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Anti-Teubner: autopoiesis, paradox, and the theory of law

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> It is the condition of human law always to decline endlessly, no part of it can ever stand unchanged for ever, and nature makes haste to bring forth many new forms ... (Watson ed., 1985, pp. 532–535, *Confirmatione* 18)

In classical rhetoric the figure of paradox – *paradoxon* – was defined as an expression of wonder and was associated with doubt and with linguistic deceit or simple confusion. As a figure of reference, paradox suggested an impossible unity or conjunction of opposites that would forcefully, if ironically, persuade the listener of a thesis that could not otherwise be demonstrated. While the figure of paradox might generically imply wonder, marvel, or some other species of openness to the indeterminacy of the real, it should also be noted that the predominant rhetorical sense of paradox has been associated with the corruption of eloquence and the abuse or manipulation of an audience or, in forensic terms, jury or judge.

In the context of law, the figure of paradox was especially significant of the decline of the art of legal oratory. For Quintilian, and more explicitly still for Tacitus in the *Dialogue of the Orators*, (1914 edn) the use of paradox was a principal sign of the unfortunate divorce of legal scholarship from legal decision making and of legal education from legal practice. The frequent use of paradox signified not only the corruption of eloquence – the divorce of law from literature, from poetics – but a more fundamental irrelevance and even decadence or ethical decline in the scholarship and pedagogy of law. For the lawyer, paradox was a figure of ill omen and signalled at best declamation rather than legal oratory, the dispute of the schools rather than the judgements of courts or the reason of law. If one looks to Renaissance works on paradox, it is again that alternately playful and polemical meaning that most commonly defines the use of paradox or, to borrow from Anthony Munday's popular treatise, *The Defence of Contraries* (1593). For Munday, paradox was a figure taken from the schoolroom and used in the Inns of Court to train the apprentice in the art of researching and defending the implausible, the unpopular and the unorthodox. The defence of opinions that conflicted with or outraged popular belief was explicitly depicted as a radical species of declamation rather than logic of argument and this exercise was self-evidently polemical and directed against common sense (1593: fol. A4b). Even for a proponent such as

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Munday, the discourse or elaboration of paradoxes was presented as a sophistic exercise, as play or intoxication, rather than practice or proof. For the lawyer Puttenham (1589, p. 189), paradox was equally a figure of obscurity and of limited use in the agonistics of law.

The negative connotations of paradox, and the infelicity of self-contradiction in the propounding of an argument or justification of judgement, alike suggest the novelty of treating paradox as fundamental to the order and reason of law. It is perhaps in this sense the greatest contribution of the autopoietic theory of law to have explicitly recognized and positively acknowledged that the modern legal order can only properly be understood in terms of the paradox of a system founded upon self-reference (Luhmann, 1988, p. 162). For Gunther Teubner, the great glossator of Luhmann's work in the domain of law, the positive and constructive expatiation of the paradoxes of law – that the system is founded upon 'the violence of an arbitrary distinction' (Teubner, 1997a, p. 765), that the application of a legal rule is also the creation of a legal rule – is the most radical and novel dimension of this new jurisprudence. In treating paradox as definitive of the method and practice of law, Teubner undoubtedly introduces a novel and radical dimension to contemporary legal theory, as well as providing a valuable interpretation of autopoietic theory in its application to law. At the same time, and as should be expected of a theory that offers to structure a knowledge of law around the figure of paradox, there is also a declamatory and polemical resonance to the work of translation, persuasion and application to which Teubner has devoted many years. There is a sense, in other words, in which the use of paradox also connotes the more antique and dramatic meaning of institutional irresponsibility, ethical failure, and a certain sentiment of academic irrelevance.

In the spirit of paradox as the figure of the drama of non-correspondence between expectation and event, and of the incommensurability of the discourses of practice, I will treat Teubner's work in terms of contraries or of the paradoxes of its elaboration. The polemical trope of my title, 'Anti-Teubner', is itself paradoxical. The title is drawn from a work of considerable scholarship and wide influence entitled *Anti-Tribonian*, the work of a French Renaissance legal humanist Francois Hotman who there inveighed against Tribonian, the compiler of the fifth century *Corpus iuris civilis* and the emblem of the greatest of all the codes of law. Hotman devoted his work both to a critique of the helmsman or 'gubernator' Tribonian, and equally to an attack on his later glossatorial followers for mistaking and indeed sanctifying an imperfect relic of antique law for a coherent representation of a living system of legal rule: 'what is one to think of this huge and difficult enterprise, carried out by such a man in such unhappy times, in so great a number of books, in such a huge and horrible confusion of laws ... and put together in so short a time?' (Hotman, 1567, p. 55). *Anti-Tribonian* attacked the greatest systematizer that western law has known for his poor sense of history, his failure to appreciate the geographical limitations of the local roman law that he codified, and overall for an arrogance or excess of optimism that led him not only to ban all commenaries upon the *Corpus* but also to accompany the publication of that vast and prolix library of rules – the *Digest* alone ran to some fifty books – with an order that the classical texts upon which it was based should be destroyed.

Anti-Tribonian was a work concerned with the role and influence of the academic, of the law-teacher and scholar, and with the relationship of their scholarship to the enterprise, the practice and profession of law. In borrowing my title from that historic work, I do not intend a merely alliterative reference, nor do I wish to suggest any antipathy towards the contemporary and friend to whom 'Anti-Teubner' is at least

nominally addressed. It is my argument rather that, in borrowing the structure of my remarks from Hotman's emblematic text, I can also borrow the paradox of that work, which is that Hotman criticizes Tribonian and his followers for proposing unconsciously what Hotman himself eventually propounds as the explicit and desirable method of law, namely philology. In other words, under the figure of paradox, *Anti-Tribonian* can be understood as in large measure a work of critical appreciation, even of advocacy of the *ratio scripta* or system of written reason that Tribonian had inaugurated. It criticized Tribonian so as to better understand him and the law he had compiled. Its polemic was addressed to Hotman's contemporaries, and its barbs were reserved in the main for the unthinking glossatorial epigones who sought to purvey the contents of the *Corpus Iuris* as a sacred and so unquestionable truth. The reference to *Anti-Tribonian* is thus to be understood positively. The structure of Hotman's critique of Tribonian will form the model for an assessment of the status of legal science in a contemporary context in which law is also to be understood as not going well. To borrow from Justinian, contemporary legal systems are declining at an accelerated pace, new forms are emerging that bear only a marginal resemblance to the old order of law, and worst or most paradoxical of all, legal academics – the scientists of the juristic regime – are increasingly irrelevant to the production or promulgation of law.

Teubner too is a great systematizer (Teubner, 1993). He alone, or perhaps he first amongst contemporaries was brave enough to attempt to apply the late Niklas Luhmann's theory of social autopoiesis to jurisprudence, and it is to this enterprise in the application of system's theory to law that I will address my remarks. The study of law, which for Tribonian was explicitly defined as *legitima scientia* (Honoré, 1978, p. 243), is the terrain of legal science and it is through that lens of pedagogy and its various efforts at systematization that the question of law and science can best be approached. The initial question to be posed is that of the relation of law to the other social sciences: what is its place amongst the other sciences of society and how does that place affect the role of law in society or the status of its social practice? If the answer to that question is that the epistemic of law is not distinct from that of other social sciences, if indeed law is parasitic upon other forms of knowledge of social events, then it is necessary to return to an essentially artistic model of legal method. Focussing for these purposes on one polemical text, Teubner's 'The King's Many Bodies: The Self-Deconstruction of Law's Hierarchy' (1997a), and via certain necessarily paradoxical divagations on a certain tone that this sociology of law adopts, I will reinvoke the medieval concept of a 'gay science' of law as an alternative to some of the solemnities of autopoietic jurisprudence.

1. *Dissonance and consonance amongst the disciplines*

The autopoietic theory of social systems is undoubtedly the most radical and 'sophisticated' of contemporary social theories. (Pottage, 1998, p. 1) For Luhmann society is composed of systems and their environments and is to be understood exclusively in terms of communicative events rather than actions or persons. The social system exists independently of the psychic systems that inhabit its environment and act at some considerable remove from the systems of communication that constitute the social. The radicalism of autopoietic theory thus lies – or perhaps better is perceived to lie – in its anti-humanism and a corresponding and systematic disparagement of common sense. Modernity, for Luhmann, is characterized by paradox and virtuality.

For social theory, being is replaced by the self-observation of multiple, horizontally arrayed, systems of communication. The paradox of social theory is thus that it does not relate in any direct way to being or the various ontologies through which being was known in a hierarchically organized world, but rather social theory must be constructed, in Luhmann's version, upon elementary operations that have no foundation, that are based upon an origin that is 'entirely not there' (Luhmann, 1985, p. 48). There are no sovereigns and there are no subjects, only systems and the need for an epistemology that is capable of moving on, of 'thinking more about transportation and telecommunications and less about mutual feeling or community' (Murphy, 1997, p. 166).

Systems theory aspires to observe the self-constitution of the social world through the differentiation of communicative systems from their environments. In Teubner's slightly inelegant but persistent metaphor, itself borrowed from von Forster, order is created from noise (Teubner, 1992, pp. 71, 75–80). Society is composed of a plurality of colliding systems and rationalities, and these exist side by side, indifferent or epistemically blind to each other, without subjectivity or totality, the social whole itself being conceived as a disaggregated multitude of systems continuously in the process of differentiation in a context of contingent environmental noise. At the level of the system, which is to say at the level of our knowledge of society, all that exists are systems and these are autonomous, closed units of self-reproduction, be it economy, politics or law that happen to be at issue. If we take the example of law, then according to Luhmann, who like many social theorists trained initially as a lawyer, it must be conceived as a closed system: 'the law is completely autonomous at the level of its own operations' (Luhmann, 1989, p. 139). There is no law outside of law, to which it should be added that law carries with it no special privilege within the order or multitude of discourses. Law is one system amongst many, and just as law is blind to the disorder of co-evolving social systems, so too the social systems within which law is placed are largely deaf to the noises created by law.

The radicalism of autopoietic theory is also the source of its fascination. It is reminiscent of the Renaissance penchant for discourses against common sense or, to borrow again from Anthony Munday's title, it specializes in the defence of contraries, and the declamatory or, more technically the epitropic rebuttal of the commonplaces of public morality or censure (1593, fol. A4a). Following Foucault's famous aphoristic observation that we have yet to behead the king in political theory, autopoiesis offers the systematic and rigorous vision of a heterarchic sociality. Law cannot directly know the object of its regulation any more than other social systems can know the internal rules of construction of law's own order of meaning and self-reproduction. No-one knows anything of what is going on at the level of the social whole. Law is no better a guide, indeed it is a less accurate or simply a fundamentally archaic knowledge of the social in that it has as yet to develop a language for understanding communications and their operations. Counter-intuitively, and in some respects polemically, autopoiesis thus substitutes processes for beings, systems for subjects, and disappointed expectations for the discourse of rights. That nobody understands anything of what is going on – that 'direct' knowledge of other systems of communication is impossible – means that the discourse of the sciences is fragmented, and each science, law included if one considers the binary legal/illegal to be a variant upon the binary true/false, builds its own small field of meaning in a social totality of atheistic disorder or noise. Society and law, in other words, evolve in states of mutual blindness or systematic betrayal: 'the law produces internal models of the external world, against which it orients its operations, that is to say, through information produced internally and not brought in from the

outside' (Teubner, 1992, p. 97). The juridical model of truth, in other words, the antique notion of law as *vera philosophia*, is predicated either upon a sustained oblivion to the language or order of other systems of communication, upon forgetting, or and perhaps correlativley upon a hierarchical superimposition of legal judgment to detriment of other systems of communication.

Autopoiesis transpires to be something of a wild science, an ambitious and counter-intentional play of paradoxes, of dissonance and differentiation. It is in these terms a science that does not seek to know its objects but rather to observe autonomous patterns of emergence. It does not claim either to understand or to predict but rather to follow and to expose the patterns of dissonance that mark the relationship between different knowledges of the social. At the level of discourse autopoiesis observes that law, in its modern regulatory meaning, exists in a relation of uncertainty or blindness to the environment that it purports to regulate precisely because it cannot claim either to know that environment or predict anything beyond disappointment as the structure of its encounter with that environment. Thus, in Teubner's words: 'For society, all legislation does is produce noise in the outside world. In response to this external disturbance, society changes its own internal order' (1992, p. 71).

Society itself is, of course, a multiplicity of systems and so it would be wrong to imagine that there was any one code of responses to the noise or perturbation that constitute legal events for systems other than law. Using the example of attempts to regulate the economy by legislative mechanisms such as price freezes, interest rate changes or taxation, Teubner concludes that the interventions of law have to be regarded as 'reciprocal observations between two autonomous, hermetically sealed communication systems. The law invents an image of the economy, and formulates its norms in reference to this image. The economy invents an image of the law and processes its payment procedures by reference to it' (Teubner, 1992, p. 79). One system of meaning encounters and translates elements from another system of meaning. The translation is also a betrayal and we are left with a heuristic that is spelled out not only in terms of the paradox that there can be no direct communication between systems of communication, but more broadly in terms of approximation and refinement of meanings in response to perturbations and interferences. There is no reality or final referent to such a process but rather a pattern of affinities and adequations. Norms are replaced by 'irritants' (Teubner, 1998, p. 11), meanings by disappointed expectations and power by actions upon actions in the indeterminate sphere of communications.

In terms of knowledge of law itself, autopoietic theory offers a strangely conventional image of a legal world hermetically sealed within its own protocols of invention and interpretation, ineffectively striving to comprehend the languages of external social systems that have long moved on from the humanistic world of legal self-reference. Law, in other words, finds itself lost in the chaos of social discourses and struggling to mutate with sufficient speed to catch up with the econometric networks and communicative grids through which other social sciences endeavour to depict and comprehend impermanent and indeterminate social events. Autopoiesis is here, and despite a residual juristic tendency both in Luhmann and in Teubner to the use of latinisms, a new theory concerned with the novelty of a pluralistic world of social communications that have fled the nest of the law. Law no longer governs the order of discourse or the pattern of events, it has been overtaken by other social sciences, and particularly by the mathematically based disciplines of statistical governance and actuarial administration (Murphy, 1997, pp. 133 ff). Even in Teubner's view – and he is less extreme, a little less wild perhaps, than Luhmann on this – the closure of law leaves it subject to a radical

inversion of status. It is displaced from a position of sovereignty or governance, from the position of structuring principle of the social, to that of emblem and epiphenomenon in which the self-descriptions or narcissistic professional elaborations of law are increasingly divorced from any relation to the social.

If legal knowledge is predominantly characterized by its dissonance or divorce from the languages within which an essentially economic model of governance manipulates the various indicators of group welfare, autopoiesis could also seem to be a nihilistic theory of law. Disappointed expectations, irritation, fragmentation and non-communication might well seem questionable as the heuristic elements of a theory of law and yet at the same time it is only an unflinching willingness to address that dissonant or archaic quality of law that might finally bring the legal system – the various disciplines of the juridicial order – into some kind of relation of affinity or consonance with the social order within which they belong. An appreciation of the radical closure of law is the best opportunity that jurisprudence has for understanding and rethinking the place of law in society.

Turning to Teubner – what kind of man is this? – and to the question of social science and law, the longstanding antinomy of law and society, in which law is defined against its 'other', the social upon which it acts or intervenes, is displaced. Law differentiates itself from the social but it belongs within it and can only be understood either in terms of its own internal order of meanings, or as part of the fluid or processual space, the 'variable geometry' of an inconstant and ungraspable social whole. If, as Luhmann and Teubner agree, it is impossible for law in any direct sense to know the externality or reality upon which it purports to act – 'there is no direct cognitive acccess to reality' (Teubner, 1989, p. 743) – then law cannot claim the status of science or knowledge for itself and must dress itself up rather in the guise of art or technique and the indirect and largely unknowable effects of such techniques within the variable geometry of the social. The point can be put differently. If the social order is constituted by disparate autonomous systems of communication, that themselves exist in a relation of dissonance with the second order observations constituted by the social sciences, including legal theory, then in what sense can autopoiesis claim a truth or knowledge of law that exists independently of law's self-description? To answer that question requires an analysis of Teubner's own claims to knowledge, justification or *legitima scientia*.

Autopoiesis is in a sense for Teubner the discipline of consonance, it alone seems to allow for the accurate description of systems of communication through a fortunate or intuitively realistic grasp of the manner in which systems operate. This good fortune or will to knowledge comes packaged in a polemical form, as medicine or poison for a loosely grouped array of adversaries. Autopoiesis is always more than, and more accurate than, and more serious than its contemporaries. Starting with the first claim, which we must understand as an internal self-description of the system of communication that autopoiesis itself represents as a discipline or second order of observation (Luhmann, 1993), it can be noted that it is a claim pitched against a consistent image of the disciplinary adversary. In terms of historical accretion, the theory of law as an autopoietic system is pitched against a variety of forms of jurisprudence, and most notably post-structuralism (1989), discourse theory (1989, 1996, 1997b), legal pluralism (1992), critical legal studies (1993), postmodernism and deconstruction (1997a).

The concept of law as a system, which Teubner following Luhmann defines in terms of communicative self-reference, recursiveness and hyper-cyclical self-reproduction (Teubner, 1993, p. 69), is also an aesthetic and political intervention into the domain or

play of the disciplines. For Tribonian, the task of the systematizer was that of countering the chaos of history and the infinite variety of social events. As the medieval inheritors of the great codes framed it, nothing was more beautiful than order (*nihil pulchrius ordine*) and it was the task of the systematizer to introduce and maintain that order against the blandishments of time and the misinterpretations of the unlearned, unprofessional or 'imperite'. For Tribonian, the introduction of order involved not only compiling and systematizing a vast array of books of the law and subjecting them to a structured classification, but also required a ban upon further commentaries upon the law, or recourse to texts and interpretations that preceded and formed the basis of the code itself. The infinite and disordered mêlée of texts and opinions was to be ended by the promulgation of a singular text subject to a strict prohibition upon further commentary or emendation. Explicitly, the books of the law, the *Digest* and other parts of the *Code*, were to be the object of reverence and obedience (*adorate et observate*) and 'in legal proceedings and any other matter where laws are applicable, let no-one seek to quote or produce anything except from the aforesaid' compilation (Watson ed., 1985, pp. 532–535, *Confirmatione* 19).

The *Code* formed a system, and for Tribonian the concept of a system implied completeness and perfection: there was to be one system of law for 'all men' and for 'all time'. To this it should be added that the promulgation of the system would relieve society of the confusion and uncertainty of an unsystematized and disordered body of laws while equally introducing 'a condition of reasonableness, legitimacy and truth' into human affairs (Watson ed., 11985, pp. 532–535, *Confirmatione* 13). The law of laws was necessarily the prohibition of further sources of law or conflicting meanings of the promulgated text. The aesthetic of order was thus to take the place of the diversity of laws and the goal of *legitima scientia*, of legitimate knowledge or lawful truth, was to take the place of the play of interpretations or the plurality of sources and so of meanings that can be given to words and practices that stake a claim to be law.

It is necessary to proceed with circumspection and detail if a claim is to be made that autopoiesis offers a polemic or politics that can be compared to Tribonian's great gesture towards the immortality of law's truth, the absolutism or in modern terms the autonomy and closure of the system. There are certain questions that will not and perhaps cannot be addressed. Tribonian, for example, served Justinian and lent his name and his labours to the perpetuation of Justinian's christian vision of imperium and, to borrow again from Hotman's *Anti-Tribonian*, the promulgation of the property laws of 'bourgeois Romans' (Hotman, 1567, p. 74). There is a sense in which Teubner's relation to Luhmann, the aspect of discipleship or of reverence could be analysed in terms of transference or a psychic law of repetition. The systematizer is always a follower and in a sense a moderate who defers to the author of the system itself. While it is true that Teubner does defer and probably also reveres the author of systems theory, the autopoieticist, the significant feature of his polemic, at least at the level of self-representation, is that the real governs both law and knowledge of it.

The epistemic claim that autopoiesis alone can reproduce the real in discourse, which is no small claim, is one that is made initially in negative terms. Other theories of law suffer from a consistent aporia or lack in relation to their referent. Critical legal studies, another radical theory of law, is thus depicted as a 'strange exercise' in deconstruction, and specifically as limited by its failure to penetrate beyond the 'superstructural phenomena of legal self-descriptions'. It fails to move from doctrine, the self-presentation of law, to 'the fundamental legal paradox', the ineradicable paradox of law's autopoiesis or self-foundation (Teubner, 1993, pp. 6–7).

In another version of the same argument, this time addressed to exponents of the 'postmodern legal style' and to proponents of legal pluralism, the lack that marks fellow-travelling critiques of law is further specified in terms of a lack of seriousness: 'postmodernists are obviously satisfied to deconstruct legal doctrine and joyfully play with antinomies and paradoxes' while refusing to address the sobering question of what will follow after deconstruction (Teubner, 1992, p. 1444). The 'game of legal pluralism', in other words, should be replaced by the sober sociological study of closed systems of social reproduction. Leaving to one side the question of whether deconstruction, a method of textual interpretation or at its strongest a species of philological inquiry, should be discounted for lacking an explicit project or sense of progress, the fundamental issue seems to be the lack of a sense of the fundamental which would here seem to be the duty that legal science owes to society, or that juristic theory somehow owes to the creation of a better world.

In another and exemplary article on deconstruction, the aura of lack attributed to critics of law is spelled out in terms of further absences. Deconstruction lacks clarity, its language is 'intentionally obscure' and unwilling 'to reveal its theoretical presuppositions' (Teubner, 1997, p. 764). Deconstruction is further castigated as not being radical enough: it does not 'go far enough', it is not 'ruthless' enough in pursuing its own enterprise, it remains content with what are in essence 'suggestions' and 'seductive ambiguities and ambivalences', it proposes at most transcendental demands, those of 'alterity, justice, generosity, friendship, democracy...' but leaves them 'forever undecipherable'. In short, deconstruction, the inheritor it would seem of the failings of post-structuralism, may be 'funny and exciting', but it is flawed by a lack of seriousness and of consequences that means that ultimately it simply affirms the 'order of modernity' (Teubner, 1997a, p. 767). Worse than that, and here one might sense an autopoietic trump, or in Freudian terms a slip, the relentless pursuit of deconstruction leads to a 'falling in love with the object of deconstruction. [The] postmodern mind [is] trapped in a fetishistic relation to the deconstructed thing which makes it impossible for it to suffer the loss of this thing and stops it from getting rid of this beloved object to make the liberating move beyond' (1997a, p. 773).

In the face of the joyful play, the 'dance of paralysis' or amusing inconsequentiality of deconstruction, Teubner poses the virile world of the fearless yet sober autopoieticist. He does not fall in love with law, he does not fetishize the object of analysis nor fear its loss. The autopoieticist is the unflinching practitioner of paradox and the political proponent of improvement, of progress in the theory or science of law, a progress that is both liberating and the means of moving on or 'beyond' the hedonistic impracticalities of merely doctrinal analysis. Where deconstruction offered nothing more than dissonance and disarray, autopoiesis offers the restorative or reconstructive balm of access to the reality of social relations. In its positive presentation, autopoiesis is a theory of law as a system predicated upon a founding paradox, that of the self-foundation of law (Luhmann, 1988, pp. 158–62). Recognition of this paradox is, for Teubner, both liberatory and productive and thus requires careful reconstruction.

The founding paradox of law is constituted by the binary opposition of legality to illegality. The distinctive feature of legal communication lies in the fact that the 'information it transmits relates to the legal/illegal distinction' (Teubner, 1993, p. 88). It is this distinction, the recoding of communicative acts under the differentiation of the 'lawful and the unlawful' (Luhmann, 1989, p. 140) that is definitive of the legal code and thus circumscribes the 'legal proprium', the boundary that limits and separates law from other systems of social communication (Teubner, 1992, pp. 1451–52). The

paradox of this foundation lies in the fact that there is nothing within the order of law that can legitimate the founding distinction itself: 'law's hierarchy is in reality a self-referential circularity where validity becomes a circular relation between rule making and rule application' (Teubner, 1997a, p. 765). The paradox of legality lies in the arbitrary nature of its founding distinction. Borrowing from the neo-Kantian science of language the notion that the arbitrary character of the system of differences should itself be the object of analysis, Teubner concludes that attention to the 'elective affinites between legal semantics and social structures make it possible... to produce some knowledge about the post-deconstructive reality of law' (Teubner, 1997, p. 767).

The veridical and the juridical meet at that paradoxical point, that fluid or variable geometrical space where in unity is understood as 'the unity of difference' (Luhmann, 1988, p. 163), or more concretely in terms of the 'multiple externalization of the paradox' (Teubner, 1997, p. 780). The elective affinity that produces knowledge of the reality of law is thus that between the multiple differing contexts of law, the 'polycontextual' and 'polycentric' character of postmodern legal practice, and the epistemic reflection of that fragmentation in the sociological account of multiple rationalities and multiple competing systems of communication. The epistemic language of this conclusion, of the liberatory and progressive knowledge of the real, is that of the 'visibility' of paradox and of the remedy of knowledge in the face of fragmentation. Complex, plural and inelegant though this epistemic might sound, the elective affinities that found the autopoietic theory of systems should not be understood aesthetically. The resounding moral lesson of Teubner's teaching is rather that 'it is historical developments in the practice of law that are now breaking this frame. The name of the great paradoxifier... is globalization... It is globalization that is killing the sovereign father and making the legal paradox visible' (Teubner, 1997, p. 769). Further on we are told that 'hard-core social reality made law's paradoxes visible', and that the 'hard-core operation of legal self-reproduction', the 'hard-core operations' of the legal institution, govern the reality of law.

2. *Autopoiesis and hard-core law*

Tribonian, Hotman and Teubner share at least one thing in common. It is that they are educators or pedagogues and that their theories have all been concerned with the representation of the proper method of studying law. The initial consideration or context of legal science, the dogmatic study and systematization of legal texts, is that of scholarship and the role of the scholar in the production of law and the maintenance or circumscription of the 'proprium' of law. It is important, therefore, to note both the immediate object and correlative method of such a study. Those learned in the law, the 'periti' or professionals, were experts first and most significantly in linguistics, in the meaning of words (*de verborum significatione*) and more extensively in the history and transmission of ancient authorities or sources of law. Philology was thus historically the model or, in Selden's terminology, the queen of legal science (Selden, 1618, p. xix). The history of texts, *literarum studium* or literary study (Budé, 1536, sig 26v), was the source of truth and the truth of the text was the lawful knowledge or reason of law.

For Tribonian, the work of the *Digest* was that of collecting the texts of an ancient learning, the scattered and often long forgotten or simply unknown writings of illustrious men (*vir illustris*), masters and priests of the art of law, whose words could be

conveyed to posterity as signs of a sacred truth. Those that worked on the compilation of the fifty books of the *Digest* are reported to have read 'nearly two thousand books and more than three million lines' produced by ancient authors and, like their master Tribonian they needed the arts both of eloquence and of the *legitima scientia* that marked the art of law (Watson ed., 1985, pp. 532–535, *Confirmatione* 9). It is important that when Hotman comes subsequently to define the critical project *of Anti-Tribonian*, the first issue addressed is that of philology, of texts, their history, and the teaching of law.

For Hotman, the context of his criticisms of Tribonian, from start to finish of the book, are educational. Tribonian's work is viewed as a monument to the study of law and is subjected to some eighteen chapters of criticism of the scholarly and specifically didactic qualities of the work. *Anti-Tribonian* is a treatise on the study of law and most specifically a critique of the systematizing urge that led Tribonian not simply to prohibit commentaries upon the law, but also to order the destruction of the earlier sources from which the *Digest* had been culled. Without engaging in too detailed a reconstruction of the humanist project that inspired Hotman, the tenor and the extent of his critique of Tribonian deserves some expression. The pre-modern and the postmodern are often linked and this instance would seem to be exemplary.

Hotman begins from the position that knowledge and practice of law are intimately linked. One cannot be separated from the other and hence the exceptional importance of the Justinian codification because that systematization became the primary source for the study and so also the practice of mediaeval law (Hotman, 1567, fol eib). The academic study of law was not simply an exercise in theology but also a training in justice, in an art and practice that depended upon the philological transmission and interpretation of ancient texts. Within this depiction of legal study the scholar is not simply the systematizer of law but also has the epistemological task of defining and circumscribing the boundaries of the object language of law. For Hotman, this meant that the scholar necessarily had the task of reconstruction and of critical elaboration of the textual sources of legal practice. Philology as the science of law here paradoxically implied attention to the geography and history of texts, the patient reconstruction of the linguistic, cultural and practical context of texts that Tribonian had transcribed, and frequently also edited, annotated and interpolated.

For Hotman, the system was a fiction. The notion that a vast compilation of fragments excised from earlier texts could form a complete, coherent, consistent and exhaustive system of law was simply an illusion, albeit a noble or at least grandiose one: 'In burning the precious books of the ancient Roman laws and written doctrines of the jurisconsults Justinian bequeathed a law founded upon questions of language and style as represented by the last Graeco-Roman jurisconsults... the discipline is disputatious because it rests upon nothing more complete than a collection of fragments, reports, pieces, themselves representing uncertain conjectures and divinations' (Hotman, 1567, p. 134). The task of scholarship was thus that of returning to the historical and geographically embedded sources of law and only then elaborating upon what law was appropriate or just for other times and other places. The shadow of antiquity – *tenebras antiquitatis* – was not to be allowed to obscure the ethical and political task of the legal scholar, namely that of inscribing and instilling a law that attended to its own time and place (Hotman, 1567, p. 79).

On one side, Hotman feared the mysticism of legal practice and the irrational reverence that was paid to an arbitrary and most imperfect code: 'The books were originally published by Irnerius, the original being guarded like a sacred and precious relic, only being very rarely shown, accompanied by candles and torches. Thus did the

ancient mystagogues show their law to the faithful' (Hotman, 1567, p. 120). Belief in the text as a system was not only an unwarranted and uncritical presupposition, a wild act of faith, but it was also a dangerous philological error. The compilation, the textual system, was neither complete nor coherent. To study it as such, to assume that the science of law was bounded by that one text, was to reduce the juridical order to an antiquarian fantasy and legal disputes to verbal chicanery, to 'conjectures founded either on some apparent lettering, or some trace of semi-effaced letters, or some inkstain or scribal error' that related in no way to contemporary events. History and the study of the geographical limits of particular laws composed for specific peoples and times were a far surer guide to practice than the phantasm of a system or the artificial enclosure of a singular codification.

In Hotman's account, the epistemic of law was tied to nation and to epoch and its study required a grasp of the methods of political, historical and philological analysis. The lawyer was in a sense a bricoleur, an artisan and scholar who endeavoured to understand the particular reasons and local events of their time. The scholar would here define the limits of law and it is perhaps not irrelevant to note the subtitle of Hotman's work, namely that his work is called the *Discourse of a Great and Renowned Jurist of our Times Upon the Study of Law*. In synopsis one could say that the scholar jurist endeavoured to promulgate a return to method as the theoretical component of law; the use of critique – a general geography – as the epistemic elaboration of the boundaries of law; and the contextualization of fragmentary texts as the pedagogic principle of a legal practice that aspired to some species of justice.

What is significant is that, whether practised well or badly, the academic played a crucial role in the formation and application of legal rules. The scholar was in epistemological terms a legislator, and under the name of science or diplomacy, scholarship or rhetoric, the legal academic as critic and theorist of law set out the parameters within which lawyers were schooled and law was practised. Teubner sits comfortably within that tradition and in one sense the purpose of his systematizing is precisely that of setting out the parameters, the epistemological and also and perhaps less consistently the ontological limits of law. At one level, and perhaps this is a recent and benevolent turn, his work has focused upon the construction of an overarching forum, a set of protocols within which to analyse the conflict or multiplicity of 'colliding discourses'. The new legal pluralism 'refers to a plurality of incompatible rationalities, all with a claim to universality within a modern legal system' (Teubner, 1997b, p. 157). The scholar, here the autopoieticist, is the arbitrator of competing and colliding discourses. The scholar plays the law, just at that moment when, in Teubner's words 'law plays society' (Teubner, 1997b, p. 152). What is it to play the law, if not to reclaim a bounded epistemic space and pretend that such heuristic space reflects or penetrates or otherwise reveals the real?

Autopoiesis dresses in liberal garb. Law is one discourse, one system of communication amongst many. Its claims to knowledge are no greater and are probably considerably weaker than those of other social sciences (Goodrich, 1998, p. 341). It plays at society in the sense that it judges social and administrative actions without the means of fully apprehending the social subsystems that it seeks to regulate or govern. Law, which endeavours to understand the social through its pathology, through the judicial resolution of conflicts, has little affinity with or means of comprehending a sociality that is both global in its operations and actuarial in its logics of governance (Murphy, 1997, pp. 171ff). It is for this reason presumably that social science, the sociology of autopoiesis, must stand in for, indeed displace, the archaic epistemologies or monotheistic epistemic

of what is historically a profoundly christian idea of law. Such at least is the hermeneutic move that autopoiesis makes: law is now to be understood not as a structure or truth but as a social subsystem, as a failing archaism or strange species of ethical drama played out in the twilight of the public sphere.

What the formulation of this new social science of law means in practice is less than self-evident. Autopoiesis is a theory of paradox – in rhetorical terms of wonder – and it necessarily thus always risks resolving in its opposite. The initial observation to be made is that the autopoietic claim to conflate the veridical and the juridical in a sociological law of laws functions as a re-assertion of the primacy of the scholar in the production of law. Autopoiesis comes bearing the gift of truth, if truth is a knowledge of the real, even if that knowledge is paradoxically predicated upon nothing more determinate than elective affinities between social structures and their scholarly elaboration. The question then becomes: what are these affinities? What are these laws? and who elects them?

The answer at one level is that in Teubner's hands the jurisprudence that autopoiesis offers is both scholastic and diplomatic. It is diplomatic in the sense that it seeks to use the esoteric language of autopoiesis to broker a relationship between competing discourses and conflicting rationalities. Autopoiesis, in other words, is the one system of communication that acts or evolves to the side of the mêlée of social systems and so has the comfort and the distance necessary to observe, to arbitrate and even to intervene in the progress of law. Admitting that such a politics 'beyond hierarchy' or this justice as between discourses must live from the beginning with 'the certainty of its failure' (Teubner, 1997b, p. 176), faces autopoiesis with another paradox. Diplomacy relates to the manipulation or simple wielding of power. Socio-legal science can wield only the power of academic discourse and so to shore up the lawfulness of this discourse, legal autopoiesis enlists the support of the real understood through the protocols of its own elaboration of *legitima scientia*.

Consider again the critique of deconstruction as no more than superficial and inconsequential game-playing, as no-more than an epiphenomenal appeal to ethics. Deconstruction was blind, paralysed and paralytic, because its attacks upon the ideology of law, upon the mysticism of legal sovereignty, were to no avail, the lawyers carried on regardless: 'all attacks on them turned out to be utterly unsuccessful in the institutionalized practices of law. Whatever the nagging doubts within legal theory, legal practice is still reproducing its operations... and drawing its legitimacy from a political constitution. It seems that the relentless deconstruction of law has no consequences' (Teubner, 1997, p. 768). This is the strangest of arguments and not least epistemically. It can best be understood diplomatically. If systems of communication have no direct access to other systems of communication, and if in consequence theory can only act indirectly because power is a question of emergence, of actions upon actions whose outcomes belong within the distortions of other codes, then all theory is relentlessly doomed if not to inconsequence at least to the incalculability of its effects upon other systems of communication.

In diplomatic terms, Teubner proposes at best that the protocols of autopoiesis are more acceptable than those of deconstruction: it moves better within the academy, it could even be something of a success in bridging or building 'linkages' between colliding discourses and in dissolving the legal 'irritations' that come with globalization. There is no particular reason to dispute this but it does not follow from this that autopoiesis has some privileged access to the 'hard-core' or real of institutional actions any more than the 'legal proprium' can genuinely determine the legality of a communication. The latinist notion of the proprium can also serve to remind us of the

moralizing quality of protocols and diplomatic interventions. What is proper to law and what is the property of law is a political question and it is one which autopoiesis can only answer in the quietist and somewhat melancholic or Hegelian terms of affinities or the ability of socio-legal science to respond to the prior determination of social events.

Whether Teubner's analysis of globalization – he discusses the determinism of *lex mercatoria* or international commercial law, of *lex sportiva internationalis*, *lex laboris internationalis*, or the internationalization of the contractual notion of *bona fides* in the *corpus iuris britannicum* – has a special affinity with the real, the hard-core operations of institutional practice, is not a question that can be answered directly. What his bravura rhetoric of consequences seems to suggest, however, is that in an era that has witnessed the increasing alienation of the legal academy from legal practice, he is asserting the commendable and historically leftist claim that legal theory should dictate the strategies of legal power and formulate the doctrinal variations that set the limits or announce the boundaries of governance. To insinuate the academic into the practice of the institution is a diplomatic adventure, a political game. What that politics would be is not yet evident, autopoiesis in this sense treads softly or speaks vaguely of rights and the justice of heterarchies. Nor is it apparent that the invocation of the real – ironically primarily in the form of latinate designations – lends a greater epistemic status to autopoietic depictions of externalities, operations and hard-core acts than is available to other depictions of the limits of law.

The remaining question, a scholastic question, is that of the politics of paradox, of interventions predicated upon protocols that cannot give a knowledge of the world. For Aristotle, law was wisdom without desire (Aristotle, 1965, pp. iii, 11, 4). Teubner adopts that maxim and stakes the plausibility of his theory in part upon that assertion of seriousness and of action as against affect. There is no place for emotion in the study of law. Reminiscent of the classical juridical exclusion of the feminine and the aesthetic (Goodrich, 1995, pp. 144ff). Teubner curiously denounces legal critics, deconstructionists, postmodernists and their acolytes for falling in love with the law, for fetishizing the law, for being unable to lay down the law or let it go. Such love is not part of the hard-core. Affect is opposed to knowledge. As elsewhere, however, this claim is paradoxical in that knowledge is explicitly presented in terms of the elective affinities between social structures and legal semantics. It is affinity, itself a species of affect, a smooth term, that should be examined by way of conclusion.

3. *Gay science and the paradox of law*

It is hard to think of devoting a life to a discipline and not in some sense, however obscurely or conflictedly, being in love with it. Academic object choice or the elective affinities of scholarly study necessarily presuppose some affect or drive that binds the intellect to its specific pursuit of texts. It is equally hard to think of being a legal academic or scholar and not harbouring aspirations to having an effect upon the institution or changing some terms of law. It is the propensity of academics, and not only of legal academics, weakly to imagine improving the world (Legendre, 1982, p. 3–7). Legal reason in some accounts is indeed a form of consequentialist reasoning and it would in a sense be doubly hard for a legal academic to exist, to expend, to work without consequences. In such a context, and although it may initially seem strange to equate the question of science with that of tone, Teubner's judgement of his colleagues is harsh. They play games, they dance, they are joyful, they are amorous, but precisely in this

hedonism or corporeal pleasure they evade the hard questions of law by witlessly falling in love with it. Deconstruction is declamation rather than dialectic, it is paradox without purpose, mere object choice at the level of texts. Put differently, Teubner's affections lie elsewhere in an image of social science and of the social scientist as dispassionately erudite, as worldly but wise, a serious yet smooth realist strategizing detachedly in a chaotic world. He can take law or leave it as occasion demands.

It is hard to disagree with this cold and virile image of the activist scholar. Even if Feyerabend in *Against Method* did rather engagingly mandate that seriousness in any enterprise is unimpressive (Feyerabend, 1975, p. 21), that affinity to lightness or flippancy was probably overstated. Even in radical formulations of method, the social sciences have seldom acceded in practice to the 'serious frivolity', 'innumerable laughter' or principle of *incipit parodia* that Nietzsche's reinvocation of the 'gaya scienza' suggested as the appropriate method of disciplines that historically mixed both music and prose, rhythm and writing (Nietzsche, 1910, p. 3). More strongly, the tragic tone of dismissal addressed to those others who fail to achieve the precision of elective affinities or the logic of autopoiesis is probably a mistake. The theory of autopoiesis is committed to a high level of recursivity or self-reflection and indeed one of the criticisms of the critics of law, the 'juridical Derridites' (Teubner, 1997a, p. 775), is precisely that they lack 'autologics or an analysis of the historical conditions that generated their critique. Such self-reflection would also, however, suggest that the antinomic desire to exclude the self-consciously affective, hedonistic or ludic is bound to a certain bad faith. Even in the most superficially descriptive terms, deconstruction is agonisingly self-reflective and recursive in the extreme or to the point of tedium. Similarly, if the critics have fallen in love with law, that is a very complex issue and one marked by ambivalence and nuance. If the postmodernists lack strength or seriousness or a sense of structure or autopoiesis, that is also a question of modesty, of geography and the plurality of forms of political intervention. Put differently, the critics of law, those 'against law' (Schlag, 1998, pp. 9–11) are genuinely practitioners of paradox accepted in its earlier sense of wonder: lost and in love, perhaps lost because in love, they flirt with law and they run from law, and in doing so I would suggest that they display a properly ethical ambivalence, and a properly paradoxical desire to learn – slowly, cautiously, effectively – more about their 'enamoratum', the object of their professional practices.

In that it is Derrida to whom the worst strictures of abandonment are addressed, it is perhaps worth briefly alluding to those affinities of deconstruction that fit badly or are too close to autopoiesis for comfort. The question of the autologics of deconstruction has been addressed many times and for Derrida the issue is one of the geography of theory as well as that of the cultural practices that deconstruction reflects. In *Memoires: For Paul de Man*, (1986) the questions of translation, of importation and the politics of deconstruction are lengthily elaborated and questions raised that innumerable critics have taken up or laid to rest. It is not, in other words, that deconstruction, whatever that term has come to mean, is disengaged from the war of texts (Derrida, 1979) or unreflective upon the conditions of its own emergence but rather that its engagements are more immediate, textual and located in the hard-core of the academic institution – in the life we reproduce through our own institutional practices – as opposed to a politics located in the image of an autonomous exterior world.

If the difference is not that Derrida avoids the questions that autopoiesis asks, then perhaps the playfulness or lack that marks deconstruction is a sign of other rivalries and of geographical and national differences. Derrida has, after all, been highly prominent

and irritatingly successful. The inconsequence of his theories has, ironically, had a huge impact upon the academic institution and most cultural and literary theory now knows at least in part how to read with the recursive tools of the judaic tradition. And perhaps in the end Derrida will be seen to have taught a modest or properly philosophical caution in the political claims that academics make. No theory, autopoietic or other, will dismantle the social structures or take the place of history or of law. What Derrida counsels in what is rhetorically, and so also politically, his most radical work is precisely a suspension of the position and arrogance of the judge:

> In that I still love him, I can foresee the impatience of the *bad* reader: this is the way I name or accuse the fearful reader, the reader in a hurry to be determined, decided upon deciding (in order to annul, in other words to bring back to oneself, one has to wish to know in advance what to expect, one wishes to expect what has happened, one wishes to expect oneself). Now, it is bad, and I know of no other definition of bad, it is bad to predestine one's reading, it is always bad to foretell. It is bad, reader, no longer to like retracing one's steps. (Derrida, 1987, p. 8)

That suspension of prior judgement, which is later recalled as defining justice (Derrida, 1990, p. 921), is equally a protocol for a politics of writing and a theory of law. We act politically on faith and a recursive sense of an immediate environment. Autopoiesis does not arrive at any different conclusion, but it still denounces the style of the fellow-travelling theory.

In the first instance the agonistic or antirrhetic logic of denunciation may fit well with the binary coding of autopoietics and the theory of a legal proprium – a system of communication that distinguishes legal and illegal, true and false – but it is not the most interesting of interpretations of the politics of contemporary jurisprudence. In one sense, the institutional rhetoric of law, of trial and judgement, is reproduced epistemologically: the veridical becomes subject to the agonistics of law. More than that, autopoietic theory here faces the danger of casting theoretical discourse into the domain and tenor of acrimonious internecine struggles, or the sibling rivalries of academic fraternities. The omnipresence of lack that surrounds the advent of autopoiesis in the academy can, however, itself be turned against that theory of contraries: it too, insofar as it is not everything, must lack. The question to be posed then becomes that of what it is that deconstruction can bring to that lack, what supplement or complement does it promise or threaten?

Returning to *Anti-Tribonian*, it is interesting to observe that in its Renaissance form the discourse of paradoxes or contraries was only in part an attack upon the philological corruption of law. Hotman like Nietzsche sought to know more not less about the law. The reverence of faith was to be supplanted by the relational and mundane qualities of affection, of an education 'in eroticis', or even the patient task of 'learning to love' – music, poetry, law (Nietzsche, 1910, p. 258). Hotman's *Anti-Tribonian*, in other words, attacked Tribonian to understand him better and so to better or at least to continue that aspect of his project that was concerned with the history of law. The exercise was, at least in its conclusions, constructive and its style was correspondingly one of intellectual engagement. Hotman returned to Cicero and to the model of friendship and of justice as the dual parameters of educative endeavour and of scholarship in law (Hotman, 1567, p. 156).

If then it is helpful to think in terms of lack and supplement, that exercise can be carried out in a more self-conscious manner. The history to which dance, song, joy and love – the bearable lightnesses of being – belong is historically that of gay science or the most radical of rhetorics of amatory law. Gay science applied the laws of love in a heterarchic and affective manner: conflicts between lovers were poetically engaged and

amorously resolved without recourse to any judgement of lawfulness beyond the elaboration of a principle drawn the lovers' lexicon (Goodrich, 1996). Few have dared to imagine alternative forms of law or laws that were not subject to the binary monotony of the legal proprium, that of the lawful and the unlawful. Few also have rejected the adiaphoristic posture of science in favour of relationship, affect or love as species of knowing. In either case, taking autopoiesis at face value, if it seeks to understand law as a system of thought then it cannot exclude the work of imagination or the supplement of affective self-reflection, the play of texts or the dance of meanings.

Gay science, which later became a codified rhetoric of the forms of amatory expression in the public sphere, is probably correctly diagnosed as a dissonant discourse or rhetoric of dissent (Dragonetti, 1982). Tied to imagination rather than description and to the possibilities of the text rather than its arbitrary referents, it certainly does not hold centre stage in a legal academy that has devoted the bulk of its attention or science to 'depriving man of enjoyment and making him colder, more statuesque, and more stoical' (Nietzsche, 1910, p. 49). That does not mean, however, that the tradition of critique of or supplement to essentially tragic knowledges is either politically irrelevant or heuristically ineffective. The gay science of law is rather, at least in potential and in history, a novel system of thinking law, a wild and in that respect threatening supplement to the prose of written reason, of system and application that was inherited, at least in part, from the anachronistic and paradoxical history of codes and from the latent autopoiesis of the dogmas of law (Goodrich, 1999). As an affective casuistry, a system of debating 'tensons' or cases, one might think that gay science too could be absorbed into the theory of legal autopoiesis and yet to do so would simply be to internalize a dissonance. In this instance it might be preferable for autopoiesis to inhabit the paradox of the plurality of modes of reason and to befriend or allow the supplement of its other. In that sense, of course, autopoiesis always inhabits a boundary between translation and empathy, between affinity and amity. In that essentially diplomatic version of the theory, in the sense that the emissary acts with respect or as a public friend, it should equally be acknowledged that anti-Teubner is also pro-Teubner and it is really the protocols of engagement that are at issue in a fractured academy which has a seemingly decreasing status in the world of judge-made law.

Where autopoiesis is in issue, a certain circularity is desirable by way of conclusion. The radicalism of autopoiesis lies ironically or, in this instance paradoxically enough in its ability to deconstruct the social system into a multiplicity of systems and rationalities. Law, according to this theory, is but one such social subsystem, and one competing rationality within political cultures that are increasingly dominated by economic and statistical indicators of administrative action and social events. Law understood as governance has long disintegrated into a variety of subsystems and we need now to address the serious questions raised by the paradox of laws outside of any singular reason or system of law. That said, in social imagination laws remain laws and there is in consequence a significant supplement to be offered to the empirical bent of legal autopoiesis. Law remains the site in which the social drama of affect is acted out in resilient theatrical forms. Ethic and antagonism, identity and alterity, are staged in the symbolic forum of law and that staging too deserves study. Where the legal scientist is not bound to beautifying or systematising the pragmatism of judges, theory also has a role to play in the formulation and criticism of the cultural practice of law. Laws can be understood, in other words, as systems or forms of reason, but they are also, and particularly in the visual media of social communication, less rational or at least less conscious systems of affect and image, power and play. At the level of method or science,

the elaboration of paradoxes is thus both a reflection upon and a supplement to the closure or more strongly the tragedy of the autopoietic vision of law.

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