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Restoration of gender inequalities through anti-abortion reforms: Can Teubner's "anonymous matrix of communications" help feminists?

Wiederherstellung der Ungleichheiten zwischen den Geschlechtern durch Anti-Abtreibungsreformen: Kann die „anonyme Kommunikationsmatrix" von Gunther Teubner Feministinnen helfen?

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Abstract: This article is a response to the new wave of legal changes restricting access to abortion in several countries across the world, which have substantially undermined the global advances in the field of reproductive rights observed in recent years. To address this problem, the article derives insights from two important bodies of literature that are usually perceived as theoretically and ideologically counterposed, namely feminist legal studies and systems theory. In juxtaposing two important academic literatures, the article exposes gaps in both, and it demonstrates the conceptual potentials inherent in this juxtaposition. The article engages with the work of Drucilla Cornell and Gunther Teubner, who – despite their very different intellectual backgrounds – provided progressive interpretations of systems theory. It further critically examines whether societal constitutionalism can help feminists explain the recent developments in abortion law across the world. It engages critically with Teubner's arguments concerning the role that human rights play in con-

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straining the expansive tendencies of social systems, such as politics and religion, revealing the limitations of Teubner's arguments in relation to reproductive rights and justice. At the same time, the article helps restate the contemporary relevance of systems-theoretical approaches in atypical fields like reproductive justice and gender studies.

Zusammenfassung: Dieser Beitrag ist eine Reaktion auf die neue Welle von Gesetzesänderungen, die den Zugang zum Schwangerschaftsabbruch in mehreren Ländern der Welt eingeschränkt und die in den letzten Jahren beobachteten globalen Fortschritte im Bereich der reproduktiven Rechte erheblich untergraben haben. Um dieses Problem anzugehen, werden in dem Artikel Erkenntnisse aus zwei wichtigen Literaturbereichen herangezogen, die normalerweise als theoretisch und ideologisch gegensätzlich wahrgenommen werden, nämlich feministische Rechtswissenschaft und Systemtheorie. Durch die Gegenüberstellung zweier wichtiger akademischer Literaturen deckt der Beitrag Lücken in beiden auf und zeigt die konzeptionellen Möglichkeiten auf, die in dieser Gegenüberstellung liegen. Der Beitrag befasst sich mit den Arbeiten von Drucilla Cornell und Gunther Teubner, die – trotz ihres sehr unterschiedlichen intellektuellen Hintergrunds - progressive Interpretationen der Systemtheorie vorgelegt haben. Außerdem wird kritisch untersucht, ob der gesellschaftliche Konstitutionalismus Feministinnen helfen kann, die jüngsten Entwicklungen im Abtreibungsrecht weltweit zu erklären. Er setzt sich kritisch mit Teubners Argumenten über die Rolle der Menschenrechte bei der Begrenzung der expansiven Tendenzen sozialer Systeme wie Politik und Religion auseinander und zeigt die Grenzen von Teubners Argumenten in Bezug auf reproduktive Rechte und Gerechtigkeit auf. Gleichzeitig trägt der Artikel dazu bei, die zeitgenössische Relevanz systemtheoretischer Ansätze in untypischen Bereichen wie der reproduktiven Gerechtigkeit und der Geschlechterforschung zu verdeutlichen.

Keywords: Abortion law, Feminist studies, social constitutionalism, Teubner, health law.

Restrictive abortion laws and continuous gender inequalities

In 1992, referring to the US Supreme Court's abortion decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, Drucilla Cornell (1992: 783-784) observed: 'as we watch the stripping away of women's most basic civil rights, such as the right of abortion, we need to ask ourselves why feminist legal reforms have been so difficult to sustain and why the conditions of women's inequality are continually restored.'

She described the process of restoration of gender inequality as a state in which 'anything associated with the feminine is disparaged, devalued, feared and, ultimately, repudiated'.

30 years later these words could not be truer, despite the fact that we have witnessed progressing liberalisation of abortion laws in many countries. Since 2020, Argentina and Thailand have legalised abortions, with certain gestational limits,[1] and Mexico and South Korea have decriminalized abortion.[2] Germany, and New Zealand eased their abortion restrictions. In 2022, Colombia made abortion legal on demand up to twenty-four weeks of pregnancy, making it the most liberal abortion jurisdiction in Latin America.[3] Other countries which liberalised – albeit modestly – their abortion laws include Kenya, Burkina Faso, Chad, Guinea, Mali, and Niger (Centre for Reproductive Rights 2023). In 2024 France constitutionalised the freedom of women to voluntarily terminate a pregnancy. These developments have been supported by important pronouncements of international organisations, including CEDAW (2007, 2011, 2013, 2022), UNHRC (2016), WHO (2022), and the Inter-American Commission of Human Rights (2018, 2020). Yet, at the same time, tendencies towards the restoration of inequality are prominent. For example, in October 2020, the Polish Constitutional Tribunal, reconfigured by the governing right-wing Law & Justice Party (PiS), over-

1 The Constitutional Court of Thailand ruled that the penal code provisions criminalizing abortion were partially unconstitutional and ordered the legislature to amend the code. *See* Miss Srisamai Cheuachat v. Respondent, Ruling, No. 4/2563, The Constitutional Court of the Kingdom of Thailand (Feb. 19, 2020), https://perma.cc/3D7Z-54CZ. Consequently, on January 25, 2021, the National Assembly of Thailand relaxed currently restrictive regulations on abortion by decriminalizing the termination of pregnancy during the first twelve weeks. *See* Act Amending the Criminal Code (No. 28), B. E., 2554, sec.2, http://www.ratchakitcha.soc.go.th/DATA/PDF/2564/A/010/T_0001.PDF; See *Thailand: Abortion in First Trimester Legalized*, libr. cong. (Mar. 1, 2021), https://www.loc.gov/law/foreign-news/article/thailand-abortion-in-first-trimester-legalized/. In South Korea, abortion became decriminalized on January 1, 2021, when the provisions of Act No. 293, the Criminal Act, that criminalized abortion became invalid. Criminal Act, Act No. 293, Sept. 18, 1953, arts. 269–270, amended by Act No. 5057, Dec. 29, 1995, https://perma.cc/3D7Z-54CZ. See *South Korea: Abortion Criminalized Since January 1, 2021*, libr. cong. (Mar. 18, 2021), https://www.loc.gov/law/foreign-news/article/south-korea-abortion-decriminalized-since-january-1-2021/.

2 In South Korea, abortion became decriminalized on January 1, 2021, when the provisions of Act No. 293, the Criminal Act, that criminalized abortion became invalid. Criminal Act, Act No. 293, Sept. 18, 1953, arts. 269–270, amended by Act No. 5057, Dec. 29, 1995, https://perma.cc/3D7Z-54CZ. See *South Korea: Abortion Criminalized Since January 1, 2021*, libr. cong. (Mar. 18, 2021), https://www.loc.gov/law/foreign-news/article/south-korea-abortion-decriminalized-since-january-1-2021/. See also: Decision of the Supreme Court of Mexico, No. 271/2021 07.09.2021; summary available via: https://www.internet2.scjn.gob.mx/red2/comunicados/noticia.asp?id=6581.

3 Constitutional Court of Colombia, Judgment C-055/22, 21.02.2022, available via: https://www.corteconstitucional.gov.co/english/Decision.php?IdPublicacion=13181.

turned the law protecting abortion in cases of foetal anomaly, almost immediately criminalizing 98 % of procedures officially performed in the country (Krajewska 2021). In June 2022, The Supreme Court of the United States issued a decision in *Dobbs v. Jackson Women's Health Organization* (2022)[4] that overturned the seminal *Roe v Wade* judgment (1973)[5] recognising that the US constitution protects the individual's liberty to terminate their pregnancy. Gender hierarchies are perpetuated and reinforced by creeping restrictions in countries such as Italy, Hungary, Russia, Croatia, Honduras, or Brazil. On these grounds, in a spirit of increasing frustration, we ask: *How is it possible that to date, despite considerable progress, women's reproductive rights are not secure and are always at risk of being restricted?*

Over decades, feminist scholars provided complex and comprehensive analyses of the patriarchal structures and processes in society that determine sexual and reproductive rights, especially access to abortion (Luker 1984; Petchesky 1995; Fineman & Karpin 1995; Reagan 1997; Ziegler 2020; Sheldon et al. 2022). Very few of these scholars have recognised the utility of the systems theory, especially as developed by Niklas Luhmann, as an instrument for explaining patriarchal structures and gender inequalities. This is not without reason. As aptly pointed out by King and Thornhill (2003: 204), Luhmann refused to recognise the influence of historical and contextual factors on the operation of law and politics and the role of law and politics as vehicles of change. Furthermore, '[Luhmann's] uncompromising position as a highly critical observer of radical and idealistic social movements earned him a reputation as a reactionary social theorist and as a major exponent of conservative political ideas. At the same time, (…) his refusal to accept at face value widely accepted accounts of justice, equality, democracy, stability, dominance, exploitation and so on, have led to accusations of anti-liberalism' (King & Thornhill 2003: 203).

Against the grain of these readings, this article has two main objectives. First, it aims to analyse the explanatory potential of systems-theoretical approaches in the examination of the development of abortion laws. Second, it aims to fill a significant gap in systems-theoretical literature, which to date has almost entirely disregarded the problem of sexual and reproductive rights and justice. This oversight is both surprising and disconcerting, given that gender equality constitutes one of the most important challenges in world societies. In juxtaposing two important academic literatures – feminist socio-legal studies of abortion and systems-theoretical studies of law – the article exposes gaps in both, and it demonstrates the con-

4 Dobbs v. Jackson Women's Health Organization, No. 19-1392, 597 U. S. (2022).
5 Roe v. Wade, 410 U. S. 113 (1973).

ceptual potentials inherent in this juxtaposition. It shows how systems-theoretical approaches can provide a lens through which analysis of reproductive rights can be abstracted against its historical, social, and political context. It also shows how such approaches make it possible to assess and explain the contingencies visible in social and legal phenomena that traverse national boundaries. Conversely, the introduction of the subject of reproductive rights into systems-theoretical debates can help test its limits, and in turn restate its contemporary relevance. Importantly, the starting point for the article is a clear commitment to advancing the cause of sexual and reproductive justice. Consequently, the article deviates from work more traditionally positioned in the systems-theoretical canon in that it investigates the potential for expressing and defending normative commitments in systems theory. It demonstrates the implications and limitations of such an approach.

The article engages with the work of Drucilla Cornell and Gunther Teubner, who – despite their very different intellectual backgrounds – provided progressive interpretations of systems theory. These theorists are addressed together as exponents of a normatively engaged and potentially transformative application of systems-theoretical approaches. The article examines Cornell's claim that systems theory provides a conceptual framework that helps to explain how gender hierarchy could be understood as a social subsystem in social-theoretical terms. She demonstrates that restrictive legal reforms in the area of abortion are the result of the structural coupling between law and gender hierarchy. Subsequently, the article analyses Gunther Teubner's work on societal constitutionalism, celebrated in this volume, which attempts to reclaim the (in certain circumstances) transformative function of law and politics. In particular, the article focuses on the analysis set out in 'The Anonymous Matrix: Human Rights Violations by 'Private' Transnational Actors' published in the *Modern Law Review* in 2006. Here, Teubner argued that human rights provide the necessary protection against the communications of functional systems which in modern society threaten the integrity of the body and mind of human beings (2006: 336; 341). This article critically examines whether societal constitutionalism can help feminists explain the recent developments in abortion law across the world. Although focused on methodological reconstruction, the article is not solely an exercise in theoretical interpretation. On the contrary, it constructs abortion law as a case study that illuminates the limits of systems theory. In particular, it highlights the destructive effects of systemic expansion, reflected in the real experiences of persons communicating with the political system, the healthcare system, and the legal system. On this basis, abortion law is examined as a traumatic structural coupling, where different expansionary systems converge.

The analysis commences with the reconstruction of Cornell's argument concerning the 'restoration of gender inequality' through restrictive abortion laws, which constituted an original attempt to link systems theory with feminist thinking. Questioning some of the interpretation provided by Cornell, the article proceeds to propose a different, more critical and constructive, use of systems theory to examine abortion. It does so by analysing abortion in light of the systems of health and law. This analysis consequently leads to Teubner's theory of societal constitutionalism and his work on anonymous communicative matrices. Subsequent sections of the article engage critically with Teubner's arguments concerning the threats posed by such matrices and the role that human rights play in constraining the expansive tendencies and dangers posed by those systems. In this respect, the article attaches particular emphasis to the explanatory potential and limitations of Teubner's arguments in relation to reproductive rights and justice.

Abortion through the lens of systems theory

Drucilla Cornell's systems theoretical approach to feminist legal reform

Unlike other feminist scholars, who tend to avoid engagement with systems theoretical approaches, Cornell (1992: 784) saw the need for a systems-theoretical explanation of ways in which the gender hierarchy intersects with the law 'so as to effectively undermine the legitimacy of women's demands for justice'. In her view, systems theory both offers an explanation of how the contamination of legal institutions by patriarchy occurs, and it allows analysis of the preconditions for change.

According to Cornell (1992: 792), 'gender differentiation takes place through the consolidation of the binary code which defines each one of us as a man or a woman. Gender, then, is a classic example of how a functional system structures itself through a binary opposition'. She further argues that gender hierarchy can be conceived as a closed self-referential system observing communications alongside a binary code, in which MAN is ascribed positive value (of potency and power), while WOMAN is ascribed negative value (repudiated and devalued as impotent and subservient). Her argument is based on Lacanian interpretation of gender, from which she infers that the function of the gender system is to create hierarchy between members of different sex/ gender, perpetuating itself through the repudiation of the feminine. In her view (1992: 792), Lacan's analysis of gender differentiation is informative as it:

> 'is structured not only as a binary opposition, but as a hierarchy in which the feminine is pushed under. Thus, it can only be a system in Luhmann's sense precisely because sex is only given to us by the system and not by a pre-given biological reality. Yes, men have a penis and women don't, but it is the meaning given to that fact within the system of the gender hierarchy that continually re-inscribes the devaluation of women as the castrated other'.

Furthermore, according to Cornell (1992: 796), gender inequalities are restored in the legal system through structural coupling.[6] She gives the example of mothering as 'an "event" that takes place in a number of systems to show that the categories of the legal system express the "reality" of the gender hierarchy. For instance, mothering negatively impacts on women's ability to be promoted in their professional lives, despite formal equality. Seemingly progressive provisions, including flexible (part-time) working arrangements, often negatively impact women's ability to be promoted and reach positions of leadership. Consequently, she argues (1992: 795) that 'the category of functional differentiation may itself disguise the way in which this differentiation can only seemingly be functional, as opposed to stratified, if one implicitly takes for granted the already-in-place gender hierarchy'.[7] In her view, the pre-given is a reminiscence of the historic stratified differentiation.

In order to demonstrate this 'pre-given gender hierarchy' she utilises the work of Carole Pateman concerning the social contract. In line with second-wave feminist claims, Pateman argues that the essential basis of social order is an implicit sexual contract that gives men access to women, often by violent means. This remains within the private sphere and beyond the scope of the social pact. The institution of a contract only regulated relations between men, not between men and women, as women could never be subjects of the social contract; 'they can only be subjected to it' (Pateman 1988: 17). Allowing women to enter contracts or political institutions does not change 'the patriarchal "foundation" of the myths which justify civil society' (Cornell 1992: 788).[8] Consequently, according to Cornell (1992: 793), the contribution of systems theory to feminist analysis lies in the fact that it helps to analyse the barriers that obstruct functional differentiation. While Cornell does not expressly state this, her view appears to be that communication about gender

6 'Feminists need a conception of the structural coupling of systems to understand the restoration of the gender hierarchy within the legal system' (1992: 795).

7 Cornell (1992: 788-789) argued that systems theory helps explain 'why a psychoanalytic account of the gender hierarchy can be successfully transposed into the arena of public relations, without collapsing psychic structures into the social, a move that most psychoanalytic theorists are careful to avoid'.

8 'By 'pre-given' Cornell (1992: 796) meant only 'the recognition of the "past" in which gender hierarchy was clearly a fundamental stratification'.

(hierarchy) coupled with other systems, such as religion or law, reinforces social inequalities. The same could be said of race or class.[9]

Consequently, according to Cornell (1992: 790), '"the right of abortion" should only be understood as part of a broader program of equivalent rights', and, as such, it forms an integral part of the system of gender (hierarchy). She suggests that we cannot understand the backlash against even the most meagre civil rights of women and the restoration of inequality through the traditional explanations of the distribution of political power. Instead, she frames gender hierarchy as a system that allows her to explain how law becomes 'contaminated by patriarchy'. Cornell's analysis of gender hierarchy as a separate subsystem is not plausible within the terms of systems theory itself, as communication about gender (and race) cuts across all subsystems and generates different modes of communication in each of them. A gender-critical systems-theoretical approach, in parallel to Cornell, may need to focus on Luhmann's concept of the environment, not the system, as the environment may be seen as subject to a binary coding along gender lines. However, Cornell's claim that systems theory provides us with illuminating insights concerning the status of abortion in society is certainly worth pursuing in more detail. Consequently, the following section provides a detailed analysis of abortion through the lens of systems theory. In particular, it applies systems-theoretical analysis to consider abortion as part of the systems of health/medicine, law, politics, and religion. Consequently, this analysis elucidates societal compulsion to control sexual and reproductive health.

Abortion and its relation to the system of health

Abortion is usually considered an occurrence – albeit potentially spatially and temporarily fragmented[10] – that separates two states of being: pregnant/not pregnant. Miscarriage, stillbirth, and birth are all occurrences that have similar effect

9 Cornell (1992: 797) used systems theory to explain intersectionality and 'to account for how the system of gender intersects with the system of racism. If we assume that there is an intersection between two systems then we can better understand that what it means to be a woman can never be the same for an African-American woman and a "white" woman. (…) This insight is perfectly consistent with the "postmodern" insight that to be a woman is always to be a woman differently, depending on race, class, sexuality and age, and yet there is meaning to the statement that one is a woman, even if that meaning constantly shifts. This is an intrinsically interesting argument, but it deviates from the construction of a social system proposed by Luhmann, because race and gender traverse all systems.

10 While abortion, like birth, is often conceptualised as a point in time, it is important to remember that both occurrences are often both temporarily and spatially fragmented and/or stretched

and, as increasingly noted in literature, the difference between them is far from clear (Moscrop 2013).[11] Importantly, it is only through communication that abortion acquires a positive or negative meaning in society. Communication about abortion will depend on how we view pregnancy and motherhood. Following the development of the welfare state post-1945, our inclination might be to connect pregnancy and abortion with healthcare. In systems-theoretical terms, we might be tempted to see abortion as part of the system of medicine/health.

According to Luhmann (1983), the code for the differentiation of the system of medicine is 'ill/healthy' – this code is visibilized in the communication between the doctor and the patient. Importantly, illness is the positive value side of the distinction.[12] This is because only illness is instructive for the doctor; s/he can only act when the latter is identified. Health gives nothing to work with, as it only describes what one feels in the absence of illness. From medicine's point of view, healthy people are those who are not yet ill, or not ill anymore, or those who are ill, but asymptomatic. Thus, the primary aim and function of medicine is to free from disease, which involves the move from positive towards the negative value (Luhmann 1990: 176-188). Once this aim (i.e. the reflexive value of health) has been achieved, there is nothing more upon which to reflect. All communication between the doctor and the patient is about present illness, and, hence, it is unnecessary when the illness disappears, and the patient is cured. No second-order observation is necessary; the absence of illness speaks for itself.

Consequently, there are many illnesses and only one health. As illness is seen as disturbance of the body and mind, which constitutes a necessary environment for all communication in society, healthcare develops to eliminate this major threat to the system. As a result, over the years, the health-care system has proliferated and created new classifications of disease, to which it can react through research, which in turn leads to further expansion of therapeutic and preventative procedures. Once the patient is cured of illness, the need for communication between the doctor and the patient disappears. For Luhmann (as noted by Bauch 1990), this explains why, in contrast to other function systems, medicine and health care has developed

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out. Medical abortion might require several steps and can take place over time. The beginning and the end of the proces might happen in different places.

11 I would like to thank Professor Sheelagh McGuinness for the insightful discussion of this problem addressing the most recent developments in clinical knowledge and academic literature included in her presentation '*My miscarriage was actually an abortion*' which took place at the Institute of Global Innovation at the University of Birmingham on the 17 April 2023.

12 See my discussion in Krajewska (2020).

neither a specific generalized symbolic means of communication, nor a complex theory of reflection based purely on its functions. The systems-theoretical approach elucidates both the process of medicalisation of society (Illich 1975; Conrad 1992), e.g. the multiplying categories of illness and the expanding preventative measures for asymptomatic conditions, and at the same time, the difficulties concerning the legal definition of health (Krajewska 2020).

Accordingly, the systems theory offers additional insights into the reasons why both pregnancy and abortion have become deeply medicalised. Over the centuries pregnancy was not initially treated as a condition necessitating medical overview. In modern health-care systems, however pregnancy often triggers a process of medical oversight and a series of diagnostic interventions, including routine blood tests, ultrasounds, genetic prenatal diagnosis. Thus, it could be said that, to all intents and purposes, pregnancy is constructed as an illness. As such, it becomes part of the system of medicine until the moment at which pregnancy ends.

This type of conceptualisation can have diverse consequences. On the one hand, it can lead to the strengthening of the decision-making power of healthcare professionals and their enhanced control over women and pregnant people. The way in which healthcare professionals, in particular members of the medical profession, utilised medicalization of human reproduction to increase and then solidify their power in society has been well documented in academic literature (Mohr 1978; Luker 1984; Keown 1988; Joffe 1995; Petchesky 1997; Reagan 1997; Sheldon 1997; Solinger 1998; Thomson 2013; Sheldon & Kaye 2020). The state can also utilise the increasing medicalization of reproduction to intensify the surveillance of pregnant people, which can result in in their abuses by public and private institutions. In October 2022, the Polish government imposed on healthcare professionals an obligation to provide information about a pregnancy of a person seeking health services into a national Medical Information System, regardless of consent of the data subject.[13] On the other hand, if pregnancy is treated as an illness, the act of giving birth and, importantly, abortion, are occurrences that instigate the transition from the condition of being ill to the condition of being healthy. It could, thus, be argued that abortion does not necessarily belong to the sphere of medicine and health care, and it should be separated from the ordinary health-care system.[14] Miscarriage has distinctive importance in this respect. As 25 % of pregnancies end in a miscarriage,

13 Dz.U.2020.1253 as amended by Dz.U.2022.1296.

14 This conceptualisation could support healthcare policies that favour home births as a default position, the involvement of different birthing partners (doulas, traditional midwives, etc.) and hospital deliveries as an option in case of complications.

it should not be treated as an illness. The value of miscarriage will change depending on whether the pregnancy is wanted or unwanted. Miscarriage, and similarly stillbirth, in a wanted pregnancy can be seen as an illness (or a cause of illness, e.g. distress). Abortion on the other hand, fluid definitional boundaries aside, is far less likely to be seen as an illness, as it usually occurs in an unwanted pregnancy. These values will change if the health system is irritated by the communications belonging to the system of religion or politics.

If we resist the pressures of medicalization, we will see pregnancy as simply one of the physiological states of being, thus falling outside the system of medicine. Abortion then is nothing other than a stage between two different forms of health and, for this reason, does not acquire any special societal status. This conceptualisation is often favoured by feminists who aim to release women and pregnant people from medical control, which usually enhances gender inequalities (Erdman et al. 2018). At the same time, however, perceiving pregnancy as the state of health can have oppressive consequences, especially if we perceive pregnancy as part of motherhood (interpreted as part of the subsystem of gender hierarchy described by Cornell). If there is nothing wrong with you (you are pregnant = healthy) then you do not need an abortion. Consequently, systems theoretical analysis suggests that equating being pregnant with being healthy may pose a threat to pregnant people who wish to terminate their pregnancy. This type of conceptualisation might explain why abortion on request tends to be subject to restrictions, e.g. it is permitted within the first 12 weeks of pregnancy, requires counselling or periods of "reflection". Furthermore, this is also present in the discourse of many healthcare professionals and policy makers reluctant to facilitate a medical intervention that will terminate a state of being healthy.

To be sure, we can imagine a situation in which pregnancy causes some disturbance of the body (e.g. diabetes, tachycardia, sepsis etc.), so that it falls within the positive code value of the system of medicine. In such cases, abortion is an event that can "cure" the pregnant person; it serves a medical function. Cases of illness in pregnancy are the most accepted grounds for abortion. This is reflected in many jurisdictions, the overwhelming majority of which permit abortion in cases where there is a risk to life or health of the pregnant person. A similar function will be performed if a biological anomaly affects the life/health of the foetus. The communication about the healing function of abortion in such cases can vary. It can be seen either as a prevention of prospective suffering, illness or death of the future child and/or as a remedy for the present suffering of the pregnant person caused by the knowledge about the condition of the foetus and the prospective illness or even of the future child. Many national and international legal instruments permit this type of abor-

tion because it can be construed as falling within the right to health protected by Art. 12 ICSECR (1966). The latter has become one of the most powerful arguments in favour of decriminalisation of abortion (WHO 2022). In fact, one could argue that abortion on the grounds of rape also serves a therapeutic function: it protects the wellbeing of the pregnant person, whose bodily integrity has been gravely violated and for whom pregnancy and subsequent motherhood can often mean continuous re-traumatisation. In all such cases, the system of medicine fulfils its typical function. As demonstrated above, this is how legalisation of abortion is usually framed and justified. However, abortion can have different functions and it can be observed in a different way in different systems. For instance, abortion on the grounds of rape/incest can be seen as performing a legal/"restorative justice" function for the victim whose rights and personal integrity have been violated. Abortion can serve an "economic function" if it is done for socio-economic reasons.[15] Contradictions between different observations concerning abortion become acutely visible when we observe the systems of religion and politics. Observations made by these systems can perceive abortion as an occurrence aimed at the destruction of a (potential) human being, i.e. a murder, or a threat to family, 'nation', and society.

The above analysis suggests that abortion often becomes the basis for a number of structural couplings between medicine, politics, religion, education, economy, and law. For instance, if abortion is decriminalised and/or legalised because it is seen as performing an important healing function, it becomes the basis of a structural coupling between the system of health and law. More importantly, communication about abortion supports the expansion of those systems. The expansion of the system of politics and religion, and the way in which they irritate the legal system in the case of abortion, is such that it threatens not only the system of health, but also the system's environment – the human body and mind.

Here is where the work of Gunther Teubner on societal constitutionalism becomes crucial. Particularly relevant for the discussion of abortion and gender inequalities are his arguments concerning the threats posed by expanding global communicative systems and the role that human rights should play in limiting such expansion. The next part of the article begins with a detailed analysis of Teubner's theory, and subsequently proceeds to consider its application and relevance in the context of abortion and reproductive rights. Particular attention is given to impact that the expansion of different social systems can have on the integrity and lives of preg-

15 It can also perform a different type of economic function – generate income for medical professionals - if it is not covered by the public healthcare system.

nant people and the role of fundamental rights in addressing the impact of this encroachment.

Gunther Teubner's threat of the Anonymous Matrix

In his article on the 'Autonomous Matrix', Teubner (2006: 330) observed that systems theory urges us to reformulate the problem of inequality, and thus also of redistributive justice, 'away from the perspective of interpersonal conflicts between individual bearers of fundamental rights, to a view of conflicts between anonymous matrices of communication, on the one hand, and concrete individuals, on the other'. Taking systems theory as a starting point, Teubner (2006: 330) redefined the problem of inequality and injustice as 'an "ecological" problem: as an injury that an expansive social system does to its social, human, and natural ecologies'. As a result of this systems-theoretical reconceptualization, he claimed that:

> 'Society's internal divisions should be understood (...) as resulting from the interrelations of communicative networks with their environment. Actual people are not at the centre of these networks (...). [They] are the environment for the communicative networks, to whose operations they are exposed without being able to control them...' (2006: 333).

On this construction, the problem of injustice (or multiple injustices) occurs in numerous social institutions, each forming their boundaries with their human environments – both between politics and individual, but also between economy and individual, law and individual, science and individual, or medicine and individual. Importantly, Teubner (2006: 339) warns against boundary formation that is understood as a whole/part relation. Rather, it should be seen as the 'difference between communication and mind/body'. Injustice occurs because of the totalising tendencies and the structural violence of impersonal communicative processes against body and mind.[16] In other words, people are being threatened 'not by their fellows, but by anonymous communicative processes' (2006: 341).

16 Teubner utilises the example of Dr Mengele, whose experiments 'were once regarded as an expression of a sadistic personality or as an enslavement of science through the totalitarian Nazi-policy', but according to Teubner should be seen 'as the product of the expansionistic tendencies of science to seize every opportunity to accumulate knowledge, especially as a result of the pressure of international competition, unless it is restrained by external controls' (2006: 338).

Injustice related to abortion can certainly be conceptualised in this way: it can be seen as the destructive potential of communication about abortion produced by religion, politics, medicine, economy, and law against their environment. Such communication and structural couplings threaten the body/mind of pregnant people (and their families). In this perspective, abortion is a symbolic point – albeit also embodied and corporeal – which crystallises the problems of systemic expansion and overreach of matrices of medicine, politics, religion, and law.

Three issues, discussed by Teubner, appear particularly relevant in this respect and require further inquiry:

1. The systemic expansion/overreach of medicine, religion, politics, and law through communication about abortion.
2. The injury caused by this expansion to the natural ecologies of the system, i.e. women and pregnant people (and their families).
3. The limiting/emancipatory potential of human rights, which, according to Teubner, appears as a force limiting systemic overreach.

Abortion and the systemic expansion of societal fragments

First, as is well known, Teubner's theory of societal constitutionalism indicates that 'private actors, which establish their own regimes outside of institutionalized politics' undergo processes of self-reproduction and maximization of their particular rationalities, which become excessive (Teubner 2012: 9). This is particularly true in conditions of globalisation when pressures exerted by the state to set limits to their growth disappears and regimes undergo unprecedented expansion. When these societal fragments expand, 'communication can be used by people productively for their survival, but it can also – and this is the point at which fundamental rights become relevant – turn against them and threaten their integrity, or even terminate their existence' (Teubner 2012: 334-335). Specific endangerment of physical and mental integrity comes not just from politics, but in principle from all social sectors that have expansive tendencies.

As mentioned earlier, communications about abortion support the expansion of different systems: medicine, religion, politics, law, and education, often intensifying tensions between them. In the context of abortion, the expansion of the political system in a fashion that poses a threat to human integrity remains crucial. As will be demonstrated below, governments, political organisations and lobby groups remain powerful and influential actors in shaping sexual and reproductive rights across the globe at subnational, national, regional, transnational, and international

level. This is often visible in abortion law reforms introduced by newly elected governments (e.g. in Brazil, Poland, Hungary) or in the negotiations of international treaties, where particular state interventions shape the content of provisions affecting reproductive rights (e.g., the Inter-American Convention of Human Rights). However, religious discourses can (and do) irritate the system of politics and law. Political and religious communications can (and do) irritate the system of medicine, law, and education. These processes have been well illustrated by Deflem, in an article written in 1998 in which, using U.S abortion law as a case study, he examined competing hypotheses on law derived from the theories of Parsons, Luhmann, and Habermas. He argued that Luhmann's theory could not explain how abortion law had developed since 1973 because it disregarded the influence of certain non-legal contexts. However, his analysis did show how communications about abortion were utilized by and contributed to the expansion of the systems of politics and religion and how in turn their irritations lead to the expansion of the system of law in the context of abortion. As pointed out by Deflem (1998: 793), abortion became the main issue of presidential campaigns and 'a central concern of presidential policy' during the presidency of Ronald Reagan, whose presidency involved 'a concerted and rather successful effort to intervene in the legal abortion debate'. During his presidential campaign, Reagan endorsed a human life amendment to the Constitution, which would result in a ban of abortion. In 1986, he proclaimed the National Sanctity of Life Day, declaring abortion 'the ultimate human rights issue' (Deflem 1998: 793). He further appointed Supreme Court Justices who opposed the legalisation of abortion and placed anti-abortion officials in key administrative posts. This influenced the Court's more conservative rulings on abortion since the mid-1980s. On this basis, Deflem (1998: 806-807) argued, that contrary to the claims made by systems theorists, morality and religious claims were directly incorporated into law, and that consequently, instead of providing cohesion, abortion law has contributed to the acceleration of conflicts over the morality of abortion. Deflem's rejection of systems theory's explanatory potential can be questioned on two clear grounds. First, as mentioned above, in systems-theoretical terms the impact of religion and politics could be explained by structural coupling and irritation between systems. Second, while abortion law might not always resolve social conflict, it is possible to argue that it can provide social cohesion through the oppression of one group over another. The oppressive impact of abortion law resulting from structural coupling between medicine, religion and law has been demonstrated in various geo-political contexts across the globe.

For instance, in an interesting revival of religious discourses '[i]n Central and Eastern Europe, "abortion rights had been restricted… due to the political revitalization of religious institutions… and the general 'remasculinization' of the region,

manifested in a backlash against the gender-equality ideology presumably imposed by communism' (Mancini & Stoecki 2018: 225). The development of Polish abortion law after 1989 is one of the most striking examples of this irritation of the political and legal systems by religion, which has had devastating consequences for women and pregnant people. While under the Socialist regime, abortion was legalised and widely available for almost 40 years (Zielińska 2000, Fidelis 2010; Kuźma-Markowska & Ignaciuk 2020), the political and socio-economic transition, formally initiated in 1989, gave rise to one of the most restrictive abortion regimes in Europe. Since the late 1980s, Polish society has experienced systematic introduction of succeeding restraints on access to reproductive rights (Krajewska 2021a). This retrenchment is commonly attributed to the hegemonic position of religious organizations, traditional social structures, and complex political dynamics after 1989 (Jankowska 1991; Fuszara 1991; Hoff 1994; Titkow 1999; Graff 2008; Mishtal 2015; Kuhar 2015; Rosenfeld & Mancini 2018; Korolczuk 2020).

Legislative debates that led to the adoption of restrictive abortion law in 1993 made extensive references to the sanctity of life and religious discourses. The Act on Family Planning and the Protection of the Human Foetus 1993 was offered as *a compensation* to the Catholic Church for the support that it provided to the opposition movement during the Communist period. This was possible because in the first years of democratic transition, the Chambers of Physicians, the main medical professional organisations in Poland, have been dominated by doctors active in the "Solidarity" movement in the 1980s and closely linked to the Catholic Church (Krajewska, 2021b). Through these connections, the Chamber became a powerful ally of the Catholic Church after 1989 and it was an active supporter of its anti-abortion agenda. The influence of religion has been more surreptitious in the most recent reforms of 2020. On October 22, 2020, the Polish Constitutional Tribunal (CT) held unconstitutional Art 4a (1)(2) of the 1993 Act (K1/20).[17] Art 4a (1) of the Act 1993 allowed access to abortion where: 1) The pregnant woman's life or health is at risk; 2) medical examination suggests a high risk that the foetus would suffer severe and irreversible impairment or an incurable illness that could threaten its life; or 3) the pregnancy is the result of an illegal act – rape or incest – up to the 12th week of pregnancy.[18]

17 The judgment was issued with a 7:5 majority and came into force two months later, on January 27, 2021, upon its delayed publication in the Official Journal. See: K 1/20 (Dz. U. 2021.175) (Pol.), https://trybunal.gov.pl/postepowanie-i-orzeczenia/wyroki/art/11300-planowanie-rodziny-ochrona-ploduludzkiego-i-warunki-dopuszczalnosci-przerywania-ciazy.

18 Dz. U. 1997.88.553 ze zm (Pol.).

The CT (K 1/20) judgment can be seen as part of the political project of PiS, which has governed Poland since 2015. Originally, the party was rather moderate in its demands concerning reproductive rights. However, the political dependence on the Catholic Church and the competition with reactionary political factions led to its rapid radicalization. Consequently, since its assumption of power, the party has mounted an offensive against reproductive rights and openly supported numerous attempts to restrict even further the already restrictive abortion law (Kubisa & Rakowska 2018). In 2016, a few months after PiS came to power, the Prime Minister admitted that the government would support a total ban on abortion. At the same time, an ultra-Conservative organization, *Ordo Iuris*, prepared a legislative proposal according to which abortion would constitute a crime in all but one case: If the death of the foetus was a consequence of an action aiming to avert a direct threat to the woman's life. Over the years, different legislative projects of more draconian abortion laws collapsed in Parliament, most recently in April 2020. This is the reason why, in 2019, a group of 119 Conservative MPs chose the route of constitutional complaint to achieve such changes. By then, the government had acquired control of the CT, and it determined the outcome of the decision (Bucholc 2022). As such, the judgment K 1/20 constitutes a perfect illustration of the broader patterns of government that have dominated Polish politics in recent years.

However, when read closely, the judgment of the Polish Constitutional Tribunal displays clear signs of the overreach of the religious and the political system. This is manifested, for instance, in the focus on the value of foetal life, accompanied by a complete disregard and silencing of the constitutional rights of women (Krajewska 2021a; Furgalska & De Londras 2022). The two-hundred-page long majority judgment, published with a three-month delay, fails appropriately to apply the basic standards of doctrinal analysis and constitutional interpretation. First, the court agreed with the applicants, who claimed that the challenged provision, Article 4a (1) & (2) of the Act 1993 legalized 'eugenic practices in relation to the unborn child'.[19] It found that the provision violates Article 38 in connection with Article 30 and Article 31 Paragraph 3 of the Polish Constitution 1997. These provisions guarantee respectively: a) legal protection of every person's life; b) respect for and protection of human dignity; and c) the principle of proportionality. The Tribunal found that the protection of every person's life guaranteed in Article 38 of the Constitution 1997 encompassed the entire 'biological existence of the human being' from the moment of conception. Employing a wide interpretation of this provision, read in conjunction with Article 30 the judges came very close to equating the constitu-

19 Dz. U. 2021.175) (Pol.).

tional provision for the '*legal protection* of everyone's life' with *the right to* life of the foetus. This interpretation disregards the literal and teleological interpretation of the Constitution, which specifically does not aim to provide an absolute protection to human life 'from the moment of conception'. This issue has been widely debated at the time of constitutional drafting in 1996-1997. The Constitutional Assembly eventually purposely decided to avoid specific phrasing in this respect to limit the scope of the legal protection of the foetus (Zielińska 2007; Wróbel 2007). In K 1/20 the Constitutional Tribunal suggested that, for abortion to be justified, it needs to meet the standard of 'absolute necessity'.[20] This was taken to mean that the protection of the foetus's life cannot be limited in order to protect rights and values of 'lower standing', which include the right to property, other economic rights, and even the health of others. In essence, going contrary to the literal and teleological interpretation of the Polish Constitution 1997, the Tribunal held that the life of the foetus should take precedent over the health of the pregnant person. While the judges did not explicitly utilise any extra-legal arguments to support their interpretation, the judgment is another clear example of the expansion of the system of politics (and religion, albeit indirectly) that influenced the system of law.

As aptly pointed out by Teubner, the expansion of social systems is particularly acute at the global level, when the power of the state diminishes. In the context of abortion, this is illustrated by the rapid development of transnational emancipatory and anti-abortion movements (Korolczuk & Graff 2021). As remarked by Mancini and Stoeck (2018: 221):

> 'Today, pro-life activists from different continents and countries cooperate both formally and informally, unified by an agenda aimed at influencing domestic and international lawmaking and litigation, in the sphere of religious freedom and sexual and reproductive rights. (…) This transnational dialogue has resulted in the circulation of anti-abortion arguments and strategies across different countries and legal systems'.

Indeed, this has been the case in Poland, where the ultra-conservative Polish Catholic think-tank *Ordo Iuris* has relied on transnational links and overseas financial support. The association draws inspiration from the *Tradition, Family and Property* (TFP) network of Catholic fundamentalists, founded in the 1960s in Brazil. Its allies include the global branch of the controversial US legal advocacy group *Alliance Defending Freedom*, which in 2017 was involved in 580 'ongoing legal matters', challenging sexual and reproductive rights in 51 countries (Provost & Milburn 2017). Such networks and social movements form alliances across different faiths and

20 K1/20, para 160.

denominations (e.g. Catholic and Evangelical). Consequently, they have had notable success in influencing abortion laws and practices across the world at national and international level. For example, whenever Polish abortion law is (about to be) amended, *Ordo Iuris* produces guidelines providing restrictive interpretation of the law. Thanks to informal links with the government, such guidelines are then sent to public institutions, such as the Public Prosecutor's Office, and circulated amongst members of staff, potentially influencing their activities and behaviour. Following other organisations of this kind, *Ordo Iuris* obtained 'special consultative status' at the UN's Economic and Social Council (ECOSOC) in 2017 to strengthen and formalise its influence over global political and law-making processes (Kurasinska 2018). The next section examines the impact of this expansion of different communicative matrices on the well-being of pregnant people and the state of society.

The threat to the ecologies of the system

This expansion of the political and religious systems, exemplified by anti-abortion legal reforms has had devastating consequences on the lives of women, pregnant people, and their families. They can be seen as corroborating Teubner's observation that communication can irritate psycho-physical processes in such a way as to threaten their self-preservation, or it may simply destroy them.[21]

This is well evidenced by the human rights litigation against states with restrictive abortion regimes. For example, in *Tysiąc v. Poland* (2007) gynaecologists refused access to lawful abortion to a woman even though three ophthalmologists concluded that carrying the pregnancy to term constituted a serious risk to her eyesight. This risk later materialized, qualifying the applicant as a person with a serious disability in the Polish welfare system.[22] The ECtHR found a violation the applicant's right to privacy guaranteed in Article 8 ECHR on the basis that the state did not guarantee procedural transparency and certainty in the access to lawful abortion services. In *RR* (2011), doctors, hospitals, and administrators repeatedly denied a pregnant woman access to prenatal genetic and other diagnostic tests and medical information about her pregnancy until abortion was no longer an option.[23] This was done despite the fact that foetal irregularities were discovered during a sonogram at an early stage in the pregnancy and that Polish law at the time permitted termination

21 Teubner provides an in-depth analysis of threats by the economy and politics in his work on access to medicines and scientific freedom. See: Teubner 2006; Hensel & Teubner 2014.

22 *Tysiąc v. Poland*, (No. 5410/03) 2007 IV Eur. Ct. H.R, http://hudoc.echr.coe.int/eng?i=001-79812.

23 *R. R. v. Poland* (No. 27617/04) 2011 IV Eur. Ct. H. R., http://hudoc.echr.coe.int/fre?i=001-104911.

of pregnancy in such cases. These delays, the treatment by healthcare professionals, and the resultant uncertainty meant that the woman suffered acute anguish and suffering, and she eventually gave birth to a girl with severe Turner syndrome. In a landmark decision, the ECtHR found for the first time that the behaviour of public authorities amounted to inhumane and degrading treatment and therefore violated Article 3 ECHR. Finally, in *P. and S.* (2012), a minor was denied access to abortion, although the pregnancy was a result of rape, a case stipulated in the Act 1993 as a ground for lawful abortion.[24] The applicant and her mother encountered multiple obstacles, including the refusal of doctors to perform a legal abortion, lack of referral to a different provider, provision of false or distorted information about the legal requirements to access abortion care, and disclosure of personal and medical information to the press. The obstacle resulted in harassment of the applicants by doctors, members of the clergy, and anti-abortion groups. In addition, the minor was removed from her mother's custody and detained for a short period of time in a juvenile centre. Unsurprisingly, the treatment of both applicants by healthcare professionals and public authorities was found to violate Article 3 and Article 8 of the ECHR. The risk posed to Polish women by the expansion of the religious and political matrices increased dramatically after the judgment of the CT in 2020. Two women died in the first two years, because doctors denied access to lawful abortion in fear of prosecution (Strzyżyńska 2022).

Similar consequences can be observed in other countries with restrictive abortion laws, including Brazil, Nicaragua, El Salvador, Nigeria, or Somalia. Most recently, the Inter-American Court of Human Rights heard the case of *Beatriz et al v. El Salvador.* The case concerned a young woman who was denied access to abortion in 2013 even though her pregnancy was high risk due to a range of conditions including lupus, arthritis and renal failure, and the foetus she was carrying suffered from anencephaly. After the Constitutional Chamber of the Supreme Court of Justice in Salvador denied her request to access abortion, she became gravely ill and eventually underwent an emergency C-section, giving birth to a child that lived only a few hours. Beatriz died in a traffic accident in 2017, in part due to her ongoing physical weakness (IACtHR 2022). In Brazil, a 10- and an 11-year-old girl, whose pregnancies resulted from rape, were initially refused lawful abortion services, which led to significant stress and suffering. In one case, following successful litigation to access abortion, the details of the participants were published in violation of Brazilian law, which led to extensive harassment of the patient and hospital staff. In the second case, the judge pressurised the girl to continue with the pregnancy, denying her

24 *P. and S. v. Poland* (No. 57375/08) 2013 IV Eur. Ct. H. R., http://hudoc.echr.coe.int/fre?i=001-114098.

request for abortion and supporting doctors who had refused to provide the service (Starr 2020; Lopez 2022).

The destructive potential is also inherent in the communications observed by the systems of medicine and science, especially if irritated by religion and politics. In most societies, the decision of whether or not to provide abortion to the pregnant person lies with the physician, who decides whether abortion is needed or necessary to protect the person's health or life. Historical studies of abortion have shown that abortion was a 'battle ground', through which the expansion of professional power and autonomy took place (Luker 1984; Sheldon 1997; Solinger 1998). It has also been argued that medical professionals often used religious (sanctity of life) and political (nation-building/ modernisation) arguments to advance their economic and cultural power in society (Mohr 1978; Keown 1988). Even the US decision in *Roe v Wade* – often considered an exemplification of women's empowerment in the context of abortion – shows the pressures exerted by the system of medicine on pregnant people. When SCOTUS decriminalised abortion in the first trimester, it still left the decision-making power to physicians, when it held that '[f]or the stage prior to approximately the end of the first trimester the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician, subsequent to approximately the end of the first semester the state may regulate abortion procedure in ways reasonably related to maternal health, and at the stage subsequent to viability the state may regulate and even proscribe abortion except where necessary in appropriate medical judgment for preservation of life or health of the mother' (*Roe v Wade* 1973:705).

The threats posed by the system of medicine to the environment, i.e. the body and mind of pregnant people, can also be illustrated by the fact that subsequent scientific and medical developments, such as image diagnostics, assisted reproduction techniques, and others allowed for new anti-abortion discourses, some of which had limiting and oppressive consequences for women and pregnant people. This trend has been undermined by the increased use of misoprostol and mifepristone as miscarriage-inducing medications, which can be self-administered and therefore open the opportunity of self-help among women (Pizzarrossa & Nandagiri 2020, Yanow et al. 2021). This reconfiguration could also potentially lead to the expansion of the systems of science (through the development of other abortion medicines), economy (through private online supply of pills) and the internet (by making sure that purchases are untraceable, developing software for feminist self-help and digital civic resistance). These developments show that expansion can also have emancipatory consequences.

Nevertheless, Teubner's observations concerning the expansionist tendencies of the communicative matrices help explain why excessive optimism might be premature, for high levels of societal differentiation do not necessarily guarantee that the threats to the environment (body and mind) will diminish. As noted by Teubner (2006: 337), 'in its endeavours to control the human mind and body, politics expands with particular verve across the boundaries of society'. The same can be said of religion, medicine, or law. However, it is also worth noting that the likelihood of such threats is lower in societies where the systems of religion, politics, law, and medicine are highly autonomous, because the instances of mutual irritation decrease. This claim might be problematic. Utilising Cornell's line of argument, we could say that the threats remain because the legal system is contaminated by communications concerning gender inequality which is *already in place*.

Consequently, Teubner (2006: 334) suggests that '... the question is no longer one of distribution of social resources in the broadest sense, i.e. power, wealth, knowledge, life chances, among the parts of society. Instead, the point is to constrain the institutions' acts in such a way that they do not do injustice to the intrinsic rights of their social and human ecologies'. The overcoming of inequality among people and the fair distribution of resources are then replaced by two quite different demands on social institutions. First, internal and external limitation of their expansive tendencies; and second, sensitive balancing between their intrinsic rationality and the intrinsic rights of their environments. According to Teubner, fundamental rights, especially human rights, can help us deal with these challenges. The next section tests the limits of these claims.

Human Rights as limits to the destructive potential of the anonymous matrix

As mentioned earlier, Teubner used systems theory to reconceptualise the role of fundamental rights in society, especially regarding their horizontal application to relations between private actors. For Teubner (2006: 336), fundamental rights are 'pre-political' and 'pre-legal', in the sense that they arise from 'communicative conflicts in politics, morals, religion or law, and the resulting conflicts'. The historical role of such rights has been to protect the precarious results of social differentiation from systemic overreach or unmanageable politicisation. Yet, in contemporary global society, fundamental rights are directed against the intrusions of other expansive social systems, e.g., economy, medicine, science, religion. To this degree, such rights provide defence in face of threats posed to the integrity of institutions, persons and individuals that are created by anonymous communicative matrices

(institutions, discourses, systems). Consequently, Teubner (2006: 342) divides fundamental rights into several dimensions:

> 'Firstly, *institutional rights* which protect the autonomy of social discourses - the autonomy of art, of science, of religion - against their subjugation by the totalising tendencies of the communicative matrix... Secondly, *personal rights*, which protect the autonomy of communications, attributed not to institutions, but to the social artefacts called 'persons'. Thirdly, *human rights* as negative bounds on societal communication, where the integrity of individuals' body and mind is endangered by a communicative matrix that crosses boundaries'.

Human rights express relations between anonymous processes, on the one hand, and ill-treated bodies and souls, on the other. They establish a form through which these bodies and souls can express their anti-power, anti-medicine, anti-religion messages of violence or suffering. At the same time, Teubner's expectations with regard to human rights are surprisingly limited, as he concludes that the problem of 'justice of human rights' can only be formulated negatively. Human rights can only be expected to remove unjust situations, but they cannot be expected to create just ones. According to Teubner (2006: 346), 'human rights justice' constitutes at best 'the counter-principle to communicative violations of body and soul, a protest against inhumanities of communication, without it ever being possible to say positively what the conditions of 'humanly just' communication might be'.

This reconceptualization of human rights serves an important purpose in the context of abortion. First and crucially, instead of focusing on specific institutions, organisations, or individual people, it allows us to see 'abortion wars' (Solinger 1997) in a different and much broader light: as a conflict between broader rationalities of distinct social spheres, which has devastating outcomes for large segments of (global) society. It enables us to examine the development of abortion law in (and independently of) different geographical, political, and historical contexts. This, in turn, helps us identify broad processes that permeate global society. Furthermore, it allows us to incorporate non-state actors into human rights analysis, which can be particularly fruitful in case of transnational networks and social movements. In Teubner's model, human rights should be utilised to defend pregnant women against the harms stemming from the communication of transnational anti-abortion networks. On the one hand, one could argue that human rights (and human rights language) have been very successful in limiting the anonymous matrices of politics, medicine, or religion. For instance, in the UK, first courts, and subsequently the government, have established 'buffer zones' around abortion clinics to protect their clients against harassment by anti-abortion protesters, who are usually supported by transnational networks. The jurisprudence of regional human rights courts, and/or domestic apex courts, discussed above, shows that human rights

helped to identify violations perpetuated not only by state actors, including hospitals and healthcare professionals. In addition, human rights language has paved the way to decriminalisation of abortion across the world. The examples of liberalisation of abortion law discussed at the start of the paper, and the most recent WHO abortion guidelines (2022), have all been based on the recognition that criminalisation of abortion constitutes and/or leads to human rights violations.

Nevertheless, for all its potential benefits for analysis of sexual and reproductive rights and in particular abortion law, Teubner's theory of human rights and their role in global society encounters inevitable challenges and it has certain limitations.

First, like Luhmann's systems theory, it is difficult to account for the particular historic, political, geographic, socio-economic, and cultural context in which (abortion) law develops, the different trajectories of its development, and the global inequalities that influence it. For instance, it might be possible to explain the apparent similarities between the Irish and Polish abortion law through the influence of the Catholic Church (i.e. irritation of the system of law and politics by the system of religion). However, it would be far more difficult to account for the very different trajectories and experiences of the two countries that might explain the currently different legal frameworks regulating abortion. It would also be difficult to try to capture the experience of colonisation in many parts of the world and its influence on abortion law and practice in post-colonial settings.

Second, systems theory in general, and the theory of global communicative matrices in particular, have limited utility for attempts to examine intersectionality in the context of abortion. The fact that the risks posed to the human body and mind by different systems are not the same, has, tellingly, not been discussed by Teubner. Obviously, we could utilise Teubner's terminology to say that the system's ecology – 'the tortured body and soul' – can be subject to different levels of irritation. However, the insight to be gained from such a description is limited. It does not capture the fact that the same abortion law will inevitably pose different risks to pregnant people depending on their sex, gender, ethnicity, socio-economic and cultural background. Teubner's theory does not allow us to account for the extent of the pain and suffering experienced by different social groups in consequence of the expansive tendencies of the political, healthcare, and religious systems. It does not tell us enough about the way in which human rights should address social inequalities, especially the historic ones, even if we accept, that they play merely a defensive function to save people from the destruction caused by social systems.

Third, existing abortion laws, practices and experiences challenge Teubner's already modest vision of human rights. While human rights have been incorporated into many national laws and constitutions, restrictive abortion laws continue to exist, harming women and pregnant people. In some contexts, despite recurrent judicial recognition of human rights violations, unjust situations persist threatening the life and integrity of women and pregnant people. In Poland, Peru, or El Salvador, human rights have not successfully limited the expansive and harmful tendencies of the communicative matrices of politics, religion, and medicine. Conceptualising those problems in terms of boundaries (communication/body and mind) does not actually help women, who die and suffer. Furthermore, countries like Ireland, Argentina, or Colombia, which have recently succeeded in liberalising abortion laws, face serious problems regarding the implementation of the new provisions and regulations (Mishtal et al. 2022; Askham 2023).

In addition, Teubner's juxtaposition of human rights and communicative matrices, in which human rights protect against systems' expansive and destructive tendencies, makes it difficult to account for the phenomenon of appropriation of human rights language by the anti-abortion movements. The example of abortion demonstrates that human rights are understood and utilised differently by different systems and play a different role in them. The hijacking of the human rights discourse by the anti-abortion networks has become visible in recent abortion litigations in Poland and the USA. In these cases, claims concerning the right to life of the foetus were skilfully replaced by arguments about disability rights, discrimination and equality. In K1/20 the Polish Constitutional Tribunal accepted the concerns raised by the applicants, supported by *Ordo Iuris*, about the impact of abortion on the grounds of fatal foetal abnormality on the rights of people with disabilities. In *Dobbs* (2022) the SCOTUS drew parallels between the decision in *Brown v. Board of Education* (1954), which outlawed racial segregation, and the decision to overrule *Roe vs Wade* and return the power to regulate abortion to individual states. As such, it ignored the fact that criminalisation of abortion has disproportionally negative consequences for women of colour.[25] Estimates undertaken in 2021, prior to *Dobbs*, suggested that a nationwide abortion ban would increase maternal mortality by 21 % overall and by 33 % among Black Americans (Stevenson 2021). How do

25 As noted by Backes Kozhimannil et al. (2022), data collected by the US Centre for Disease Control and Prevention 'show that Black and Indigenous people are two to four times as likely as White people to die during pregnancy or around the time of childbirth. Abortion, which is now criminalized in many U. S. communities, is safer than pregnancy and delivery, especially for Black and Indigenous people'.

we account for, and respond to, the expansion of the anonymous matrix which uses human rights in a way that threatens the integrity and lives of pregnant people?

Finally, Teubner's theory of global constitutionalism suggests that the rapid expansion of global societal systems can often lead to their self-destruction. It is in these moments that such systems introduce fundamental rights and second level rules. Constitutionalisation is thus an attempt at self-limitation and self-preservation. We could see such phenomena during the economic crises and medical scandals. However, not all systems react in the same way. For instance, when scandals undermined the authority of the Catholic Church, reformist tendencies were accompanied by aggressive attacks on reproductive rights and there is little sign of self-limitation. On the contrary, religious organisations utilise abortion to expand their sphere of influence. As mentioned earlier, in some countries the system of politics is equally resistant to change. The question thus remains: How do we make human rights communicatively significant and effective and how do we unleash their limiting potential?

Conclusions

This article is a response to the new wave of legal changes restricting access to abortion in a number of countries, which have substantially undermined the global advances in the field of reproductive rights observed in recent years. In order to address this problem, the article derives insights from two important bodies of literature that are usually perceived as theoretically and ideologically counterposed, namely feminist legal studies and systems theory. With a background in systems theory, Gunther Teubner's theory of societal (global) constitutionalism proves extremely useful in capturing the contingencies in the development of abortion law in global society, resulting from the rapid expansion of the systems of politics, medicine, religions and law. The article critically examines Teubner's claims concerning the necessarily limited role of human rights in defending the integrity of pregnant people against the devastating consequences of the communication developed by the autonomous matrices. In this respect, it identifies several weaknesses in this conceptualisation. These include problems related to the implementation of human right standards, incomplete analysis of the appropriation of the human rights language by the anti-abortion movement, and most importantly, the fact that the self-limitation of the destructive matrices is not brought clearly into view. On this account, Teubner's theory is insufficiently radical to address the challenges posed by anti-abortion politics, law, and practice. The next generation of scholars

undertaking work in the field of systems theory should be strongly encouraged to address both theoretical and practical challenges. For, one cannot but agree with Deflem's (1998: 807) assertion that '[t]he debate over abortion law is in this respect a crucial indicator of modern societies' capacity to maintain social solidarity and preserve rights of self-determination'.

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