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Chapter 19. THE AUTONOMY OF LAW: An Introduction to Legal Autopoiesis. (Gunther Teubner, Richard Nobles, David Schiff)

Preamble: Explaining and developing the theory

Autopoiesis is a theory that requires some introduction, especially to those who are coming across it for the first time in a jurisprudence course. It is quite hard to understand some of the writings on this theory, without knowing something about the debate which proponents of the theory are having with other theorists, and other kinds of theory. (Chapter 6, on law and social theory, offers a beginning to understanding this debate.)

Autopoiesis presents new insights for many of the big questions of social theory. The biggest of these questions is how society has changed - and how it is likely to change in future - and how we can understand what is taking place at the moment. This is one of the central questions of sociology. Alongside this question we have fundamental questions of philosophy. A central question here is how we can know anything? What are we, what does it mean to observe and to know. And this question has become affected by the study of meaning - to get 'objective knowledge' we need objective meanings - but can we get 'objective meanings'? These questions come together if we ask how we, embedded in society, can know anything about that society? The sociological question cannot escape the philosophical questions, which are in turn tied up with questions about the nature of language. Autopoiesis has something to say about all of these fundamental questions.

Let us start with the sociological question - how has society changed? Modern society is complex, and fragmented. There is increasing specialisation. How is it all kept together? Theories like those of Marx, which seek to reduce society to a few variables - the class struggle between the bourgoisie and the proletariat - don't seem to do justice to the complexity of modern life. At the most general level, it may be correct to say that we belong to different classes, but there is nothing as simple as the relations of production. We are doctors, managers, lawyers, politicians, clerics, teachers, skilled workers, unskilled workers, electricians, scientists, horticulturalists, etc. On top of this, we are of different races, cultures, gender, etc. But if Marxism offers a reductive analysis, which fails to do justice to the complexity of modern society, what is the alternative? Another social theorist, Durkheim, sought to account for the solidarity of modern society by reference to its complexity. For him, modern societies were actually more integrated than older ones because of their complexity. Modern societies involve a division of labour - specialism increases productivity - but it also increases interdependence. This interdependence leads to stronger links between persons in a modern society than a primitive one. Durkheim's theory may celebrate complexity, but it does not really explain how this complexity leads to solidarity. There is an assumption that an increase in interdependence will lead spontaneously to greater co-operation. But will it? Each person is dependent for their welfare on an infinite number of persons - farmers, train drivers, policemen, bureaucrats, engineers, doctors, etc. What makes the doctor turn up and act as a doctor, the farmer continue as such, etc? What keeps it all in place? How can so many different people be co-ordinated? This is all too big for any one person, or persons, to control. It is impersonal. Can material rewards, and self-interested individualism (the law of the market) really account for the incredible degree of specialisation and co-ordination required?

This sociological question spills over into questions of knowledge, language and, at the basic level, meaning. Autopoiesis, as set out in the writings of Luhmann (extracts of whose writings are found in this chapter), gives an explanation of social order (and knowledge and meaning) which focuses on the differentiated (specialised) nature of social communication. Co-ordination is made possible, according to this theory, by the use of common reductive terms, self-referential communication, and (at the level of self-observation) widely shared values. While we have fragmentation of experience, we also have systems of communication which give rise to 'objective meanings' which limit the possibilities of what may happen, and thus facilitate co-ordination.

To put this in simpler terms, what occurs within modern society is the growth of specialist languages. This is a system of differentiation. But the differentiation is not at the level of role or function (law is a dispute resolution system, politics is a decsion making system, etc), but in language. Different systems of communication encode the world in different ways. The legal system encodes the world into what is legal and illegal. Medicine encodes the world into what is healthy and unhealthy. Science encodes the world into what is true or false. Accountancy constructs the world into debits and credits. The Economy perceives the world in terms of profits and losses.

What are the implications of all this? It is functional for society to develop in this manner - but, by functional, Luhmann does not mean that systems operate in a positive way for the good of society, this is not another idea of progress. And functionality does not mean that each system carries out a particular task. He does not mean that it is the function of the health system to keep society healthy, or the function of the education system to produce knowledge. Or the function of the legal system to resolve disputes. Each system may communicate about itself, or be communicated about in other systems, by reference to such ideals, but it is not the pursuit of these separate ideals that maintains each of these systems, and keeps each separate from the other. The differences between systems of communication lie not in the task that they carry out, or the ideal that they appear to strive towards, but in the fact that they communicate about events using different codes.

The functionality of these different systems of communication - sub-systems of language and social communication - is that they increase the number of ways in which we can adapt. Society has more possibilities - it can become more complex. It can become more complex because while differentiation creates different languages, or jargons, and the notion of a universal language appropriate to all situations becomes less and less possible or real, the range of meanings that can be generated within any system of communication is limited by that particular system of communication.

Let us apply all this to some questions in jurisprudence. How, in a fractured society, where there is no agreement on the common good, can we have something which is peculiarly legal? How can we have law separate from other systems, and what if anything is the basis of any certainty in the law? Many legal sociologists will look to politics (see the analysis of the Critical Legal Studies movement in chapter 7). They will see the certainty if any, in law, not in the rules, or kinds of legal reasoning, but in the politics of those who decide. Know the politics of your judges, police, etc, and you will know what to expect from the law. This is often called law in action - to distinquish it from those, like Kelsen, who might expect to find objective legal meanings in books, or statutes, or case reports. From this law in action perspective, there is little that is peculiarly legal - law is an extension of politics. But what does it mean to say that law is just politics. Politicians find themselves in the courts. Pressure

groups sometimes give up on politicians and bring legal cases. Is this just a case of seeking to bring politics to bear on a different group of persons, judges instead of ministers? An autopoietic answer to this question is to claim that law is not politics, in the very real sense that an attempt to talk 'politics' in a court room simply does not work. To speak in a court room, one has to speak law. Whatever political cause one wishes to advance has to be pleaded, as a cause of action. A claim for resources for doctors, has to become an action for breach of contract, or a judicial review, or an action for damages. To turn politics into law, one has to stop speaking politics and start speaking law. One cannot advance a claim in law by arguing about the interest groups affected, or the votes that can be gained, as one might in politics. To make a political dispute into a legal one, one has to reconstitute it within existing legal communications, in order for the law to recognise the political claim. And of course it works the other way. Those politicians who are dissatisfied with legal decisions, don't have to speak about case reports, pleadings, orders, etc. They can talk about a legal decision in political terms - public interest, votes lost, economic losses, etc.

The origins of autopoietic theory lie in biology, in particular, in theories of evolution that concentrate on the nature of cells. Systems of communication, if autopoietic, are like cells. The fact that cells can operate alongside each other to form complex physical beings - plants, animals, human societies, does not make each cell a part of the next. They are separate entities. The outcome of their developing complex relationships with each other is a complex being. But this is not a mechanical relationship, with one cell being the input to another cell. Each cell is a separate entity which reproduces itself from itself: from its own DNA and its own cell wall. Understanding the processes by which cells reproduce themselves in this way, the internal processes (which determine what is feasible for a cell to become) provide a basis for understanding how to interact with living organisms. This is a different, and perhaps more sophisticated understanding of the nature of life, than simply identifying inputs (such as nutrients, oxygen and drugs) and observing how changes in these inputs affect the ability of cells to survive). This biological theory has been adapted by Luhmann, who argues that it is appropriate for the study of social processes. Instead of cells, the focus is on systems of communication, which reproduce themselves from their own elements.

At the level of social communication as a whole, the analogy with cells works. We cannot communicate with each other except by drawing upon existing forms of communication, although we may use communications in novel ways. The more controversial, and potentially more illuminating claim, is that sub-systems of communication are (or can be usefully studied as if they were) autopoietic. Legal autopoiesis treats the legal system as a closed system of communication that can only make further legal communications out of existing ones. But how could law be like a living cell? How can law be said to reproduce itself from its own elements. Let's look back at the circularity found within some legal theories - take, for example, legal positivism. Within positivist legal theories, one finds attempts to explain law by reference to a hierarchical source, which establishes what is to count as law. But closer examination of these theories suggests not a source, or hierarchy, but circularity. Take Hart. The source of law is the rule of recognition, that establishes what can count as a rule of a particular legal system. The rule of recognition is the rule used by officials to identify what is to count as law. But who the officials are is established by law - constitutional law. So the law, identifies the law. Take Kelsen. The law is the norms authorised by the historically first constitution. The law is authorised by the law. The logical impossibility of this is acknowledged by Kelsen, who says that we presuppose a source for legal authority - above the constitution - called the grundnorm. And is this source hierarchical? Well yes and no. For we are told that law must be effective to explain the actions of officials. There must be some convergence between primary norms, and the actions of officials, for the point of legal

knowledge is to give us the normative meaning of official action. To put this another way - if the constitution we have identified does not explain what the officials are doing, then we have the wrong constitution. So, does the legal meaning of official action come from the constitution, or does the legal meaning of the constitution come from the officials. Or is it both - is it not really hierarchical, but circular?

Autopoiesis is a social theory which makes sense of the circularity of legal authority - that it is law that decides what is to count as law. Autopoiesis tells us not to worry unduly about this, for it is a feature not only of law, but of all autopoietic sub-systems of social communication. Education, politics, law, the economy - these entities exist not as things which one can touch or feel, but as circulating systems of communication. A legal communication is a link in a system of communications. It refers back to earlier legal communications, and it can in turn trigger further legal communications. Let us try a specific example. What makes a fine something 'legal'. The positivist theories make us look for a source of some kind: a hierarchical chain of commands, rules or norms. With autopoiesis we have something similar. The communication of a notice of a fine, will be linked to an order of a court, which will be linked to a judgement, which will be linked to a summons, which will be linked to an arrest, which will be linked to a police officer's power, and to a statute, etc. Note that this is not a simple tracing upwards of a hierarchy of sources - upwards to a constitution or its equivalent. What makes the meaning of a fine 'legal' is the system which generates the notice of the fine. Now, and this may be difficult to understand, the notice of a fine is still 'legal' even if it has been issued under some mistake, or if the judgment was wrong, or the arrest was ultra vires. A fine is a legal communication because it is part of the legal system of communication - it is not only legal when that system operates in some manner which is regarded as 'correct'. To use the biological methaphor - a cancerous cell is still a cell, and a cell that has been made from its own elements - the fact that those elements have combined in unusual ways does not make it cease to be a cell. To return to the fine - a valid fine is as legal as an invalid fine - a valid communication by an official is as legal as an invalid communication. Any communication generated by a legal system is legal. In that case, you might ask, what is **legal** about a legal **system's communications?** The answer to that is the code which law applies. Legal communications apply the code legal/illegal. Implicit or explicit in all legal communications is this labelling of events into this opposition. The statement 'this is legal' is a legal communication. The statement, 'this is illegal' is a legal communication. A notice of a fine, is a coding of events as illegal.

But what, you may ask, of the hierarchies within legal systems? How do we compare a ruling by the House of Lords with a mistaken imposition of a fine? In the language of the theory, systems develop second order observations of themselves. What this means is that communications develop which observe (and communicate those observations) on the communications circulating within the system. In the theory of H.L.A. Hart a similar role is played by secondary rules: rules which identify, change and enforce primary rules. Within this theory, communications about legal communications develop within the legal system. Concepts of mistake, constitutionalism, precedent, reflect the system's communications to itself, about itself. As with the earlier description of the game of chess, they cannot (as Hart attempts) be reduced to master rules. For they are not rules. The communications are moves in the game: communications which have complex contingent and contestable relationships to the communications from which they draw their meaning. Their success as communications (established moves, false moves, etc) depends on their role in later communications. (Try reading the difficulties in describing the meaning of precedent, as set out in Chapter 14, with this paragraph in mind.)

So what does this theory add to all the others you have looked at in this book? First, it takes a positivist view of law - law is not morality. Second, it takes a realist view of law - law is something that happens in the real world. Third, although realist, it does not support the idea that there is an opposition between law in the books and law in action. The reality of law is not found in its ability to control actual events, but simply in the continued circulation of legal communications. If we think of law like the cell, then we can take a radically different view of the sort of things that are ordinarily taken to influence or determine law - class, politics, money, interests groups, power, race, gender, etc. To understand how law reacts to the things in its environment, we should not assume that it simply takes them into itself in some simple way. It does not, it re-organises itself. To make this concrete, think of the complaint of so many of those who have experienced litigation, that the experience had nothing to do with what they were seeking to achieve. This is not simply an experience of private individuals. Businessmen complain that law does not reflect their need to do business, teachers say law cannot capture what they mean by education, doctors speak of the difficulty of fitting good medicine into legal rights. The fact that business influences law, that education influences law, that the medical establishment influence law, or even that such groups dominate their particular areas of law, does not explain such complaints.The distortion lies in the need for law to make things legal, to include things into itself by communicating about them through legal communications, that link to earlier past legal communications, and forward to future ones. When events outside of law generate communications within this chain or system, they are transformed in a way that their authors would not recognise. This is due to the necessity for those events to generate legal communications, which link to other legal communications. The need for legal communications to link in this way is what allows law (like any system of communication involving different individuals with different backgrounds, experiences, etc) to have congruent meanings, and an existence which cannot be simply be reduced to the materials (money, power, etc) which sustain it.

The anti-formalist revolution in law

The view that law is an autopoietic system has been met with some suspicion. Any notion of autonomy and closure of law can appear located in the past, a return to the outdated and narrow 'conceptualist' view of law that sees law as essentially private law (most notably property and contract), and the primary function of law as the guarantee of private arrangements (including guaranteeing freedom from state interference). While liberal legal theories still stress the importance of law in private ordering (think of Hart's emphasis on power conferring rules) such an understanding of law's autonomy cannot survive the evolution of a welfare state, which not only leads to a vast increase in the amount of legislation and regulation compared to private law, but to the colonisation of law by political forms of discourse, such as arguments of policy and consequential reasoning.

The autonomy of private law was based on formalism and non-intervention. For example, judges dealt with private contracts on the basis of a highly developed and complex artificial formal language that often had little obvious connection to the real-world issues as seen by the people involved in the dispute. Formalism was tied to non-intervention. Judges generally left it to the freedom of the private parties to decide what was actually to be done. With the rise of positive social rights, as part of a move from liberal states to states organised to promote their subjects welfare (hence 'welfare states') private law changes. It becomes politicised. Instead of appearing as the formal expression of private intentions it becomes an inextricable mixture of legal, political, economic and other social elements. For example, contract law became more political as judges actively intervened more directly in contractual affairs and the power conflicts between contractual actors. Judges often corrected and rewrote contracts in order to

translate the policy goals of legislation into contracts. Adjudication became an opportunity for contracts to be regulated, rather than simply enforced.

If law, even private law, is now political, economic, social, etc. how can it be seen as autonomous? And how can autopoeisis, which seeks to describe law as a system constantly regenerating itself from its own elements, improve our understanding of law? Are we trying to pretend something that quite obviously is not the case: that law can exist separately from politics, etc? Autopoietic systems theory in the tradition of Luhmann (1987; 1992a; 1992b), however, opposes this apolitical perspective and provides an alternative approach to understanding how the nature of modern society is determined by the highly intensive mixture of law, politics, economics and other social domains. This perspective uses an analysis of the closed, autopoietic forces within the legal system to illuminate the complex processes involved in the open, transformational relations between law and other social systems.

Maturana defines an autopoietic system according to its inward-looking characteristics of self-reproduction, self-reference, and closure (Maturana and Varela 1980; 1988). Law is a network of elementary legal acts that reproduces itself. On the other hand, law is a system that is significantly open to its turbulent external environment. In order to understand the openness, and the transformations of law under the influence of society, it is necessary first to analyse the mechanisms of autopoietic operational closure, which underpin the legal system. This apparent paradox is encapsulated by Edgar Morin (1977): L'ouvert s'appuye le fermé – 'the open rests on the closed'.

Luhmann (1989) 136-144 (Law as a Social System)

In the classical division of labor between jurisprudence and sociology, jurisprudence is concerned with norms, and sociology, in contrast, with facts. The jurist's task is to interpret norms and apply them. The sociologist may concern himself only with the existing context of the law, with its social conditions and consequences. But this classical view was already out of date, if not anachronistic, even at the time when Hans Kelsen gave it its most precise formulation. …

The resulting dissolution of the sharp demarcation between jurisprudence and sociology has given rise, since the beginning of this century, to the hope that sociology will be able to make a contribution to the administration of justice. From the perspective of the law, however, sociology's function remains more that of an auxiliary science. Aside from a few exceptions (the concept of an institution, for example), sociology has had no influence on legal theory and scarcely any impact on legal doctrine. Nor is it clear whether a special discipline called "legal sociology" can provide the law with information, or whether all branches of sociology would be available to do so. And there is still no adequate sociology of legal doctrine or legal theory.

There has not been much movement on any of these questions in the last two decades. It is clear, however, that the quite optimistic expectations for a sociological contribution to the administration of justice have diminished and become more realistic. At present, moves toward a radical alteration in the way these questions are posed can be expected neither from jurisprudence nor from sociology. To the surprise of scholars of both disciplines, they are coming from elsewhere-from research that is attracting more and more attention under such names as general systems theory, cybernetics (of the third or fourth generation), multivalent logic, theory of automata, information theory, and, recently, as a general theory of self-referential "autopoietic" systems, with which we shall be concerned here.

This detour by way of general autopoietic theory is currently producing more confusion than clarity and more problems and open questions than answers. The confusion is closely related to the fact that the offerings of existing theories have their origins in mathematics, biology, or neurophysiology, and do not take matters of psychic or social fact into consideration. As yet there has been no place in this discussion for systems that conduct their operations with the aid of the medium of "meaning". The new discovery is that biological systems, if not physical systems in general, are characterized by a circular, recursive, self-referential mode of operation. The mode of analysis that has emerged from this discovery has dethroned the "subject" in its claim to be unique in its self-referentiality. This does not have to mean that psychic and social systems are now to be interpreted in terms of the model of biological systems. A mere analogy between them would miss the mark, as would a merely

metaphorical transfer of biological terms to sociology. The challenge is rather to construct a general theory of autopoietic systems that can be related to a variety of bases in reality and can register and deal with experiences deriving from such diverse domains as life, consciousness, and social communication. Current uncertainty is due primarily to the fact that a general theory of this kind does not exist, and consequently one is frequently working too directly with concepts borrowed from mathematics or biology, without adequate concern for the appropriateness of the transposition.

In the application of the theory of autopoietic systems to the specific case of the law, there is an additional problem of coordination among multiple levels. One can conceive of law as a social system only if one takes into consideration the fact that this system is a subsystem of society, and that there are other subsystems as well. To conceive of society as itself a differentiated social system presupposes a general theory of social systems that can deal not only with the comprehensive system of society as a whole but also with other social systems, such as face-to-face interaction, or organizations. Theoretical decisions must therefore be distributed across several levels and must be checked to see whether what is asserted of the law does not hold for society as a whole, or even for every social system or every autopoietic system as well.

The following reflections focus on the legal system and must therefore largely disregard these problems of coordination among multiple levels. In the treatment of a relatively concrete subject, this omission will produce the appearance of excessive abstraction. The reader should not let this intimidate him; nor should he see it as proof, in and of itself, of the scientific character of the treatment. In fact, it is only in this way that one can confront general theories with the realities of concrete areas of investigation to see whether the theories are functional and what modifications they might need.

I.

There are two innovations that especially lend themselves to use in a theoretically grounded sociology of law: (1) the theory of system differentiation, inspired by general systems theory, which conceives of differentiation as the establishment of system-environment relationships in systems; and (2) the assumption that such differentiation is possible only through the establishment of a self-referential closedness in the systems becoming differentiated. Without such closure, the systems would have no way of distinguishing their own operations from those of the environment. With the aid of these two concepts we can achieve an understanding of the social character of law and, at the same time, the legal system's own reflective accomplishments. In other words, doctrine or legal theory can be better understood as one formulation of the legal system's self-referentiality. This understanding does require, however, a much more precise mode of presentation than has tended to be customary, a presentation that is consistent with systems theory.

Formulations such as the statement that there are "connections between" law and society (which presupposes that law is something outside of society) especially must be avoided. The legal system is a differentiated functional system *within* society. Thus in its own operations, the legal system is continually engaged in carrying out the self-reproduction (autopoiesis) of the overall social system as well as its own. In doing so, it uses forms of communication that, for all their esoteric quality, can never be so abstract as to be completely removed from normal, comprehensible meaning. This means not only that the legal system fulfills a function for society-that it "serves" society-but also that the legal system participates in society's construction of reality, so that in the law, as everywhere in society, the ordinary meanings of words (of names, numbers, designations for objects and actions, etc.) can, and must, be presupposed. In the legal system, then, Mr. Miller is still Mr. Miller. If he is only claiming to be Mr. Miller, and this question must be examined within the legal system, then a language that is generally comprehensible is indispensable for resolution of that question as well.

The legal system, however, is distinct in many ways from law's environment within society (and of course from its extra-societal environment as well). The law is not politics and not the economy, not religion and not education; it produces no works of art, cures no illnesses, and disseminates no news, although it could not exist if all of this did not go on too. Thus, like every autopoietic system, it is and remains to a high degree dependent on its environment, and the artificiality of the functional differentiation of the social system as a whole only increases this dependency. And yet, as a closed system, the law is completely autonomous at the level of its own operations. Only the law can say what is lawful and what is unlawful, and in deciding this question it must always refer to the results of its own operations and to the consequences for the system's future operations. In each of its own operations it has to reproduce its own operational capacity. It achieves its structural stability through this recursivity and not, as one might suppose, through favorable input or worthy output.

In this conceptualization both the dependence and the independence of the law are more strongly emphasized than in the customary expression "relative autonomy." When sociological theory is used to formulate a theory of the legal system, it reveals many more aspects of dependence and many more aspects of independence than one tends to notice in the normal activity of the law, and

consequently theory has to abandon the amorphous formulation "relative autonomy." Differentiation gives rise to an escalating relationship in which aspects of dependence and aspects of independence both increase, because differentiation leads to greater complexity in relationships between the system and the environment. For this reason, the concept of the autonomy of the legal system cannot be formulated on the level of (causal) relationships of dependence and independence. Rather, the concept of autonomy refers only to the system's operative closedness, as a condition for its openness.

A theory of this kind, however, is convincing only if it succeeds in precisely defining the elements of the closed character of the system and how those elements determine the system's openness. This can be done by describing more precisely the components of the particular elementary operations peculiar to the law (those which occur nowhere else but in law) and how they are reproduced through reference to one another.

In a way that no other system does, the law processes normative expectations that are capable of maintaining themselves in situations of conflict. The law cannot guarantee, of course, that these expectations will not be disappointed. But it can guarantee that they can be maintained, as expectations, even in case of disappointment, and that one can know this and communicate it in advance. From the sociological point of view, then, normativity is nothing but counterfactual stability. To formulate this differently: in that it protects expectations, the law frees us from the demand that we learn from disappointments and adjust to them. It thereby holds out the prospect of resolving conflicts (and at the same time makes it possible to seek out and withstand conflicts), for it contains a preliminary decision (however unclear it may be in the individual case) about who has to learn from disappointment and who does not.

Processing these expectations requires a binary code that contains a positive value (justice) and a negative value (injustice), and that artificially excludes both contradictions (justice is injustice, injustice is justice) and other values (utility, political expediency, and so forth). This coding is of decisive significance for the differentiation of the legal system, as it provides the system with its own internally constituted form of contingency. Everything that enters the law's sphere of relevance can be either lawful or unlawful, and anything that does not fit into this code is of legal significance only if it is important as a preliminary question in decisions about justice and injustice.

One could show through more detailed analysis that this coding fulfills a dual function. The first function of the code serves to differentiate the system for the specific task of the law. It simulates the problem of the disappointment of expectations by providing that either the expectation or the conduct that disappoints the expectation will elicit either the positive or the negative evaluation. To this extent, the coding is tied to the law's function. At the same time, however, the coding also serves the system's ongoing process of checking for consistency, that is, the actualizing of its memory. For memory is nothing but checking for consistency, and to this end it presupposes, presumably even on the neurophysiological level, a binary coding that can ascertain both consistencies and inconsistencies and can link them to further operations. Thus, the second function serves the autopoietic reproduction of the system - the closure of the system's reproduction complex. It makes it possible to examine all processing of normative expectations in terms of the key question whether or not the processing is compatible with previous processing.

Once this dual function, and with it the law's autopoiesis, has been assured, the system can develop reflexive processes and, ultimately, self- reflection. It can regulate its own regulation, and thereby also regulate, legally, alterations in the law. Further, it can evaluate the system as a whole from its own perspectives (e.g., in terms of the idea of justice).

II.

The next sections of this essay will deal with some of the consequences of this theoretical point of departure. Especially important here are aspects in which this theory leads to views that are new or that differ from ones previously accepted.

A.

An especially important implication of this theory of the law's autopoietic character is that the boundaries of the system must be drawn differently than has been customary (even in the way sociologically oriented systems theory has dealt with law). Up to now the law has been treated either from the perspective of jurisprudence, as a complex of norms, or as a system of knowledge, in abstraction from real social behavior. Jurists saw the legal system as a macro-text. Or, as is customary in sociology, the focus was shifted to institutions that are concerned with law on a full-time basis, whether those institutions were organizations (primarily the courts), or the legal profession. This perspective permitted empirical treatment of such problems as "access to the law". Yet distinguishing

between the legal system and the state as the basis for organizations and the source of power was difficult. Political influence on the law was conceived as a kind of input (of the law into the law). Alternatively, the legal system as a whole was even conceived from the standpoint of the political system, as an "implementation" of politics. For all its ambivalence, this perspective has left a definite mark on jurists' attitudes toward the relationship between law and politics.

Assuming that the system has a self-referential, closed character leads to completely different notions about the boundaries of the system. They are defined not at the institutional but at the operative level. And, as is evident to the sociological observer, the system's boundaries are defined by the legal system itself, with the aid of a recursive referral of operations to the results of (or the prospects for) operations by the same system. In these terms, every communication that makes a legal assertion or raises a defense against such an assertion is an internal operation of the legal system, even if it is occasioned by a dispute among neighbors, a traffic accident, a police action, or any other event. It is sufficient that the communication be assigned a place within the system, and that has already occurred with the use of the code lawful/unlawful. Of course, the law can also be observed from the outside, as in a news report in the press. And within the educational system there is also a didactic treatment of law that only simulates legal cases and thus does not aim at a decision. Consequently not every reference to the law is an operation internal to the legal system. But whenever a communication occurs in the context of the administration of justice, the context of providing for conflicts within the law, or the context of an alteration of the law-that is, in the processing of normative legal expectations-we are dealing with an operation internal to the legal system, and this operation simultaneously defines the boundaries between the legal system and the everyday life context that occasions the posing of a legal question.

These system boundaries are a good place to study the filtering effect of the legal system. One sees clearly, for example, how difficult it can be in ongoing life relationships (marriages, work relationships, relationships between neighbors) to resort to the law to give force to one's own views. The rigidity of the binary code makes the reasons for this difficulty clear: asserting one's own legal position is tied to designating opposing views as unlawful. A look at the legal cultures of the Far East also shows that recourse to the law can be interpreted as an intention to engage in conflict, and consequently it is institutionally discouraged.

Clearly there is a connection between the complexity of the law, its resulting opaqueness, and how high this threshold of discouragement is. Corruption, which a look at various civilizations will show to be a normal phenomenon, has an equally discouraging effect on potential users of the legal system. Corruption in law is a normal phenomenon: it is only realistic to assume that the law accommodates dominant interests; it could not conduct itself otherwise and still be accepted. (This does not mean, however, that corruption is a part of official legal policy or that it is consciously cultivated). Rather, what is amazing is the degree to which the law can be purged of corruption in spite of this. With a decrease in corruption, the threshold of discouragement is thereby lowered; people have confidence in a judge who is impartial. Yet, this relief itself leads to an increase in the complexity of the law. With less corruption to filter people out of the legal system, the number and diversity of cases increases, and as a result there is increased need for regulation. With this increase in complexity, the threshold of discouragement shifts its location from corruption to complexity. It thereby acquires a form against which the legal system itself is powerless and which is the subject of recurrent complaints throughout the history of law.

If one adopts a self-referential autopoietic theory, it no longer makes sense to assume that the structures of the legal system, which themselves regulate the production of its operations, can be specified as input and output. The specification of structures always presupposes operations of the system itself. This does not contradict the assumption of a normal complicity with dominant interests on the part of the law. Nor does it exclude the possibility that an outside observer could describe the legal system with the aid of an input-transformation output model. But such a description would be compelled to give the transformation function the form of a 'Mack box', and to take into consideration the fact that the law adjusts its reactions to its condition at any given time, that it can change even if external interests do not change, and that it thus does not function as a "trivial machine". To the degree to which these factors are taken into consideration, however, it makes sense to move from an input-output model to the theory of self-referential systems. It is better suited to the existing state of affairs.

B.

The most important advantage of this theory of a closed self-referential legal system may lie in its close resemblance to the notions of legal doctrine and legal theory, a closeness which by virtue of its alienation effect proves surprising and irritating at the same time. …

Our starting point is the thesis that a self-referential system can link its operations together and reproduce them only through concurrent self-observation and self-description. To put it very simply, one needs "reasons" in order to be able to deal selectively with the multitude of possible internal connections, and to check for consistency and inconsistency. Consequently, all processing of expectations is always accompanied by a supervisory observation through which the way the world is observed is itself observed - that is, the way one communicates correctly or incorrectly within the system is itself the subject of communication. …

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Basic principles of legal autopoiesis

How does legal autopoiesis deal with the battle between the formalism associated with much traditional jurisprudence and anti-formalism of much realist jurisprudence. The theory of law as an autopoietic system is not concerned with the insulation of 'the legal' from 'the economic' and 'the political'. Instead, its central thesis is as follows:

1. Modern law is highly politicised through an intense structural coupling of law and politics, and law and the economy;

2. Political-legal intervention in the economy is pervasive and necessary because of the closely interwoven mix of these areas.

The special contribution of autopoiesis to legal theory, as opposed to other 'realist' theories of the materialisation of law, lies in what it says about the conditions, mechanisms and consequences of mutual interference between law and other systems. This builds on two main concepts (Teubner 1993):

1. The law is defined as an autonomous system whose legal operations form a closed network. This idea of an autopoietic operational closure is different from the inadequate concept of relative autonomy (e.g. Lempert 1987), which regards law as being more or less dependent on society and the main question is to determine empirically the precise balance between its internal and external causation.

2. Heteronomy (law's interrelationship with other social domains) is treated as 'structural coupling'. This view, expounded by Maturana, involves the multiple membership of legal communications in other autonomous domains.

A clear distinction is made in legal autopoiesis between the mechanisms responsible for the autonomisation of law (its self-reference) and those responsible for its heteronomisation (its other reference). The autonomy of law is concerned solely with operational closure and the way legal operations form a closed network in which units of communication self-reproduce. This does not involve causal, informational or environmental closure. It acknowledges that law cannot be insulated from politics or the economy. But it moves the focus of analysis of heteronomy from the causal influences of outside forces to the complex ways in which, say, a legislative event also participates in political, economic and other 'worlds', each (as law has) with its own special language, logic and dynamics.

Such autonomy does not focus only on issues like the institutionalisation of the courts and legal concepts, and their independence from politics. Rather, it has to do with the constitution

of elementary legal acts, which are different from any other kinds of communication. Law's autonomy and its heteronomy can vary from each other greatly. They are not in some kind of zero-sum game. At present there is probably a mutual increase in, both making modern law simultaneously highly autonomous, and it making it highly heterogeneous (both highly specialised and technical, and at the same time closely connected to other areas of social life).

Social and legal autopoiesis

A legal system is constituted whenever legal acts emerge as a set of operations that go back recursively to earlier acts of their own kind, in order to produce new legal acts of the same kind. The legal system is a network of legal acts, which confer validity on normative expectations, which are expressed through the 'legal/illegal' binary code.

A fully-fledged legal order is produced by the institutionalised distinctions between normative/cognitive, legal/illegal and valid/invalid. Legal acts driving the dynamics of this network include the making of a judgement in a court, the passing of a law by parliament or the concluding of a contractual agreement by the parties to it. These are defining 'magic moments', when validity is conferred on a new norm or rule. Thus, the important thing about the closure or autonomy of law is not institutionalised separation of powers, or the invention of rules and concepts, but the emergence of specific communications which distinguish themselves from other kinds of communication and are recursively connected to each other in a self-propelling network.

This process is not stable and self-maintaining. It is a network of fast-moving change through micro-variations generated in the second-by-second performance of legal acts that alter the inner content of the legal order. Each act creates new structures and the new structures create new acts in a continuous cycle. This closed communication network conforms to Maturana's definition of biological autopoiesis. It is not a subclass of it, but is a different manifestation of self-reproduction.

Social autopoiesis offers a broad view of the legal system, which encompasses private contracts and lay acts and not just state-centred legal operations. However, there is a special class of communications within the legal system which carry authority in making a statement about the validity of certain legal rules. This would include a pronouncement on the law by a legal authority, for example the judge, the legislator or the law professor, but not other general comments by that professor or other observers, such as journalists.

Autonomy and structural coupling in legal autopoiesis

Some theories on the autonomy of rule systems (e.g. Hart 1961) can be seen as predecessors of legal autopoiesis. But they are different because they over-emphasise the structures of the legal system, such as its rules, their hierarchies, delegation and the creation of new spaces of legal autonomy. Autopoiesis finds such a structuralist orientation too narrow because it fails to recognise the dynamism and recursiveness of legal acts in which the rules are essentially a by-product. We can understand this point if we use Hart's own example of chess. Most people consider the constitutive rules of chess as the game's defining feature. (Remember how Hart develops this analysis to understand rules.) But chess did not emerge fully developed, and then remain static. Chess, like any form of social communication, emerged (and continues to emerge) through moves (through playing if you like). The process of play establishes legitimate and illegitimate moves, which in turn form rules. Challenges continue, and the game continues to develop from itself. The degree to which chess has stabilised itself, leads us

to see it as an institution whose meaning lies in its rules, rather than its moves, and the relation between them. Social autopoiesis, however, explains chess as a 'living' social system based on a dynamic chain of events. From this system, a new autonomous unit of communication - the move - emerges, which is recursively linked to other moves. The move is the emergent element of the chess game, with the rules only a secondary phenomenon. The dynamics of chess are concerned essentially with the emergence of something new that is not contained already in the lower strata, using Maturana's language of autopoietic emergence. Chess is an example of the way a very artificial type of communication specialises itself and begins to operate recursively on different types of its own kind, thereby beginning the development of a chain of distinctions that propels itself into the future. The dynamic game consists of recursively linked moves in a web of expectations, moves and rules. Law as an autopoietic system emerges from general communications in society in a similar way. (Once you see even chess in this dynamic way, the ability to use traditional games as a metaphor for what is stable in a system as dynamic as law becomes quite suspect).

Autopoietic autonomy is also different from the notion of a self-regulating system. Usually this is understood as self-organisation of systems which govern themselves by creating their own rules. Autopoiesis goes a step further than other theories of self-organisation by saying that the process produces the basic operations, in addition to self-reproducing the rules.

Another distinction needs to be highlighted between autopoietic autonomy and ideas of 'causal independence', like relative autonomy (Lempert1987), the 'last instance' of Marx and Engels, or political intervention. Causal closure would be a very different type of closure, with the system insulated from all outside interference, bar one (in Marxist writing this being the material base and relations of production, society's economic infrastructure). In contrast, the operational closure of social autopoiesis recognises the system's openness to an array of external influences. It also, importantly, emphasises the way operational closure enables the system to have a decisive influence on the way the external causes are able to act on the system through an internal, circular causal process which is influenced by the outside world.

Autonomy has also been defined in terms of the creation of independent, self-contained worlds of social meaning (Lempert 1987). Autopoietic operational closure creates a 'meaning world' of its own that does not exclude outside influences. It recognises the steady stream of external influences on the communication systems and world-views of lawyers, which are so important in the creation of a legal system. However, the important factor in this autopoietic process is 'reconstruction'. Reconstruction translates and re-signifies social meaning in the legal world. For instance, the current economic analysis approach to law prevalent in the USA (see chapter 18) may seem to transform law into being a part of economics by reducing justice to notions of efficiency. (See the final extract from Teubner at the end of this chapter.) On closer inspection, however, it can be seen that strange things happen to economic constructs when they travel into a legal context. Take the concept of an 'enterprise'. In economics, the enterprise represents the basis of a theory from which hypotheses are derived and challenged by empirical results. In law, enterprise is transformed into a normative concept as part of legal doctrine.

Each autopoietic system could be seen as a unique ongoing dynamic that cannot be controlled from elsewhere. Such systems cannot participate directly in each other's worlds, yet an ongoing process of structural coupling between worlds creates zones of contact between them (for a detailed discussion, see Teubner 1993).

A new perspective on contract

Luhmann's concept of 'functional differentiation' is a vital correlate to social autopoietics. It describes society as being differentiated into a number of autonomous systems, such as the law, the economy, science and politics. Autopoietic theory sees society as an ensemble of differentiated autonomous discourses or systems, which have evolved via processes in which distinctive characteristics become more and more prominent through their recursive operations.

Functional differentiation can be understood as the emergence of a series of autonomous systems based on operations of their own, like legal or economic or scientific or political acts. Each autonomous system has its own binary code and reproduces itself through a highly specialised language and ruthless logic of its own. That analysis offers a new twist to ideas from earlier social theorists like Durkheim (1933), Parsons (1971) and Weber (1978) - see chapter 6.

Under conditions of extreme functional differentiation, the social world becomes fragmented into different dynamics of rationality. This means that a contract can no longer be regarded as a simple exchange between two actors and their resources, which actors have certain goals in mind. In autopoiesis, the contract reappears as different projects in at least three different social worlds: legal, economic and productive. There are many distinct productive worlds, including ones for science, engineering, health, the arts, education, distribution, manufacturing, tourism, sport and communication media. However much these worlds may be coupled with economic communications, they cannot be reduced to them. Doctors may work within budgets, but health is not the same thing as balanced expenditure. Even in commerce, the product is an expression of something (art, design, etc) which is not reducible to the revenue that it may generate. With a contract we see communications about production, communications about budgets, costs and prices, and communications about legality. None of these can be reduced to each other. Individual legal words, or even sentences, cannot be made to stand for economic ones, which in turn equal legal ones. This applies even if the same word ('contract') is being used in all three systems of communication. In production, a contract may be a communication about opportunities to produce. In economics it forms part of a calculation about committed expenditure and expected income. In law, it exists in a circulation of communications about contract formation, contract interpretation, contract enforcement, etc, all of which are linked to each other through processes of linkage and differentiation. (Textbooks which separate contract formation, interpretation and enforcement for heuristic purposes, make sense of a system of communications in which all of these exist at the same time – what contracts require and how they will be enforced is also part of what it means to create legal relations).

A contract in modern society is therefore essentially a compatibility relation between separate, differentiated social systems and their ongoing distinct dynamics of rationality. Provided this relation is effective in each system, the contract will be reconstructed in terms of three types of projects:

1. A productive agreement for a project in one or more of the autonomous autopoietic productive worlds, operating according to the way people work within the social dynamics of that system;

2. An economic transaction for a profit-seeking entrepreneurial project obeying the logic of the market;

3. A legal project in the world of law, based on time-binding promises and rule-producing obligations.

These three projects are not just different aspects of one contractual relation viewed from different analytical dimensions. They are empirical observations about three independent projects that participate in separate worlds of meaning. These worlds are operationally closed to each other and are on autonomous path-dependent evolutionary trajectories that propel them along very different routes. The unity of the modern contract lies in the precarious and provisional relations of compatibility between these fragmented discursive projects. A three-D image might help here. Consider the contract as the tangential intersection of three circles. Start by imagining two spinning circles alongside each other, with contact limited to a single point. Add a third circle, spinning on a different plane and touching the other two at the same point. Then consider this: the meaning generated in the different circulating systems of communication cannot become one single meaning for all three systems even if there is a common moment when the word contract is used in all three systems. The meaning of a communication about a contract within legal communications is connected to all the other kinds of communications that can be made in legal discourse about contracts. Any communication fits into a wider network of such communications. Similar connections determine the meaning of a contract within the other systems.
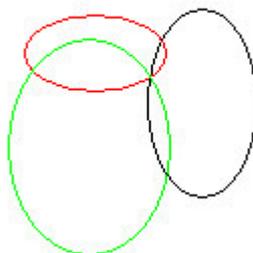
Functional differentiation also leaves its mark on contracts in the way an agreement reappears in different worlds. This means 'enslavement', in the language of self-organisation. An agreement in the economic world, say, is 'enslaved' to obeying all the conditions for the realisation of an economic transaction. Similar forces affect all the other worlds into which the agreement is transformed. Achieving an effective contract across all legal, economic and productive worlds is rare. Only highly gifted entrepreneurs can observe the different highly specialised social dynamics simultaneously and then spot the opportunity to maximise autopoietic operation in each domain.

The 'self' that emerges from contractual discourses

Social autopoiesis argues for the modern contract to be seen as being primarily about inter-discursivity, not the inter-personal relations between two actors with their own goals and resources. This means giving up the idea of the dominance of actors and their subjective meanings and individual resources. Of course, a contract always needs an agreement between at least two actors, whether they are real people or fictitious entities, like an enterprise acting as a 'legal person'. But the unmediated relation of such contractual inter-subjectivity has been

supplanted today by the greater complexities of inter-textuality between several functionally differentiated worlds of meaning.

The participants in this process can be considered as 'social homunculi of modernity', in that they are artificial personae arising purely from social discourse. The contract can then be seen as being not between physical beings but between highly artificial structures, whose interactions form an autopoietic system of contract that has a logic and dynamic of its own. The interests that people think they are realising or exchanging through a contract are therefore not their personal interests, but are social or discursive products. This analysis illuminates contracts formed between artificial persons such as corporations, whose intention cannot refer to an inner psychic state. More controversially, individuals as contracting parties are identified as creations of discourse. A human being is not a 'contracting party' except as a construct of a legal discourse. As a contracting party, the manner in which an individual signifies assent to terms, his intention to form legal relations, and the meaning of the normative expectations generated by the contract, are all products of legal discourse.

This analysis reveals the contract as an inter-discursive relation between its temporal states at the moment it is struck and at the transformations of the contract through its fulfilment stages. This inter-discursivity has its own socially-constructed goals that are different to the interests of its individual human actors. One could even go as far as talking about the 'self' or 'identity' of a contract. If one thinks of long-term contracts like a franchising-chain with its own corporate identity, this idea becomes plausible.

The contract binds the ongoing actions of the socially-constructed interests of the contractual partners. This social binding exists only as semantic artefacts, like texts and other products of discourse, which become the bearers of obligation in the contract. The source of the social dynamics of contract can then be understood as its binding of the actions of a social system towards achieving the contractual purpose.

Creative misunderstanding and surplus value

The trick in creating successful contractual autopoiesis across functionally differentiated worlds lies in unlocking a hidden agenda toward compatibility between different worlds. A contract makes possible translations between specialised autonomous worlds which can lead to exploitation through processes of 'creative misunderstanding' that take place during the translation of a contractual agreement into the languages of other related specialised worlds.

For example, the economic language of profit reappears in the productive world as the personal resources available to a project. The economic expectation of market prices is transformed into legal payment obligations. Law's creation of rules and expectations reappears as a factor that reduces or increases costs in the economic world, or as kind of moral bindingness within the productive discourse. What is deemed valid in one world might be invalid according to the logic of another, such as a contract that is acceptable from an economic perspective being rejected as an invalid/illegal (immoral, contrary to public policy) agreement.

Creative misunderstandings introduced by these compatibility activities offer an escape from the impossibility of ever being able to translate accurately the language of one world into another domain's communication system. One discourse uses the meaning materials of another as a provocative stimulus to reformulate something new in its own internal context. Since a real translation is impossible, something is invented. This inventiveness creates the

surplus value of a contract, which is added to the autopoietic dynamics within and between systems. The ability of systems to create internal versions of the communications of other systems overcomes what otherwise would constitute an enormous impoverishment of opportunities resulting from the specialist systems of communication. Conversely, increasing numbers of functionally differentiated systems of communication increase what meanings (and thus opportunities for co-ordinated action) are possible. An example, using other materials in this book, may assist. Consider the enterprise known as economic analysis of law (chapter 18). If all legal terms are reduced to an economic model, so that all entitlements are simply offered to the person who bids most for them at an imaginary auction, the very idea of entitlement (as understood by lawyers) disappears. But so too does the ability to do the calculation required by the economic model. One cannot know what can be paid for an entitlement, without having already allocated lots of entitlements (rights to property and contracts) on an non-economic basis. Thus the complete reduction of one system of communication to another is counter-productive for both systems. They need to maintain their differentiation. On the other hand, total closure of each system to another is also counter-productive. Take another example from the same chapter. Laws against monopolies are hardly likely to have much purchase on market activity if law is incapable of making any kind of economic communications. Law has to re-package economic calculations inside itself: to find forms of communications about markets that it can link with communications within the existing legal network. Economics has similarly to re-package legal communications to link them with communications within the existing network of economic communications. This process, which is not the simple reduction of one set of communications to another, or their translation into a common simpler meta-language, is productive. This does not, however, mean that every coupling between systems of communication involves major re-combinations within each respective system. Productive couplings can be routine and simplistic. A contract can be productively understood within the economic system without an awareness of the circumstances in which contracts may be declared invalid or frustrated. The ability to re-work the communications from one system in order to fine tune its coupling with another offers one kind of opportunity, the routine failure to invest resources in such endeavours offers another.

Luhmann's revolution in autopoiesis theory - the individual in autopoiesis

The above example from contract reflects the very different manner in which individuals are understood within the theory. The social system creates products of meaning which do not represent an aggregation of what has gone on in individuals' minds and is different to the thoughts and memories of each individual. Unlike Maturana, who reserves the concept of autopoiesis for human individuals, Luhmann sees both the individual **and** society as autopoietic systems.

The idea that meaning is located within systems of communication, and that subjects are just as much constructs of those systems when they are individuals as when they are corporations or institutions, threatens to deny that individuals have a separate existence despite their obvious separate physical identity. This threatens to lead to a theory which, like some variants of Marxism, makes the individual human subject simply an object, the bearer of dispositions imposed by outside structures, in the case of Marxism, class relations. (For a fuller account of this see the introductory paragraphs to chapter 16.) Luhmann's revolutionary idea is to distinguish between psychic autopoiesis and social autopoiesis which create worlds of meaning in their own rights. The individual operates as an autopoietic system. Our own internal communications (thoughts) are related to other operations in our heads. Indeed, it is only by constantly connecting thoughts together and constructing relationships of consistency (memories) that we can have a sense of an ordered world, or environment. The relationship

between communications within the individual psyche are not rigidly separated into the separate social systems in which the individual may participate. They have their own dynamic internal relationships. The fact that individuals can organise such dynamic relationships between their internal communications is one reason why their subjectivity, the meanings unique to each individual, cannot form part of the everyday objective meanings that circulate (or rather are produced in and through circulation) in social systems. However, the deep meanings of an individual's psychic world are not therefore lost within the social, as they have been in theories that seek to socialise the individual or language-centred views that deconstruct the subject. Luhmann essentially identifies two autonomous worlds of meaning based on different operations. These are interrelated in very indirect and complicated ways. Systems can construct individuals as subjects in ways that recongnise their seperate autopoietic existence whilst at the same time, and inevitably, failing to give full effect to it.

The individual thus re-emerges in Luhmann's theory as an autopoietic system of its own. But this subject now has a new competitor in the social system, which has the ability to cognise through communication. This is different to all other approaches to thinking about the relationship between the individual and society, from individualist psychological reductionism to socialisation and language reductionism and the undifferentiated mix of inter-subjectivity in between.

The concepts of individual and social autopoiesis reflect the split in modernity that distinguishes between personae as social 'masks' and the inner subjective thoughts and feelings to which the personae refers, but can never be a part of. These metaphors of personae and masks help to understand the role of actors in social worlds consisting only of communications. Actors as personae are secondary phenomena, given that it is the communication act which creates structures which do not have an independent existence outside the system. Every communication invokes its structures explicitly or implicitly only through this ongoing process of invocation. All the language cues and other identifying characteristics of an actual person form a particularly rich structure, but its meaning continually changes through invocation in different ongoing communication acts. Other structures could be roles or principles or rules.

The way personae operate can be seen when an expert participates in a different arena. Evidence given in court by, say, a medical doctor could be treated as a valid contribution to the legal process. However, that evidence might not be recognised as a valid scientific statement within the specialist medical system, where the perception of that expert in subsequent medical discourses could be altered. The really creative communication acts are those which can survive the difficult test of belonging successfully to different discourses. A successful contract is one that finds the creative words to enable it to participate effectively in legal, economic and productive worlds.

Despite the part played in the theory by individual autopoiesis, an uncomfortable, but necessary, consequence of autopoiesis is its anti-individualistic view of many forms of action. Consider again contract making. Despite much rhetoric about the revival of an individual's autonomy in modern private law, an understanding of contract as an autopoietic system demonstrates that the individual subject is not the master of the contractual relation. Autopoiesis fragments the subjective actor's rich social fullness into diverse semantic artefacts. The rational economic persona thus created maximises efficiencies and utilities; the rule-bound legal subject fulfils contractual obligations; and the productive actor produces or consumes goods and services. None of these personae expresses the desires of the full human subject.

It would be wrong to interpret social autopoiesis as in some way giving meaning to the actors within the process. Instead, autopoiesis suggests that ongoing communication acts produce their own meanings in the form of semantic artefacts. Within the overall stream of talk in society, specialised languages emerge for each of the functionally differentiated systems. Each of these creates its own artificial 'homunculi' actors, such as the 'legal person' or the 'homo economicus'.

It is also often not clear who the actor actually is. For instance, according to some economic theories the corporate actor is the corporation itself. Other theories identify the resource bearing employees of the enterprise. Most contracts are based on the same actors participating in all relevant worlds, although in many cases the contractual partner is different in different worlds, as when the 'legal person' appears in different productive or economic worlds as a manager, worker or the organisational entity itself.

Socio-Animism[*]: the collectivist danger of autopoiesis

Durkheim's concept of the 'collective consciousness' refers to the parts of our psychic lives, which integrate into a social consciousness, that is more than just individual motives and actions (see chapter 6). In autopoiesis, however, meaning emerges in the social sphere as a way of processing information and putting it into a multitude of different contexts, then moving from one actualisation to another. This can be regarded as a form of 'socio-animism'.

When a lawyer or economist or poet creates a work of meaning, the important thing in an autopoietic system is not what that work means to its author's individual psyche, but the way the work gains in meaning when it moves through different worlds. This is similar to the way in which the legal world interprets a contract in terms of its observable meaning, rather than according to the subjective motivations of individual actors.

To some extent, autopoiesis thus reifies collectivities and deconstructs the reality of the actor through socio-animism. This process has implications for what it means to observe. It multiplies the number of observational perspectives as the observer is not identified just with the mind of an individual agent but with a 'chain of distinctions', which could be a human actor or an ongoing process of communication involving people. Rather than see observers as persons who stand outside of the social activity, which they observe and reflect on, observation and criticism is located in systems of communication. What is commonly conceived of as individuals commenting on social life, is reconceived in autopoiesis as the ability of systems of communication to communicate about events, and even to develop communications about themselves. Thus for example, lawyers don't simply comment on law as impartial observers, they utilise communications (including ideals) developed within law in order to communicate about law. Economists can criticise law, but they utilise the communications of economics to produce an observation and critique. There is no possibility of abstract observation and critique as a human being, but only observation and critique within systems of communication. Once this is accepted, there is a danger of concluding that there is really no human subjectivity separate from systems, and that it makes as much sense to speak of law observing itself, as lawyers criticising law.

However, social autopoiesis based on Luhmann's principles creates a distance between real people and their engagement in social processes, which also makes clear we are dealing with

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[*] A social version of animism, which is the belief that animals and natural phenomena have souls or spirits as well as a material existence.

profound and infinite dynamics that never intersect with each other. Autopoietic systems theory recognises consciousness as psychic autopoeisis, but sees it as parallel to - and in competition with - several autonomous 'language games'. Theories which can too easily conjure up a merging of the individual with the social (such as Marxism) can be very dangerous in certain political arenas (consider the experience of Soviet Russia, and Nazi Germany). Individual or psychic autopoiesis can, hopefully, provide some resistance to this temptation to dissolve the individual into the social.

Intervention and innovation in social autopoiesis

The clear boundaries between functionally differentiated autopoietic worlds and the resultant impossibility of direct influence of each internal world across those boundaries means autopoietic influence can occur only through internal reconstruction. This has profound implications for concepts of political, legal and other intervention. Any attempt at intervention must now recognise the internal dynamics of autopoietic systems, which direct any external force away from the paths and goals sought by the external influencers. This has implications for issues such as juridification (the ever increasing proliferation of legal rules in modern societies) and regulatory failure (the failure of vast amounts of such rules to influence behaviour in the manner desired, or often, their failure to have any influence at all on conduct).

Autopoietic insights allow fresh attempts to be made to find more indirect forms of influence that accept they will be subjected to the changes brought about by internal meaning worlds. The central problem becomes that of the degree to which external guidance or regulation can lead to innovation. In autopoietic systems, innovation is not caused by outside change as such (law telling others what to do) but depends on the degree to which a system is able to construct novelties that may be triggered by perturbations in the outside world (law, or any other system, inducing reconfigurations of the communications within the other system). Metaphors can be used here. The contacts between a system and the environment caused by these perturbations are reduced to external 'hammering' - perturbations having no meaning until their informational 'noise' has been interpreted internally by the system. Some attempts at intervention elicit no response - an example of deafness. Some attempts produce new configurations (order from noise). At its extreme, this leads to intervention in which the external intervener perturbs the internal world exposing its limitations. The most extreme of these limitations can be described as 'paradoxes'. One example (relevant to most of Part I of this book) is that law, which codes what is legal and illegal, has no ultimate basis for deciding what should be legal as opposed to illegal. It is just an endless process of communicating the distinction. (This 'paradox' may demystify much of the Positivist-Dworkin debate on the division between applying law and making law). 'It is legal, because it is legal' is the ultimate paradox of law. Suggestions that it might be legal because it is 'just' collapse when it is realised that Law's recognition of what is just, in its operations, is limited to what it recognises as legal. Law is quite vulnerable to any demand for the basis of the legal/illegal distinction to be located in some fundamental fact or value. A constitutional crisis can be viewed as a situation which exposes this paradox (would anything you have read in Part I equip you to respond to demands in the media or politics for the fundamental basis of legality to be explained and justified?).

Another variant of this same paradox, and an example of the kind of changes produced by perturbation, is the meaning of miscarriage of justice within criminal justice. Not everything which occurs in law is considered just. Law generates critiques of its own earlier communications, and is capable of declaring them to be mistakes (a feature of the

development of doctrine as well as the identification of miscarriages of justice). Not only does the basis for such criticism and judgements have no ultimate justification outside of the linguistic practices of the participants, but the ability of law to recognise earlier communications (convictions) as mistakes will not correspond to what other systems of communication identify as Law's mistakes. The sustained media campaign on miscarriages of justice toward the end of the last century (Guildford 4, Birmingham 6, etc) exposed Law's inability, given its practices for identifying miscarriages of justice, to respond to dense media and political communications about the innocence of many persons serving life sentences for murder. Eventually Law responded. The reforms of law (the most important of which went to changes in the rights of appeal) will not prevent such perturbations occurring again, as Law's communications about miscarriages continue to differ from those made in the media and politics. Nevertheless, the pressure of media and political communications on Law and its failings did produce change (Nobles and Schiff 2000).

The potential for being stubbornly unchanging or highly adaptive depends on the extent to which a system can break, or deconstruct, its internal chain of distinction in order to react to its environment. Systems with higher internal sensitivity to the opportunities created by perturbations will be more creative and adaptable. If the system does not have the potential to create internal variety, innovation will not take place. Such stability might even be a good survival strategy in a very turbulent world. But it should be recognised that social communication in itself can be highly innovative through the autopoietic process of creative misunderstanding.

Social autopoiesis is particularly appropriate as a tool for analysing the highly fragmented nature of modern society. It is less valuable in looking at societies where there is tight integration of legal, religious and political aspects in communication. At a global level, the unpredictable dynamics of autopoiesis argues against the unrealistic view of those who believe that it is possible to move world society in a desired direction via a deliberative global democratic process. An autopoeitic understanding reveals such enterprises as necessarily utopian. Autopoiesis is closer to the 'new polytheism' of Weber which suggests different rationalities have developed their own systems and that people are exposed to these ongoing rationalising process without being able to create a super-process to control those systems.

This approach should result in a modest attitude to how far organised political processes can cope with chaotic, uncontrollable autopoietic forces. It leaves the only feasible strategy as one which seek goals like containment and reduction of conflict, not the creation of a benign omnipotent controlling process.

Luhmann (1989) 144-150 (Law as a Social System)

Every complex system must balance variety, that is, the number and diversity of its basic elements, against redundancy. In a complex environment it is not possible to operate in a completely rigid fashion, without surprises. Rather, the system must be open to irritations that disrupt the usual practice. If the law, however, is to provide security, this openness cannot be carried too far. There must be a provision for redundancy so that knowledge of one or more elements (knowledge of important court decisions, for example, or knowledge of decisions about laws) can be relied upon to permit inferences about how the system will behave in concrete instances.

This issue of the relative degrees of variety and redundancy is closely connected to the system's relationships with its environment. One can proceed on the assumption that in interactions between elastic and rigid systems the elastic systems will adapt to the rigid ones, just as sand conforms to stone but stone does not conform to sand. A legal culture of argumentation that produces a high degree of variety, that emphasizes the individual nature of each case and is content with vague general formulas like "proportionality" or "balancing interests," will tend to open the legal system to adaptation to rigid environmental systems such as large-scale organizations whose form is set by

technology or capital investment. Whereas a rigid, highly redundant legal system will be able to maintain itself, whatever the social consequences may be, in the face of the more elastic systems of its environment and to turn such highly elastic communications media as money or political power to its own ends.

This is only one of many examples of the way sociological analysis produces an "alienation effect" through its special understanding of the way systems observe and describe themselves. Reconstructing argumentation as the management of redundancy does not grasp argumentation the way it is intended; it understands argumentation not as a search for convincing rational grounds but as a way of mastering contingency and as a condensation of the systemic context. The sociological description of the system's own self-description could not be accommodated within that self-description (although there is more to be said on that point). For that reason, in observing the legal system, sociological description always uses the schema manifest/latent as well, and with the help of this schema it also sees that the system does not see that it does not see what it doesn't see.

But in contrast to the aims of a critique of ideology, no unmasking or enlightening effect is intended here. Rather, this way of seeing things follows logically from the assumption that every autopoietic system differentiates its own operations with the aid of its own distinctions, and thus, if it wants to preserve this differentiation it is prevented from distinguishing itself in turn from these distinctions.

How far into legal doctrine this impossibility extends shall remain an open question here. Certainly it applies to the code itself. To deal with the question whether the distinction between justice and injustice is being used justly or unjustly would lead the system into paradoxes and block at least the operations based on this question. Observation and description of the legal system in terms of legal theory must presuppose the acceptability of the code. It may proceed neither on the basis of a tautology (justice is what is just) nor on the basis of a paradox (what is just is what is unjust). It has to "tune out" this possibility of defining the unity of the system within the system itself; it has to de-tautologize and de-paradoxicalize the description of the system and at the same time make the operations through which this is done invisible.

If it is important to him to do so, the sociologist can observe, with the aid of the schema manifest/latent, legal theory's efforts to de-tautologize and de-paradoxicalize the system; he locates the latent functions of the manifest intention of the legal discourse, which will be directed elsewhere. In doing so, he can make use of general systems theory's distinction between natural and artificial necessities. The operations that serve to de-tautologize and de-paradoxicalize the system will seem to the system to be naturally necessary. An observer, in contrast, can recognize the function of these semantic efforts and speculate about other, functionally equivalent possibilities; to him, every specific semantic solution to this problem appears historically determined and contingent, dependent on the supply of plausibility in the specific sociohistorical circumstances.

C.

Finally, with the help of a general theory of self-referential autopoietic systems it is possible to connect systems theory to a theory of evolution more adequately than before. What results is a weakening of the concept of "adaptation" to the environment, a concept that cannot adequately explain either the high degree of form constancy in natural evolution nor the accompanying tempo of innovations. This is true for the theory of the evolution of living systems, but even more true for the theory of social evolution.

Special evolutionary paths become possible when the differentiation of particular autopoietic systems is successful; for as soon as this occurs a system can vary its structures, insofar as this is compatible with its continued self-reproduction. In constructing and altering structures, autopoietic systems can make use of contingent impulses from the environment that occur and disappear again, as well as of errors in the reproduction of their own operations. The possibilities are often restricted more by the demands of internal consistency than by problems of survival in the environment. In other words, very often a system fails to make full use of the degrees of freedom the environment permits it and restricts its own evolution to a greater degree than would be ecologically necessary. Even with this modification to the theoretical apparatus of classical Darwinism, however, it is still correct to characterize evolution as an unplanned (not coordinated and in this sense making use of "accidents") differentiation in variation, selection, and restabilization.

Accordingly, a theory of the evolution of law has to clarify two primary questions: (1) what problem leads to the differentiation of a particular evolution of law within a general social evolution, and (2) what is the nature of the autopoiesis of law that allows it to be maintained even when structural alterations take place? The answer to these questions must start from the principle of variation, for a

specific selection mechanism can be formed only if the pertinent variation manifests specific peculiarities.

The problem that gives rise to a special evolution of the law must lie in uncertainty about whether expectations, and which expectations, can be maintained, or at least be proven to be counterfactually justified, in the case of conflict. This problem becomes relevant, if it was not so from the outset, because a segmentary social structure establishes who is to be on what side, who is to confirm claims, to take oaths, and if necessary, to fight. The evolution of law then begins with the loosening of the structures of segmentary societies, and especially with the introduction of a sufficient measure of uncertainty into social conflicts. For it then becomes a question of how this uncertainty is to be resolved, and selection criteria can be developed for that. A certain independence of religious or tribal political roles from preexisting ties of kinship or proximity was probably decisive for this development. In any case, whether or not an evolution of the law is set in motion does not depend on the prior institutionalization of the competence to make legally binding ("judicial") decisions. Such an arrangement is still inconceivable in fairly well developed late archaic societies, and presumably even for Mycenean culture. It presupposes a critical mass of already existing, already evolved legal rules that make it possible to think of this judicial competence as connected with law. Thus, in theoretical terms, the autopoiesis of law, the production of law by law, must already be possible for the central institution of a court that makes binding decisions, the institution that in turn makes possible the autopoiesis of law, to be possible. Evolution does not work directly; it works epigenetically. Only in this way can innovations that presuppose themselves arise. This is why contemporary observers give a mythic or religious interpretation to the paradox of the asymmetry in the origin of this circle: The Areopagus, for example, is instituted through divine intervention. Or, God puts the law under the bush. Or later, and in more civilized form, law is created by God in the form of human nature.

Only when adequate differentiation in variation and selection has been established, and when every legal claim is no longer both lawful and unlawful at the same time, depending on the person involved, can criteria for selection among selection criteria be developed. A long period of practicing law and observing its transformations over time is required before possibilities for distinguishing between selection and restabilization arise. The legal system that has already evolved develops possibilities for reflection, puts its own "justice" into question, and has recourse to moral ideas in order to protect a subsistence economy (limiting tax levies and debt collection, for instance, as in the reforms of the lawgiver Solon in classical Athens). Religion and morality place limits on the structure of argumentative justification in the law, and thereby also limit the possibility of giving law the stability of tradition. In addition, due to peculiarities of its organizational practice, the law can become so complex that legal knowledge can no longer be taken for granted as part of the normal knowledge of the aristocracy. Thus there arises a need for special educational arrangements. We are familiar with the result of this process in the concept of an institution (which originally meant "teaching"). The function of stabilizing the law is transferred to processes of doctrinalization and systematization, which then in turn outlast changes in society by virtue of their own potential for innovation, which is inherent in their concepts.

When the peculiarities of modern positive law are considered against this background, it becomes obvious that in many respects this kind of evolution no longer functions. Perhaps it is too slow for our circumstances. At any rate, the impetus to variation no longer lies in anticipating conflicts that can be expected; instead, the law regulates modes of behavior that are themselves provided with the capacity for conflict. The law itself creates the conflicts that it needs for its own evolution, and thereby perfects its own autopoiesis. It ordains, for example, that only a limited amount of wine is eligible for subsidy, and in doing so it gives rise to problems that can in turn be fed into the legal system as legal problems. As a consequence, the law evolves-there is no question of planning here-so rapidly that traditional means of stabilization no longer come into play. The law evades the control of doctrine. Nor can it any longer properly be described as a system of norms, to say nothing of a system of "knowledge". At this point it can only be described as a social system defined by its own code. Stabilization now lies only in the positive character of legal validity - in the fact that specific norms are given force by decisions (whether it is the decision of the legislator, the judge, or the current opinion of the commentators), and *have not yet been changed.* For this reason the stability of the law must be understood as something completely temporal, and objective questions come into the picture only from the standpoint of complexity. They make alterations difficult, and as a result, the law, despite its accelerated tempo of change, remains by and large the same. …

III.

Legal theory has found it difficult (and perhaps it always will) to grasp this positive quality of the law in the absence of any conception of an external (especially a moral) justification. The 19th century's attempt to understand law as a guarantee of freedom (and that means freedom for irrational and immoral conduct) and thereby to accommodate it to the disintegration of the traditional unity of reason and morality, did not succeed. Even Kelsen still needs a fundamental norm, even if it is one with the ambivalent status of an epistemological hypothesis. And for the normal jurist, the idea that even good, pertinent arguments lead only to the confirmation of argumentation itself-to the strengthening of its redundancy-must still be completely unacceptable. In this situation the theory of autopoietic systems offers at least the possibility of an adequate description. Whether this description can be introduced into the legal system itself (i.e., used as its self-description) must be left an open question (which means, left to evolution). In this situation the theory of autopoietic systems can only make use of its own autopoiesis as clearly as possible.

At this point the question of the basis and the justification for legal validity leads us to assume an escalating relationship between closedness and openness in a system. Only as a self-referential closed system can the legal system develop "responsiveness" to social interests. Viewed in this way, evolution selects (on the level of organisms as well as on the level of social systems) forms that permit greater complexity in combining closedness and openness. But that certainly does not mean better adaptation to the powers that be; it does not mean more efficient corruption.

A second, related point concerns the creative character of paradoxes. The term "paradox" signifies here a phenomenon of observation or description-that accepting a description has as its consequence the acceptance of the opposite description. The observation of paradoxes, something which occurs, for example, in the application of the code to itself, blocks the system's observation and description, even though at the same time the observer must concede that the system's own autopoiesis is not blocked by the paradox. In other words, the system can simultaneously both be observed and not be observed as a paradoxical system. The observer must then transform this self-paradoxicalization into a quality of his object by asking how the system de-paradoxicalizes itself.

These reflections hold both for outside observation and for self-observation. Consequently, they state the problem in such a way that sociology and legal theory could collaborate on it. That would presuppose, of course, that legal theory reconceived things it had previously taken for granted and saw them now as functions of de-paradoxicalization, thus making the transition from natural to artificial necessities. And such reconceptualization will probably become possible only when sociology can offer a good deal more theoretical certainty for this step into the unknown, this illumination of what has been latent, than it has hitherto been able to do.

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Coda: The creative element in social autopoiesis

The fact that autopoiesis can illuminate such issues as regulatory failure should not lead one to conclude that autopoiesis is mainly concerned with ameliorating failures of old techniques for manipulating society, say through developing new approaches to auditing and the instrumentalisation of knowledge. On the contrary, the central message of the theory comes from its understanding of the non-instrumental character of knowledge and meaning. It emphasises a creative, almost playful and artistic development of different knowledge fields. (See the extract from Luhmann below, on the creative use of paradox throughout legal history and legal theory.) This has nothing to do with the instrumental manipulation of actors or systems. There is something in legal culture, which cannot be reduced to the narrow view of law as a manipulative political and economic instrument. This follows from the inability of systems to completely incorporate each other, and the lack of any common meta-language into which they can all be translated. While communications within law and politics take the form which philosophy calls 'practical reason', the communications of neither system can be reduced to this. It may be true that the internal models of certain worlds might take a more instrumentalist view of social autopoiesis (for example, politics and law may use autopoietic insights to develop indirect forms of intervention into other areas of social life). Nevertheless, social autopoiesis is essentially an aesthetic theory whose main importance is in its analysis of

the way new and unexpected worlds of meaning emerge by processes which create their own realities. Any patterns of communication are only provisional. (Remember, even the game of chess continues to develop as it is played). As an example of such emerging worlds of meaning see the final extract in this chapter from Teubner below.

Luhmann 1988, 153-165 (The Third Question: The Creative Use of Paradoxes in Law and Legal History)

I.

A recent book of Henri Atlan with the suggestive title *A tort et a raison* (wrong *and* right) begins by telling a famous story, allegedly of talmudic origin. A teacher was asked about his judgement on a question disputed by some of his students. The first student explained his point of view. After a long reflection the teacher answered "You are right". Then the second student, who had not been heard so far, protested and gave his reasons. And the teacher answered again, "You are right". Now, other students butted in, objecting that he could not accept both opinions if they contradicted each other. And the teacher, after a long reflection, once more said "You are right". The third question, too, received a friendly answer.

This feeling had been shared, it seems, by Tristram Shandy's father. 'Tis a pity", he said, "that truth can only be on one side, brother Toby - considering what ingenuity these learned men have all shown in their solution. Hence, in spite of binary coding there seem to be good reasons to give both sides their due and to accept the binary code of truth as well.

In one sense, this is harmless, innocent self-reference. The teacher presents himself as willing to see the best in every cause. In social affairs, this is the easiest way not to get mixed up with the quarrels of others. A therapist probably would react in a similar way. The therapist, too, would start by agreeing and then, remembering her or his professional obligations, would add "but you could see it also in a different way".

But a judge? A judge, of course, cannot be permitted to avoid taking sides. A judge has to decide. The daily problem for a judge is: who is right and who is wrong? And a judge has sufficient knowledge of the books and of life to decide the issue. But remember the third question! On one hand, the judge is not allowed to take the stance of the teacher and accept the right on both sides. But on the other hand, there might be deeper reasons to accept controversies with their right on both sides, and if this is so, what or who justifies the judge in eschewing these reasons as if they were not valid?

The judge has to pay for it, to be sure. There is nothing for nothing under the sun. The price is acceptance of the paradox of a binary code applied to itself. What, then, about the right or the wrong to decide about right and wrong? How is it that somebody has the right to say that a position or an opinion is wrong? Is there any right to invent the wrong, to create the wrong, or in more recent terms, to "construct" the wrong?

In a famous essay Walter Benjamin made the point that there is no such right above right and wrong, no such superright. There is simply *Gewalt*. The whole Frankfurt School of "critical theory" would join him, because, for them, critique would mean exposure of the contradictions which exist in reality, for instance the contradictions between assumed right and assumed wrong. But then we find ourselves transferred to the same issue in epistemology: how to prove with a noncontradictory logic that the reality is contradictory?

There are paradoxes everywhere, wherever we look for foundations. The founding problem of law, then, is not to find and identify the ultimate ground or reason which justifies its existence. The problem is how to suppress or to attenuate the paradox which an observer with logical inclinations or with a sufficient degree of dissatisfaction could see and articulate at any time. It remains possible to ask the third question: can we accept contradictory opinions as being both right and wrong? Or eventually: how can we rightly or wrongly differentiate the right and the wrong? At least under modern conditions we cannot avoid the issue. But it is also possible to unask the question and to transform the paradox into a less troubling issue. By some sort of *Gestalt* switch there may be ways of transforming the question which make it possible to give an answer. Or there may be answers which make it possible to ask the question.

For this lecture my proposal is to use the invisible hand of the legal paradox as a guideline for an investigation of the history of legal thought. If the assumption holds that there is always a primary necessity to avoid the paradox, there may be different ways to do so. In many ways the forms of deparadoxifying the paradox depend on conditions of social acceptability, and these conditions

change with the transformations of the social system of the society. They depend on social structures and are therefore historical conditions.

The background assumption of the paradoxical foundation of the legal system (and, for that matter, of all systems working under a binary code) offers the possibility to connect logical and historical reflection and to see correlations between changes in social structures and changes in legal semantics. We have to remain at a rather detached level - at the level of the third question and at the level of observing observers. But concepts and theories developed for this level have been influential in practical matters, and I shall touch on some of these issue during the course of my lecture.

II.

First of all, we have to limit the case. There are many paradoxes in law connected with specific problems. Normally, they pass unobserved. But as soon as legal theory develops an interest in consistent reasoning and decision-making, paradoxes surface. A recent essay by George Fletcher discusses some of them; for example, the paradoxes connected with paying attention within the law to ignorance of law or to error concerning legal questions, or the paradoxes of the changing interpretation of law which has to, but cannot, refer to itself as some kind of legislation. Other paradoxes are connected with taking into account subjective self-consciousness, reflecting mitigating circumstances in breaking the law. And, again, others have to do with the so-called economic theory of law, calculating the consequences of divergent legal solutions, including the consequences of the decisions themselves for future behaviour, and then using the consequences as a criterion for the decision itself.

Fletcher shows that legal theory copes with such paradoxes by conceptual innovations. He observes two ways of handling such problems: either by abstaining from the legal practice that leads into the contradiction and by limiting the scope of attention for reasons and interests; or by finding or constructing a distinction that dissolves the paradox. Only the second technique is creative and leads to the advances in legal thought. Then, Fletcher proceeds to distinguish the innovative distinctions. There are those which have already been found or constructed and are today incorporated in the established body of legal thought; they are already law, so to speak. And there are others as yet unknown. They have to be found or constructed and remain, for the time being, a matter of further legal thought.

We may share this optimistic outlook and accompany the development of legal theory with our best wishes. But one question remains, and this is, in a different guise, again the third question. Are we sure that we can replace all emerging legal paradoxes by appropriate distinctions? What about the paradoxes implied in using distinctions, the paradoxes of the same that is treated as different? And above all, what about the paradox of defining the law by the distinction of legal and illegal?

This question leads back to my topic. I want to reformulate the third question in the following way: how can a society enforce a binary code? How can one ever be sure that the true is not untrue and the right is not wrong - given experiences which are reported in Greek tragedies or South American novels? And in addition, what happens within the legal system when the society enforces its code?

III.

The main body of my lecture will abstain from further theoretical arguments and replace them with a historical survey, comparing different types of society with respect to the ways in which they handle - within given structural and semantical limitations - this problem of binary coding.

Larger societies of the past were organised by two kinds of differences - social strata and centre/periphery. They described themselves as hierarchical order of castes or estates and were at the same time what we would call "urban societies" or "peasant societies", depending on the distinction between urban centres and rural periphery. Putting the emphasis on one form or the other, they could observe their unity by looking at the top or by looking at the centre. There was no problem of representing the unity of the system within the system. These societies could see their order as natural order and could therefore characterise alternatives as disorder. Ambiguities came up, and particularly so in the Middle Ages, when both forms disintegrated - that is, when the aristocracy was no longer urban aristocracy, and also when the top groups were split according to religious and political functions without clear primacy (or with a semantic primacy of religion and a real primacy of estate-based politics). But even then the system was described as a natural order, and the concept of nature had normative connotations because its antonym was disorder - and not, for example, civilisation.

These societies could easily describe law as natural law. Within old mythical traditions the genesis of order was conceived as emanation. The one (which in Greek arithmetic was not a number) generated the numbers, that is, the difference between odd and even numbers. All multiplicity came out of unity. The unmoving mover created the difference between moving and static entities. In this

sense it was easy to conceive the law in the fundamental sense of eternal or divine law creating the distinction of natural and positive law and the distinction of legal and illegal behaviour as well.

By now you may see that this is a way of handling the paradox. The paradox remained invisible and became replaced with a narrative telling the genesis of distinctions. However, this semantic strategy did not succeed completely. Paradoxes have a fatal inclination to reappear. Necessities came up - or at least the urgent necessity to decide at particular occasions against the valid law, the famous *excessum iuris communis propter bonum commune.* For this purpose, new characterisations were invented which provided for new antonyms. The law was characterised as *strict and formal* - and *equity* was invented to justify its neglect in cases where it would be hard to follow the law. This distinction of cruelty and leniency *(crudelitaslclementia)* served to reject the legal code of right and wrong and to re-incorporate the law into the human society. After centuries of decision-making this distinction re-enters the law and we find a casuistry which remembers the cases in which the law itself allows for lenient, attenuating considerations. The distinction which first articulated the paradox of rejectable law is finally transformed into a device for creative social learning within the legal system.

Something similar happened with another distinction, likewise used to present a paradox and to suggest creative ways of solving it. In this case the law was characterised as *normal* - and the institution of *derogation* was invented to justify a violation of the law in view of higher necessities or utilities (and the social order left no doubt about who was and who was not able to do that). The paradox reappeared in long debates about whether derogation is an institution of natural law, permitting the violation of natural law, or whether it can and has to be justified as positive law only in view of postlapsarian conditions. The first opinion could refer to Cicero's dictum *communis utilitas derelicto contra naturam est.* The second requires a psychological brake. It has to be practised *a regret et en soupirant* as Gabriel Naude recommends.

However, the paradox not only reappeared, it also revanished. As soon as equity and derogation evolve into a system of definitions and rules - and what else could a jurist do with them - the paradox makes an evasive move, being unprepared to accept regulations. As Wittgenstein asked, "What use is a rule to us here? Could we not (in turn) go wrong in applying it?"

[As with 'rules of equity', think of how to formulate rules for emergencies when the order that law relies on is threatened. Can one write rules for disorder? Attempts to do so, elucidating on 'states of emergency' can never be complete even though they might appear to be; the paradox can always reappear.]

IV.

During the seventeenth and eighteenth centuries a remarkable change occurred. The third question looks for new answers. The paradox of law looks for new places to hide away. It appears in new disguises, more appropriate to changing social conditions. The law of nature contracts and becomes the law of reasonable arguments, supposing that reason at least is the nature of human beings. This gives more freedom from theological supervision and more hope for progress by refining and improving the self-control of human affairs. Reason appeals to reason as the last court which is supposed to be able to judge its own affairs. Hence, the paradox is maintained as tautology - as a distinction which is supposed to be none: as reasonable reason. (For affairs not suitable for the jurisdiction of reason, we find at roughly the same time parallel concepts of self-authentification, that is, taste for art and love for intimate relations.)

And again, the paradox reappears, being more sophisticated than reason itself. In practical affairs of acquisition and use of property, reason argues with equal voice for equality and inequality. The desire for property and its accumulation is clearly wrong, violating the natural (and the created!) equality of human beings. And the demand for equality is clearly wrong, violating the law of property. How, then, to drive the paradox back into its invisible retreat?

One easy solution consists in using a double concept of nature. Natural reason may demand to surpass nature. "Men are born naked, but they are clearly better off in clothes." But then we have to face the question whether nature teaches us that we are better off with an unequal distribution of property.

For more than one century, the question of property becomes the problem in terms of which the foundations of the society are discussed. "Le partage des biens est la premiere loi de la societe, et le tronc, pour ainsi dire, de toutes les autres lois", wrote the Marquis de Mirabeau. Jurists tend to recognise a contract, albeit an implicit contract, because the acquisition and use of property implies the recognition of the property of others. Also, until the second half of the eighteenth century, the society itself is thought to have been based on contract with roughly the same kind of argument. Thus, there is no place for separating state and society; the deparadoxification has to take place within

the context of reflections about political society or civil society, and the arguments have to lead back to its *origin*.

In this sense, the authors of the seventeenth and eighteenth centuries used thoughts of Greek and Roman origin to reformulate the paradox. The form was again a quasi-mythical narration. At the beginning there was communal property in the state of nature. But then, the multiplication of people and the invention of arts and sciences made it advisable to separate the goods and to give the chance to augment her or his property to each individual. For a certain time, the selections of Roman materials under the heading of "about acquiring property" played a decisive role in legitimating the law as such. During a long discussion, distinctions became refined. Pufendorf, basing himself on Grotius, introduced the famous distinction of negative and positive community of property - the negative being in a sense property *avant la lettre* (property before the law), the positive being private property with more than one owner.   John Locke added the idea that the real reason for the distinction of state of nature and civilisation was the necessity of organising labour, and that the situation became problematic only by the invention of money taking away any limits of acquiring and preserving property.

I cannot go into details here, but have to mention two points. The first is that, in this account, the origin of property has to be a mythical one, not simply a historical state. Hence, the whole structure of deparadoxification became vulnerable to historical and comparative research. This happened in the middle of the eighteenth century, particularly in the writings and lectures of David Hume and Adam Smith. Secondly, if we decipher the structure of the thought looking through its mythical form, we find the idea of natural rights. Natural rights are rights whose recognition does not depend on complementary obligations. They are rights in the sense of Thomas Hobbes or Jeremy Taylor, that is, rights before the law, rights not depending on the recognition of others (for example, the right to preserve and to move one's own body, the old *potestas in se ipsum)* - that is, rights before the distinction of right and wrong. You may recognise it: it is a paradoxical right, a right answering the third question.

But this is a concept of the seventeenth century. The eighteenth century, preoccupied with morality and reason, found what seemed to be good arguments against this concept and insisted that there could not be rights without complementary obligations. Of course not! The paradox has to remain invisible. But then, where does it hide now?

V.

In the course of the eighteenth century, the strategy of deparadoxification became reversed. The tradition had started with the idea of an innocent beginning. Once there had been a golden age. Once, in the state of nature, human beings could live according to their needs in a state of communal peace. Then, deterioration set in and mechanisms to compensate needs. Already in the seventeenth century doubts were raised about this version, as in Hobbes, but the countermodel could not really be constructed. There was the dispute of the ancients and the moderns and there was the idea that, on the whole, we might be better off in modern times. But only in the second half of the eighteenth century do we find the complete reversion. Only then do we find the idea that the beginning was wrong, that the beginning was violence, or that it consisted in the enclosure of property and the co-operation of people stupid enough to believe that this was just. Therefore, it was felt that only the process of civilisation would take us into a better future and justify the past in retrospect. The hidden message of the paradise lost was no longer sin (which presupposes the law) but the violence of God, expelling Adam and Eve from the garden of Eden and preventing their return by his armed troops.

We find this new look with authors who rejected the idea of a contractual foundation of the law - an idea which is evidently tautological (that is, paradoxical) in founding the law on the presupposition of the law. We find this rejection and the corresponding foundation of law on violence in Linguet, one of those writers of the French post-enlightenment who were particularly fond of frivolous paradoxes. And we find it, better known, but also less intriguing, in Kant.

At the beginning was violence. Forget it. Things are much better by now and we can embark on further improvements, for instance by designing a constitution . But then, are we to know the unknown, the future? And do we, in rejecting the past, reject the story of the Tower of Babel as well?

At any rate, the paradox, like the sun, passes underground and reappears in the future. The attempts to domesticate it by reasonable elaboration fail, of course. The Kantian inflation of hopes regarding the foundations of law failed to impress professional men in law, in religion, and in pedagogy as well. The famous names are Gustav Hugo and Anselm, Feuerbach, but a whole school of thought developed which criticised the inexact and superficial ways in which Kantianism had been transferred into jurisprudence. At that time, a science of the positive law was in demand, and the options seemed to be whether the positive law should be designed by conceptual constructions, taking the historical

experiences of generations of lawyers into account, or whether, on the base of the constitutional state, legislation should be the preferred road into the future.

The paradox now disguises itself as the splendid future of divine mankind, the future of freedom and equality, the future of emancipation and democratic constitutions, or the future of the greatest happiness of the greatest number of people, and finally as the future of the communist society as the new state of nature, the state after the state, after property, after all divisions and distinctions. The paradox prevents observations and descriptions, the future being unobservable by itself anyway. The future becomes the grand excuse for all the misdeeds of the new industrial society, the grand excuse for applying the law which the society itself produces according to a calculus of interest and, increasingly, as a reaction to its own self-created problems.

And again, as always, we find more technical forms of deparadoxification. One of them is the distinction between legislation and administration of justice. Statutes have to be general, court decisions have to apply the law to the concrete case. The production of law has to proceed without paying attention to particular cases, and it finds its justification, if not its innocence, in its general form. Court decisions have to distribute the symbols "right and "wrong" to particular circumstances, taking the validity of the law as given. In many senses, this is not the final answer. There remain the well-known problems of self-referring laws and the problem of circular loops between legislation and adjudication. But these are theoretical concerns. In practice, the institutional role differentiation works sufficiently well, and remaining problems can be collected under the heading of "legitimacy", understood as the popularity of governments, exposed to periodic elections. Moreover, it is now easy to solve a very old paradox, that is the paradox of the right to change the law. The legal system may recognise political motives as sufficient for changing the law - but only at the level of legislation and not at the level of adjudication.

This, too, is a way to replace the paradox by a distinction. Moreover, its distinctive feature is avoiding any reference to natural law or morality, having recourse to positive law only. This makes it meaningful to replace the distinction of right and wrong with the distinction of legal and illegal and thereby in addition attenuate the problem. What had been a morally upsetting paradox can now be seen as a simple contradiction between morality and legality - for example, a morally-required disobedience to the law.

The other modern device is the result-oriented practice on both levels, in legislation and in court decisions. What counts is not a principle, nor a logical deduction, nor the elegant conceptual construction, but the difference a decision effectuates either in social reality or in the legal system itself. Are legal effects therefore the criterion of law? This is certainly not a convincing theory but it is the usual practice and the distinguishing mark of the good lawyer. It is something like cutting the future into small chunks that can be handled in the situations of daily life. But again and nevertheless, the future remains unobservable. The legal decisions claim to be right (and not wrong) immediately and remain so, whether their intended results come about or not at a later time.

Logically then, the validity of a programme depends on its own execution. The execution of the programme becomes the condition of the execution of the programme. Hang the man if - and only if - you hang him. This instruction, of course, would make issues undecidable. You really need the future - that is, your present opinions about the future - to discriminate decisions and to deparadoxify a self-conditioned conditional programme. But then you have the question: whose guesses about the future are valid guesses, which is the question: who is in power?

When this form of deparadoxification becomes institutionalised we can expect a need for compensating mechanisms, in particular for self-correcting devices. When the results do not show up, the law has to be changed accordingly. The future remains the future, the problems change their shape, the situations can be handled in one sense or another. The legal system grows by what can be called, using a linguistic term, hypercorrection. The machine ends by being constantly in repair. The promoting paradox remains invisible.

VI.

We could make a dream out of this, perhaps a nightmare - the crumbling tower of Babel without the hope for the celestial Jerusalem. We could also decide to risk another look at the paradox or to ask the third question again.

An answer to the third question is a way to put a basement under the building, a basement in which the secrets of the system can be preserved, or, as some would rather suppose, the corpses. We need this basement as the rule without exception, that is, as the exception to the rule that there are no rules without exception. We need it as the paradox.

It may not be obvious that we need a paradoxical foundation at all. To be sure, the language of law permits the construction of sentences which are inconsistent. This is true for all language specialised on cognition, and so much more for normative languages. But why do we not simply avoid these

pitfalls, why not steer clear of certain questions and certain constructions and, with this precaution, use the language of law without the embarrassment of looking into the Gorgonian face of the paradox? Even logicians and philosophers try, in constructing formal systems, to design exclusion-devices or to simply put an embargo on what otherwise would seem to be a possible move. We know that this does not work, except *ad hoc*. But what prevents us from doing it nevertheless? It could be sufficient to say that there are rules with exceptions and rules without exceptions. Or that there be right claims and wrong claims. But then, what is indicated by the "and" and what is excluded by the "and"? Nothing. The "and" serves as the joker replacing within the system the unity of the system. Like the end of the system the "and" of the systems operates as symbol for the unity of the system within the process of reproducing the system - here and now. It is not a sufficient description of the unity of the system. It is again a hiding-place of the paradox.

The unity of the system is not something outside of the system. It is not something inside the system. How and where, then, can we observe the unity? The system is the multiplicity of its operations. It never acts as this multiplicity, it never acts as the network of its operations - for example, as the network of all the legal decisions. It is nothing but the constraints produced by one decision for others of the same system. These constraints exclude other possibilities of the same system. But then, how do we justify these exclusions - for example, of women from certain clubs, of non-owners from property, of prisoners from freedom? The system itself contains these excluded possibilities. If you have clubs, you have members and non-members. If you have prisons you have people inside and outside prison. For every owner of a house there are by now five billion non-owners of this house. How to cope with these atrocities? Technically speaking, exclusion-devices may work sufficiently well. The law can forbid or make it simply invalid to ask the third question. It may prescribe the expulsion from office of a judge who behaves like a wise person. And indeed, we all know that there is a law which forbids the defiance of justice. This makes it possible to ignore the problem. It does not eliminate it.

From a systems point of view we can, following Talcott Parsons, make a distinction between this technical level of the execution of social functions and an institutional level at which a system has to reflect its integration into the encompassing system of the total society. More recent theories make a distinction between "natural" and "artificial" devices for handling the paradoxes of self-reference or between internal and external observation. These differences in conceptual style reflect advances in systems theory which we can leave aside at the moment. My final question is, rather, are there structural reasons in modern society which make it appropriate to enforce this two-level thinking on the legal system and to provide for higher levels of description, be it internal or external, which go beyond merely technical advice? And my proposal will be that in modern society this is not simply a question of legitimation in the sense of taking into account symbolically shared values in communicating the intentions which guide your actions. Indeed, this is too easy to do. The problem is, rather, to improve on the transparency of the internal workings of functionally differentiated systems for themselves and for others. But if paradoxes are the crucial obstacles for observing systems, and if the ways in which systems treat their paradoxes produce transparencies and intransparencies as two sides of the same coin, then this issue has to replace the rather trivial topic of legitimation. And the distinction between the two levels of operative theories and of reflective theories, of technical advice in legal problem solving and of reflection upon the ways in which a system becomes understandable for itself and for others, may become not the solution of the problem and certainly not a new technique of self-legitimation, but at least an adequately differentiated way to produce descriptions.

Now, all this may seem to be a highly theoretical problem without any impact on practical affairs. Lawyers who are programmed for decisions are likely to find this sort of problem uninspiring. My intention has been to show that this is not the case. The historical survey teaches that there is one general technique of avoiding the third question, namely replacing it by a distinction. The code of the legal system, the distinction between right and wrong or, for modern conditions, between legal and illegal acts, is itself a first scheme to articulate the paradox, to found the possibility of self-reference. But then, further distinctions are needed to solve the resulting problems, distinctions like rigid justice and equity, or rules and exceptions, or the distinctions of property, or the differentiation between statutes and court decisions, or between decisions with more or less preferred consequences for legitimate interests. On this level of secondary distinctions the law adapts to social evolution and, in particular, to its own increasing differentiation. These distinctions have a technical side. They are undisputed assumptions in the reasonings of lawyers as persons of practical competence. But they have also an institutional side mediating between the decisions and the unity of the system. "Saving distinction" - this is the recipe for solving the paradox, and "saving" should be taken in the double sense of saving the system in spite of the paradox by using a distinction and saving the distinction itself by the operation that makes use of them.

The prevailing opinion in legal and social science describes the unity of the system as a value, representing the social and cultural autonomy of its task. The legal system then has to implement justice. This comes close to being tautological. In my opinion, the unity of a system is realised by its

guiding *distinction.* The legal system then has to implement the distinction of legality and illegality. This comes close to being paradoxical, seeing unity as the unity of a difference.

These are clearly competing theories. We will have to choose between beginning and ending with unity or with difference. And there is no other final answer to the third question.

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Teubner 1997, 149-176 (Altera pars audiatur: Law in the Collision of Discourses)

POLYTHEISM AND (POST-)MODERNITY

> It is like the days of old when the world was full of many gods and demons, only different; it is like when the Greeks made sacrifices, one time to Aphrodite, another time to Apollo and above all to the gods of their home towns, only today the magical and mythical is missing from existent conduct. It is fate that reigns supreme over all the gods and their struggles, and definitely not knowledge. (Max Weber)

Today the only god left to whom law is supposed to make sacrifices is called rational choice. Over the past thirty years, a quasi-religious academic movement has spread through all the law schools of North America with a particular zeal. After its high priest, Richard Posner announced 'the demise of law as an autonomous discipline', economic rationality is supposed to represent the new universality of law. Theory of transaction costs, theory of property rights, public choice and economic analysis of law are different currents in the broad stream of a movement which is intent on replacing the emaciated concept of justice with the ideal of the economic efficiency of law. This new monotheism speaks with the pathos of natural law in the name of both 'nature' and 'reason'. The internal laws of the market and of organisation are in the nature of modern society and law has to reflect them. The philosophy of 'rational choice' elaborates on the principles of reason in this new order and they apply to law as well.

Law and economics claims to be the new victorious paradigm which eliminates older moral-political orientations of law, and it does not tolerate the co-existence of any other paradigms alongside it. 'Thou shalt have no other gods but me.' Law and economics justifies its exclusivity with its historic victory in modern societies, with the society-wide, and today almost world-wide institutionalisation of economic rationality. Its strength lies here, without doubt, for who can reject the argument that modern society is economic society and that modern law has to provide market-adequate, economy-adequate legal forms?

At the same time, this is exactly the great weakness of the law and economics movement. Economic rationality does not have the privilege of society-wide institutionalisation all to itself. There has, indeed, been a paradigm shift. However, it is heading in a different direction. It is not the case of eliminating moral-political monotheism in favour of economic monotheism which law needs only to reflect. Rather, it is the case of a change from monotheism to polytheism, from the monotheism of modem rationality to a polytheism of the many discourses. There is a paradigm shift to the particularistic rationalities of the many gods to which law has to respond in other ways than by just adopting a new god.

Apart from economics, it is, above all, politics, science and technology, the health sector, the media, the law and possibly also the morality of lifeworlds which have all individually developed their own self-centred rationalities. They all expose a strange contradiction. On the one hand, they are all clearly particularistic rationalities. On the other hand, they are all institutionalised, in effect, society-wide and they all demand universal acceptance. In this way, the cost-benefit calculus of economic rationality is only institutionalised in economic transactions; however, economisation takes hold of the whole society and rational choice makes its claims in all social contexts. Accordingly, rational choice also demands law's obedience. Efficiency instead of justice. The same is true for political rationality. Democratic legitimation of power is typically only institutionalised in the political context. Nevertheless the ideal of democracy demands society-wide acceptance and, accordingly, realisation in law. Democratic legitimacy today is seen as the only valid foundation of law. Again, the core of scientific rationality-uncompromising search for intersubjective truth-is essentially only institutionalised in teaching and research. However, scientification is a society-wide process which forces even the law to take a scientific approach in its regulatory aspirations. Finally, moral criteria develop typically only through concrete small-scale interactions as evidence of mutual esteem. Nevertheless morals,

especially in their academic forms of philosophical ethics systems, want to regulate all social, today especially ecological issues and request a hearing on legal issues as well.

If all these belief-systems were only airy-fairy theoretical constructs, mere philosophical abstractions, law could easily reject their claims for universality as merely academic. However, the many new gods do not just create faint theologies. They exercise their firm power grip in concrete world-regimes. Max Weber's 'iron cages' or, as one would say today, 'computer networks of a new domination' have their foundations in social practices themselves. These universal regimes of particularism have five characteristics of social effectiveness which render their influence on law well nigh irresistible.

First, their material base consists of manifest *social practices,* on which the distinctions of the various universalities have been inscribed. Markets and business organisations, elections and political associations, government and opposition, research practices and technologies, information systems of the media and the agencies of health and social security systems all demand from law specific regulatory measures which have to reflect the universal principles of particularism which each of these entities has institutionalised separately. The modern plurality of gods is not a matter of individual belief but is a hard social reality which is forced inexorably upon law. To the detriment of its effectiveness, law has to abandon the simple model of threatening (dis)obedient subjects with sanctions and must reformulate its norms in order to 'match' specific constraints in the economic, political and scientific-technological domains.

Secondly, neither are these social practices mere conventions, brought about by the typical economic, political, scientific, or ethical motives of actors. Rather, the many gods have created many theologies, elaborate social abstractions in the form of self-concepts and *reflexive theories* which in turn control and rationalise the practices. As we said, they are bold enough not to respect their own boundaries. Each of these partial reflexive theories claims to be accepted as the one and only one universal rationality. Economic theory has long since crossed the borders of its specific domain of the economy and claims to be the valid theory of society which interprets society as a giant network of cost benefit calculations. The same applies to political theory which in its turn reduces society into conflicts of interest and power between groups and political aggregates. As both these reflexive theories are not restricted to cognitive issues only, serious consequences emerge for law. Both theories develop, each by itself, mutually exclusive normative concepts about a just society which compete, as political justice or economic justice, with a specific legal justice. Beyond economics and politics, sensitive observers have discovered other 'spheres of justice' in many social domains which present their own autonomous concepts of a non-legal justice.

Thirdly, the many gods have even taken residence in the inner sanctum of law, in *legal theory and jurisprudence.* Of course, 'political theories of law' are not new; there is a long tradition of providing concepts of law from the perspective of political sovereignty. Today, however, political theories of law have experienced an extraordinary radicalisation, ranging from old German *Freirecht* and American legal realism, the international movement of law and society, and the more recent critical legal studies movement to feminist jurisprudence and critical race theories. In their way of destructing the legal in law, they are only surpassed by recent economic theories of law. 'Law is politics' is the war cry of critical legal studies, but is now drowned out by the war cry 'law is economics'. As if that were not enough, we can hear today a crescendo of aesthetical-antirational theories of law announcing the ultimate deconstruction of the legal proprium.

Fourthly, legal practice itself has not been spared the plurality of gods either. Politicisation, moralisation, scientification and economisation of legal practice itself have profoundly changed methods of judicial decision-making and their use of *legal doctrine.* Although the results are strikingly different, the new method is always the same: law plays society. Legal decision-making is invited to play-act. Legal reasoning is supposed to simulate the practices of other social subsystems in order to produce socially adequate norms, that is norms which do reflect the inner logic of law's social environments. Balancing interests as a judicial method is a typical simulation of the political process. The predominant purpose- orientation in legal practice and the regulatory spirit of modern law necessitate simulations of scientific-technical behaviour. The appeal to community values asks for a simulation of moral universalisation. The model of a hypothetical contract situation simulates economic behaviour, law mimics the market.

Fifthly, the most powerful weapon yet of the new polytheism may be the creation of an array of various independent machineries of *social norm production* which produce legal norms directly from outside the law, from the various subsystems of society. With the help of these machineries, heterogeneous particularistic rationalities and their normative claims massively infiltrate the law which has little control over them. The most productive extra-legal rule-making machines which are driven by the inner logics of one specialized social domain are installed in various formal organisations and processes of standardization which are competing today with the legislative machinery and the contracting mechanism. In the light of their massive operations, the question as to whether or not law

should remain 'pure' as against the contaminations of particularistic rationalities of society has long since been decided. It is no longer a question as to whether or not, but only as to how!

FROM POLYTHEISM TO POLYCONTEXTURALITY

This scenario may sound very much like the patchwork of post-modernity, but it by no means refutes the modernity of law. On the contrary, the pluralisation of discourses to which law is subject today is the typical modern experience which only is stylized anew in the post-modernist gesture. This is why we find the fundamental analysis of the new polytheism not with the contemporary theoreticians of discourse plurality but back with Max Weber, the grand old man of modern social and legal theory. Late modern and post-modern authors are refining and elaborating Max Weber's analyses. At the same time, however, they radicalize his ideas on the new polytheism. What can we gain from this debate stretching from Max Weber to Francois Lyotard as to the position of law in the plurality of discourses?

Max Weber analysed modernity as the era of absolute polytheism. Parallel historical processes of rationalising different value spheres have led to insoluble conflicts between the many gods of modernity, between depersonalised powers of belief which cannot be resolved or removed through reference to the One Reason. These conflicts, Max Weber submitted, have to be endured, have to be suffered subjectively and individually. We have to live through these conflicts in a chain of ultimate decisions.

Max Weber articulated the collision of discourses only vaguely and metaphorically as 'the struggle of the gods', that is, as a conflict of the spheres of ideal values. In the later discussion, this problem has been redefined sociologically as a real phenomenon of society and analyzed more precisely by linguistics as a collision of different 'grammars'. Weber took his metaphor from the sociology of religion where the old polytheism of the Greeks appeared to be replaced temporarily by the Judaeo-Christian monotheism, only to resurface in modern times as the struggle between depersonalised powers of belief, between spheres of secularised values. The crucial aspect of the collision according to Weber is the insoluble contradiction between knowledge and values, on the one hand, and the antagonism between the different spiritual spheres, the good, the holy, and the beautiful, on the other hand.

Wittgenstein's plurality of language games gives the collision of values a linguistic turn which deprives it of its transcendental motives articulated by Weber and which, as it were, naturalises it. 'Language games' collide because of their idiosyncratic structures of rules which can be referred neither to principles of reason nor to abstract values, but only to the practice of real 'forms of life' in society: 'One could say that what is given and what has to be accepted are forms of life'.

The contemporary discussion elaborates in more detail the grammars of language games, analyses more accurately the social practices at their roots and assumes the incommensurability of discourses and the lack of any meta-discourse. Today, at the provisional conclusion of the debate, we find Francois Lyotard's distinction between *litige and differend* of the discourses, Niklas Luhmann's plurality of closed self-referential systems and Jurgen Habermas's normative propositions as to how to resolve discourse collisions. From these perspectives, the conflicts to which law is subject today, do not result from colliding ideal values but from colliding real social practices with their own logic and with an enormous potential for self-inflicted damage. Law is not called upon to decide the eternal conflicts between the holy, the good, the utilitarian, the true, the just and the beautiful. Law is exposed to potentially destructive conflicts between concretely conducted discourses in society, between self-reproductive concatenations of *enonces* which are conditioned by an internal grammar and by binary codes and programmes, which reproduce their internal logic with hermetic closure.

Recent theorizing has produced more than mere refinements and greater detail. Contributions from, above all, systems theory and deconstructivism have radicalised Max Weber's proposition of a new polytheism in all its three elements-plurality, god, and conflict.

First, the diagnosis of plurality-the assumption of a social poly-centrism-is too harmless as it is, for instance, proposed by Schluchter in his interpretation of Weber's work. Polycentricity still maintains the comforting assumption of an ultimate unity of context in which various centres of action co-exist - as it were, the Olympus of the gods. It is replaced today by a more threatening 'polycontexturality', that is, a plurality of mutually exclusive perspectives which are constituted by system/environment operations and which are not compatible with one another.

Second, Max Weber's many gods who, even after secularisation, still represent basic authorities in the sphere of values are replaced today by strange paradoxes lurking at the foundation of social discourses and threatening to paralyze the observer. Quasi-religious value as the basis of a discourse has given in to paradox, the new 'fondement mystique de l'autorite'.

Third, the severity of the conflict between the gods appears to have dramatically increased. This is no longer a competition between different value systems; in the contemporary view of discourse collisions the 'warring gods' have assumed almost self-destructive proportions. According to Lyotard

discourses are so hermetically closed that they deny each other the right to be heard and only do 'violence', 'tort', 'injustice' to one another. According to Luhmann and Habermas, social systems have developed such powerful and uncontrollable internal dynamics that they not only overburden individuals and harm the ecology, but also have disintegrating effects upon one another. Truly, the struggle between the new powers of belief produces a tortious society, if not a tortured society.

A NEW CONFLICT OF LAWS

The recent debate has not only changed the perspective on the phenomena of collision but also questioned Weber's 'solution' of the collision problem-subjectivisation. Weber identified the individual subject as the true victim of the struggle of the gods and he celebrated the tragedy of individuals in their inevitably guilt-ridden decisions about conflicts and coping with them. Today attention has moved away from individuals to discourses. Not only individuals but also discourses, and among them law, are exposed to the conflicts which they have created for themselves. Society does harm to itself in its different discourses. Weber could still believe that the spheres of values could be kept out of the problems of collision successfully by the sophistication of their formal rationality. This explains his celebration of the formal rationality of law. This explains also why he was so suspicious about substantive rationality, why he dismissed and marginalised all the moralisation, politicisation and economisation of law.

Nonetheless, Weber got it wrong. Formalisation did not protect the law against infiltration through extra-legal rationalities. Above, we have already inspected the Trojan horses which today successfully lead the extra-legal normativities into the empire of law. We found: (1) norms produced outside the legal system which compete with the norms produced in courts; (2) extra-legal references in doctrinal analysis and legal method which materialise the formal law; and (3) non-legal theories of law which destroy the unity of jurisprudential reflections of law.

Law cannot be kept immune against the collision of different rationalities by formalisation. Of course, formalisation changes the quality of the collisions because the universality of law is protected against immediate competition from other universalities by formal coding. The legal code of law/not law rejects the codes of other discourses, such as true/false moral/immoral, have/have not, government/opposition. However, this is only a matter of replacement. The other discourses which have been defeated at the level of codes return even more vigorously at the level of legal programmes and wreak havoc on law from that point. The arguments which are used in legal argumentation, reasons of policy, cost-benefit calculations and moral grounds will always defer to the legal code of legal/illegal but will nevertheless rule as the successful criteria which control the distribution of the values of legal and illegal. Law cannot get rid of the threatening polycontexturality of society by, first, contributing to it in producing its own rationality and, second, by observing the pluralism of the other social rationalities through the looking-glass of its own rationality. No, the repressed fragmentation of society is returning in the inner workings of formalised law as a fragmentation of law itself, even if modified by the specific legal perspective.

Therefore, we are faced with legal pluralism in a more radical sense than how the term is used in current legal sociology. It does not just refer to a plurality of local laws, of ethnic and religious rule-systems or of institutions and organisations. Rather, it refers to a plurality of incompatible rationalities, all with a claim to universality within a modern legal system. Different social particularistic rationalities have formed bridgeheads within the law from which they operate in the designing of mutually incompatible legal concepts, to represent alternative doctrinal arguments and methods, and to project norms which contradict each other. Given this situation, there may be a temptation in the Law's Empire to give in and to hand over the unity of law to one of those bridgeheads. If it is impossible to constitute the unity of law through its own closure, formalisation and positivity, such a unity has to be constituted by extra-legal means. Such colonialist claims come today from an economic theory of law, a political theory of law, and from a moral theory of law. Their fatal attraction is that they can provide, within one approach, a framework of legal theory, doctrinal arguments and methodological instruments. However, the question still remains: how can the law decide between them, if each one of them is legitimately institutionalised in social practice and if each one of them can demonstrate a universal rationality? Or to put it more strongly: is it possible for society to protect itself against self-destructive tendencies of the colliding discourses by giving preference to one of them? Is it not, on the contrary, plausible that these self-destructive tendencies are increased by a preferential treatment of one of the discourses?

A counter-position would be to refuse such a momentary decision of faith and the *sacrificium intellectus* connected with it, and to accept the controversial plurality within the law and to see it as an opportunity rather than as a sign of decay. The question, then, is whether such a plurality of legal 'ontologies', juridical concepts, and legal models has to be avoided, or whether one can cope with it. Does the pluralisation of the rationalities of law necessarily lead to relativism and nihilism? Or can it

not be turned around constructively? One would accept the permanent conflict between ontologies within the legal system as such and without the possibility of ever deciding it. The idea would be to transform law into a discourse that maintains conflict or even increases conflict, not reduces it. This is not anything-goes-relativism but a position that argues for an increase of 'agonistic aspects of society'. Is there not a case for finding ways and means to increase the plurality by 'civilising' the conflict of discourses and to use its rich tapestry of conflicts productively? Here we can see new life in Max Weber's suggestion as to how to deal with modern polytheism; but we have to shift the accent away from the individual onto legal discourse:

> ... to lead one's life consciously, if it is not to pass by like a natural event, means to know about those contradictions, and it means to see that each singular important act, and even more so, life as a whole, are a chain of final decisions through which the soul, as seen by Plato, chooses its own fate, that is, the meaning of its actions and its existence.

Can the legal discourse cope with the struggle of the gods and can it choose its own fate through a chain of decisions?

As far as current German legal theory is concerned, there are above all two authors who confess candidly to the new polytheism, Rudolf Wietholter and Karl-Heinz Ladeur. Wietholter's work concentrates on the question as to how law can deal with the collision between different grand theories, that is, economic theory, systems theory and critical theory. In spite of personal sympathies for the most critical among them, he avoids bias which would impoverish the discussion and puts his bets on mutual enlightenment - and on the capacity of law to syphon off productive norms from these learning processes. Ladeur's work represents the turning of jurisprudence to post-modern legal theory. In analysing the plurality of discourses and the variety of systems, he concludes normatively that the law should not again favour a doubtful unity but should rather deliberately maintain its internal plurality and guarantee mutual transparency of the discourses against their tendencies to block each other. Is there scope for an elaboration of these approaches?

My suggestion is to work out the concept of a new law of conflicts. The issue here is the new situation of law having to decide between colliding rationalities of different discourses, not the classic collision between national regimes of law or between competing jurisdictions. The new areas of conflicts are defined by symbolic codes and programmes delineating discourses and are not made up by territorial borders. Is there something to be learnt from the historical experience with international conflicts between laws for dealing with the conflicts between discourses and systems? In the classic international law of conflicts there are many collisions which cannot be resolved by reference to hierarchy, there is an abundance of circular references, self-references and paradoxes, which all have to be coped with in one way or other. So there may be a case for fruitful analogies for a law of interdiscursive conflicts which is faced with similar challenges.

A starting point could be the equal authority of colliding discourses, just as conflicting national legal regimes have equal authority in the international law of conflicts. This position does not allow for a permanent solution. It facilitates, on the contrary, a never-ending routine of referring the one regime to the other and vice versa, and it arrives at decisions in the course of this routine, without, however, questioning overall the respective authorities of the conflicting regimes. Accordingly, a law of discourse conflicts can only be understood as an infinite 'chain of ultimate decisions' in the sense of Max Weber, in which the legal argument 'passes through' the different particularistic rationalities which are institutionalised in law, and arrives at decisions on this basis, without ever resolving the permanent conflict. This hardly satisfies the romantic desire to reconcile the divisions in society, but it increases variety considerably and may lead to more adequate and acceptable results. By 'ceaselessly contextualizing and relativizing law's knowledges' it may open 'possibilities for productive confrontations between discourses'. It reconstructs the different normative projections of the other particularistic rationalities and attains its norms through decisions on what cannot be decided.

This sounds paradoxical, and it is paradoxical. However, it only provides the situation of legal discourse in today's society with the name of the paradox of a *unitas multiplex* which is also reflected in its parts as a *unitas multiplex.* Such a *unitas multiplex* cannot be resolved by referring hierarchically to the whole, or to the centre, or to the top, but it can be 'deparadoxified' through the grand tour of references and references back.

The traditional international conflict of laws can thus be seen as a vast network of references to foreign law and references back to the domestic law. The relevant technical terms here are called choice of law, qualification, assimilation, *ordre public,* internal and external consistency of decisions, *renvoi* as the reference back to the local order and onward to third orders. These terms provide a legal form for oscillating between inside and outside, for blending the foreign with the familiar, and for the game of confusion of self-reference and hetero-reference. Here it is in particular the legal concept of the *renvoi* which, as the reference to a foreign legal order referring back to the local legal order, has

always fascinated legal scholars in conflict of laws by the very nature of its paradoxical, circular structure?' Should the *renvoi* be prohibited? Should the *renvoi* be aborted, or should one follow its lead? Or can it be made productive by introducing appropriate distinctions?

Is there in the collision of the discourses a similar game of confusions in form of the *renvoi,* that is, in the discursive references back and forth? Indeed, those other discourses refer to the law, when in conflict, and the law refers to other discourses, when in conflict. Are these only infinite reflections of symmetries, empty tautologies and vicious circles? There is a case to be made for observing if and how legal practice succeeds in shifting symmetries into asymmetries, in unfolding apparently empty tautologies, in turning the vicious circles of references and references back into virtuous circles.

Now, if legal theory could search into this direction, it could play an entirely different role in the game of references. It would definitely get away from merely endlessly pitting a political theory of law, a moral theory of law, and an economic theory of law against a legal *(sic!)* theory of law, and calling one of them the ultimate one. Instead of trying once more to declare one of the particularistic rationalities as the very deepest fundament of law and justice, jurisprudence should develop a theory of discourse collisions which calibrates law precisely to the plurality of social rationalities. Such a theory could delineate, in the never-ending game of references, how to arrive at the necessary asymmetries, substantiate tautologies, unfold paradoxes without reducing the plurality of the points of references, and it could-perhaps-contribute to its refinement.

So the specific mission of legal theory would be to reflect upon the infinite game of references played out between a plurality of observation posts and, upon its translation into a 'constitutional' form. Will such a constitutionalisation reformulate the classical compensatory task of law in a new context? Will a constitutional form for the conflict of discourses be able to curb self-destructive dynamics? Or at the very least will it counter them with some measure of compensation? In the old inter-personal conflicts, the classical task of law has been to guarantee the mutual acknowledgment of autonomy, to curb mutual infringement and to compensate for mutually inflicted harm. Is there a way to translate these classical concepts into today's interdiscursive conflicts?

Of course, there is one fundamental difficulty of such an interdiscursive law of conflicts. It must accept the conflicting particularistic rationalities on equally authoritative footing without being able to assume the rationality of the whole. However, exactly the same has always been the situation of the international conflict of laws which does not assume a hierarchical top of world - law that would have to decide on conflicts. Historically and by default, conflict of laws has used a strangely paradoxical technique of self-application. National laws have been judges in their own case. Conflict of laws has designed a multiplicity of national *fora* which decide international conflicts by recourse to one of the laws in conflict. This multiplicity of decentralised *fora*, deciding on conflicts, fills the void of one central international conflict forum. This is indeed the situation of conflicting discourses which, as is well-known, have lost their *meta-recit* in the course of the most recent history of the Western world. Discursive collision can only be decided decentrally, only within each discourse, and in each case afresh and differently.

This leads, as it does in the case of the national *fora* of the international law of conflicts, to the further question as to what the forum for the interdiscursive law of conflicts could be like. What is the appropriate forum on which the conflict of discourses can be treated? In principle, there are two venues: either it is the *forum internum,* situated in the legal system itself or it is the *forum externum,* situated in one of the other social subsystems. Either the collision is 'incorporated' in the operations of the internal forum of law, or it is 'externalised' into the operations of an external forum. Both scenarios are institutional reality today. They reveal, each for itself, quite different normative perspectives which indicate how law can respond reflexively to the collision of discourses if it translates the game of references into constitutional forms.

In the following, I shall concentrate on these two scenarios and what follows from their normative perspectives. In the first scenario, the case of 'incorporation', the elements of the colliding social discourses are reconstituted *ab initio* in the forum of law. This opens up perspectives on how legal argument can respond to the conflicts of discourses. My example here will be from the field of legal reasoning - the methods of legal consequentialism. Can we gain new results for the discourse conflicts through consequentialist argumentation? In the second scenario, the case of 'externalisation', discourse collisions are dealt with in the *fora* of social subsystems other than law. Here the perspectives for a translation of the game of references into legal constitutional forms are quite different. My example will be the institution of ethics committees, a selection of social, non-legal *fora* for the treatment of social conflicts. My chosen perspective leads here to the question: is it possible to counteract the imperialism of one particularistic rationality by counterinstitutions in the fabric of social discourses?

DISCOURSE COLLISIONS BEFORE THE FORUM INTERNUM

Jurgen Habermas, in his work *Faktizitdt und Geltung* has dealt exhaustively with the first scenario, the case of the incorporation of conflicts and the battle of autonomous social discourses before the forum of law. He pursues the question as to how different discourses find their way into the law, and how law can decide between them. He draws a distinction between moral discourses which aim for universality, ethical discourses which target individual or collective identities, pragmatic discourses which establish relations between ends and means and rank the priorities for certain collective goals, and finally forms of bargaining which constitute a culture of fair compromise. They all turn into an internal conflict for law in the moment that these autonomous forms of discourse are 'translated'-to use Habermas's word-by the legal discourse which represents an autonomous form of discourse in its own right, guided by the criterion of legal coherence.

According to Habermas, law solves conflicts of discourses by adhering to a 'processual model'. Pragmatic, ethical, moral and interest-oriented arguments are freely exchanged in legislative process, as Habermas sees it, until they reach the filter of legal argumentation at the end. Here the legislative programmes resulting from discourse are subjected to a test of norm coherence, especially constitutionality, in order to find out whether they fit the relevant legal system. According to Habermas, the situation of judicial decision-making in applying norms is quite similar. Here too, Habermas identifies a number of pragmatic, ethical, and interest-oriented arguments which are at the end controlled by the measure of legal coherence. Coherence appears in both cases as a kind of filtering device which excludes as non-consistent some of the solutions which result from the free play of discourses in the forum of law.

In my view, Habermas has found a sensitive concept for the problem of collision with this approach. However, he simultaneously overestimates and underestimates the role of law in resolving this problem. On the one hand, Habermas overestimates the communicative rationality which is actually provided by legal procedure; on the other hand, he underestimates the single-mindedness of legal dynamics which does far more than just filtering out arguments. The overestimation of law leads Habermas to believe that the procedural rationality which is incorporated in law does not only produce substantial norms discursively but can even assist in clarifying argumentatively the meta-question of the collision of different discourses. This will surely be well received by some legal scholars in their professional self-aggrandizement who celebrate, in particular, constitutional law as the place where the social divisions are healed. In fantasies of omnipotence entertained by a 'New Republicanism', constitutional law emerges as the locus of a social super-discourse of a fictitious civil society which takes over the tasks of integration of fragmented society.

It is certainly asking too much of law to achieve this, for where are the cognitive and procedural resources of the legal process which could empower it to decide between economic, political and moral rationality and claim to be binding for all society? If science which, after all, is stacked with shining intellectual riches for problem-solving cannot succeed here, how much less likely is it that law can succeed with its comparatively impoverished intellectual equipment? Instead of taking the normative projections of constitutional law scholars too seriously, one should observe legal practice itself more accurately. In doing so, it is easy to see that legal practice indeed reconstructs the arguments of the other autonomous discourses but that it, at the same time, 'deconstructs' these external universalities in a particular fashion. Law turns their universal rationality into local rationality. It produces precisely the contrary of what a super-discourse would produce in terms of substantial rules and what a meta-discourse would produce in terms of collision rules. It does not solve the conflict at the highest level of universal justice, that of the super- and meta-norms but, in fact, chooses the lowest level, that of local justice. It does not perceive the different discourses as a conflict of universalities but only through the looking glass of a local conflict and resolves it at this level, only locally, without ever coming close to universal perspectives.

It is here that Habermas, on the other hand, underestimates the specific contribution which law can make towards coping with discourse collisions. The legal arguments which are applied locally have a greater effect than that of a mere filtering device which excludes some of a number of discursively established results as inconsistent with the past legal practices. Rather, the concrete question of applying the law, that is, the local practice of equal or unequal treatment is the crucially productive mechanism which also copes with the collision problem. To treat what is equal equally and what is unequal unequally is not only a fundamental legal norm but also a dynamic process of law-making which triggers off a self-propelling series of distinctions. It is not only a question as to the test of normative coherence, as implied by Habermas, it is above all the question as to a generative mechanism, a 'historical machine' or a 'non-trivial machine' as Forster would call it. In this context, concepts like precedent, *stare decisis, and* treating the equal equally are not what is interesting. Rather, it is the deviation from the precedent, the 'distinguishing' and 'overruling', the unequal treatment of what is not equal, which provokes the search for new legal norms and produce arguments on which to ground them. Legal inequality provides the conceptual framework for the never-ending

search for alternative norms and facts, principles and values. It provokes innovations which, in turn, introduce a new round of questions of 'equal or unequal?' in the chain of distinctions.

Law also uses this local rationality to treat the collision of discourses. 'Equal or unequal?'-that is the question with which new constellations are absorbed by law by subsuming them under a local rule. In order to answer that question, law incorporates incrementally, *ad hoc* and eclectically some of the arguments provided by other discourses. Here it is crucial that law does not accept, as a whole, the method of universality from morality, the issue of identity from ethics, the goals-means relation from pragmatics, the cost-benefit logic of economy, and the policy method of politics. Rather, law collects from these conceptual edifices individual pieces *ad hoc* which are then fitted in its own constructs according to the blueprint of equal treatment. Constantly on the relentless search for criteria for the distinction of equal versus unequal, legal discourse is scanning its discursive environments, borrows ideas, rules and principles where it can, and exploits moral, ethical, pragmatic and strategic arguments. However, it transforms them all into legal criteria for the assessment of the issue as to whether the new constellation has to be decided differently according to norms which have yet to be found. Contrary to Habermas's conclusions, we do not see here a free play of discourses in the forum of law but find that external rationalities are literally 'enslaved' for the purposes of the legal system. Francois Lyotard introduced the distinction of *'litige' and 'differend'* in order to define that slavery. Discourses are closed off from each other because of their different internal grammars in such a way that, in the case of a conflict between them, no *'litige'* is possible, and that means no fair trial in which both parties can make their cases authentically and in which a just decision can be made. Nonetheless discourses can 'meet' in spite of their hermetical closedness, but only by way of *'differend',* that is, a confrontation, in which one discourse perpetrates structural violence on the other and commits injustice.

A more accurate way to analyse the slavery perpetrated by the *'differend'* is to look how the 'history machine' of an equal/unequal treatment of cases treats arguments which are foreign to law. This machine forces the strict discipline of a legal procedure on them which decides, on the basis of the current law, which arguments are admissible, which aspects of the foreign argument are legally relevant and which are not, how priorities are set and how conflicting perspectives are treated. Indeed, the current law as the historical product of the operatively closed legal system decides how unequal cases are currently decided. To have disposition over inequality is the privilege of law and this includes the legally authorised use of arguments which are foreign to law.

Just as a domestic court does not apply foreign law authentically in the international law of conflicts, legal discourse does not all of a sudden act in an authentic manner morally, ethically, scientifically, economically or politically when it uses non-legal arguments. In both situations, foreign concepts are radically reconstructed. National law of conflicts constructs, in cases which touch upon foreign law, a mixture of domestic and foreign rules from the perspective of the local forum, that is, a hybrid body of rules which is significantly different from the rules which a foreign court would apply. Ago has captured this 'constructivist' method in conflict of laws aptly:

> Necessarily, the legal order is always exclusive in the sense that it excludes a legal aspect of everything which does not re-enter that order as legal.

Indeed, re-entry-in the terminology of Spencer-Brown - is the term which captures the remarkable transformation of foreign concepts into legal conflicts. An original concatenation of distinctions separates, through their operations, the legal system from its environment; what is legal from what is not legal. Legal operations, by their very operative closure and, as a matter of principle, cannot reach out into the domains of non-law. As a result, law can only reconstruct its environment internally through closed, self-referential operations. This internal reconstruction of the external world is never identical with the events as they happen in the external world. Even if their substance appears to be identical, they are different because they are recontextualized. For instance, at the very moment that law reconstructs moral arguments internally, they lose their relation to the criterion of universality and to the moral code. They are now subjected to the mechanics of the equal/unequal treatment, pressed into the programmes of law (rules, principles, doctrines) and ultimately linked to the binary legal code of legal/illegal. Calculations of costs and calculations of power, policy arguments and scientific constructs, they are all treated by the law in the same way. They all become strange hybrids which are now, however, the sole responsibility of the legal discourse.

The most important effect of enslaving as far as discourse collisions are concerned, is that what could not be compared before can be compared now. Or what could not be decided before can be decided now. However, and this cannot be stressed strongly enough, this effect works only within the symbolic territory of law. Law does not assume the role of the super umpire of the grand society game. It can only compare discourses within the legal game, and that only in the aforementioned local way. Discourses remain incompatible outside the world of law. The re-entry to the internal side of law has

the effect of making incomparable universalities appear all of a sudden as comparable entities inside law by reproducing the external world internally.

Precisely this, making slaves and comparing what was incomparable, is what happens through the re-entry of foreign meaning into law. All these concepts lose their original meaning and appear as items for decision-making in the history machine of law. Moral maxims, ethical identities, pragmatic recommendations, economic cost considerations, policy strategies all undergo a remarkable process of transubstantiation; after their re-entry they appear as mere components of the legal discourse: as legal values, legal principles, norm purposes, interests and ambits for decision- making. Consequently, this is not a case of the moralising, politicising, economising of law but it is, on the contrary, the case of the legalising of moral, economic, political phenomena with the effect that their discursive differences become neutralised. In this way, perspectives of efficiency, effects of policies and moral principles can be offset one against the other in each case - but to repeat: only in so far as the internal realm of legal discourse is concerned.

It seems as if, with this approach, legal practice is quite in touch with most recent developments. Indeed, legal practice seems to fulfil the extravagant demands of a post-modern plurality of discourses. Law does not need the *meta-racit* of a societal central agency in order to treat the conflicts between different social rationalities; nor does law itself become such a *meta-racit;* nor must law give in to an economic, political or any other particularistic rationality. Rather, the re-entry of particularistic rationalities into the realm of law makes them now reappear as comparable components of legal discourse, and can so be offset against one another on the basis of legal argument in each individual case and in a form which resolves the conflict between the particularistic rationalities.

CONSEQUENTIALIST REASONING AND POLYCONTEXTURALITY

An ingenious solution, indeed! Of course, legal practice invented it and not legal theory. But there is a price to pay for it. This is not only the trivialisation of 'high-cultural' achievements which become legal petty cash. Far worse is a loss of reality which comes along with making social particularistic rationalities the slaves of law. Law seems to lose contact with social reality by enslaving it, precisely by making contact with the social reality through the incorporation of its concepts. Enslavement takes care of the conflict, at least in the single case, in the small world of law. However, what does that imply for the acceptance of the decision in the large world of society? Seen in the perspective of the international law of conflicts, law has solved, with the re-entry, the problem of its 'internal consistency', that is, the problem of the coherence of its own order, satisfactorily. However, what about the 'external consistency', the acceptance in the external order? The ingenious solution is not reflected in the environment of law; it may even result in environmental damage as far as the other discourses are concerned.

A similar effect can be seen particularly clearly in the parallel case of economic calculations: just like the legal discourse the economic discourse also enslaves the world in its entirety-including events which are clearly far away from economics like love, religion or the law-in assessing them all as cost factors and submitting them, even if under the mute protest of the enslaved rationalities, as now comparable items to the economic calculus. However, this way of calculation has no base in the social context and it creates harmful effects on the ecology. As a consequence, the ecologisation of the economic discourse, that is, the 'external consistency' of economic calculation, is a burning political issue.

Perhaps, then, the ecologisation of the law of discursive conflicts is the point where legal theory can inform legal practice? For theory can show that the law has created an asymmetry in the form of the 're-entry' which enables society to refer to law. But at the same time, this has seriously prevented law from referring back to society completely, and has at the same time denied law a sensibility as far as society is concerned. Is there not a case to be made that law should develop conceptual sensors as to whether or not its treatment of collisions has harmful effects on its social environment? Should the law not be concerned as to whether or not its well-meaning conflict decisions are inflicting damage on its social environment? Should one not here once more introduce the circular reference of the maligned *renvoi* in order to give law a base in society?

I would like to examine this general argument using an example from legal methodology - consequentialist reasoning in law. I shall suggest a particular form of teleological orientation to legal practice which would be not to adopt teleological orientation in general but which is tailored to the problem of the ecologisation of legal discourse.

Today lawyers make, as a matter of routine, decisions contingent on their actual outcomes. They do so even though they know, or at least could know, that this cannot work. However, lawyers have hoped that concrete empirical findings on the causal consequences of legal decisions will lead to general models which will warrant predictions as to judicial or legislative actions. These predictions, in turn, could then be translated into legal argument for or against a concrete legal decision.

However, there are new doubts in sociology as to the prognostic capacity of social sciences which undermine a consequentialist orientation in law. These doubts are not only related to the temporary backwardness of the social sciences when compared with the more successful natural sciences, a backwardness which may soon level out. These doubts extend to the fundamental principles of scientific methodology. There are now theories in the natural sciences which categorically deny predictability in certain constellations, even if events are fully determined and all laws governing them are well known. Furthermore, the chaos character of social processes is cited as a reason why predictions are impossible in principle or only possible within extremely narrow margins.

A second problem for legal consequentialism is that causal chains are infinite. According to Luhmann, a form for legal consequentialism has to be found which does not increase the 'variety' of law to such an unbearable degree that the functioning of law is put at risk. The challenge is to find new 'redundancies' in law mitigating uncertainty in decision-making which has been increased by consequentialist reasoning.

Here Dworkin made the widely recognised suggestion that rights be rendered indispensable and be excluded altogether from consequentialist considerations. The interesting point about this suggestion is that it shifts the relation between variety and redundancy clearly in favour of redundancy by excluding whole bands of objectives for teleological considerations and thus from creating variety. However, in view of the density of interdependent social actions such a clean dissection of spheres of subjective rights will not be possible without considering the consequences of actions which are covered by law.

Therefore, the suggestion by MacCormick to limit the array of the outcomes which have to be considered rather than the band of objectives for consequentialist considerations, appears to be more realistic. MacCormick permits legal consequentialism only when general rules are at stake and excludes it in relation to individual decisions. He refers such a 'rule consequentialism' to the concept of universal applicability in law. 'Rule consequentialism', in contrast to 'act consequentialism', would clearly increase redundancy and decrease variety.

A suggestion by Mengoni takes a similar direction. He perceives the problem of consequentialism as caused by the, in principle, indeterminacy of infinite concatenations of consequences and wants to distinguish between long-term outcomes and short-term outcomes. Judges are advised to consider exclusively the first links in the chain. In this way, the number of external variables can be drastically reduced.

Grimm, finally, counts on a more normatively defined limitation of relevant consequences. He holds that it is primarily a problem for legal doctrine to develop criteria which allow a selection from the infinite number of consequences. He hopes that a systematic development of the concept of purpose in law will lead to further impulses for legal doctrine.

We have to follow these leads, in my opinion, but must also move with our abstraction in a different direction. The relevant consequences of modern law are today no longer experienced in the diffuse lifeworlds of the subjects of law with their infinite causal chains but in the other specialised social subsystems where decisions of the legal discourse are translated, through a new form of re-entry. Only after such a translation has taken place, can it be detected in law whether a legal decision can be tolerated in the other discourse or whether it inflicts negative, disintegrative or even destructive effects. *Altera pars audiatur.* This means that not only must the other party involved in each individual case be heard before a legal conclusion but also that the other discourse involved has to be heard before the law can make a decision on the collision of discourses. With the help of a 'back translation', law should be made capable of receiving the specific linguistic form of such 'translations' and their possible damaging effects. Law should make good use of the sociological insight that, in social discourse, legal norms are not just read as expectations of the law addressed to them and demanding obedience. Rather, legal norms are reconstituted economically, politically and pedagogically in a 'second reading' by respective discourses. Rules are 'translated' as cost factors, power positions and as instruments of education. A legal observation of the consequences of decisions should now, by way of a 'third reading', limit the relevance of the, in principle, infinite consequences to the few but decisive consequences which have a negative impact on the law's discursive environment.

'Translations' matter, not causal chains! How is the legal norm translated into the other concrete discourse? How is the re-entry of the legal decision into society worked out? What does the 'second reading' of legal norms look like in other discourses? Does the legal norm have negative, disintegrative, destructive effects? And further: how can the legal discourse respond, in a 'third reading', with new norms which take its social environment into account? This should be, in my opinion, the search and find formula of a realistically defined consequentialist orientation.

This orientation is limited, as it were, to the destructive effects of discourse collisions. At the very least, this orientation could make up, in parts, for the lost contact with the social environment which came about because law legalised the conflict between colliding discourses, enslaving it and reducing it to trivial routine. Now the question could be examined as to whether or not the legal decision would

have negative effects on the discursive environments of law. In essence, this means limiting the analysis to one and only one consequence of legal decision-making: how do the actors in the relevant social system really read the legal decision? As a factor in a costs-benefits analysis? As a change of the concrete power relations? As a change to an educational programme? Does the translation have negative effects on the everyday life in that social sphere? This one consequence of decision-making has to be translated back again: what are the reactions which law can muster to respond to the negative consequences of its social transformations? There would be no need to rely on the impossible prediction as to how the actors in the respective social context would react to their second reading of legal norms. On the other hand, law would clearly gain in realism if it registered, in each case, only the one consequence, namely, whether the legal decision had a damaging effect in the second reading of the relevant social context, and whether it adjusted to these perceived effects by issuing norms which are less damaging.

Recent trends of 'contractualization' illustrate how consequentialist reasoning may be fitted to this iterative translation of discourses. Hugh Collins analyses how social discourses reread the norms of contract law and reconstruct their worlds of meaning after their 'contractualization'. Assessing their damaging effects on social relations (bilateralism, specificity, externalities, power relations) he proposes new ways of how contract law could respond to its own negative consequences.

Of course, one should not overestimate the anticipatory capabilities of law. If it is correct that the prognostic potential of the social sciences is far more limited than previously thought, the only solution which is left must be to strip legal consequentialism as far as possible of predictions of possible future consequences and to focus on the observation of environmental damage which has actually materialised. Retrospective observation of consequences is what is needed, not prospective predictions of consequences. In essence, we are no longer concerned with the ambitious project of applying sociological models for the prognosis of future behaviour in a response to legal change, but we are concerned, more modestly, with collecting factual information about the environmental damage which has resulted from the concrete second reading in the other discourses after they have reconstructed the legal decision on their own terms. The legal forum which has to decide on the collision of discourses would accept a greater responsibility if it exposed itself to the consequences of the decision, that is, if it tried to find out whether the decision had disintegrative effects in the other discourses and if it tried to draw conclusions from that.

However, the question remains as to whether we have found the sought-after antidote to law's tautologies, symmetries and paradoxes if it only returns the conflict between discourses as a legal conflict loaded, as has been discussed, with arguments about consequences back to the discourses. Is that not only pushing conflicts back and forth between different domains? The difference is made by the real changes which result from this process of translations and back translations. 'Re-entry' does not mean that external meaning is mirrored accurately internally, it means that external meaning is reconstructed internally and that new decisions are made on this basis. Ultimately, we can observe here a series of multiple transforming re-entries. First, the conflict between discourses enters the law and is decided there in the specific 'local' form. Second, the legal decision is reconstructed in the other discourse and leads to a reaction which is specific for this discourse. Third, the reaction is brought back to law and appears, legally reconstructed, on the screen for inspection, providing a new basis for decision-making. As the discourses are operatively closed, they can only misunderstand each other in this recursive process of reconstruction. At the same time, such misunderstandings are not mere fiction because they are, in fact, an internal reaction to an external irritation. They build on the 'tacit knowledge' of the other discourse. This added value is given by, as it were, a series of productive misunderstandings.

Are we only projecting an ideal world of law which is supposed to translate conflicts between discourses into law, decide on them and control the consequences argumentatively? I do not think so. Here, we can refer once more to the current practice of legal economics, this time in order to show that such a game of references is already played out in an advanced version between law and another discourse. First, law reconstructs here economic transactions on legal terms with the help of economic analysis; secondly, it adjusts legal argumentation to anticipated and possibly already materialised economically damaging consequences; and thirdly, it reformulates legal norms on the basis of these transformations. Nevertheless one has to be on one's guard as to the imperialism, or even totalitarianism of economic theory. If the law opens up to the claims of universality of economics in this way, it must be open to the other discourses as well. The task here is to generalise this game of *renvoi* as practised by legal economics and to apply it to the multiplicity of discourses in society.

DISCOURSE COLLISIONS BEFORE THE FORUM EXTERNUM

Of course, law's cognitive resources are considerably strained, if not to say overburdened, in this intricate game of *renvoi* by internalisation of collisions and observation of their consequences.

Unquestionably it is somewhat demanding to ask down-to-earth lawyers who are trained in case analysis to demonstrate multilingual attitudes which help them to reconstruct the language game of economics, politics and ethics within the language game of law. Then it is even more important to focus attention on other forums in society outside the law, in which conflicts between discourses are taking place. What can law contribute to this external treatment of the collision of discourses?

Here our attention is drawn to autonomous social fields of rule-making in which different social universalities are directly expressed in legal form. As we mentioned before, following the historical example of legislation and contract, a number of other plural sources of law have been developed, especially rule-making in formal organisation, technical-professional standardisation and other forms of private justice. The trick is always the same: transactions which are specific for one discours-economic exchanges, political acts, management decisions within organisations and acts of standardisation-are misunderstood as legal actions and perceived in law as contracts, statutes, associational laws and technical or professional standards. Thus, without going into the details of a demanding economic, political or technical analysis, law attains 'implicit' knowledge about the particularistic rationality of the social sector involved, if it is only sensitive enough to assimilate carefully the concrete social process and its rule-formation.

However, in this ongoing practice of social rule-making, law is prepared to make sacrifices to one god only, and is therefore at risk of losing its polytheistic virtues. Joining forces in this way with only one of the other particularistic rationalities, law may inflict damage on other social sectors. Seen in this light, constitutional review of legislation and, to a lesser degree, judicial review of contracts and standard terms of business can be called a service for polytheism. In this sense, constitutional civil rights and general clauses in private law can be understood as collision rules in the law of conflicts, in which the particularistic universality of politics or economics is changed by the incorporation of polycontextual elements. In comparison with judicial review of statutes and contracts the judicial review of the internal laws of organisations and of technical-professional standards is clearly lagging behind.

Even more exciting is the question as to how discourse collisions arise in arenas of legal pluralism itself. This exports, as it were, the collision from law to other discourses themselves. According to Wietholter, this creates a situation in which 'autonomy' understood as self-determination of social discourses needs to be respected by the law and, at the same time, control by law is not exercised as outer-directed but as a possible help in the situation of impossible self-help, a maeuetic situation, not unlike counselling and mediation arrangements outside of law.

Can this subtle game of autonomy and heteronomy be institutionalised? Again, I have chosen an example, in order to illustrate the abstract perspective. 'Ethics committees' in the broadest sense are currently one of the politically most exciting experiments. This is perhaps less so for the national top level ethics committes which work out general rules and is more so for the small local ethics committees in hospitals, business firms and universities which review problematic decisions. In the polycontextual perspective, they are problematic because they are highly specialised, particularistic unidimensional transactions that are in potential conflict with the inner logic of other discourses. The primary task of ethics committees would be to search for discourse collisions: can these decisions be justified in the light of different universalities in order to do 'local justice'? These questions should not be decided by the law, rather they provide law with a new task: to constitutionalize alternative institutions which infuse a polycontextual orientation into highly specialised discourses in society.

One aspect of this new task for law is particularly important. In order to cope with collisions, law would have to switch over from the current pluralism of interest groups to a pluralism of discourses, a pluralism of language games. Law should not attempt a micropolitical imitation of interest group pluralism as it is practised in a larger political arena with changing corporate participants. To structure ethics committees with a concept of group pluralism in mind would be a mistaken method of their 'politicisation'. The decisive question is whether or not in a rule-making process which is dominated by only one type of discourse it is possible to institutionalise competing rationalities via participation rights, demands for information, evidential procedures and decision-making procedures. *Altera pars audiatur.* This would mean here that ethics committees would not just listen to different group interests but make sure that the dominant economic or medical discourse would not inflict damage on the internal life of other social areas, on the conditions for their proper functioning and on their guiding principles.

JUSTICE FOR THE HETEROGENEOUS

Here, then, are our principles for the conflict of discourses under law. The infinite game of *renvoi* reappears now in a double way. If discourse collisions are internalized and brought before the *forum internum* of law, legal reasoning should take on a consequentialist orientation which focuses on negative effects of those collisions. If the collisions are externalised and disputed before non-legal *fora*

the law should be brought in to transform those uni-dimensional extra-legal rule-making processes into polycontextural institutions.

However, in both cases we should be resigned to the fact that there are no general and substantive legal principles, no super-norms, no meta-norms which could ultimately resolve the collision of universalities. Rather, in both cases the role of law is limited to simply participating in the infinite game of *renvoi* played out by closed discourses. Law only influences this game in a particular way, constitutes it in legal forms and infuses it with elements of juridical rationality, at best, contributes to minimising destructive tendencies in the collision of discourses. Emile Durkheim could still hold that the threatening centrifugal tendencies of the modern division of labour will be countered with integration through organic solidarity, restitutive law and professional-corporative ethics. However, today in a world of radicalized polycontexturality, an 'integrative' role of law is definitely ruled out, if it means that the law signifies governing values, principles and norms as valid. Rather, law's role is externally to impose internal limits on the unfettered dynamics of a specialized discourse in the interest of other discourses. The current task of law cannot be to reconstitute the lost unity of society but to designate borders of plural identities, protect them against domination by other discourses and limit damage from the fallout of discourse collisions.

The central concept is 'justice for the heterogeneous'. Lyotard says about a justice of multiplicity:

> Justice would be this: acknowledging that the plurality of the interwoven language games cannot be translated into each other, and that they have their own autonomy, their own specificity which cannot be reduced to one.

One would extend the old *altera pars audiatur* from an individual to a social perspective that sees the plurality of discourses as the central problem of society today. No longer can these conflicts be decided by a central authority; rather, central authorities are in an intractable conflict with one another. If we insist on such a position 'beyond hierarchy', justice could be conceived as a relative term which would not be applicable in one location only, say, law or politics, but which would have currency in all discourses. So justice would denote the deeply problematic relation between discursive identity and discursive otherness, not however from a superior third party perspective but from the unique perspective of one singular discourse in relation to the meaning worlds of other discourses. Justice, then, would not be anything specifically legal, something which under current circumstances would still justify a privileged role of law. Rather, justice is a provocation for each discourse. A legal system would respond to the challenge of justice in a double way. It would not only attempt to achieve the internal consistency of law but, at the same time, would attempt to reconstruct internally the rationality of the other discourse which is involved in the conflict. Justice seen in this way would put modern law under a demand which is two-fold. The question is no longer only: is law treating what is equal equally and what is unequal unequally, but the question is now also: does the law do justice to other discourses on their own terms?

Without doubt, such a justice for discourses has to live, from its inception, with the certainty of its failure. Principally, this justice cannot rule out that discourses violate one another. It cannot reverse the fall from grace in the form of a profound social divide, functional differentiation and fragmentation of discourses with all their self-destructive tendencies. 'Compensatory' as this justice is, it can only insist less ambitiously on an *ad* hoc limitation, reduction and compensation of the harm which is inflicted by the collision of discourses.

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