ecology; human rights; societal constitutionalism, etc.

'Adequate complexity' refers to the requirements for evolutionary survival. To survive, a system must maintain a compatible relationship with its environment. Consistent replication (for law, "the logic of *stare decisis* and the systematicity of legal doctrine" (Teubner 2009: 9)) will not itself ensure survival in a changing environment. Law, to survive, must continue to adapt to its changing social, human, and natural environments. But there is even more at stake than the continuation of law. There is also the continuation of society, and alongside society, the billions of human beings who depend on society for their ability to experience an environment compatible with their psychology and biology. If law's current function, at the level of society, is to stabilize normative expectations (as set out in Luhmann 2004: 142–172) appropriate to society and in particular the heterogeneous operations of the other functionally differentiated social sub-systems within it, then the disappearance of law, or even its failure to evolve, raises the question: through what functionally equivalent means could the function currently addressed by law be achieved? Teubner's essay does not reach that last question. Instead, it addresses what law must accomplish for it not to need answering. Within an evolving environment, how can law offer norms of adequate complexity, both in the sense of a complexity adequate to its continued existence within its environment, and adequate in its contributions to all the other systems of its environment? And, if that amounts to 'adequate complexity', what are the inadequacies or, even more, both the subversive and the self-subversive tendencies of such adequacies?

2 Emphasis in the original. Here Luhmann gives more detail on this conception of justice in his earlier writings.

3 In particular, because of its similar reliance on both Luhmann and Derrida: Teubner 2001; and, for a more recent example: Teubner 2020.

2 Justice as Law's Contingency[4] Formula

In exploring this theme Teubner is relying on Luhmann's analysis,[5] but also moving that analysis forward. Justice as law's contingency formula operates wherever law undertakes secondary observation: observing on its own applications of the legal code[6] in order to answer the question of whether case A is equal, or unequal, to case B.[7] The choice of the word 'case' is deliberate. Cases are not only the manner in which claims enter the legal system, they are also one of the principal forms in which the legal system organises its memory. The case representing a decision on a legal issue is what, within law's memory, must be compared and what is being currently claimed. And the decision in the present case is what, if selected, will be added to the system's memory for the purposes of future comparison.

The requirement to treat like cases alike operates throughout law. It underlies the application of law when like cases are treated alike, and the judgement that law has been mis-applied, when alike cases have mistakenly been treated unequally. It generates law's increasing internal complexity when distinctions are drawn between unequal cases and these distinctions form the bases for further comparison. It accompanies revisions to the sources of comparison, when earlier decisions are overruled on the basis that they did not reach 'just' conclusions as to what was equal and unequal. It is also a requirement that cannot be rejected. Within the legal system, a case cannot be identified as being indistinguishable from another without having to concede that both cases should be treated alike. The alternative to this concession is to claim that the case used for comparison was wrongly decided, in which instance one has to re-open other comparisons to formulate a new version of

4 The relevance of contingency as an attribute for our understanding of the modern social world cannot be overstated. See, for example, Niklas Luhmann's essay: "Contingency as Modern Society's Defining Attribute" in his *Observations on Modernity* (Luhmann 1998: 44–62). The development of Luhmann's own analysis of contingency is succinctly formulated by Hans Ulrich Gumbrecht (2001).

5 In short, at chapter 5 "Justice, a Formula for Contingency" of Luhmann 2004: 211–229. Luhmann demonstrates how 'justice' plays this contingency role for the legal system, in contradistinction to other roles in earlier societies (often linked to forms of Natural Law reasoning), and how other formulae for contingency play their roles as pertaining to other social subsystems.

6 This is, according to Luhmann, not a legal operation ("on the level of the code") but an observation relating to law's programmes, "in the form of a (disappointment-ridden) norm" (Luhmann 2004: 214).

7 "Justice, as a formula for contingency in its most general form has traditionally, and still today, has been identified with *equality*. Equality is seen as a general, formal element, which contains all concepts of justice, but which means only something akin to regularity or consistency." (Luhmann 2004: 217).

what is equal and unequal. The use of the same formula for applying law, increasing its complexity through distinctions, and overruling established bases for comparison, makes legal justice (Teubner tends to use the phrase "juridical justice" (cf. Teubner 2009: 6–8)) an eigenvalue - present in all of law's programmes.[8]

Before considering the transcendent qualities of this formula, its relation to Derrida's observations on justice, and its contribution to society's continuance, it is necessary to examine what gives this formula its grounding. The claim that it is wholly subjective, with any judgement of likeness/unlikeness equally possible would, if true, undermine the existence of law as "stabilizable and statutory, calculable, a system of regulated and coded prescriptions" (Derrida 1992: 959).[9] The first point to note is the difference between law's formula for contingency and that of other social systems. The requirement for law to be 'just' is not "legitimacy in politics, god in religion, scarcity in the economy, *Bildung* in education, limitationality in science" (Teubner 2009: 9). The requirement to observe on law's decisions by reference to the justice of treating like cases alike offers different possibilities from observations based on these other formulae. But if the requirement to be just excludes these other formulae, what does it include? As Teubner observes, John Rawls' formula of justice as fairness (Rawls 1971, and, as revised Rawls 2001) has limited relevance to law. Few of law's case comparisons could be articulated in terms of their contribution to ensuring that the least well-off are not made worse off, or as a contribution to political liberties. To the extent that these formulae operate, they only do so to a limited extent. And further, Rawls' characterisation of an original position removes the contexts in which decisions within law need to be made. This leaves us with no more than an injunction to 'be impartial' (something which, at least at the level of having no direct financial interest in the outcome of decisions, law has largely achieved though making judicial offices salaried).

For Ronald Dworkin this formula (of treating like cases alike) opens up law to philosophy: a decision on the truth of any contested legal proposition requires a judgement that the proposition selected is justified by "principles of personal and political morality that provide the best interpretation of other propositions of law generally treated as true in contemporary legal practice" (Dworkin 2006: 14). This

8 In Luhmann's terms (2004: 455): "What remains is the ongoing creation of contingencies as stable eigenvalues, as recursively renewed values of the legal system.") That said, the stability and "self-validation of media eigenvalues must therefore be seen as a risky evolutionary achievement […] in all circumstances must be considered uncertain." (Luhmann 2012: 238)

9 This article appears in French and English. It is later edited and discussed in Cornell et al. 1992, as well as Goodrich et al. 2008.

statement captures the form of legal arguments, with their Janus-like qualities: facing out towards justice, and inward towards what has been decided. The legal system's openness to justice (through application, distinctions, and the correction of mistakes) is restricted by the requirement that moral and political principles be used to justify "other propositions of law generally treated as true". But what establishes those "other propositions of law generally treated as true"? These cannot be identified, within the arguments preceding a particular decision, by using the same structure of argument, as this would continue ad infinitum, namely lead to a process of infinite regression. And there is no possibility to ground the truth of legal propositions through a demonstrable consensus. Legal argument does not involve conducting polls to find the truth status of legal propositions, nor could it be possible to do this if, as Luhmann claims, its contingency formula accompanies all of law's self-observations. The surrogate for truth is the authority afforded to past legal decisions by the legal system: the ranked authority of different legal sources – in state legal orders, constitutions, statutes and other legal directives, doctrine and court judgments. If legal argumentation limits itself to reaching decisions that were compatible with these authorities, then it has a grounding for the philosophy articulated by Dworkin, but none to revisit these authorities and declare them to be 'mistaken'. This situation would, if it were as suggested here, represent a significant impediment to law's ability to evolve in response to changes in its environment. According to Dworkin, no such impediment exists as legal authorities are themselves the results of reasoning which has the structure he identifies, and only maintain their force within legal arguments to the extent that moral and political principles continue to justify them. The ability to examine even a long established and widely cited legal authority by reference to how, in terms of justice, it impacts on individual cases, provides law with a means to discard and replace its own structures. But this in turn makes it difficult to sustain the claim that legal authorities provide a secure grounding for legal decisions. If all legal authorities are hypothetically always open to re-assessment for the justice they provide, what stops the hypothetical becoming the actuality?

Teubner explains law's ability both to incorporate justice and maintain sufficient levels of consistency (with the inevitable injustices that may result) by reference to the "constraints of positivity", and in so doing demonstrates the self-subversive character of justice[10] as a formula for contingency:

10 "Justice works as a subversive force with which the law protests against itself. Justice protests against law's natural tendencies to *stare decisis*, to routine, security, stability, authority and tradition." (Teubner 2009: 13)

> "Constraint of decision-making: the conflict cannot possibly be suspended, one party has to be right, the other wrong. Constraint of rational justification: the decision must be founded on reasons which pretend to combine consistency and responsiveness. Constraint of rule-making: the decision reduces the complexity of the conflict to an over-simplified rule." (Teubner 2009: 21)

There has to be a decision – even if the decision is that the matter is not justiciable, and the status quo will not be disturbed. The decision will be based on reasons which combine consistency and responsiveness (as Dworkin claims). The pretence (or conceit) is the presentation of this particular combination as if it was an example of Habermas' ideal speech situation, one that would convince any impartial addressee. And the decision will be presented as something more (and less) than an ad hoc conclusion that one party deserves an ad hoc remedy. There is an expectation that the judgment which accompanies the decision will provide indications as to how cases that are 'like' this one should be decided in future. None of these features contradict the fact that the decision is a decision: something that could have been decided differently.

The discipline imposed by these constraints also operates within the legal arguments which precede a legal decision. The parties expect a binary decision, with each presenting their arguments that the existing law requires a decision in their favour (restricting the possibilities of arguments directed to concession, conciliation, etc). Their arguments will have the structure Dworkin identifies. And each side will have to address the question: if this case is decided in your favour, for the reasons you give, what are the implications for other cases (both those decided in the past, and those expected to arise in the future)? There is a further constraint not mentioned by Teubner, which is that both the arguments and the judgment will have the same temporal dimension – they will all state what the law 'is'. Neither party will argue that the current law is contrary to what favours their side, or unknowable, and needs to be changed or created by this decision. And the same temporal dimension will be repeated in the decision so that, even if this decision is expected to provide a new foundation for future legal decisions, it will still be presented as an application of the current law, and not as a legislative act.[11]

11 This is so despite the many complications that it entails. Take the example of prospective overruling. This involves limiting the retrospective effect of a judicial decision, to determine its application to only future cases. Such a conception is challenging, but by no means insurmountable, to the sort of reasoning that requires judicial decisions to represent a current statement of what the law is. In a similar way, giving judicial decision-making authorities the legal authority to overturn their own or other decision-making bodies' earlier decisions presents a challenge, but not an insurmountable one, to the reasoning that relies on any decision being a 'legal' decision (a statement of

Thus, the legal arguments that precede a decision, and the arguments that justify a decision, exhibit a common requirement to treat like cases alike. In *Law as a Social System,* Luhmann describes this requirement using concepts from communication theory: "If justice is given by the consistency of decisions, we can also say: justice is redundancy" (Luhmann 2004: 319). Redundancy, within communication theory, is what makes it possible to extract information from a communication. Information is what is new – the distinction that makes a difference. But information can only be identified against the background of what stays the same: the redundancy. Ordinarily, the more redundancy within a message, the less scope there is for error in decoding. But there is a cost to this. Increased levels of redundancy not only reduce the possibilities of error (inconsistent decoding), they also reduce the possibilities of what information can be communicated. Indeed, it is exactly by reducing the possibilities of what can be communicated (reducing the possibilities of surprise) that increased redundancy reduces inconsistency in the interpretation of messages. The relevant distinction here is between variety and redundancy. The more redundancy that builds up in a system, the less scope there is for variety (whether error, or not). But systems cannot evolve in response to an increasingly complex environment if they simply increase their levels of redundancy. To increase their own complexity, they have to find ways of increasing both redundancy *and* variety. And this is the function that Luhmann attributes to legal argument.

This is not just a change of terminology. Luhmann explains that "redundancy is the condition for the possibility of legal argumentation" (Luhmann 2004: 318):

> "Something has to happen 'in lieu', in order to stop a disintegration of the system into a group of single decisions, which have no relevance to each other and can only be recognised by an observer if he applies his own criteria to such a group (for example, criteria of genus or species). The creation of sufficient redundancies is the answer to this problem." (ibid.: 319)

Luhmann claims that "[f]rom the viewpoint of coordination, redundancy is the 'invisible hand' of the system" (ibid.:318). It is what underlies even the most visible cause of variety within a modern legal system. Modern law has evolved redundancies that allow vast increases in the variety of what can be law. The most obvious two examples are legislation and contract. By ignoring most political communications but rather focusing on statutes, treating statutes as deliberate changes to the law rather than declarations of existing law, and developing a relatively small collection of interpretive strategies and maxims, law has been able to generate enor-

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the current law). The use of justice within legal reasoning, of course, anticipates such challenges and helps them to be overcome.

mous numbers of technical regulations. Similar increases in variety have resulted from the development of contract as a basis for parties to alter their legal relationships. That said, Teubner, by exploring justice not only as law's contingency formula, but also its transcendence formula, is able to approach its self-subversive character and thereby add to what both Luhmann and Derrida suggest.

3 Justice as Law's Transcendence Formula

If legal argument, and legal decisions, were driven solely by the pursuit of consistency (redundancy), there are plenty of reasons why this would remain an unachievable ideal. The system is never able to observe itself as a whole. Observation on what cases are like others is always a local survey. Attempting to achieve consistency throughout the law would severely burden legal argument, as those arguing for a decision on one legal issue would have to accept responsibility for ramifications around the legal system in general. Instead, there is a need for 'loose coupling'. In addition, law has to absorb new norms arising from its periphery, most particularly through legislation and contract. These norms create new bases for comparison. Further, there are the implications of re-entry. Law's environment appears within law through an internal construction. What can be constructed by law is restricted to what can be given meaning within a system whose communications are coding events as legal/illegal. This is not a solipsist experience – law is not the author of the events that it codes. So, the requirement to treat like cases alike involves the constant challenge of new events, generated by changes within law's environment: other sub-systems, organisations, interactions as well as the physical environment. The redundancies which make consistency possible are formed through processes of reiteration and condensation which ensure that they do not remain immune from further evolution. In consequence, if law's justice were only a commitment to consistency, contingency and judgement would still remain. But in what sense is justice as law's transcendence formula more than the need for decisions in the face of contingency?[12] We can distinguish two senses in which justice within law potentially transcends itself, one possibly self-subversive and one not. Both involve situations which offer prospects of infinite justice. The latter of these, which we explore here, arises from the nature of decisions. The former we will explore in the next section.

12 See note 4 above.

One outcome of what it means for something to require a decision is that that decision could always have been different. There is contingency and there is also freedom, and with freedom comes the possibilities of justice. This freedom is present even in circumstances where the application of the law is clear, where only one outcome would be regarded as an application of law and anything else would be regarded as error. This is a situation where there is no basis for distinguishing this case from like cases where the expected application of the law has occurred. Here the requirement to 'be just' generates a legal duty to decide in a particular manner. This nevertheless remains an irrational moment. Not only because the rational justifications offered by legal justice will be found inadequate when considered from outside the legal system; but also because reason is never sufficient to activate the behaviour that can be recognised as a decision.[13] In the case of a human actor, there must also be motivation: the desire on the part of the parties to achieve a successful legal argument; the desire on the part of the decider to 'decide' – to reach a decision which will not be observed thereafter as an error and corrected. Whilst both legal arguments and reasoned decisions exhibit communicative rationality – the rationality that accompanies persuasion, they are also instrumental – they depend on the desire to succeed.

Is this a moment of hiatus: a point at which juridical thought should expose itself fully to the paradoxes within law that have led to this moment, and experience – "invocation, abyss, disruption, experience of contradiction, chaos within the law?" (Derrida, quoted by Teubner 2006: 17)[14] Is this the "walking through the desert" (Derrida, quoted by Teubner 2009: 17–18) where everything that has been excluded from law should now be recognised and considered? If the time of the decision is taken as such a moment, then it is not a moment that will be followed by the constraints of positivity; for the constraints of positivity operate throughout. They have been present in the preceding arguments and the proceedings in which those arguments were advanced. They are present in the binary choice which law is offering at this point: to achieve a successful legal decision, or not. By the same token, the transcendent possibilities offered by unrestricted openness have also been present throughout – at the selection of arguments likely to be successful as well as the decision maker's selection of which arguments to include in their reasoned judgment. Also present throughout is an awareness of the role played by redundancies in constraining interpretation, and the potential costs of seeking a decision which requires the abandonment of redundancies. Some of those redundancies, such as

13 "Legal reasoning does not and cannot justify legal decisions – anyone who has had to decide a legal case has been exposed to this disturbing experience" (Teubner 2009: 13).

14 Also quoted by Teubner 2006, especially Part IV "Derrida: Theologising Deconstruction": 55–58.

the hierarchy of authorities, will have been utilised throughout all the operations leading to the decision, and throughout the decisions which have been utilised to construct the communications through which those operations were executed. This does not make their rejection an impossibility, but it does raise questions: how can a decision to reject be made when the authority to make the decision is dissolved by the rejected redundancies; and, like the person who allows a conversation to proceed without raising objections – why (are you starting to argue about this) now?[15] If transcendence is present, alongside the constraints of legal justice, in a straightforward application of law, how does the position alter when law engages with justice as self-subversive transcendence?

4 Self-subversive Transcendence

Law checks the consistency of its operations, and their appropriateness to its environment, via the requirement to 'be just'. We have written elsewhere on the manner in which this occurred within the common law tradition. A self-description that identified law as custom, arising within the community, allowed the judiciary to articulate their own decisions as not law, but simply evidence of law. When new claims were made, these were acknowledged as potentially 'law' and a remedy granted if they were considered just. This required a consideration of how new claims compared with those already accepted – were they 'alike', or not. But this process of comparison was not limited to the comparison of new claims with those previously acknowledged as law. The process also allowed previously accepted claims to be re-visited. A claim that had been recognised as law could later appear unjust when compared with surrounding claims that had since been accepted. This allowed the decision in which that 'unjust' claim had been acknowledged to be identified as a mistake. As the decisions of judges were not, within this self-description, law, but merely the best evidence of law, the discarding of a decision was not described as a change in the law (Nobles & Schiff 2006: 49–89).

Through this process (checking the justice of decisions by reference to the presumed justice of decisions, including the possibility that claims which were generated within law's environment could lead to the overruling of earlier decisions)

15 At this point transcendence is crucial since "The ultimate reasons are always only penultimate reasons." (The last sentence of the chapter on "Legal Argumentation" in Luhmann 2004: 356). As an empirical matter Luhmann claims that this is noticeable or self-recognised in lawyers' attitudes of "a certain ironic distance from legal ideas and means of argumentation." (Luhmann 2004: 356).

the common law was able to evolve. It is fair to describe this process as something more and different from the working out of what is immanent within the existing law. In decisions recognising new claims the common law was not simply applying and extending the already acknowledged law. The newly acknowledged claims also offered the possibility that any law might have seemed unjust in comparison with the laws that now surrounded it. Being 'unlike' in terms of justifications afforded to surrounding laws, apparently existing law could now be declared to be 'not law' in a manner not dissimilar to classical Natural Law: "*lex iniusta non est lex*" (an unjust law is not a law). We can see in this process justice as self-subversive transcendence of law. Law transcends itself through the application of its own contingency formula, not limited to the working out, through a commitment to consistency, or the implications of past decisions, but allowing their transcendence in the face of claims generated within law's environment.[16]

Today, the self-description of law, within both civil and common law jurisdictions, primarily takes a Positivist rather than a Natural Law form. Law's self-description refers to constitutions, and the authority which these afford to positive law: law that is constantly changing. But the processes of transcendence and self-subversive transcendence have not ceased. Law continues to revisit decisions, even those that represent substantial redundancies, through the application of its contingency formula. Some examples: The common law has continued to develop alongside statutes, and the redundancy represented by a hierarchy of courts has given way to a heterarchy, with the House of Lords' (as it then was) announcement that it (now the Supreme Court) is able to overrule its own earlier decisions. The doctrine of Parliamentary sovereignty was re-visited in the *Factortame* decision and revised in consideration of the UK's growing dependence on European Community (and then European Union) legislation, in a decision that managed to maintain and preserve the redundancies offered by two sources of law – a decision that increased both redundancy and variety (now, of course, to be reformulated following 'Brexit'). In the United States, the doctrine of original intent and the doctrine of a living constitution exist alongside each other. The latter offers a doctrinal means to reconsider earlier constitutional decisions. The former doctrine offers a means to resist this, but one limited not only by the different willingness of judges to invoke it, but also by the impossibility of interpreting all of the constitution by reference to intentions that could plausibly be attributed to its eighteenth-century authors.

16 This analysis tries to make clear what Derrida meant by his much discussed, apparently paradoxical claim: "Deconstruction is justice" (Derrida 1992: 945). What is significant for Teubner is the use of Derrida's claim beyond Luhmann's seeming intolerance of it.

Do these processes open law to infinite justice? We would answer 'yes' and 'no' for reasons very similar to those which apply to decisions which can only have one outcome that is not expected to be self-observed as an error. The 'constraints of positivity' are present throughout, not only in the decision to be reached, but in all of the decisions that have led to the decision to be reached. A judgment able to achieve transcendence and juridical justice's self-subversion, such as a judgment of an appeal court, will have been preceded by claims, originating instruments, discovery, pre-trial hearings, legal argument, judgment, notice of appeal, and further arguments. Many of these stages will involve overlapping redundancies (acknowledged hierarchies of texts and institutions) making it, if not impossible, then certainly difficult (assuming the continued presence of a desire to have the claim accepted) to mount legal arguments that seek a rejection of those same arguments. To disagree, over complex legal issues, both sides have to use, and implicitly affirm in common, significant levels of redundancy.

These processes have implications for the openness of law to infinite justice. To draw again on the common law tradition, it has been said that the "common lawyers saw society through the lens of law" (Cotterrell 2003: 32). To their critics, this resulted in a complex, technical, formulistic body of laws that had no recognisable connection with any philosophical theory of justice, or the idea of doing justice in the individual case by reference to all the circumstances. The reply of the common lawyers was that their system was not based on the kind of speculative reasoning undertaken by philosophers, but was a form of practical reasoning, applied on a case by case basis, in which what had been acknowledged as justice before offered a prima facie standard for what is just in the particular case. As such a prima facie standard it could nevertheless be revised, but the greater the revision (loss of redundancy) required for a successful outcome, the more obvious and glaring the requisite injustice. The common law, through its insulation from speculative reasoning, and its openness to arguments based on a case by case assessment of justice, managed to survive – to achieve both sufficient consistency and sufficient ability to evolve in the face of changes in law's environment, to maintain its function as the system primarily responsible for the initiation and stabilization of congruent generalizable normative expectations. And even to evolve from a legal order with a natural law self-description to one with a positivistic one.

5 Justice as an Attractor

From an evolutionary perspective, 'adequate complexity' is demonstrated through survival: by the ability of systems to continue their autopoiesis. For law to continue, it must stimulate norm production at its periphery, and successfully integrate norms at its centre. And in order to do so, it must stimulate actors to seek legal norms, and to assert claims in the face of disappointments, instead of learning not to expect. They must look to law for justice. This is, we suggest, the lesson of Michael Kohlhaas: not his particular circumstances, but his attitude towards justice.[17] Law's environment can only be introduced into law through law's operations. Law needs more than new norms, via legislation and private ordering. It also needs to be able to consider how those norms impact on its environment. That environment is constructed by law in response to claims. Claims allow law to consider which cases are equal, and which thus deserve equal treatment, and which are not.

Legal justice, as a formula for contingency, operates through what Teubner calls the "constraints of positivity": constraints that operate continuously (Teubner 2009: 20–21). They inform the instrumental calculations of those who want to achieve a successful legal argument/decision. But legal justice also operates as an attractor. It attracts those who are motivated to achieve justice:[18] those who refuse to learn from disappointment. Here we might distinguish the different modes in which it attracts. Those who approach law as secondary coding – who view it as support for economic transactions or the distribution of political power – will be able to take account of the constraints of positivity in calculating the benefits of seeking legal justice. A money claim can be discounted by the risk that the arguments which support it will prove unpersuasive. In such a case, legal justice has an exchange value in £/$. There is a different exchange value when law is viewed as a distributor of political power.

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17 Teubner starts his "2009" article as he does a lot of his writings with a reference to a source that has no obvious formal 'legal' character, though it may pertain to legal questions, and in this instance also ends it with Heinrich von Kleist's novella *Michael Kohlhass*. In this story Michael Kohlkass suffers from and perceives corrupt and blatant injustice by legal authorities and is "deeply hurt in his sense of justice." Following his vendetta and rebellious actions in pursuit of that sense, he perturbs the law to respond positively by recognising his 'just' claim, but ultimately negatively, in that law responds to his actions by executing him. In between these events is the incommunicable mysticality of a gypsy woman's witchcraft, giving him an amulet containing a message that could save his life if disclosed, which he reads but does not disclose, thereby not saving his own life but perhaps saving something more significant (*fiat justitia ruat caelum* – let justice be done though the heavens fall).

18 "But justice is not the law. Justice is what gives us the impulse, the drive, or the movement to improve the law …" (Caputo 1997: 124).

A government's ultra vires use of an administrative or prerogative power can be defended in court to the level, and extent, that avoiding (or delaying) an official finding of illegitimate conduct is considered worthwhile. The situation is similar for those who seek a finding of illegality for the political capital of its construction as an official verdict of illegitimate government action. And there will be disputes which are inter-systemic – as when a pupil asserts that their religion requires them to adopt a form of dress forbidden within their school (education vs religion). Here law offers its support to one or the other system, facilitating or inhibiting the distribution of their respective media. But is there a meaning attributed to legal justice which is not explicable in terms of the media of other social sub-systems? Is there a propensity in psychic systems to approach legal justice from the perspective of infinite justice – in the sense that they read law's function in supporting normative expectations simply as a mechanism through which they can avoid learning from disappointment? They come to law, not for access to any of the media distributed via social sub-systems, money, or power, or health, but, like Michael Kohlhaas, *for* justice.

From the perspective of the legal system's survival, there are parallels between this view of legal justice for law and Luhmann's view of democracy for politics. Democracy offers politics the largest range of possibilities from which to select. In so doing, it offers a mechanism whereby politics can attract energy from the greatest number of sources. It can be relevant to the widest (especially compared to the alternative) range of actors within its environment. Law has been content to second code politics within the nation state, allowing for a considerable part of its variety to arise through political selection. But, in a global world, it has become apparent that there are events within the environment of a regionally organised political system that do not resonate, and do not lead to necessary legislative outcomes. In such a world, the pursuit of justice through law, a justice irreducible to the meanings of any social system, may offer what law requires for its continued relevance – a hammering at the constraints of positivity which offers better chances for selection, and survival.

Thus, there is more to say about justice than that it provides a formula for law to manage and transcend its own contingencies. Justice induces the constant presentation of law's environment to itself. The fact that this environment will always be reconstructed internally does not make the openness of justice irrelevant, but the converse. Law is subject to claims that exceed the constraints of positivity, and like a mill, grinds those claims into a form that it can operationalise. Justice incentivises claims that go beyond what is likely to succeed: it feeds the mill. If the existence of modern complex functionally differentiated law is a highly improbable evolutionary achievement, then legal justice, in the form of claims that exceed what law

is able to operationalise, is part of what has allowed law to reach this state. By increasing its capacity to evolve, law benefits from actors who do not learn about its limitations, and who seek what it cannot provide. As Jiří Přibáň has observed, there are echoes here of the role played by art as a system: "every work of art must translate disorder into a system of language or conventions in order to be able to convey information" (Umberto Eco as quoted by Přibáň 2001: 116). But, just as Teubner insists that transcendence is not limited to religion, but occurs in the communications of all social subsystems, so too the translation of the incommunicable is not limited to art, but must similarly form part, or urge to form part, of the evolution of all subsystems. What Teubner draws our attention to, through his engagement with Derrida's version of justice, is that there is more that can be said about that part of law's environment that fails to achieve re-entry through codification and condensation than that it constitutes 'noise'. We should also consider what attracts noise to be directed towards the system. With self-subversive justice we have a coupling between law and consciousness that is not dependent on law's existing structures, nor satisfied (and thereby extinguished) by any structures that law can develop. Justice here complements the paradox of the code. The paradox of the code (the unity of the difference between legal and illegal) insinuates that there are no inherent limits to law's potential evolution. But this does not mean that law will evolve, only that it could. Evolution requires law to demand new structures. Justice, which symbolises law's openness to a utopia, is an attractor which generates these demands and, like the code, poses no limits on the possibilities of adaptation.

6 Adequate Complexity and Self-subversion?

Justice as self-subversive transcendence is justice as the presentation to law of what cannot be communicated as law but, possibly, may nevertheless perturb law. How does this potentially contribute to justice as adequate complexity? Here we would add a note of caution. Something that increases the possibilities of adaptation within a changing environment offers increased possibilities of survival – of law – of society – of humanity. The paradox of the code and the openness of justice invite an optimism towards law, and a rejection of accusations that it has inherent structural limitations. Indeed, there are many good reasons why we should be open to new forms of law, and new kinds of legal actors – just as Teubner has been here and in many of his writings. But possibility is not actuality, and while adaptation takes time it does not always occur within the time available. There are many notorious examples in the world of miscarriages of justice, with those making claims or allegations well after the period of their sentencing has elapsed or become un-reme-

diable. In these circumstances one finds other forms of transcendent communications about justice, profoundly incommunicable in law but challengingly expressed about law. Take the example of Langston Hughes' poem 'Justice' (1932):

> "That Justice is a blind goddess
> Is a thing to which we black are wise:
> Her bandage hides two festering sores
> That once perhaps were eyes."[19]

Langston Hughes' poem, taking the symbol of law's justice as impartiality and transcending it, is such a challenging, or in systems terms, perturbing example. Luhmann himself explores such possibilities when he writes of poetry, that it is "existentially affected by the problem of incommunicability. […] There are, if one can put it this way, non-linguistic language devices available here for making visible what cannot be formulated" (Luhmann 2001: 15).

As Teubner describes in this essay, with justice in relation to law as much in modern societies as former societies, we have a dynamic formula for contingency and an intense formula for transcendence, but beyond those formulae justice as self-subversive of both. We have Luhmann as well as Derrida and conceivably even something more. We glimpse that possibility in the way that he attempts to utilize the Michael Kohlhaas story at the beginning and end of his article. The sense of justice that "turned him into a brigand and a murderer", as represented in that story, is incommunicable in relation to many of the legal forms that it addresses. This sense of justice is, at best, reliant for its expression on stories, parables, poetry, or other creative efforts. Only in such moments can it materialise in forms of communication, namely operate as part of society. What Teubner tries to achieve (and perchance this is characteristic of many of his writings) is something beyond Luhmann and, in this case, a marriage of Luhmann and Derrida that has resonance for much Luhmann scholarship which it is prudent not to ignore. Teubner adds self-subversion, a certain frisson to Luhmann's scientific endeavours. One in which "the discourse of justice is forced to overstep the limits of legal signification" (Teubner 2009: 19). Of course, to talk of a certain frisson or equivalent phrases is much more associated with artistic rather than other forms of communication. But Teubner recognises "hidden affinities between artistic and juridical creativity" (ibid.: 23) and here, as elsewhere, seems to enable those affinities to break through and, in this

19 Published in *Scottsboro Limited*, a poem written in response to a notorious miscarriage of justice known as the Scottsboro case in the Jim Crow South.

important article, make some progress.[20] We see the spirit of justice expressed and appreciated in its self-subversive character beyond its contingency and transcendence formulae of law. That spirit hammers at the margins of society, despite being offered such limited opportunity for further exploration, even in the legal system with its regular self-observed profound and widespread reliance on justice. But that exploration is, he argues, both necessary and dangerous. With law, as with other systems in their own ways (economic justice, political justice, etc.), the search for legal justice as a form of universalisation for the achievement of a just society is "the *summum jus summa injuria* [extreme justice is extreme injustice] of functional differentiation". Teubner symbolises this by ending, where he began, with Michael Kohlhass: "one of the most upright and at the same time one of the most terrible men of his day" (Teubner 2009: 23).

Teubner specifically develops his contribution by alluding to other attempts at capturing what is involved when law confronts its own paradox and, "is forced to overstep the limits of legal signification" and thus expose itself "to the question of justice." Rather than rely on Derrida or Weber, Nietzsche or Levinas, Adorno, Heidegger or Agamben, Teubner returns to Michael Kohlhaas and the "romantic rupture" in that novella concerning the amulet that will "save you your life" (ibid.: 19). He relies on this story to hammer at the temporal restrictions of law's operations, in a similar way to the exploration of the temporality of a moment in a moving landscape. Such creative energies are, for him, not the antithesis of legal argumentation but a necessary antidote to its partiality and imperialistic overreach.

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20 As he concludes at the end of his article about some of the implications represented by Kafka's 'The Trial': "The added value of Kafka's parable lies in the non communicable aspects of the Law being made communicable by the literary form, and only by the literary form. It is not in legal doctrine, or in legal theory, that we experience some of the secret depths of the Law, but in the story 'before the law'" (Teubner 2012: 201).

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