

**The Pedagogy of Law and its First Mover**

Willem Schinkel

Wanting to have the cake and eat it may be a trait of scholars in the Critical Theory tradition. Illustrative of this is the following quote from Brunkhorst's manuscript:

"To explain the take-off of the social evolution I will combine the Hegelian notion of negation with Luhmann's idea of communicative variation, Marx [sic, WS] concept of class-struggle, and Habermas [sic, WS] assumption that normative validity claims are unavoidable once Alter understands a symbolic expression of Ego." (Brunkhorst 2013, 8).

Although this sentence seems to have disappeared from the final version of the book, it does very accurately describe what happens in the book. And I actually like this a lot. I want to be convinced, and so I'm going to problematize the effort Brunkhorst undertakes somewhat. This band of four men, Hegel, Luhmann, Marx and Habermas, is no doubt easiest to deconstruct – that is, to take apart and to reconstruct anew from the inside – by focusing on the role of Luhmann. For having your cake and eating it too here seems to mean to speak of the system of law, of its evolution also, in terms of its mechanisms of variation, selection and retention or stabilization, and to yet combine this with a conception of a normative driver of evolution that is related to class struggle. Quite simply, this is impossible. On the

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one hand, having your cake and eating it too is an inability to choose, and maybe it's just being greedy, or being a miser. Maybe it's part of the universalistic claims typical of Critical Theory. But on the other hand, having your cake and eating it is a paradox, which is a very Luhmannian figure of thought. I'm going to take it as such, and I'll continue to like it. And, to have said this as well, I want to admire the brightness of the analysis in Brunkhorst's book.

So I'll interpret the main problem Brunkhorst's book struggles with as the problem of combining an evolutionary perspective with a normative perspective. I'll first take on the role of the Luhmannian critic. Then I'll try to step away from that somewhat, and present a few issues from more esoteric angles. Let me first say though, that I struggle with this myself, and I know that many colleagues do as well. As for the systems-theory point of view, one cannot easily escape from the hold it has on one. As soon as one starts to combine it with other elements, critical elements for instance, troubles ensue. And from the perspective of critical theory, the potential gains are obvious – they lie in a much more consistent conception of system and environment – but the losses are immense because they lie in the normative core of the theory, which basically threatens to get jettisoned. The feeling one gets with Luhmann is that he already ate all the cake there is. What's left are crumbs, and so, at best, we appear to be 'after virtue', to borrow Macintyre's terms.

**Luhmann on law, norms and evolution**

Let's start from Luhmann's lapidary statement that "Die Gesellschaft ist, zum Glück, keine moralische Tatsache" (Luhmann 1987, 318). It indicates right away that social evolution cannot – at least in Luhmann's view – be moralized. That is to say that social evolution never entails a driving role of normative claims, and neither does it result in some form of normative learning that is not internally induced. Likewise,

under conditions of functional differentiation, the codes of functional subsystems are morally indifferent. There is no congruency between what is true and what is good, between what is powerful and what is good, or between what is lawful and what is good. The world is definitely unplatonic, hence not a unity but functionally differentiated. Even the unity of the world appears many times in many systems and in equally many ways – and when it appears, it always appears as the unity of the difference between system and environment. So I'm starting off with some hardcore Luhmania here. I have no illusion of teaching Brunkhorst anything here, but I'm laying it out in order to highlight the tensions in his approach. Fundamentally, Luhmann's conception boils down to the incongruence between law and morality, or between law and universal reason, or between law and anything it considers environment. That means there may be legal revolutions, or at least legal evolution, but what is legal has no bearing whatsoever on what is normatively good beyond the realm of law.

Moreover, norms do not codify the system of law, and hence they do not make up the core of its self-organization. Any functional subsystem that operates on the basis of a specific medium and code does not operate through a normative code, nor can a normative code – under conditions of functional differentiation – be a functional equivalent of the codes of subsystems. Secondarily, certainly, one can normatively ground legal, political or economic action. But primarily such action is grounded by systemic codes that are normatively indifferent (cf. Luhmann 1993, 85). Therefore, Brunkhorst's thesis that social evolution is driven by normative claims, argument or dissensus seems hard to maintain. It can be maintained, but only as one contingent take on social evolution that must then give up on connecting with the primary form of modern differentiation. In other words, norms are not social supermedia. At the level of subsystems, such as the legal system, norms are replaced by forms as drivers of autopoiesis, and hence ultimately of evolution – forms such as the binary code of law, lawful/unlawful.

Luhmann in fact takes issue with the very notion of normative 'learning' in any other form than an internally induced learning (Luhmann 1993, 81). To connect normative learning to externalities, such as class struggle, seems to me to have effects akin to efforts at turning the hermeneutic circle into a spiral upwards towards better, more universalized understanding. For Luhmann, on the other hand, norms are expectations that are kept even when they are disappointed. That is, norms are primarily ways of not learning. Likewise and relatedly, Luhmann says of values: "unsolvable problems par excellence are today called 'values'." (Luhmann 1994, 19). Where Brunkhorst emphasizes normative learning, Luhmann considers norms as ways of not learning. One can argue, of course, that there are ways of learning in this not learning, but this would not exist as externally induced, and it is certainly hard to maintain that learning not to learn is a driver instead of a consequence of social evolution. Likewise, norms only function internally in the system of law. The legal system can refer cognitively to its environment, but not normatively (Luhmann 1993: 85).

In a sense, evolution in Luhmann's terms is nothing other than the possibility of social systems to ignore expectations – including normative ones – in order to produce variation, and the temporalized restabilization of new variations. In that sense, the normative plays a role in evolution only insofar as it exists in a range of variation and can be selectively ignored. Most generally, social evolution is a process of demoralization, in which neither morality, nor values, nor norms are a source of integration. Rather, evolutionary complexity entails the heightening of implausibilities.

This provides some background for the main issues I would like to highlight.

### **The problem of social evolution**

A crucial issue concerns Brunkhorst's conceptualization of evolution. He distinguishes between evolutionary adaptation to a system's environment, and to evolutionary constraints on such adaptation. Given the above, the question is how norms, or anything normative, could ever be a constraint on cognitive evolution? Because evolution concerns the primary differentiation of society, which is evidently not normatively supercoded, this seems altogether unlikely.

But in my view, this conception of evolution is problematic in a more fundamental respect. In one particular sense that I wish to highlight, it marks a decisive break, although I don't believe this is made explicit in Brunkhorst's book, with Luhmann's conception of social evolution, and it makes it harder yet to perform the balancing act between Hegel, Luhmann, Marx and Habermas. Brunkhorst says, for instance, that "...modern law is not only the result of morally neutralized, gradual evolutionary adaptation of social systems to their environment (and hence of the cognitive learning of social systems which do not care about their negative externalities), but also the outcome of class struggle and revolutionary change (and hence of normative learning processes of social groups who demand rights for the victims of history, but with ambivalent effects)." (Brunkhorst 2014, 2-3).

Throughout the book, Brunkhorst refers to evolution in the cognitive sense as a form of adaptation. But this is not at all how social systems relate to their environment. In fact, one uses a biological, organism-centered conception of evolution when adaptation is central. Evolution of social systems does not occur through adaptation, but through the maintenance of the incongruence between system and environment by means of irritation. Crucial to this is the relative degree of complexity between system and environment. The autopoiesis of social systems prevents them from 'adapting' to their environment. Their evolution is internally triggered by irritation from a self-induced environment, and it does not constitute

adaptation because social systems do not thrive by adaptation to their environment, but by incongruence with their environment. In such an evolutionary perspective, there can be no question of linear – or quasi-linear – development (Luhmann 1994, 7).

This distinction between adaptation and irritation has consequences for Brunkhorst's conception of law as providing normative constraints on adaptive evolution. First of all, as I just said, there is no adaptive evolution. But secondly, even if one were to hold that there is, it is altogether hard to imagine how law could provide normative constraints on it. After all, this would mean that the system of law could interfere in other autopoietic systems, and that is fundamentally impossible in autopoietic systems. And for the same reason, it is hard to see how social evolution in the form of normative learning in law could be considered as externally triggered, namely by class struggle, which, as Brunkhorst literally says in his conclusion, 'causes' legal revolutions (Brunkhorst 2014, 464). For that would mean that class conflict directly interferes with law, in which case there is no functionally differentiated system of law. Luhmann (1993, 77) maintains that the system of law is normatively closed and cognitively open, but that still means it can be directly steered neither normatively nor cognitively – nor, for that matter, by class conflict. Class struggle here emerges as an equivalent to what musical innovation was for Plato, when he wrote in *The Republic*: "for any musical innovation is full of danger to the whole State, and ought to be prohibited. So Damon tells me, and I can quite believe him; – he says that when modes of music change, the fundamental laws of the State always change with them" (Plato 2000, 93). For Luhmann, that too would be a quite impossible impingement of the system of art on the system of law. Let me summarize the points I've just made as the first two main problems I see:

- 1) Normative learning in law is construed as externally triggered, but normative learning can only be internally triggered, and anyhow social systems do not undergo direct external influence.

2) Law appears as a constraint upon its environment, which is considered here as an outside of the law, but social systems do not undergo direct external influence.

These issues come out of Brunkhorst's, in my view problematic, use of adaptation as central to evolution, which is then constrained by normative learning.

### **The Kantian mindset**

Let me now move on to a second set of problems of a less orthodox Luhmannian nature. These center around what Brunkhorst calls the 'Kantian mindset'. This he relates to the role of normative dissensus, as well as to the role of rational argumentation and the forceless force of the better argument in social evolution. I find the role he accords to normative dissensus or conflict, as well as the role of the Kantian mindset in this, problematic.

If we, for starters, because it is the conceptual framework Brunkhorst uses, look at what Luhmann says about the evolutionary mechanisms of variation, selection, and retention or stabilization then it immediately becomes clear that norms do not figure anywhere. Variation has to do with language and its potential for negation; selection has to do with codes, and not with norms as Brunkhorst seems to imply; and stabilization has to do with system differentiation (Luhmann 2005a, 188). The point is that communication itself gives rise to negation and thereby to variation and evolution. In Brunkhorst's book there is a constant slippage from "communicative variation" to "dissent over normative expectations" (Brunkhorst 2014, 16). In contrast to this, Brunkhorst seems to want to identify a driver of social evolution that is itself quasi-external to social evolution. He says for instance that:

"...only interaction that generates argument and contest can explain how negative communication reaches such a large quantity that social evolution can and must take off." (Brunkhorst 2014, 16-17).

I believe this is problematic in a number of ways. First of all, it assumes that social evolution can only take off after the occurrence of what is itself a complex evolutionary achievement, namely argumentative, normative contestation. So I would take issue with normative contestation as a precondition, when it occurs in a certain 'quantity', for social evolution. But more importantly, I would criticize the entire move to find an external, perhaps even universal, driver of social evolution. For this is, ultimately, the role Brunkhorst accords to the Kantian mindset. The Kantian mindset operates in his theory as a universal driver of social evolution. He allows that it develops in social evolution, but at the same time it is, albeit in perhaps rudimentary form but existing since the Axial Age, a precondition and driver of social evolution. What happens is that in the negative potential of communication, which drives evolution, he sneaks in the Habermasian features of rational argument and its forceless force, which moreover gain certain universality. The decisive move is the sneaking in of rationality. From that moment on, he can claim that social evolution provides normative constraints for cognitive evolution. And from that moment on, the Kantian mindset can assume its magical function of allowing us to have a cake and eat it. It is also how Brunkhorst can make the following slip:

"my main thesis is that of the co-evolution of cosmopolitan and national statehood. Throughout the evolution of modern law and politics, cosmopolitan state formation (...) has preceded and enabled particular and national state formation." (Brunkhorst 2014, 7).

The slip is from ‘co-evolution’ to ‘cosmopolitan state formation has preceded...’ Because the Kantian mindset operates as First Mover in Brunkhorst’s theory, the cosmopolitan is not really a co-evolutionary achievement, but it can precede national state formation.

Most importantly, I would argue, normative dissensus, and ultimately what Brunkhorst calls the Kantian mindset, thus becomes a pre-evolutionary universal, which, en passant, divorces the take-off of social evolution from natural evolution, i.e., from the evolution of the capacities of language or communication more generally. So, in addition to my earlier two points, I’ll summarize my remarks on this issue in two further points:

3) Social evolution does not take off as a consequence of a certain quantity of normative argument and contest. Such contestation is itself a product of social evolution, which emerges out of the inherent drive to negation and variation of contingency in communication. Not rational argument, but communication is in the driver’s seat.

4) There is no external trigger to social evolution, other than, perhaps, natural evolution. In Brunkhorst’s book, the Kantian mindset functions as a pre-evolutionary universal. That is a lot of work to do for a mindset, even if it is a Kantian one that predates Kant by over 2000 years.

Let me venture a guess as to why the Kantian mindset plays this role of a First Mover in Brunkhorst’s theory. The effect it has is one of moralizing social evolution, and I would say that that is what provides critical theory with its task and *raison d’être*. On the first page of his book, he immediately comes clean as to the purpose of critical theory:

“Critical theory is about the paradox of reason within an unreasonable, brutish and random history. Methodologically, critical theory operates as an instrument to find

the traces of reason and truth within a reality that as a whole is unreasonable and ‘untrue.’” (Brunkhorst 2014, 1).

I have to say I’m not such a fan of this type of gesture. It seems to me that it denies the rest of the world conscious access to that – namely Reason – to which it in the same move claims a monopoly on discovering. Now, inserting a Kantian mindset in between the three evolutionary mechanisms of variation, selection and stabilization as a universal driver of social evolution inserts just enough reason in the world for critical theory to have a job. And as a corollary consequence, the negation still appears in some form as the way toward the positive, which here appears as the normative. The situation is akin to the response to the marginalization of the subject in modern society according to Luhmann: “Das theoretisch marginalisierte Subjekt kehrt als normatives Postulat menschenfreundlicher Ausrichtung der Gesellschaft zurück oder es rächt sich durch ‘Kritik.’” (Luhmann 1981, 251). Instead, I would argue that the negation does not help universal reason to unfold through normative learning processes, but that it merely enhances the contingent.

### **Side comments**

Let me end with some side comments, four in total, and perhaps admittedly somewhat esoteric to Brunkhorst’s concerns.

1) A first one has to do with an issue that runs through Brunkhorst’s argument and which I find interesting. The growth of the Kantian mindset can, I believe, be read as an alternative theory of secularization, in which the unfolding of reason through rational argumentation and the appending normative contestation grows out of initially religious developments and then, perhaps, evolutionarily frees itself from them. In many other approaches, including for instance Marcel Gauchet’s and Charles Taylor’s, the religious gives birth to the secular, but here, my question would

be simply if, taken to its evolutionary logical extreme – if not end-point – this conception, unlike at least Taylor's, means that religion in the end will turn out to be a Weberian 'vanishing mediator'. Does this development of the Kantian mindset entail the slow but gradual disappearance of religion? Probably not, at least I don't see this empirically confirmed, but I would be interested in Brunkhorst's take on the issue.

2) A second comment concerns the contingency of Brunkhorst's starting points. I have taken the route via Luhmann to deconstruct Brunkhorst's approach, but what if we were to, for instance, take up Walter Benjamin's perspective on law as laid out in *Zur Kritik der Gewalt*? In Benjaminian terms, the Kantian mindset operates as myth in Brunkhorst's theory. And it remains locked in the vicious circle of instrumental language and law. The consequence is that it does not adequately grasp the violence of law in the way the exception continues to manifest itself in law. Empirically, there is much to be said for this (cf. Frankenberg 2010).

3) Third, Brunkhorst explicitly denies Eurocentrism. But really? These four white German men informing his theory, do they get him beyond Eurocentrism? Obviously, just because certain trends, such as modern international law, are global does not mean they are not Eurocentric or, more generally, hegemonic in various ways. I doubt whether Brunkhorst actually has the tools, in his approach, to be reflexive about his own position. In the end, this is all a very modern story, which claims universality. Many a postcolonial scholar might almost consider that a definition of Eurocentrism. No doubt Brunkhorst starts with the papal revolution and not with, say, the Code of Ur-Nammu or the Code of Hammurabi, because the latter did not yet constitute a differentiation from politics. But they did constitute written law, and as Luhmann says, law is extremely vulnerable to evolution already because it consists of text, which is loaded with the potential for negation and variation (Luhmann 2005b, 223).

4) Finally, when I try to take a wholly 'external' perspective, the entire focus on 'constraints' appears to divert attention away from what social evolution has meant in terms of natural evolution. A primary characteristic of what human world society does to the world is not to constrain anything. Brunkhorst focuses on constraints because his is an internalist focus within world society. But does that not draw attention away from the role of world society on a planetary scale? The only model that adequately describes the evolution of human world society is that of the plague. Is that, finally, and putting it evocatively, not something a critical theory would want to scrutinize, rather than the various internal normative constraints humans amuse themselves with, all the while eating away at the world in a richer sense of the word?

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## **Biographies**

### **Willem Schinkel**

Willem Schinkel is Professor of Social Theory at Erasmus University Rotterdam. He is a member of The Young Academy of the Royal Netherlands Academy of Arts and Sciences. He is currently Principal Investigator of the ERC-project 'Monitoring Modernity', which analyses the imagination of societies in practices of monitoring migration, capital flows and climate change. Forthcoming in 2017 is his book *Imagining Societies. A Critique of Immigrant Integration in Western Europe* (Cambridge University Press).