Asian Journal of Law and Society, 6 (2019), pp. 249–280
doi:10.1017/als.2019.9

First published online 26 July 2019

Societal Constitutionalism in Japan: Neighbourhood Associations as Micro-relational Constitutional Sites

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Abstract
Over the past few years, Japan has been witnessing the emergence, regeneration, and spread of micro-relational forms of cohesion, solidarity, and responsibility in response to the *ryūdō-ka shakai* and *hikikomori* phenomena. These terms refer to the crisis of social relations and co-operation, which commenced after the collapse of the Japanese economy in the early 1990s. While scholars, particularly sociologists and anthropologists, have consistently inquired into these micro-sites of civic friendship and responsibility, their juridical status is yet to be ascertained. This article argues that the paradigm of societal constitutionalism developed by Gunther Teubner can be of precious assistance in conducting such an assessment. In particular, it offers a contextualization of Teubner's reflections on constitutional pluralism and fragmentation of social functions from the perspective of Kiyoshi Hasegawa's state-centric scholarship on the regulatory dynamics of neighbourhood associations as micro-relational communities in suburban areas. A particular is given, and only given, within relations.[1]

Keywords: societal constitutionalism, Ryūdō-ka shakai, Hikikomori, micro-relational orderings, Gunther Teubner, Kiyoshi Hasegawa

1. INTRODUCTION

As is well known, after growing for more than two decades at incredibly high rates, the Japanese economy collapsed between late 1991 and early 1992, leading to a long period of economic stagnation known as the "lost two decades" (*ushinawareta nijūnen*). The breakdown was caused by the burst of the asset price bubble (*baburu keiki*). As one could expect, Japan's economic decline and the (for the most part) inadequate political responses to it have

* Part of this article was written during a visiting scholar programme at the Graduate School of Law, Kobe University in May–July 2018. The research and visit were funded by a Regular Research Grant of The Great Britain Sasakawa Foundation (GBSF; Grant Application Number 5278). My sincere thanks to the GBSF for funding my research and stay as well as to Professor Hiroshi Takahashi for hosting me at Kobe University and helpful conversations and exchanges. An earlier draft of the article was presented at the 22nd Biannual Conference of the Asian Studies Association of Australia, held at the University of Sydney on 3–5 July 2018 (Japanese Law Panel, chaired by Professor Luke Nottage). I wish to thank all those who provided me with valuable suggestions. I am also indebted to two anonymous reviewers for their constructive comments. Errors are mine only. Correspondence to Dr Luca Siliquini-Cinelli, . E-mail address: l.siliquinicinelli@dundee.ac.uk.

1. Benjamin (2015), p. 19.

led to destabilizing macro-level transformations that have been significantly affecting the country's social dimension.[2] One such development, at the centre of this article, is the proliferation of social withdrawals—a phenomenon that, as Anne Allison has recently observed, takes shape in "the rhythm of social impermanence: relationships that instantaneously connect, disconnect, or never start up in the first place."[3] Unsurprisingly, the voiding of the Japanese's sense of civic embeddedness and community belonging has attracted a considerable degree of attention both in and outside Japan, for a variety of reasons. These include (but are not limited to) the fact that, particularly since the Edo period, dating from 1600 to 1868, social order and stability have been achieved by prioritizing community concerns over local and individual interests—an approach revolving around such political concepts as *giri* (expected behaviour) and *wa* (harmony)[4]; that individual (i.e. one's own as well as others') dignity (*jinkaku*) represented "the fundamental concept of post-war democratic education";[5] and that such a crisis originated during a period (the early 1990s) when "[m]acro- rather than micro-management strategies ... prevail[ed]."[6]

To be sure, as Hannah Arendt reminded us, humankind has been witnessing "mass phenomena of loneliness"[7] since the modern "rise of the social"[8] voided the ancient public–private distinction of its political significance. It is indeed not a coincidence that the humanizing properties of public life were outlined for the first time by the philosopher who stressed the ethical–political character of friendship: Aristotle.[9] Similarly, it is not by accident that the father of republicanism, Jean-Jacques Rousseau, urged humanity to move away from a societal condition in which, rather than fighting against each other as Thomas Hobbes had depicted, "everyone is isolated from, and completely indifferent to, everyone else."[10] Yet, while it was commonly thought that this ontological condition was somehow confined to Western societies only, the number of studies that have emerged over the past few years exploring the Japanese's modes of social precarity and marginalization is testament to the need for moving the scholarly debate on the subject beyond traditional assumptions and categorizations.[11]

In the search for conceptual effectiveness and analytical coherence, scholars have come to deploy as well as borrow from each other a set of specific terms to address the multiple declensions and repercussions of the "anguish of everyday life"[12] experienced by the Japanese. The most recurring ones are *ryūdō-ka shakai* (liquid society), *muen shakai* (relationless society), *kyōsō shakai* (competitive society), *kakusa shakai* (disparity society), *kodoku*

2. Funabashi & Kushner (2015).

3. Allison (2013), p. 8.

4. For a brief survey of the legal scholarship on the subject, see Corne (1990), pp. 347–50. More broadly and critically, see van Wolferen (1990), pp. 202, 304, 314–7. For an urban-planning and development account, see Sorensen (2004), pp. 11–113; Yorifusa (2006), pp. 25–33.

5. Inoue (2002), p. 313.

6. Waswo (1996), p. 159. See also Sorensen (2006), p. 109; Feldhoff (2007), p. 92.

7. Arendt (2012), p. 59.

8. *Ibid.*, p. 68. See also Arendt (2005), p. 141.

9. Agamben (2009).

10. Cassirer (2009), p. 259. See also Nancy (1991), p. 9.

11. Among others, see Allison, *supra* note 3; Abe (2010); Horiguchi (2012); Kingston (2012); Kingston (2014); Shirahase (2014); Roberts & Orpett Long (2014); Iwata-Weickgenannt & Rosenbaum (2014); Pejović (2014); Baldwin & Allison (2015); Chiavacci & Hommerich (2017). See also the (2016) 36 Special Issue of *Japanese Studies* on "Family at the Margins: State, Welfare and Wellbeing in Japan."

12. Allison, *supra* note 3, p. 2.

https://doi.org/10.1017/als.2019.9 Published online by Cambridge University Press

(loneliness), *ningenkankei no hinkon* (poverty of human relations), *ibasho ga nai* (without a belonging) and *ohitori-sama no rōgo* (ageing alone). Above all, one term has, however, become widespread not only in sociological and anthropological studies on these forms of social retreat and existential isolation, but also in contemporary everyday parlance: *hikikomori* (social withdrawal). Given the irreducible "ontological register"[13] of relationality, it comes as no surprise that some commentators have come to emphasize the ontological character of the phenomena in question.[14]

What has emerged from the literature on the subject is that, since the midst of the first "lost decade," which almost dramatically coincided with the Great Hanshin earthquake of 1995, the Japanese have been increasingly adopting or renovating micro-relational modes of civic friendship, solidarity, and responsibility in response to the failure of macro-developmental policies and crisis of macro-forms of cohesion and co-operation.[15] By these terms, it is meant a vast array of cohesive arrangements such as those revolving around local civil society organizations,[16] including neighbourhood associations (*jichikai or chōnaikai*; NAs[17]) and community networks; joint-ventures in rural areas[18]; and interpersonal relationships arising from the activity of those incorporated, nonprofit organizations (including NAs) that have been granted legal status under the 1998 Law to Promote Specific Non-profit Activities (1998 NPO law).

While scholars, particularly sociologists and anthropologists, have inquired consistently into Japan's new small-scale, intersubjective dynamics from diverse perspectives of inquiry,[19] there is a shortage of studies assessing the juridical (and thus normative) status of their formation processes and regulatory regimes.[20] This article argues that the paradigm of societal constitutionalism developed by Gunther Teubner can be of precious assistance in conducting such an appraisal. More specifically, using NAs as a case-study, it shows that there are instances in which such micro forms of societal relationality and responsibility meet the "four quality tests" around which Teubner has developed his analytical framework. Whenever this happens, the formation and functioning of NAs can be categorized as self-constitutionalization processes of social sub-areas and function systems in Teubnerian terms.

13. Benjamin, *supra* note 1, p. 3.

14. Serizawa Shunsuke, for instance, speaks of *sonzaironteki hikikomori* (ontological withdrawal). Quoted in Allison, *supra* note 3, p. 74.

15. Sorensen, *supra* note 6, p. 101; Sorensen (2007), pp. 66, 78–80; Ito (2007), p. 161; Sorensen, Koizumi, & Miyamoto (2008), p. 33; Imada (2010), p. 36. More broadly, see Nakano (2009); Cassegärd (2014); Hirata (2002); Schwartz & Pharr (2003); Ogawa (2009); Avenell (2010); Avenell (2018).

16. For present purposes, see Sorensen & Funck (2007); Brumann & Schulz (2012); Pekkanen, Tsujinaka, & Yamamoto (2014). Defining civil society (*shimin shakai*) is no easy task. This is particularly the case with respect to its Japanese variant given that, as Pharr (2003), p. xv, aptly observed, "Japan's civil society arises in a non-Western context in which words such as 'rights,' 'public,' and even 'society' were hard to translate." An established definition in sociological literature, which this article draws from, emphasizes the voluntary and associative nature of the relations in question. See Warren (2001).

17. Discussed in this article.

18. Kikkawa & Shinozaki (2010).

19. These include the ways in which the natural disasters that, commencing from the Fukushima Daiichi nuclear power plant's tsunami of March 2011, devastated Japan's north-eastern, central, and southern regions have come to shed new light on the Japanese polity's vulnerability and instability. See Kingston (2012); Samuels (2013); Mullins & Nakano (2015); Karan & Suganuma (2016). For a comparative survey, see Butt, Nasu, & Nottage (2014). See also the (2012) 32 Special Issue of *The Journal of Japanese Law* on "Managing Disasters in Japan."

20. An exception is Takamura (2012).

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Starting from the premise that Eurocentric approaches have dominated the study of Japanese culture and society,[21] the article fully embraces the situational nature of sociological research. In so doing, it further acknowledges that, while cross-cultural legal analysis cannot do without analytical concepts,[22] there are clear risks in using Western-based conceptualizations for analytical evaluations outside the West.[23] Further, the article acknowledges the "paradoxical"[24] relationship between comparative law (including its methods) and legal sociology. This explains why it offers a contextualization of Teubner's reflections on constitutional pluralism and the diversification of social functions from a peculiar perspective of inquiry regarding Japan's micro-associational landscape: Kiyoshi Hasegawa's state-centric study of the formation and dynamics of NAs as community-based organizations in suburban areas.

The reason for choosing NAs as a case-study is threefold. First, from a historical point of view, NAs are a clear example of the Japanese state's influence over the development of civil-society organizations.[25] Second, although NAs represent a third of the civil-society groups in Japan and are "the most important organization in most communities,"[26] only 5% of them "ha[s] obtained legal status as authorized local area groups."[27] It therefore comes as no surprise that NAs have always been considered a fertile field of inquiry regarding the emergence, spread, and functioning of "traditional societal norms in Japan"[28] by anthropologists and sociologists alike. With respect to socio-legal theory in particular, NAs represent the perfect opportunity to (try to) determine whether societal micro-scale groups can be granted constitutional character beyond orthodox (i.e. state-based and positivistic) categorizations. Finally, and as will be seen in due course, while such associations are primarily formed for co-ordinating, rather than assistive, purposes, the nature and dynamics of their shared co-operative activities as well as of the societal services they provide ultimately enhance a sense of purposiveness, community belonging, responsibility, and "civicness" while also feeding back into renewed modes of subjective wellbeing.

It should, however, be clarified that the proposed analysis is not based on the author's own empirical fieldwork. The aim here is not to transplant an analytical framework (i.e. societal constitutionalism) from one context to another by relying on appositely selected and elaborated data. Rather, the aim is to determine what insights may be gained by juxtaposing the views of scholars belonging to different traditions and whose methods of investigation appear to share little or nothing. Indeed, and as will be shown, Teubner's and Hasegawa's pluralist and state-centric accounts are incompatible on several levels. However, much may be gained by, first, exploring them through the lenses of each other's methodologies of inquiry and findings and, second, implementing them with those of other sociologists and

21. Okano (2017), p. 3.

22. von Benda-Beckmann (2002), p. 42.

23. Nelken (1995), p. 437; Chiba (1998). More generally, see Mattei (1997), p. 19; Husa (2015), p. 23.

24. Cotterrell (2003), p. 131.

25. Unfortunately, the scope of this article does not allow a historical introduction to NAs to be offered. See Sorensen, *supra* note 6. Cf. Schmidtpott (2012).

26. Pekkanen, Tsujinaka, & Yamamoto, *supra* note 16, p. 83. Yet many NAs are inactive and exist only by name. See also *ibid.*, p. 183 about the decrease of participation rates. Cf. Hashimoto (2007).

27. *Ibid.*, p. 3. See also *ibid.*, pp. 43–4.

28. Applbaum (1996), p. 2.

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political theorists. In suggesting this theoretical endeavour, then, this article represents an exercise in comparative legal sociology aimed at assisting scholars in initiating a communal effort from which the academic debate on the Japanese's micro-relational bonds and growing "legal consciousness" may ultimately benefit. The adjective "legal" is used broadly, as the project proposed here requires us to embark upon juridical as well as normative thinking on the ontological "whatness" and "howness" of such intersubjective, humanizing phenomena. Such an exercise commences by sharing Setsuo Miyazawa's methodological neo-culturalism —that is to say, the belief that the "analysis of encounters and transformations of legal cultures should take a bottom-up approach which starts from a micro level."[29] However, in embracing the premise of Miyazawa's contextual method of investigation, it also pushes it further to transcend the boundaries of positivistic approaches to regulatory mechanisms. This move is simply necessary if we are to (try to) explore the constitutional character of the intersubjective phenomena on which this article focuses, without neglecting their inner plurality and variable articulations. This explains the interdisciplinary essence of the proposed analysis, which inevitably blends together fundamental aspects of political and legal theory, comparative methodology, phenomenology, and social ontology—specifically, civic consciousness, engagement, and embeddedness; philosophy of shared action and discursive co-ordination; collective intentionality and identity; phenomenology of plurality; biopolitical survival; and ethical existentialism.[30]

This article is structured as follows. The next section sets out why Teubner's societal model is preferred over similar accounts, some of which Teubner draws from to frame his analytic. Section 2 introduces the basic thrust of Teubner's epistemic framework as outlined in his major works on the subject. Section 3 presents Hasegawa's thought on the formation and dynamics of NAs. Taking one step further, Section 4 engages with some central and pervasive themes concerning the proposed comparative analytic. Conclusive remarks follow.

2. WHY TEUBNER (AND NOT OTHERS)?

Two considerations are in order before going any further. First, it needs to be clarified why the suggested comparison uses Teubner's paradigm instead of one (or more) of the many others that have been put forward within the cultural–historical and social-organization traditions. It might indeed be objected, with good reason, that other frameworks could be used for our comparative analytic—particularly Émile Durkheim's positivist "organic" solidarity,[31] Eugen Ehrlich's customary "living law,"[32] and Niklas Luhmann's functionalist system theory.[33] Second, it needs to be outlined why, despite the fact that many of his reflections on legal pluralism and societal dynamics draw from two thinkers whose accounts are for present purposes set aside—namely Ehrlich and Luhmann[34]—Teubner's constitutional sociology is worth exploring.

29. Miyazawa (1995), p. 102.

30. I share Corsi's (2016), p. 11, view that a sociology of constitutions cannot but be interdisciplinary. For the scope of this article, see Benjamin, *supra* note 1; Benhabib (1992); Beiner (1995); Tuomela (2007); Esposito (2013); Dan-Cohen (2016); Durt, Fuchs, & Tewes (2016); Smith (2017); Preyer & Georg (2017).

31. Durkheim (1972); Durkheim (1997), p. 28.

32. Ehrlich (1916); Ehrlich (2002).

33. Luhmann (2004).

34. Teubner (1997).

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With regard to the first point, commencing from Durkheim, the emphasis he placed on "those social trends which form the basis for solidarity"[35] to explain the movement from primitive to modern society might certainly sound appealing to assess the Japanese's micro-relational practices of civic friendship and responsibility. However, Durkheim's anti-subjectivist account of social facts[36] and view regarding modern law being a reflection of social consciousness would not allow us to comprehend the delicate dialectic between Japan's societal dynamics and law's nature, claims, functioning, and transformative potential. As the number of studies that have been conducted about the contemporary developments of Japan's administrative apparatus and the growing "legal consciousness" of the Japanese indicate,[37] Japan is not yet (and it might never be) a form of polity in which "[l]aw is… the most stable and precise element in [the] organization [of social life]."[38] If anything, the very emergence and spread of the micro-regulatory activities and sectorial interactional episodes this article explores confirm not only the presence of a political vacuum at the macro level in Japan (or a space of appearance in Arendtian terms), but also that many of the Japanese's normative expectations continue not to find adequate accommodation in law as we are accustomed to consider it.[39] This suggests the inadequacy for present purposes of Durkheim's view that "law is to be considered the primary form in which society, as a unity, expresses its moral essence, that is the distinctive moral character that gives it some kind of integrity and cohesion."[40]

The same argument that leads to dismiss Durkheim's positivist picture could, however, be used to argue for an analytical similarity between Ehrlich's account of law and customs and the Japanese experience.[41] I refer to both Ehrlich's argument that law cannot, and should not, be severed from culture and related critique of formalist legal doctrine for its incapacity to comprehend why social practices and patterns of behaviour are themselves to be considered as a society's "living law." Indeed, to Ehrlich, law is (and cannot but be) a social phenomenon in the sense that (from a normative rather than empirical point of view)[42] law is the expression of an ethnically homogenous community's consciousness, compulsion, and working logic(s) rather than of the ruler's commands, however institutionalized.[43] As a

35. Hassard (1995), p. 15.

36. Scheppele (2017), p. 36. The term "anti-subjectivist" is not used as synonymous with "anti-individualist." See Hunt (2013), p. 29.

37. The literature on this topic is becoming increasingly abundant. With no pretension to exhaustiveness, see e.g. Grayd (1984); Upham (1987); Upham (2013); Haley (1991); West (2005); Feeley & Miyazawa (2007); Feeley & Miyazawa (2011); Foote (2008); Martin & Steel (2008); Ginsburg & Scheiber (2012); Vanoverbeke et al. (2014); Steinhoff (2014); Wolff, Nottage, & Anderson (2015). See also the Justice System Reform Council (JSRC), Recommendations of the Justice System Reform Council—For a Justice System to Support Japan in the 21st Century (12 June 2001). The JSCR was established by Law No. 68 of 1999 and its 13 members were all approved by the Diet.

38. Durkheim, *supra* note 31, p. 25.

39. The fact that, in the words of Michael Freeman, "Durkheim has little understanding of legal processes, of how law is made, applied, and enforced" represents another reason to depart from his sociology of law. See Freeman (2014), p. 712. Furthermore, and as will be seen in Section 4, the adoption of Teubner's societal constitutionalism inevitably leads to reconsideration of what is meant by "legal consciousness" in Japan.

40. Cotterrell (1999), p. 91.

41. Scholars have already explored this route and arrived at contrasting conclusions. See Rokumoto (1972); Corne, *supra* note 4.

42. Nelken (2008), p. 445.

43. There are resemblances of Ehrlich's argument in a passage of Teubner's main work on the subject, even though Ehrlich is not mentioned. See Teubner (2012), p. 71.

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result, social order is neither formalistically created nor coercively maintained by state legal institutions, but is rather the direct consequence of behavioural conventions and micro-disciplinary dynamics[44]—a claim that Ehrlich substantiates by analyzing associations' spontaneous regulatory mechanisms (i.e. constitutions) and living law's interaction with the official law of the state. While an argument in favour of using Ehrlich's pluralist model for our comparison would certainly be sound, it ultimately would have to be rejected for two reasons: first, because, as noted by David Nelken, Ehrlich "moved promiscuously between the different levels of community, organization and individual"[45]; and, second, because, as a logical progression, opting for Ehrlich's would be analytically appropriate a posteriori only —that is, when and if the constitutional quality of the micro-relational bonds addressed here is confirmed. But, even in that case, Ehrlich's account would have to be dismissed due not only to its structural paradoxes and analytical inconsistencies,[46] but also to his lack of attention to deviance and sanctions dynamics.[47]

This leads us to Luhmann's system theory of which, as mentioned, Teubner's self-reflective societal constitutionalism is an expression.[48] A good reason to rely on Luhmann's thought for our comparative analytic would certainly be the resemblance between his notion of legal systems' operative (i.e. normative) closure[49] and Lawrence Freidman's influential reflections, both within and outside the Japanese-law literature, on law being a semi-autonomous self-regulative system.[50] There are, however, two major difficulties with using Luhmann's functionalist theory and method for of our comparison. First, while Luhmann advocated an evolutionary and functionalist approach to constitutional norms, his anti-normative sociology is considered to be misleading to hook our reading of society and its (sub)systems (including law) on such concepts as "people" and "human consciousness."[51] According to Luhmann, indeed, the development of a truly scientific understanding of society as a system of communications requires the drawing of empirically verifiable theoretical boundaries, and thus the abandonment of ideological illusions as perspectives of inquiry. While such a move is justifiable in Luhmann's case, the research that this article promotes asks that such elements are taken into account so that new light can be shed on the relationship between law's content, function, and performance on the one hand and the "whatness" and "howness" of constitutional phenomena on the other. "In the objective content of science," Ernst Cassirer aptly pointed out in his account of human culture, "[the] individual features are forgotten and effaced, for one of the principal aims of scientific thought is the elimination of all personal and anthropomorphic elements."[52] The inter-disciplinary analysis proposed here—also revolving, as set out above, on such topics as

44. "A social association," Ehrlich, *supra* note 32, p. 39, affirms, "is a plurality of human beings who, in their relations with one another, recognize certain rules of conduct as binding, and, generally at least, actually regulate their conduct according to them."

45. Nelken, *supra* note 42, p. 468.

46. Nimaga (2009), pp. 162–3.

47. Griffiths (1986), pp. 23–8; Febbrajo (2016), p. 73.

48. Teubner, *supra* note 43, p. 105.

49. Luhmann, *supra* note 33, pp. 141–72.

50. Friedman (1975). Cf. King (2013), pp. 70–1.

51. Luhmann, *supra* note 33, p. 142. This might also explain why, as recently noted by Hanna (2017), p. 350, "the organization of social movements simply did not figure in Luhmann's research interests."

52. Cassirer (1944), p. 228.

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shared action, collective intentionality and identity, phenomenology of plurality, and ethical existentialism—requires instead that such elements are given full consideration.[53] The other difficulty is related to the core of Luhmann's theory, namely his categorization of law in functionalist terms. To Luhmann, social systems are defined by their specific function. Law is one such system and its function is to meet (or stabilize) normative expectations.[54] This is how, through its binary "legal-illegal" code[55] and internal subsystems such as legislative apparatuses and courts,[56] (the) law creates and maintains social order. While Luhmann's theory is highly influential, the problem with his functional approach for our purposes is that the emergence and diffusion of the micro-relational phenomena under consideration here reveal the inability of Japanese law and governance structures (*Rechtssystem*) to perform the stabilizing, regulatory instances Luhmann assigns to them.

Moving on to the second consideration, it needs to be clarified why it is worth asking whether Teubner's societal constitutionalism might assist scholars in developing an analytic of the formation and dynamics of the Japanese's micro-forms of social cohesion and responsibility. Without anticipating what will be seen in the following pages, suffice to say that what makes such an intellectual endeavour worthwhile is the capacity of Teubner's paradigm to decode the juridical and normative force of current (sub)modes of organizational proliferation and functional differentiation.

As Teubner duly notes, the American sociologist David Sciulli was the first, in the early 1990s,[57] to "develop a refined theory of societal constitutionalism."[58] Sciulli's concept has been increasingly used in recent years to analytically assess all those pluralist configurations of private orderings that challenge the Westphalian model of the modern state as an authoritarian construct that exercises exclusive sovereign powers over a given territory and people. Drawing from, as well as transcending, well-established categorizations within sociological discourse, Teubner makes specific use of Sciulli's paradigm to uncover the constitutional status of autonomous sites of rule production and enforcement that transcend conventional boundaries and background assumptions of classic constitutional theory—such as, for instance, the "public–private" divide and the "state-and-politics centricity" that inform modern constitutionalism.[59] Teubner does so by also pushing one step further Reinhart Koselleck's attempt at "liber[ating] constitutionalism from its limitation to the state and to extend it to all institutions of society."[60] The purpose of Teubner's pluralist constitutional sociology is indeed to set out and legitimize the formation and normative working logic(s) of contemporary social subsystems by overcoming some of the basic difficulties of modern constitutionalism. This, in turn, helps legal theories and practitioners to solve some of the long-standing constitutional issues surrounding the increasing relevance of fast-evolving processes of diversification and fragmentation that shape the uncertain and liquid normative architecture of our time and challenge the rigid "national/international" dialect.

53. Further, it should be noted that history has already proved the limits of positivist reason in sociological analysis. See Hughes (1977).

54. Luhmann, *supra* note 33, pp. 142–72.

55. *Ibid.*, pp. 122–31.

56. *Ibid.*, pp. 274–304. But see King & Thornhill (2003), p. 35.

57. Sciulli (1992).

58. Teubner (2017), p. 316.

59. Teubner (2008); Teubner, *supra* note 43, p. 3.

60. Teubner, *supra* note 43, p. 16.

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Some commentators might at this point object that Teubner's pluralist theory is primarily aimed at meeting the challenges facing national constitutions in the context of globalization and transnationalism. As a logical progression, the argument would conclude that it would be analytically inappropriate to tie Teubner's reflections to the societal dynamics of a national polity like Japan. While sound, this argument ought to be rejected, for two reasons. First, it misses the structural role that the development of the so-called transnational civil society has played in the formation and spread of civil society instances in Japan.[61] Second, it obfuscates the fact that Teubner's analysis covers the pluralization of regulative sources and norm-setting bodies, as well as the systemic diffusion and penetration of regime-shifting mechanisms not only at the macro and meso levels, but also at the micro level. And, indeed, in arguing that societal constitutionalism predates globalization,[62] Teubner has not failed to grasp the relevance of micro-social dynamics and functional differentiation processes to substantiate his analytic of constitutionalization phenomena.[63]

3. TEUBNER'S CONSTITUTIONAL PLURALISM

As recently set out by Paul Blokker, "[t]he sociological analysis of constitutions and constitutionalism is, in important respects, concerned with the analysis of the emergence of constitutional structures outside of the formal political realm of the nation state."[64] A protagonist in this field, Teubner has over the years developed "one of the most highly evolved positions in the contemporary sociology of law and legal-political norms."[65] Its premise is that today's globalization "is a highly contradictory and highly fragmented process in which politics has lost its leading role."[66] This "multi-placed scenario" not only vindicates Ehrlich's "opinion that a centrally produced political law is marginal compared with the lawyers' law in practical decision-making and especially with the living law of the Bukowina."[67] Above all, it indicates that "positivist theories of law which stress the unity of state and law as well as... critical theories which tend to dissolve law into power politics"[68] are inadequate to decipher the legal character of contemporary global and transnational regulatory dynamics.[69] Thus, lawyers have to look elsewhere if they are to efficiently navigate through the theoretical malleability and practical complexities that contradistinguish pluralist regulative phenomena beyond the state. In particular, they should start exploring the "social source of global law,"[70] which Teubner identifies with "the proto-law of specialized, organisational and functional networks which are forming a global, but sharply limited, identity."[71] This

61. Yamamoto (1999); Imada, *supra* note 15, pp. 34–7.

62. Teubner (2010), pp. 329–34.

63. Teubner, *supra* note 43, pp. 1–2, 6, 15–41, 60, 65.

64. Blokker (2017), p. 178.

65. Thornhill (2011), p. 244.

66. Teubner, *supra* note 34, p. 3.

67. *Ibid.*

68. *Ibid*. See also Teubner, *supra* note 43, p. 61, 74; Teubner (2013), p. 54.

69. It is worth noticing that Teubner is amongst those commentators that use the terms "globalization," "transnationalism," "global law," and "transnational law" in such a way as to highlight what unites them. See Teubner, *supra* note 34; Teubner (2015), p. 248; Teubner & Korth (2012), pp. 23–54.

70. Teubner, *supra* note 34, p. 5.

71. *Ibid*.

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"new living law," Teubner maintains, "is nourished... from the ongoing self-production of highly technical highly specialized, often formally organized and rather narrowly defined, global networks of an economic, cultural, academic or technological nature."[72]

Global and transnational law's peculiar content and functioning force therefore require interpreters and practitioners to abandon conventional (i.e. state-centric) assumptions regarding not only law's formation and functioning broadly understood, but also regarding the political essence of constitutional development. In particular, it does so to an extent by which it "poses not just regulatory questions, but also constitutional problems in the strict sense."[73] Among these stand "the question of the fundamental constitution of social dynamics."[74] Such ontological interrogative, Teubner notes, is brought about by the "new constitutional reality" to the extent that this "is characterized by the co-existence of independent orders, not only of states, but at the same time also of autonomous non-state social structures."[75] These "islands of the constitutional"[76] are, in fact, actual "[c]onstitutional norms [which] are developed ad hoc when a current conflict assumes constitutional dimensions and requires constitutional decisions."[77]

Thus, the need for a constitutional sociology capable of "overcom[ing] the obstinate state-and-politics-centricity"[78] and answering the "new constitutional question"[79] prompted by the fast-growing emergence and spread (and thus, constitution) of pluralist regulatory activities and modes of legalization that transcend state-based categorizations exists—a need that constitutional lawyers simply dismiss while arguing that "[t]he so-called constitutions beyond the state ... lack a social substrate that could provide a suitable object for a constitution."[80] What is rejected, in particular, is the fact that "globalization produces a tension between the *self-foundation* of autonomous global social systems and their political-legal *constitutionalization*."[81] What a closer, non-doctrinal but socially grounded observation would reveal, however, is that "in the discrepancy between globally established social subsystems and a politics stuck at inter-state level, the constitutional totality breaks apart and can then only be replaced by a form of constitutional fragmentation."[82]

This is where Teubner moves away from what he labels the "basic deficiency of modern constitutionalism"[83] and deploys his self-reflective societal model that operationalizes pluralist regulatory practices, arrangements, and instruments in constitutional terms by blending together fundamental aspects of Sciulli's societal constitutionalism and Luhmannian structural coupling.[84] At the centre of Teubner's move lies a series of substantive as well as methodological considerations. First, Teubner notes, the constitution is both essentially

72. *Ibid.*
73. Teubner, *supra* note 43, p. 1.
74. *Ibid.*
75. *Ibid.*, p. 52.
76. *Ibid.*, p. 51.
77. *Ibid.*, p. 52.
78. *Ibid.*, p. 3.
79. *Ibid.*, p. 1.
80. *Ibid.*, p. 59.
81. *Ibid.*, p. 43, emphasis.
82. *Ibid.*, p. 51.
83. *Ibid.*, p. 3.
84. As Teubner (2014), p. 235, himself affirmed when calling for a "distanced" encounter between law and social theory, "[t]here is no single social theory upon which the law could orient itself."

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and existentially the result of communicative, conflicting, and self-defining social practices rather than of formal political-legal processes of legitimation and validation. Thus we read that "the constitution is too important to be left to constitutional lawyers and political philosophers alone."[85] What a constructivist reading of the constitutional moment would miss—and this is the second consideration—is that the "the constitution in the first instances serves to enable the self-foundation of a social system."[86] The self-reflective constituting process ought therefore to be decoded in both societal and functionalist terms—that is, as an autopoietic mechanism aimed at self-establishing and self-organizing social spheres. Not coincidentally, when elaborating on this passage, Teubner quotes Luhmann, according to whom "every function system defines its own identity for itself... through an elaborated semantics of self-ascription of meaning, of reflection, of autonomy."[87] However, at the same time, Teubner makes it clear that a phenomenological analytic of societal constitutions would confirm that

> [t]he comprehensive structural coupling of politics and law, observed by Luhmann in the constitutions of nation states, clearly has no equivalent at the level of world society. At the same time, occasional couplings can be seen as and when social problems demand. Constitutional norms are developed ad hoc when a current conflict assumes constitutional dimensions and requires constitutional decisions.[88]

This is a key passage in Teubner's theory to the extent that, he observes, national law can "no longer externalis[e] its paradoxes to politics, but diverts it to other social systems [by] look [ing] for a different constitutional foundation of its norm production." Thus, "[i]f it is no longer the state constitution that is enlisted for externalising paradoxes, but the constitutions of social subsectors, so of the economy, the media, science and healthcare, then there are immediate, tangible consequences."[89] This can only be grasped, however, if constituent power is realistically and efficiently rethought of "as a *communicative* potential, a type of social energy."[90] Understanding constitutional power in this way allows the interpreter (finally) to comprehend how the self-reflective process witness at the national level is being replaced by a multitude of (inherently pluralistic)[91] self-reflective constitutional instances amongst the various sub-orderings of society. Thus, Teubner writes:

> [c]onstitutions deal with the paradoxes of self-reference practically by externalizing them to the surrounding context. Social systems are never entirely autonomous: there are always points of heteronomy. If this externalization now occurs with the help of constitutions, the moment of heteronomy comes when the social system refers to the law. The 'self' of the social system is defined heteronomously by legal norms and it can then define itself autonomously thereby. While the unity of a social system develops through the concatenation of its own operations, its identity is created in its constitution through the re-entry of external legal descriptions into its own self-description.[92]

85. *Ibid.*, p. 3. See also *ibid.*, p. 59; Teubner, *supra* note 68, p. 46.

86. *Ibid.*, p. 103.

87. Teubner (2011), p. 14, quoting Luhmann.

88. *Ibid.*

89. Teubner (2016), p. 33. See also Teubner, *supra* note 43, p. 75.

90. Teubner *supra* note 43, p. 62, emphasis.

91. "Societal constitutionalism," Teubner, *supra* note 89, p. 41, asserts, "paints a picture of constitutional pluralism, although one that is anything but uniform, since it realises different degrees of intensity of constitutionalisation."

92. Teubner, *supra* note 43, p. 65.

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Hence the core of Teubner's constitutional theory, according to which

> the constitutional moment refers to the immediate experience of crisis, the experience that an energy released in society is bringing about destructive consequences, the experience that can be overcome only by a process of self-critical reflection and a decision to engage in self-restraint.[93]

From this, it follows that the self-structuring of societal constitutions inevitably requires taking into account what would happen when the subsystem's "growth-energies"[94] accelerate "to the point where it tips over into destructiveness by colliding with other social dynamics."[95] It is on the verge of these "moments of catastrophe"[96] that constitutional rules emerge to limit the system's "excessive growth process."[97] However, the response to this excess of signification takes the form of an autopoietic, self-immunizing reaction, as "it is only possible to invent these limitations from within the system-specific logic, and not from the outside."[98] External pressures are, then, internalized through structural coupling—that is, they are absorbed by the function system so that its "internal limitations are configured and become truly effective."[99]

These dynamics explain why, despite the fact that they inevitably transcend the rigid parameters imposed by modern constitutionalism on intellectual configurations, societal constitutions are able to exert those constitutive and limitative functions proper of national constitutions. This aspect is further developed by Teubner through an analysis of the role played, in each function system, by what he defines as the "organized-professional sphere," the "spontaneous sphere," and various "collegial institutions"[100] that are "responsible for the self-regulation of the communicative media—power, money, law, and truth."[101]

This conceptualization is taken up again later on when we read that "[s]ocietal constitutionalism opposes the centralization of fundamental sociopolitical issues in the political system. Its concern is to multiply the sites where controversies are fought and decisions are made about the 'political' in society."[102] Critically, it should be noted that none of this would be possible without the actively decisive "consciousness and corporeality of actual people."[103] It is indeed this anthropological element of "inter-subjectivity,"[104] as Teubner calls it, that "*triggers the* pouvoir constituant, *the potential, the capacity, the energy, indeed the power of self-constitutionalization: the reciprocal irritations between society and individuals, between communication and consciousness*."[105] This anti-Luhmannian aspect of Teubner's theory is of pivotal importance for the healthy development of the

93. *Ibid.*, p. 82.
94. Teubner, *supra* note 87, p. 12.
95. *Ibid.*, p. 10.
96. *Ibid.*, p. 12.
97. *Ibid.*, p. 13.
98. *Ibid.*, p. 14.
99. *Ibid.*, p. 13.
100. Teubner, *supra* note 43, p. 101.
101. *Ibid.*, pp. 89–96. See also *ibid*., p. 101: "[c]ollegial institutions are reflexive bodies aimed at social self-identification in two senses: they establish the specific rationality and normativity of the social sphere and they seek to make them compatible with their environments. The collegial institutions function as a kind of think-tank for the sub-constitution, which for its part governs the ecological relations of the social system."
102. *Ibid.*, p. 121.
103. *Ibid.*, p. 63.
104. *Ibid.*
105. *Ibid*., emphasis.

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interdisciplinary research proposed here. This is so despite the fact that, right after having so claimed, Teubner returns to Luhmann and clarifies that "there is no uniform shared meaning, no merging of horizons between the minds involved, but rather a series of separate but intersecting consciousness and communication processes."[106]

This reconstruction of the constitutional paradox poses, however, a "fundamental problem"[107] regarding the self-limiting autonomy and identity of independent orders for which Teubner's societal constitutionalism aims to offer a solution: "How is it possible," Teubner asks, "to increase external pressure in order to stem the negative externalities of autonomous subsystems by means of their internal self-limitation?"[108] As can be easily guessed, this interrogative hides, in fact, a meta-ontological question concerning the very method through which Teubner draws and promotes his societal picture—an interrogative that, as will be seen below, his critics did not fail to pose. Teubner is, of course, aware of this and, from the very beginning of *Constitutional Fragments*, clarifies that his sociological constitutionalism

> is based on four different variants of sociological theory. Primarily, it draws on general theories of social differentiation that move the internal constitutions of social subsystems to the centre of attention. It is also based on the newly established constitutional sociology, further, on the theory of private government and, finally, on the concept of societal constitutionalism.[109]

Further, "[c]onstitutional sociology ... promises to link historical and empirical analyses of the constitutional phenomenon with normative perspectives."[110] And, indeed, while traditional constitutionalism finds no accommodation within this new societal framework, Teubner reassures us that "[i]n empirical and in normative terms, there are lessons to be learnt from the rich history of nation-state constitutions."[111] Importantly, while Teubner concedes that "[c]onstitutional sociology can by no means predetermine legal principles, not to mention individual constitutional rules,"[112] his theory cannot avoid "modify[ing] the prerequisites for constitutional substrates."[113] It does so by contending that

> [f]irstly, the constitution should be disconnected from statehood, so that transnational issue-specific regulatory regimes may be considered candidates for constitutionalization. Secondly, the constitution should be decoupled from institutionalized politics, thus allowing other areas of global civil society to be identified as possible constitutional subjects. Thirdly, the constitution should be decoupled from the medium of power, thus making other media of communication possible constitutional targets.[114]

This multifaceted, intellectual turn revolves around two rather controversial steps that accommodate constitutional law's sociological necessity to "concentrate on developing *limitative rules* for transnational regimes"[115] and "develo[p] constitutional rules that are in a position to respond to the motivation-competence dilemma that transnational regimes are

106. *Ibid*. Thus transnational constitutions can do without representative democracy. See Teubner (2018).
107. *Ibid*., p. 41.
108. *Ibid*.
109. *Ibid*., p. 3.
110. *Ibid*.
111. *Ibid*., p. 60.
112. Teubner, *supra* note 68, p. 56.
113. Teubner, *supra* note 43, p. 60.
114. *Ibid*., p. 60.
115. Teubner, *supra* note 68, p. 57, emphasis

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facing."[116] These steps are: an empirically grounded re-elaboration of such notions as the aforementioned *pouvoir constituent-constitué*, the constitutional subject, and collective identity; and an equally empirically grounded re-elaboration of the "juridification–constitutionalisation" dichotomy.[117]

According to Teubner, the suggested roadmap allows us to reorient constitutional language beyond the narrow perimeter of orthodox (i.e. state-based) configurations so that self-limiting societal regulatory practices may be granted constitutional character. Both passages serve Teubner to, first, detach the decoding of the foundational dynamics and working logics of intermediary groups, social sub-areas, and functional orderings from the formalist reading of modern constitutional theories centred on state-formation processes; and, second, preserve the constitution as a conceptual construct. And, indeed, Teubner notes that "[a]lternative terms, such as 'meta-regulation', 'indispensable norms', or 'higher legal principles' are inadequate to comprehend the complexity of issues that the concept 'constitution' covers."[118] Rather, what is required is a complete reconceptualization of the constitution as "a living process, the self-identification of a social system with the assistance of the law."[119] As Teubner clarifies a little later when setting out why "transnational constitutionalism goes far beyond a mere juridification of societal sphere,"[120] "[s]ocietal constitutions are ... defined as structural coupling between the reflexive mechanisms of the law (that is, secondary legal norm creation in which norms are applied to norms) and the reflexive mechanisms of the social sector concerned."[121]

Under this new effectual, yet "irritating,"[122] light,

> [t]he norms of a transnational regime will have to pass the following quality tests in order to count as constitutional norms:
>
> (1) *Constitutional functions*: do transnational regimes produce legal norms that perform more than merely regulatory or conflict solving functions, ie act as either 'constitutive rules' or 'limitative rules' in the strict sense?
>
> (2) *Constitutional arenas*: is it possible to identify different arenas of constitutionalization—comparable to the arenas of organized political processes and the spontaneous process of public opinion, as they are regulated in the organizational part of state constitutions?
>
> (3) *Constitutional processes*: do the legal norms of the regimes develop a sufficiently close connection to their social context or their 'nomic community'—comparable to that between constitutional norms and the 'nomic community' of nation states?
>
> (4) *Constitutional structures*: do the regimes form typical constitutional structures as they are known in nation states, in particular the familiar superiority of constitutional rules and judicial review of ordinary law?[123]

116. *Ibid*.
117. Teubner, *supra* note 43, pp. 16, 18, 73, 79, 105.
118. *Ibid*., p. 60.
119. *Ibid*., p. 71.
120. *Ibid*., p. 102.
121. *Ibid*., p. 105.
122. Teubner, *supra* note 43, p. 15; Teubner, *supra* note 68.
123. *Ibid*., pp. 74–5. See also Teubner, *supra* note 68, pp. 54–6.

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The argument pursued by this article is that these "quality tests" regarding the emergence and dynamics of (de-formalized) sectorial constitutions may assist scholars in assessing the analytical register of the formation, organizational structure, and regulatory mechanisms of NAs as micro-relational arenas of civic friendship, solidarity, and responsibility. More particularly, and as mentioned earlier, it submits that much may be gained by contextualizing Teubner's societal constitutionalism through the lens of Hasegawa's scholarship on the formation and dynamics of NAs as community-based organizations and network systems in suburban areas—to be explored in the next section.

4. HASEGAWA'S STATE-CENTRIC ACCOUNT

Hasegawa is a leading legal sociologist and comparatist whose scholarship explores the role that state law and informal, pluralist arrangements play in the formation and development of micro-scale communities in suburban areas. Hasegawa's socio-legal studies focus on the relationship between communities' purposive actions, social normativity, and law's instrumentality. In terms of methodology, his accounts share some affinity with the so-called "mobile method" of empirical research[124] on pluralist orderings and shared co-operative activities. Hasegawa's aim is indeed to decode the way in which the regulatory dynamics of micro-relational bonds help mould a sense of civic embeddedness, collective solidarity and responsibility, and mutual understanding. This is a theme that Hasegawa investigates not only from the standpoint of Kawashima's seminal reflections on the Japanese's "legal consciousness," mentioned earlier, but also by drawing from such Western political theorists, sociologists, and lawyers as Tocqueville, Ehrlich, Giddens, Luhmann, Galanter, Hart, and Teubner.

For the purposes of our discussion, attention should be paid to Hasegawa's state-centric reflections on the regulatory functions of NAs as set out in his Japanese monograph on the subject[125] and in a more recent article that is aimed at recontextualizing his main findings for the English-speaking readership.[126] Hasegawa describes such community-based organizations as "*nonlegal*, unincorporated voluntary associations [which] are created neither by statutes nor contracts but on a voluntary basis."[127] Hasegawa's intention with this definition is to emphasize how the nature and functions exerted by such voluntary groups do not fall within the purview of state-based configurations and constructs, including law. That this categorization is underpinned by the public–private law dialectic clearly emerges a little later, when Hasegawa reiterates that "NAs are a kind of *nonlegal* social relationships"[128] and specifies that he categorizes "social relationships that are prescribed by any existing express legislative enactments as *legal* relationships, while those that are not prescribed are *nonlegal* ones."[129]

While merely introductory, these definitions are of pivotal relevance for our purposes, as they reveal the state-based (i.e. positivistic) substratum of Hasegawa's method of inquiry.

124. Büscher & Urry (2009).
125. Hasegawa (2005).
126. Hasegawa (2009).
127. *Ibid.*, p. 80, emphasis.
128. *Ibid.*, p. 84, emphasis added.
129. *Ibid.*, emphasis.

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Importantly, the voluntary, and thus not properly legal, nature of NAs has been stressed by other commentators as well. In seminal work on the subject, for instance, Robert J. Pekkanen has similarly described NAs as "voluntary groups whose membership is drawn from a small, geographically delimited, and exclusive residential area (a neighbourhood)."[130] These categorizations are rooted in the 2005 Supreme Court ruling in which it was held that participation in NAs is not compulsory.[131] Yet, it should be noted that membership has never represented a problem, as it is maintained by the household. Thus, Yutaka Tsujinaka, Hidehiro Yamamoto, and Pekkeanen observe that "Japanese NHAs have more members than almost any other civil society in the world."[132] This is also due to the fact that, despite their voluntary nature, NAs can exert considerable social pressure on those householders who do not take part in them[133] or who, after having joined, do not contribute financially or actively engage.[134]

With respect to the services that NAs provide, in an early study, Applbaum noted that these "can be classed into three areas: environmental, social (including spiritual), and political."[135] Writing two decades later, Pekkanen tells us that their "activities are multiple and centered"[136] on the local area of interest. Further, after having suggested that NAs "can be characterized by the 'four smalls': they have small membership, small numbers of professional staff, and small budgets and operate on a small local area,"[137] Pekkanen observes that "[t]hrough this organizational form alone Japan exhibits a remarkable vital local civil society."[138] Pekkanen's broad definition may be combined with what Tsujinaka, Yamamoto, and Pekkeanen maintained a few years later—namely that NAs' "activities include local environment, social events among the residents, safety and welfare activities, cooperation with local government through disseminating information among residents, and articulation of local demands to government."[139] An analogous statement may be found in Hasegawa's account, where we read that

> NAs usually hold various functions and establish a system of mutual assistance. For example, they organize social gatherings and community festivals among the residents; enable recreation, crime-and-fire prevention and garbage collection; ensure that the neighborhood is clean and serve as information channels for the happenings in the city and as vote-gathering machines in their constituencies. In short, NAs have quasi-public characteristics because they provide local public services.[140]

It is against this broadly defined, functional description that Hasegawa aims to assess the peculiar role that NAs play in enhancing and regulating societal interaction and resolving small-scale disputes in suburban areas that are either regulated by building agreements (BAs)

130. Pekkanen (2006), p. 87.
131. Courts.go.jp (2005).
132. Pekkanen, Tsujinaka, & Yamamoto, *supra* note 16, p. 63.
133. Cf. Applbaum, *supra* note 28, pp. 13–5, 22–6.
134. Hasegawa, *supra* note 126, p. 80.
135. Applbaum, *supra* note 28, p. 2.
136. Pekkanen, *supra* note 130, p. 87. Surprisingly enough, Pekkanen's work is note cited in Hasegawa's paper.
137. *Ibid*., p. 27.
138. *Ibid*., p. 32.
139. Pekkanen, Tsujinaka, & Yamamoto, *supra* note 16, p. 2.
140. Hasegawa, *supra* note 126, p. 80.

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or not. Yet, it should be mentioned that Hasegawa's micro-sociological research only indirectly touches on some of the themes at the centre of this article regarding human sociability and reciprocal altruism. I refer to such aspects as NAs' ability to satisfy participants', and thus communities', existential needs by correcting societal marginalization and improving their wellbeing. As such, Hasegawa's analysis cannot directly assist us in unfolding the societal role that NAs play in shaping what for our purposes may be defined as cultural evolution of micro-scale sociality and group responsibility. Hence, in the next section, his findings will be complemented with those of other sociologists and anthropologists who have problematized the contextual nature of relational phenomena from this perspective of inquiry as well.

Hasegawa commences his considerations by noting that "[w]hen BAs are created or enforced, NAs often provide resources such as money, manpower and meeting places, though they have no legal relation to BAs."[141] Further, Hasegawa maintains that "NAs draw up rules containing quasi-regulations that resemble those of the BAs in their neighbourhoods. They also impose various social sanctions on those who violate these quasi-regulations and urge them to stop or modify their construction by referring to them."[142]

After having so clarified, Hasegawa moves on to setting out as well as commenting on seven case-studies, two of which are of particular interest to us as they involve disputes outside BA areas, and thus institutionalized regulatory arrangements. This empirically grounded analysis constitutes the core of Hasegawa's study, as it serves him to prove that, despite being, as he calls them, non-legal relationships, occasionally "NAs are ... appropriated for the use of other *legal* relationships."[143]

This passage is of the essence to grasp the core of Hasegawa's findings regarding the extra-legal nature, as he labels it, of the services that NAs provide. Indeed, commenting on the first of the two case-studies that do not involve BAs, Hasegawa writes:

> even those who do not join the BA are often members of the NAs. Therefore, they are bound by the rules or decisions of the NAs. Sometimes, these rules include not only moral codes or etiquette but also quasi-regulations that resemble the regulations of the BAs. Although some rules are private contracts between residents, others are not, either because not all residents agree to the rules or not all the regulations can be legally enforced. However, though the residents often know that the latter are not legally binding, they obey them out of necessity. We can call rules in the NAs that are not legally binding *nonlegal* rules.[144]

The case concerned the construction of a building whose dimensions, it turned out, did not comply with the requirements set out by the local BA. Before purchasing the land, the constructor had been assured that a BA would not be created, yet one was eventually formed that resembled old established NA rules concerning land use and building dimensions. Because the constructor did not join the BA, the relevant homeowners association suggested a "compromise solution"[145] that, after a long negotiation, led to a settlement. What is of interest here is that all of this was done outside the institutional purview of the BA, into which the constructor had not entered. Thus, the parties had to resort to the NA's (*non-legal*,

141. *Ibid.*, p. 82.
142. *Ibid.*
143. *Ibid.*, p. 84, emphasis.
144. *Ibid.*, p. 92, emphasis added.
145. *Ibid.*, p. 93.

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according to Hasegawa) rules for solving their dispute. Drawing from Hart, Gouldner, and Luhmann, Hasegawa concludes that

> [i]n modern society, legal relations are not reciprocal ones that need local compensatory arrangements such as *noblesse oblige* or mutual concessions, but complementary ones in which such arrangements are not needed. Therefore, when the residents cannot rely on the legal relations based on the BA, they have only reciprocal relations based on the NA to rely on.[146]

The second dispute concerned the construction of 26 single-family houses on a retarding basing whose area was not covered by the local BA. According to the latter, the lots could only be subdivided if they met specific requirements that, according to pre-construction planning, they did not. While the BA could not apply, the NA had previously stated that "land use of lots outside or near the BA area is also bound by the BA."[147] The issue therefore arose as to whether the BA could be indirectly enforced via reference to the NA's regulatory regime. After extended negotiations, the developer agreed to most of the requests made by the NA's board to prevent the construction works being delayed. In his observations on the case, Hasegawa explains that "although [the developer] was an outsider, the board could not strongly oppose [him] since the rules of the NA were *nonlegal*. However, these rules showed the solidarity of this community."[148]

In his conclusive remarks, Hasegawa further reflects on his findings and notes, amongst other things, the following:

> (1) In the BA areas, residents took legal rules into account when facing conflicts concerning BAs. It is true that, in most cases, they settled their disputes through compromises or negotiations out of court. However, they recognized their rights, observed their disputes from a legal point of view and referred to the legal rules.[149]

> (2) When residents discussed and settled their disputes concerning the BAs, NAs played important roles. Although NAs are *nonlegal* associations, they often act as a seedbed for legal associations (e.g. HOAs). NAs often supported HOAs by providing them with resources and imposing social sanctions on deviants .... The social network of the NAs was 'appropriated' by the residents who utilized the legal system. In the neighborhood, there was a dualistic social structure that consisted of the HOAs and the NAs. Both often worked together.[150]

> (3) In the neighbourhood, the residents occasionally referred to and utilized not only legal rules but also *nonlegal* rules such as the residential rules of the NAs. The residents often recognized the difference between legal and *nonlegal* rules and were also aware of their limitations. This is why the board had to refer to the *nonlegal* rules of the NA ... and dissuade the residents from pressing unreasonable demands on the developer.[151]

Thus, referring to Giddens and Teubner, Hasegawa concludes that NAs represent "a good example of the intersection of intimacy and impersonality."[152] This is also because "residents have ... developed their sense of 'reflexive monitoring' of the diverse social rules."[153]

146. *Ibid.*
147. *Ibid*., p. 94.
148. *Ibid*., emphasis added.
149. *Ibid*., p. 95.
150. *Ibid*., emphasis added.
151. *Ibid*., emphasis added.
152. *Ibid*., p. 96.
153. *Ibid*.

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As the next section will show, Hasegawa's state-centric arguments regarding what is considered to be properly "legal" in Japan as well as his reflections on NAs' capacity to mould a relational sense of responsibility and community belonging have far-reaching consequences for our comparative analysis. Before turning to that, however, it should be noted that the impact of Hasegawa's contentions can be better appreciated if contextualized against what Yu Ishida and Naoko Okuyama have recently affirmed in an essay that explores how "private-led prosocial commitments to local community welfare"[154] are supported by non-member donations. As Ishida and Okuyama observe, indeed, NAs (NHAs in their essay) "[h]ave evolved five structural and organisational distinctions as their central features over time."[155] More particularly:

> (1) the NHAs have their own local areas for administration and activities, and one's local areas do not overlap with another; (2) the unit of account for the NHA members is a household, not an individual; (3) all the households in an area by default are members of the respective NHA; (4) the NHAs comprehensively assess a broad variety of local community issues; and (5) the NHAs are then the representative organizations to the local municipalities and outsider authorities.[156]

As discussed, the interrogative posed by this article is whether the formation, nature, organizational structure, and regulatory functions exerted by NAs fully meet Teubner's aforementioned four quality tests. Answering this interrogative inevitably requires also an engagement with some of the criticism that has been raised against Teubner's pluralist model. Both aspects are discussed in the following section.

5. SOME REFLECTIONS

5.1 Law and the Micro-relational Politics of Sociality

Modern society is highly functionally differentiated. Japan is, of course, no exception. It was after the Great Hanshin earthquake of 1995, however, that scholars commenced paying increasing attention to the growth and spread of multidimensional forms of civic engagement and responsibility in Japan. It is seems now clear that a fundamental role in the development of micro-scale participatory dynamics was played by a series of international and transnational factors that helped contain the impact of those state policies aimed at constraining the emergence of non-governmental organizations.[157] Further, it is equally accepted that, while the Japanese state is generally opposed to "the formation of national movements that are local in origin,"[158] "[o]ver the [past] thirty years, citizen participation in planning decisions increased and local planning authorities gained power."[159] Not coincidentally, the 1998 NPO law arose out of the Japanese state's awareness regarding its lack of local knowledge and inability to provide mass-disaster relief. While scholars are divided on such matters as the

154. Ishida and Okuyama (2015), p. 1166.
155. *Ibid*., p. 1167.
156. *Ibid*., pp. 1167–8.
157. Reimann (2010).
158. Hein & Pelletier (2006), p. 165.
159. Ishida and Okuyama, *supra* note 154, p. 25.

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trajectories and effects of this political turn[160] and the involvement of local governments in urban planning activities, they tend to agree that

> [c]ivil society in Japan is expanding and becoming more pluralistic, gradually moving away from the predominance of business associations typical of a developmental state ... Japanese society as a whole is moving from a security-based society in which individuals pursue cautious, commitment-forming strategies to a trust-based society in which individuals purse more open, opportunity-seeking strategies.[161]

Furthermore, as Ishida and Okuyama have more recently noted, "[t]hese days more people in Japan have become more concerned about the development of their local society and community, and have tried to involve others towards achieving sustainable development."[162] This, in turn, helps reverse the Japanese's ontological withdrawal and social marginalization by enhancing a sense of purposiveness, community belonging, reciprocity, solidarity, responsibility, and civicness. "The principal social function of the *jichikai*," Applbaum observed in the middle of Japan's first lost decade, "is to integrate residents and promote a sense of solidarity in the neighbourhood."[163] A little later, Applbaum further asserted that NAs are "a constant fact and reminder of obligations to neighbourhood life."[164] Hasegawa's case-studies, particularly the second one, as well as other recent accounts confirm this. And, indeed, NAs' "meetings are general fora in which ... members are permitted and even encouraged to participate."[165] It is no coincidence that, amongst the many social services NAs provide, "friendships and social gatherings among residents"[166] play a key role. It is unsurprising, then, that "in their provision of social services, NAs are generally guided by their intimate knowledge of local conditions and a close connection to the people being served (the neighbors)."[167]

This view is reinforced by the contextual nature of NAs' modes of governance as well as by their collaborative working relationships with other local organizations and Social Welfare Councils.[168] It is further confirmed by all those activities that NAs undertake to foster social capital, bonding, and participation,[169] while also enhancing a sense of political representation and accountability.[170] Tsujinaka, Yamamoto, and Pekkeanen observe that NAs "typically adopt a strategy of filling in the gaps in social service provision by local governments."[171] Subcontracting arrangements are the preferred route to perform this task as

160. Pekkanen, *supra* note 130. According to Ogawa, *supra* note 15, pp. 184, 180, what the 1998 NPO law has led to is civil society's "failure." The reason, Ogawa maintains, is that the new legislation reinforces the state's presence through "performance targets or cost cutting in public administration and the growth of managerialism by the government as a mode of collaboration with the NPO." See also Evans (2002). More generally, see Sorensen & Funck, *supra* note 16.

161. Schwartz (2003), p. 7.

162. Ishida, *supra* note 154, p. 1184.

163. Applbaum, *supra* note 28, pp. 2–3. Cf. Sorensen & Funck, *supra* note 16, p. 278.

164. *Ibid.*, p. 5.

165. Pekkanen, Tsujinaka, & Yamamato, *supra* note 16, p. 45.

166. *Ibid.*, p. 109.

167. *Ibid*.

168. *Ibid*., pp. 83–108, 113–4.

169. Pekkanen, Tsujinaka, & Yamamoto, *supra* note 16, pp. 59–108. Cf. Hashimoto, *supra* note 26, pp. 230–2; Sorensen, *supra* note 6, p. 122; Houwelingen (2012), p. 471.

170. Pekkanen, Tsujinaka, & Yamamoto, *supra* note 16, pp. 59–82, 150–74.

171. *Ibid*., p. 109.

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the above-mentioned authors find that "almost all local government subcontract to NHAs"[172] and further that "commissioned services and collaboration with local governments are more frequently undertaken when NHAs regard local government policies as insufficient."[173] In addition, as Ito has shown, NAs have been developing self-referred problem-solving practices in isolation from local governments.[174] All these activities also serve to counterbalance the aforementioned political vacuum at the macro level to the extent that, to the increasing lack of political and social significance of public bodies, there corresponds the growing self-reflective emergence and intensification at the micro level of spontaneous sites of rule production and enforcement.[175] Or, we may say with Teubner, NAs autopoietically constitutionalize themselves through a self-reflective structural coupling that internalizes external pressures.[176]

Importantly, these micro forms of relationality and responsibility feed back into renewed modes of subjective wellbeing[177]—a finding that is indirectly confirmed by how social-distance factors increase the emergence and spread of precarity, marginalization, and depression phenomena. "People who are different in social backgrounds from their neighbors," Daisuke Takagi et al. observe, "are vulnerable to depression because they cannot acquire sufficient supportive networks and cannot perceive collective efficacy due to deficiency of interactions with their neighbors."[178]

What about law and legal analysis, then? As normative (including legal) pluralism is a social fact,[179] it comes as no surprise that legal scholars have not failed to explore the pivotal role that both state law and non-state regulatory instruments play, or might play, in the development of civic participation bonds in Japan's societal life.[180] While the debate on the nature and declensions of these societal instances of transformative politics has proved to be particularly insightful from several perspectives of inquiry, the question that still needs to be answered is what analytical model would assist commentators to assess the legal character of this sort of shared actions, voluntary organizations, and interpersonal modes of social responsibility.

Yet, it might be objected with good reason that the heterogeneity of the phenomena in question renders it particularly difficult (if not inappropriate) to frame a unique and all-embracing analytical framework. The very path pursued by this article might therefore be deemed not worth considering. To such criticism, it might be responded by noting that, while Teubner's societal picture allows the Japanese's micro-relational arrangements to be inscribed within the purview of legal pluralism, such categorization would only be acceptable at a very general level of abstraction. Analytical accuracy and coherence would indeed

172. *Ibid*., p. 147.

173. *Ibid*.

174. Ito, *supra* note 15, p. 169.

175. Pekkanen, Tsujinaka, & Yamamoto, *supra* note 16, p. 151. This also explains why, since the 1990s, NAs' activities have been supported by decentralization movements. See *ibid*., p. 18.

176. This also applies to the very formative period of present-day NAs: the 1920s. See Schmidtpott, *supra* note 25.

177. Hashimoto, *supra* note 26, p. 226; Pekkanen & Tsujinaka (2008); Yūko, Pekkanen, & Yutaka (2012), p. 85; Matsushima & Matsunaga (2015); Yoji Inaba et al. (2015). But see Tiefenbach & Holdgrün (2015).

178. Takagi et al. (2013), p. 86.

179. Brennan et al. (2013), p. 3; Cotterrell (2017), p. 22.

180. Among others, see Feeley & Miyazawa, *supra* note 37, p. 179. In sociological literature, see Salamon & Toepler (2000).

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require us to comprehend that opting for Teubner's theory of constitutional differentiation would lead to conclude that such pluralist instances meet not only the threshold of legality, but also the higher and more rigid one of constitutionality.[181] In this sense, and to be more precise, a Teubnerian analytic would allow interpreters to conceptualize such micro-relational conglomerates not merely as, drawing from Griffths, might be defined as self-autonomous loci of legal-regulatory activity.[182] Rather, they would have to be considered as fully fledged constitutional sites.

Further, and relatedly, opting for a Teubnerian approach to the subject would allow interpreters to extend the notionistic purview of what amounts to "law" in Japan to a whole series of normatively heterogeneous[183] phenomena that, under the influence of conventional (i.e. positivistic and state-based) assumptions, would not be categorized as such. As a result, the formation and functioning of the micro-relational regulatory dynamics such as those underpinning NAs that Hasegawa categorizes as non-legal would have to be rethought as representing "islands of the constitutional" in Teubnerian terms—namely constitutional loci of intersubjective, self-reflective consciousness and communication processes. Thus, and as can be easily imagined, moving away from "legal centralist"[184] demarcations has meaningful implications for scholars' ability to analytically assess the relationship between the growing "legal consciousness" of the Japanese and the formation of societal fora of civil activity and responsibility.[185]

5.2 Questioning Teubner's Societal Analytic

That it is for the (comparative) sociology of law to take the above considerations further should be obvious[186]—particularly if we bear in mind the "*sociological turn* in constitutionalism"[187] and agree with Griffiths that the "theoretical object" of socio-legal analysis is "social control"[188] and focus on the ordering function played by the micro-sites of rule production at the centre of this article. Whether or not to choose Teubner's societal model as a conceptual framework for our comparative analysis is, however, another question and open for discussion (if not controversy). The argument pursued here is that Teubner's constitutional picture is worth exploring to the extent that it helps us systematize (and thus comprehend) different normative orders and regulatory regimes in an age, such as ours, characterized by increasing regulatory density, complexity, and uncertainty. This is due to the fact that Teubner specifically framed his socio-legal paradigm to overcome the difficulties that classic constitutional theory has shown in trying to decipher the proliferation and divergence of isolated alternatives to the modern constitutional project, even in Japan.

As was seen, indeed, while Teubner elaborated his societal constitutionalism primarily for the global and transnational environment, its utility for the purposes of our study lies in the way he has re-worked the "state/society" dichotomy by blending together different group and

181. Teubner, *supra* note 43, p. 110.
182. Griffiths, *supra* note 47; Griffiths (2003), p. 24.
183. Griffiths, *supra* note 47, p. 38.
184. Galanter (1981), p. 17; *ibid*.
185. Cf. Cotterrell (1998), pp. 190–1.
186. Cf. Zweigert & Kötz (1998), p. 11.
187. Blokker & Thornhill (2017), p. 6, emphasis.
188. Griffiths (2017), p. 105.

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complexity theory arguments. Teubner's interdisciplinary approach allows interpreters to make use of the societal constitutionalism paradigm for (potentially) all sublevels of ordering, including those discussed here. Having said that, however, analytical accuracy requires us to consider some of the criticism that has been raised against it. Two very similar critical appraisals are of particular interest for the scope of our discussion: Emilio Christodoulidis's "internal critique of ... the constitutional and political dimensions"[189] of Teubner's theory and Ming-Sung Kuo's criticism regarding how far Teubner has extended the concept of constitution to account for informal modes of group formation and ordering.[190]

Christodoulidis's and Kuo's reviews of Teubner's account share a common concern about the consequences implied by a shift from empirically based constitutionalism to abstract constitutionalization. Christodoulidis contends that "constitutionalization, as an ongoing process, undercuts what we typically associate with the constitutional, which is its framing function."[191] More particularly, while noting that "the great novelty of [Teubner's] theory is to withdraw the primacy of the legal"[192] from the purview of scholarly discourse on the subject, what Christodoulidis thinks Teubner's societal constitutionalism fails to grasp is that

> the meaning of the constitutional points to a certain function of "containment" along the social, temporal, and material axes [shaping such meaning]. These are threshold requirements for ascribing constitutional meaning. Uploaded to the level of transnational societal constitutionalism, they become unsettled, as they become subject to a number of extraordinary reconfigurations in all three dimensions.[193]

This feature of sectorial constitutions leads Christodoulidis to maintain that, if, as in Teubner's case,

> constitutionalization is merely the name of what "hardens" into concepts that acquire some form of orientation value for the system in response to societal stimuli (be they protests or conflicts) as it surges on along the trajectory of its self-reproduction, then we sacrifice the possibility to draw distinctions on a political-societal register.[194]

Although he never cites or indirectly refers to Christodoulidis's critique, Kuo argues similarly while targeting the shift, at the centre of Teubner's model, from the constitution as we know it to the (somehow intangible) autopoietic processes of constitutionalization. Categorizing Teubner's picture as a "constitutional wonderland,"[195] Kuo's intent is to challenge the constitutional credentials of Teubner's theory by showing that his analytic implies a semantic deception that ultimately affects its ability "to offer an alternative constitutional vision for political ordering"[196] in contemporary society. "Teubner's version of global constitutionalism," Kuo affirms,

> is semantic as the world order comprising constitutional fragments he envisages is disembedded from political, discursive communities of self-determination. With functional autonomisation in

189. Christodoulidis (2013).
190. Kuo (2014).
191. Christodoulidis, *supra* note 189, p. 632.
192. *Ibid.*, p. 647.
193. *Ibid*.
194. *Ibid*., p. 650.
195. Kuo, *supra* note 190, p. 160.
196. *Ibid*., p. 160.

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> the place of political self-determination, Teubner's constitutional wonderland appears to be steeped in an endless process of constitutionalisation without the constitution as we know it, albeit still overloaded with constitutional trappings.[197]

What renders Teubner's pluralist model problematic, if not completely inadequate, then, is what is hidden in his methodology of inquiry—that is, the fact that is purposively moulded to sustain his imaginary vision of societal conglomerates' formation and functioning. Paradigmatic of this empirical indeterminism, overinclusive functionalism, and lack of conceptual appeal is the role that Teubner assigns to the constitutional actor that, in the above-mentioned "moment of crisis" in which the social sub-area (supposedly, according to Kuo) autopoietically constitutes itself through a self-reflective cutting and judging to immunize itself from a vital threat, "seem[s] to be left alone"[198] in her newly discovered capacity as a "super civic republican."[199]

Christodoulidis's and Kuo's critiques are both strategic to the extent that they tackle central and pervasive themes concerning the empirical accuracy and theoretical soundness of Teubner's genealogical reconstruction of the constitutional moment as a protective response in the face of an entropic, existential risk. As such, they also shed new light on the sociology of law's commitment and ability to offer specialized frameworks of logical understanding that allow both theorists and practitioners to engage with one another and construct a (more or less) shared knowledge of reality based on (more or less) shared standards of rationality. However, an engagement with all their aspects would require a more extensive treatment than can be provided here. It will suffice to note that, while certainly dynamic (i.e. the constitution *as* a process), Teubner's sectorial constitutions do not lack the framing properties of canonical constitutions for the simple reason that, if that would not be the case, the constitutionalization (i.e. formation and structuring in constitutional terms) of societal sub-areas could never occur phenomenologically.

Not coincidentally, it might be added, throughout his scholarship to date, Teubner has given several examples to demonstrate the constitutional (rather than merely legal) character of societal sub-areas whose formation and relational regulative regimes transcend the conceptual safety net attached to the "public–private" dichotomy. As was seen, these include the economy, science, health, mass media, and so forth—all subsystems that are not only ontologically constituted, but also perform constitutional functions within their subject areas. If we agree that constitutions are self-reflective communicative processes through which societal arenas are autopoietically ontologized so that the political life of communities can express itself, then NAs too can be efficiently categorized as sectorial constitutions in Teubnerian terms.[200]

6. CONCLUSION

Not only legal pluralists, but also legal comparatists, positivists, and post-positivists have in the past two decades come to stress that a full comprehension of the legal dimension requires us to, first, move beyond state-centred categorizations and, second, embrace a relational

197. *Ibid*.

198. *Ibid.*, p. 169.

199. *Ibid.*, p. 173.

200. Cf. Pekkanen, Tsujinaka, & Yamamoto, *supra* note 16, p. 69, where we read that "NHAs are the *foundation* of local communities" (emphasis added).

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account of law's existence and content. Thus, in advocating a new taxonomy for the comparative study of law(s), Ugo Mattei has observed that "any social structure ... is also a legal structure."[201] Turning away from his much-debated reductive focus on state law, exclusivist legal positivist Joseph Raz has recently urged theorists to take into account "other kinds of law"[202] and, significantly, "the rules and regulations governing the activities of voluntary associations."[203] In framing a socio-legal positivist account that draws while also departing from H. L. A. Hart's state-based conventionalism, Brian Tamanaha has asserted that "[l]aw is whatever people identify and threat in their social practices as law (or *droit*, *retch*, etc.)."[204] More particularly, to Tamanaha, "[l]aw is a social historical growth—or, more precisely, a complex variety of growths—tied to social intercourse and complexity."[205] Similarly, in his recent post-positivist account of the legal dimension, Alexander Somek asserted that "[l]aw is first and foremost a relation between and among people."[206]

Any such claim would, however, risk being sacrificed at the altar of analytical rigour if the requirements for a social practice or a relational encounter to be, first, recognized and, then, conceptualized as "law" are not clearly set out and met. The argument pursued by this article is that a cross-cultural approach to Teubner's societal constitutionalism is the most accurate framework one can deploy to conceptualize and operationalize the formation and functioning of Japan's new micro-sites of relationality and responsibility. In particular, starting from the assumption that societal dynamics are phenomena to be explored in their historical and contextual contingency, this article has called for a contextualization of Teubner's societal analytic of functional differentiation and constitutional quality tests from the perspective of Hasegawa's empirical studies on the regulatory regimes of NAs as micro-relational communities.

As discussed, the strength of Teubner's societal analytic lies not only in its explanatory value, but also, and more significantly, in its ability to offer a juristic framework within which some of the complex phenomena of social normativity can be recognized, assessed, and operationalized. Teubner is, of course, well aware that there are many controversial questions that constitutional sociology, including his own one, has yet to answer.[207] Hence he concedes that his "capillary constitutionalisation" cannot but be experimental.[208] This might help the dialogue with those critics such as Christodoulidis and Kuo, who point at the model's epistemological relativism and overinclusiveness. In any case, few would disagree that Teubner's merit is to have shifted our focus from the "legal–political" dialectic of modern constitutional studies to all those processes of self-constitutionalization that take place outside the traditional channels of modern analytical constructs (i.e. the constitution not, or not only, as a text, but rather as a self-reflexive practice that expresses a communicative potential). Through societal constitutionalism's lenses, Teubner observes, drawing

201. Mattei, *supra* note 23, p. 19.

202. Raz (2017), p. 138. See also *ibid.*, p. 144.

203. *Ibid.*, p. 138. Raz, however, still considers the state as "the most comprehensive legally based social organisation" (*ibid.*, p. 137).

204. Tamanaha (2001a), p. 169. More generally, see *ibid.*, pp. 133–70; Tamanaha (2001b).

205. Tamanaha (2017), p. 3.

206. Somek (2017), p. 20.

207. Teubner, *supra* note 58, p. 315.

208. Teubner, *supra* note 68, p. 58.

https://doi.org/10.1017/als.2019.9 Published online by Cambridge University Press

from Koselleck, that "[t]he fundamental structures of civil society would have to be treated in terms of constitutional politics as equal to the structures of the state constitution."[209] This is because "[i]n contrast to the simple juridification of social sub-areas, we may only speak of their constitutionalization once legal norms have assumed th[e] dual function [of foundation of an autonomous order and its self-limitation]."[210] It can hardly be disputed that NAs' foundational and regulatory dynamics as well as self-referred problem-solving practices do not meet these requirements—particularly if we bear in mind the self-immunizing, constitutional function that, as displayed in Hasegawa's case-studies, NAs exert when faced with a vital threat (or entropic, existential moment of crisis in Teubnerian terms).

As was seen, the proposed theoretical move allows interpreters, first, to tackle the difficulties implied in the usability of analytical concepts in cross-cultural dialogue and, second, to push the debate on pluralist normative configurations in Japan beyond the conventional state-centric horizon. It does so to the extent that it provides the analytical background against which to categorize the micro-relational forms of cohesion, solidarity, and responsibility that the Japanese have been developing as fully fledged constitutional sites. The reason for this should be obvious: if what this article argues is correct, such pluralist instances of organized societal life would meet the threshold of not only legality, but also the higher and more rigid one of constitutionality. Importantly, opting for Teubner's pluralist analytic would, in turn, not only enhance the theoretical and practical comprehension of Japan's polity's inner dynamics. More significantly, it would also assist commentators in initiating a communal effort from which the scholarly dialogue on the subject, and thus the mutual understanding between the Japanese and Western legal traditions, would ultimately benefit.

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209. Teubner, *supra* note 43, p. 16.

210. *Ibid.*, p. 18.

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