

Gunther Teubner

Professor of Comparative Law and Legal Sociology

Fachbereich Rechtswissenschaft, Universität Frankfurt

Law Department, London School of Economics

**Economics of Gift - Positivity of Justice:
The Mutual Paranoia of Jacques Derrida and Niklas Luhmann**

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Economics of Gift - Positivity of Justice: The Mutual Paranoia of Jacques Derrida and Niklas Luhmann

I. System versus *différance*

Niklas Luhmann and Jacques Derrida have made the same diagnosis of the sober world of lawyers and economists.¹ Where other people observe rational decisions based on cost / benefit calculations and on rule / fact subsumptions, their diagnosis is: madness of decision. In contrast to all analyses of rational choice, games theory and decision theory and to all promises of normative argumentation and discursive rationality, the protagonists of autopoiesis and deconstruction insist that the every day routines of legal and economic decisions contain a component of madness, irrationality, mystery and even sacredness. The irrational is not to be viewed as a negligible remainder in a process of increasing rationalisation but as the driving force of the decision. According to Luhmann:

The mystery of the decision and the mystery of the hierarchy respectively support each other. Both exhibit an unspeakable (dare one say, religious) element, which makes them into what they are (Luhmann, 1993c: 287).

According to Derrida law and justice works

...without calculation and without rules, without reason or without rationality...we can recognise in it, indeed accuse, identify a madness. And perhaps another sort of mystique. And deconstruction is mad about this kind of justice. Mad about this desire for justice (Derrida 1990: 52).

The deconstructive consensus held by the opponents goes even further. The irrational not only occasionally breaks into ecstatic moments of the calculation of decisions but reaches the foundations of formal rationality. Derrida and Luhmann are in agreement that arbitrariness, inconsistencies, antinomies, paradoxes, and even violence, lie at the bottom of the most refined constructs in economic and legal action. However, exposing the irrational is not the end of analysis in the spirit of Carl Schmitt's decisionism (Schmitt, 1996; 1985) but, instead, constitutes its beginning. Both theories are not at all aimed at denouncing the detailed practices of justification and calculation in economics and law as mere ideological mystification of power constellations.² On the contrary, Derrida and Luhmann raise drastically the expectations of the quality of economic and legal calculations – despite their paradoxes. Exposing the irrationality of a decision does not, according to both authors, mean suspending the claims concerning social justice but, on the contrary, it means taking the normative requirements of justice even more seriously.³

However astonishing the convergence of autopoiesis and *différance* may be, the crucial point is not to uncover isomorphies, analogies and selective affinities.⁴ Usually, systems theorists prefer a selective incorporation technique. They decorate the facades of their autopoietic palaces with deconstructive fragments of *différance*, of *itération*, of *trace*. This is certainly attractive for theory building but ultimately leads only to an involution of the architectonics without altering the foundations. If Jean Paul is right that 'wit' means the connection of remote ideas, then this decorative incorporation is as irrelevant as the

rigorous confrontation of deconstruction and autopoiesis preferred by Derridists which ends only in reciprocal immunisation.

By contrast, I would prefer a reading of a reciprocal paranoia in Derrida's and Luhmann's writing which exposes a dynamic of mutual persecutions between the theories. Indeed, it begins with a common analysis of foundational paradoxes in law and economy which binds the theories together. But then incompatible reality constructs come in which render the theories blind and distrustful to each other. We ought to dispense with all hope of restoring sight to the blind and trust to the distrustful. Rather, we should exploit the paranoid dynamic itself which is by definition, a 'form of delirium characterised by convictions which despite being apparently similar are in reality conflicting and are not capable of being altered neither through logic nor through experience, e.g. delusions of grandeur or fears of persecution' (Felice 1987, 1432). Autopoiesis and deconstruction – what do we gain from of their reciprocal fears of persecution which end in a hectic whirl of deconstructive moves and systemic counter moves, in an ascending relation of stabilisations and destabilisations, in a dance of reciprocal plagues. This reading of para-noia becomes productive when the closed world of fictions of one theory reappears in the other's fictitious world. Thus: autopoietic systems as Jacques Derrida's nightmare, the gift of justice as Niklas Luhmann's redemption.

II. Foundational Paradoxes

First, it is amazing how radically they depart from common assumptions revoking the consensus on the foundations of legal and economic institutions. Courage is necessary if not, an extravagance, if one, like Derrida (1992, ch.1), does not wish to ground a social theory of the economy on exchange and reciprocity, but instead wishes to see the foundations of economic action in the structure of the gift. The pure gift relation, according to Derrida's conceptualisation, is totally asymmetrical, it means giving without gratitude. It exposes a radical non-reciprocal generosity which is destroyed if only trace elements of symmetry, reciprocity and even recognition, not to speak of the social bond of gratitude,

exist. Such courage is also necessary if one, like Luhmann (1993d: 545; 1988), refuses to conceive of law's foundation in terms of a *Grundnorm*, of an ultimate rule of recognition, substantive and procedural principles of legal validity, or in terms of its socio-political legitimation, but in terms of the extreme borderline case of pure self-referentiality of legal operations which fall into paradoxical confusion through their self-application. It is precisely their radicalism which offers a new view on the foundations of legal and economic institutions, a view which until now was seen to be based on a flaw of reasoning (Fletcher, 1985: 1279). Legal and economic institutions, Derrida and Luhmann insist, are not based on rational principles but on dangerous antinomies and paradoxes which not only destroy their legitimacy but also paralyse each operation and calculation through their self-contradictory structures.

As regards the founding paradox of law, however, despite the far reaching identity of the analysis of the initial consensus, our opponents' views are suddenly reversed into being completely incompatible with each other. Both commence with a critique of law's violence which is informed by Walter Benjamin (1996 {DT Bd. II 179-203}) to the extent that the customary critiques of law which refer to ideology and power and which expose law as the expression of economic or political interests are rejected as being superficial. At a deeper level, both authors view law as caught in the paradoxes of its own self-referentiality.⁵

Since the origin of authority, the foundation or ground, the position of the law can't by definition rest on anything but themselves, they are themselves a violence without ground. Which is not to say that they are in themselves unjust, in the sense of 'illegal'. They are neither legal nor illegal in their founding moment (Derrida, 1990: 943).

Luhmann (1988a: 154) identifies the same phenomenon, he sees at the bottom of legal rule hierarchies 'the paradox of the binary code applied to itself'. For both authors, all attempts to ground law on legitimate normative foundations or even on a concept of justice are, in the end, useless. They are all confronted with the violence of the primordial distinction between

legal and illegal which in itself cannot be revealed as legal, legitimate or just, but merely as violent arbitrariness.

The foundational paradox is the point where the bifurcation of deconstruction and autopoiesis begins. Derrida does not shy away from the precipice of law's paradox and attempts to enter the dark worlds of the paradox with a bold interpretation of the original violence of law which leads him to a mysterious distinction of various legal forces (Derrida, 1990: 1027ff.). Reinterpreting Benjamin's famous essay on law and violence, he distinguishes between a mythical foundational violence which establishes the positivity of the state and the law only through blood shed, and a divine foundational violence establishing a different justice which is destructive and even annihilating but which is life-supporting without blood shed. It is at this stage that Derrida formulates the most provocative paradox: the distinction between positivity and justice is itself indecipherable; there are no criteria which might distinguish between mythical and divine violence, not only before the decision but also after the decision. The question is merely postponed to an indeterminate future which is, in effect, a delegation to an infinite responsibility.

Luhmann detests such precipices; for him, these results of deconstructive analysis further confirm the paralysing effects of the paradox which gather strength the more one attempts to shed light on the darkness of the legal paradox. The results are merely Derridian 'verbal acoustics', obscurities of speech and the typical deconstructive gestures to shock people with dark paradoxes: '... a mixture of arbitrariness and paralysis'.⁶ Luhmann explicitly proceeds in the opposite direction: while it is fruitless to develop a theory which only repeats the inconsistencies, the unruliness, the darkness of the legal paradox in a different language, a creative use of the paradox becomes possible once one enquires the social techniques of de-paradoxification. De-paradoxification means to invent new distinctions which do not deny the paradox but displace it temporarily and, thus, relieve it of its paralysing power. This leads Luhmann to detailed historical and sociological analyses of how in European legal history institutionalised distinctions between natural and positive law

or, currently, distinctions between legislation and adjudication, have produced their impressive cultural achievements despite or precisely because of the legal paradox.⁷

Thus, contrary to first appearances, the foundational paradox of law is not Derrida's and Luhmann's common object of analysis but is merely their common runway which they then, however, use for a take-off in opposite directions: the autopoietic escape from and the deconstructive search for the paradoxes of law. If one then has a closer look at the foundational paradox of the economy, the way how they treat it differently indicates that it is not yet sufficient to identify their difference of paradoxification and de-paradoxification as merely a difference in cognitive interests, analytical directions and conceptual apparatus. Already their formulations of the economic paradox are so different that their common starting point is barely recognisable; rather, a more fundamental difference between autopoiesis and deconstruction comes into sight.

For Luhmann, the circulation of the economy is made possible at the historical moment when economic institutions circumvent successfully the paradox of scarcity, according to which the richer supply of the one is the greater need of the other, more abstractly: every access to scarce goods which serves the lessening of scarcity increases scarcity. Only by rendering this blockage invisible can the paradox be overcome and the circulation of the economy be commenced. This occurs when the effects of access to rare resources is bifurcated and effectively institutionalised as a binary code in economic action.

For he who acts quickly, the access to scarce resources lessens. For all others, it increases...condensed scarcity appears then as the difference to have/not to have (Luhmann, 1988b: 181).

Derrida determines the conditions of possibility of economic circulation from a different starting point, not from the paradoxes of access to scarce goods, but from the impossibility of the pure gift. The gift relation is the exact opposite of the exchange relation of the economy but, at the same time, provides the stimulus for the circulation of the economy.

The founding paradox of the economy arises in the moment when the pure gift relation, which exists before any reference to subjectivity, constitutes the subject:

a subject neither gives or receives. On the contrary, it is constituted precisely in order to subdue this hubris or impossibility through the calculation and the exchange of power which is announced in the promise of the gift (Derrida 1992 {37}).

And yet, both versions of the economic paradox coincide in the concept of property. The bifurcation of the effects of access, the coding of property as the difference between to have/not to have, and the attribution to semantic artefacts of property owners and non-property owners leads, according to Luhmann, away from the blockades of the scarcity paradox and into the dynamics of the economy. According to Derrida, the constitution of the subject as an offerer and receiver destroys the purity of the gift and renders the calculations of the economy possible through the recognition of the property of the subject.

But Derrida's interest in the circulation of the economy is not orientated to Luhmann's social techniques of deparadoxification, to the socially constructed order of the property code, later the money code, and economic programmes. Instead he analyses how the continual production of the gift is permanently interrupting economic circulation, how the irrationality of the gift is indeed transcending economic rationality. We do not therefore have two competing social theories on the economy before us which illuminate the same subject matter from different perspectives and with different cognitive interests. Rather, according to their self-understanding, two opposite worlds clash in whose opposites can no longer be understood only as the competition of different methods, theories or paradigms. Luhmann's ambitious attempt to construct a theory of society as the phenomenology of communication - based on a strict analogy of Edmund Husserl's phenomenology of consciousness - stands in stark contrast to Derrida's explicit refusal to develop a scientific theory. Theory, Derrida insists, would be incapable of thinking the gift. Instead, he attempts to revitalise the analogy concerning the opposites of thought and epistemology, the opposites of nomenal

and phenomenal, in order to conceive of a 'transcendental illusion of gift' which 'extends beyond and exceeds the experience, the knowledge, science, the economy and even philosophy' Derrida, 1992: {44}).

Thus, although they initially agree on the paradoxical foundation of law and economy, both schools of thought have in fact nothing to say to each other. Luhmann asks the question how de-paradoxification techniques construct the immanence of social institutions and build a world of autopoietic social systems, their coding and programming. By contrast, Derrida's thought aims at the transcendence of social institutions through their re-paradoxification and proposes a counter-world of *différance* in which the deconstructive double movement permanently exposes the founding antinomies of social institutions as well as the paradoxical paralysis of concrete decisions in law and economy. Luhmann's world and Derrida's counter-world stand orthogonally against each other and cannot directly influence the other. It is, however, precisely their mutual closure that makes them threaten, persecute and haunt each other.

III. Derrida's Nightmare: Autopoietic Social Systems

Why can indifference, however, not prevail? Why should Niklas Luhmann stalk Jacques Derrida following his deconstructive movements step by step? And why should systems theorists continuously be intellectually harassed by deconstructionists? While the opposing features of de-paradoxification and re-paradoxification, of empirical institutional analysis and transcendental illusion, of the immanence of social systems and their transcendence by *différance*, can render plausible the way in which they exclude each other they do not explain how and why they haunt each other.

There is, however, a different linkage of autopoiesis and deconstruction. The linkage lies in their basic concepts, or rather in their *distinctions directrices*. Derrida's distinction between writing and speech is drawn in such a way that it is necessarily blind toward Luhmann's

distinction between consciousness and communication, but is, at the same time, continuously provoked by it. On another level, precisely the opposite happens. Luhmann's autopoiesis is permanently provoked by Derrida's *différance* but is at the same time unable to conceptualise it. This mutual blindness of their *distinction directrices* is responsible for their perception of the social and thereby for their views on the possibility of justice.

Derrida and Luhmann start with the same question, namely, why Edmund Husserl's phenomenology of consciousness cannot do justice to social institutions. Their concern to wipe out Husserl's blind spot concerning society is shared by other contemporary theories on 'Justice towards the Other' - Lyotard, Habermas, Levinas.⁸ There is a general agreement that Husserl's attempts to integrate society into the philosophy of consciousness - the (in)famous *Monadengemeinschaft* - has failed (Husserl, 1950: 125, 137, 157). His distinction between consciousness and the outer world has no place for the social and the mere phenomenal construction of the world of consciousness is the reason for the principal inadequacy towards social institutions. Society, let alone a multiplicity of conscious individuals, can not be conceived adequately by Husserl's phenomenology. Since Husserl describes communication as a mere declaration of signs, meaning is produced exclusively in consciousness. This does not do justice towards the other: the other practically only conducts a phenomenological (consciousness-dependent) existence. The distinction between transcendental/ empirical (ideal / psychological) serves only as a poor compensation. While it makes a universal, objective and ideal sphere of meaning beyond a single consciousness possible, it has, however, inherited all the difficulties associated with transcendentalism: it is ahistorical, a priori, unempirical, undynamic, highly abstract, 'pure' etc.

Lyotard's phenomenology of language games attempts the exact opposite which, however, is bound to repeat and thereby to mirror Husserl's problems (19). Here, the world is constituted by mere constructs of language games (Lyotard, 1987). Consciousness, inner discourse, introspection are thereby made taboo. Since language games are self-referentially constituted, this theory cannot deal adequately with the inner infinity of

consciousness. Actors are mere pale linguistic constructs of language games. Lyotard's blind spot is to be found at precisely the same place as Husserl's, however, they find themselves at the respective other sides of the distinction between inner/outer -- consciousness on the one hand and discourse on the other. Husserl's exclusion of the social is paralleled by Lyotard's exclusion of consciousness. The issue of justice is not, according to Lyotard, a problem of being fair to the originality, the infinity and depth of the other, but merely a problem in the conflictual relation between different closed discourses. The *différend* can never become a *litige*. The *différend* necessarily ends up in injustice, in the violence of one language game to another.

Now, Derrida and Luhmann both attempt to overcome the alternative of consciousness / discourse as monopolists in the production of meaning. With the primacy of writing over speech and the polemic against the philosophy of consciousness, Derrida (1998, 1978) specifically aims at the blind spot between consciousness and speech. Writing is supplementary to this distinction; it undermines the difference between 'inner' and 'outer' processes of meaning which leave a trace. And here is the point where Derrida's *distinction directrice* interlocks with Luhmann's. In order to circumvent the sterile juxtaposition of the philosophy of consciousness and the theory of language games, Derrida's deconstructs the hierarchy of speech and writing in a double way, into a tangled hierarchy and into a secret reversal of the hierarchical relation.⁹ This ingenious idea matches the originality of Luhmann's conceptual move. Luhmann (1995: ch. 7) intends to overcome the Husserlian *Monadengemeinschaft* by duplicating the process of sensemaking: consciousness and communication are producing separate, independent and autonomous worlds of meaning which cannot be reduced to each other. However, the two *distinctions directrices*, Derrida's writing / speech and Luhmann's communication / consciousness, are mutually exclusive. The one distinction 'sits on' the blind spot of the other. They cannot be integrated into a synthesis. What remains for the outside observer, is a continuous 'switching' from one distinction to the other resulting in an almost simultaneous observation of the world which contains two contradictory but at the same time

supplementary perspectives. Condition of this supplementarity, if it is to become productive, is that the distinctions are capable to shed light on their respective blind spots.

Derrida's writing/speech-difference exposes an unavoidable blind spot when it comes to the peculiarities of social institutions. The distinction is responsible for the (in)famous asociological character of deconstruction. Because it forces writing as the impossible third party in the difference of consciousness and speech, it excludes society from intertextuality. Deconstruction cannot grasp the autonomy of the social. At the same time it cannot do justice to the precipices of the individual consciousness, given that writing cannot distinguish communication and consciousness. As a compensation, deconstruction draws from Levinas' philosophy of alterity which, however, constitutes only another correction of the Husserlian blindness to the social. Levinas(1979) juxtaposes the totality of meaning with the infinity of transcendence and places the reality of the other in the realm of infinity. This amounts to a 'premature' sacralisation of the social which makes disappear any experience of society in the blind spot of the distinction between totality and infinity.

This is where Derrida's nightmare begins. Social systems operate in the blind spot of his *distinction directrice*. He can deconstruct economic and legal institutions but only as texts and intertextualities, not as social systems. Their restless autopoietic self-reproduction haunts him continuously despite of all attempts of deconstruction. It is the secret of autopoiesis is that social systems are no longer threatened by the paradoxes of their deconstructive reading. Autopoietic self-reproduction means that in routine operations they are constantly de-paradoxifying their foundational paradox. Thus, they are capable of deconstructing deconstruction, of course not in the sense that they can exclude it on a long term basis but in the sense that they shift, displace, disseminate, historicize deconstruction itself which changes drastically the conditions of its possibility (Luhmann, 1995b; 1993b: 490). Luhmann's concepts are Derrida's non-concepts, autopoietic monsters in the world of deconstruction, which constantly stalk paradoxifying efforts with their relentless de-paradoxification. This is particularly true for Luhmann's central concepts of social autopoiesis, polycontextuality, and second-order cybernetics.

What is the paradox that is dealt with by social autopoiesis? It is the paradox of alterity, the paralysing self-contradictions that occur in the primordial encounter with the other. Action is paralysed whenever Ego makes her action dependent on Alter and vice versa. The encounter with the other and the precipices which arise here are, of course, Derrida's continuous theme in his philosophy of gift and in his philosophy of justice (Derrida, 1990: 959; 1992: {21ff.}). In Luhmann's theory they appear in the paradox of double contingency (Luhmann, 1995: {184ff.}). But their treatment makes the decisive difference. In Luhmann's account, the paradox of the encounter with the other is resolved by the emergence of autopoietic social systems. Social systems do not abolish the original paradox but they transfer it to a new sphere of meaning, namely, that of communication. Double contingency of two self-referential systems in their inner infiniteness is made bearable when communication emerges as an autonomous system of sense production. Communication makes the paralysing effects of the paradox vanish because '... the self-referentiality of social systems presumes an immanent duality so that a circle emerges whose interruptions are able to give rise to structures' (Luhmann, 1997: 333).

To be sure, the paradox of alterity remains. But it changes its form, it is reconstructed and homogenised within the sphere of communication. Now it loses its paralysing power for two self-referential systems that are reconstructing each other in an infinite and unresolvable circularity, and it reappears as the precarious but manageable social interdependence of two communicative constructs, ego and alter. The paradoxical effects of their encounter are, so to speak, rendered harmless when they are reconstructed in communication. But there is a price to pay. While the paradoxes of the encounter with the other disappear, the foundational paradoxes of social systems emerge. Rendering them invisible in their turn becomes then the permanent problem of communication.

While Derrida does relentlessly enquire into the paradoxes of constituting subjectivity and intersubjectivity, the instruments of deconstruction are designed in such a way that they cannot thematise the crucial transformation of the paradox of alterity into the foundational

paradoxes of worlds of communication, among them the paradoxes of law and economy. Thus, deconstruction remains hostage to the original paradoxes of alterity. This points again to Derrida's deficit of historical and sociological analyses. *Specters of Marx* are very strong on all kinds of spectrologies but very weak when it comes to concrete analyses of contemporary society.¹⁰ A deconstructive analysis that took account of the transformation of the paradox of double contingency into the foundational paradoxes of emerging social systems, would need to become historical, especially for its own transformations. While the basic structures of the paradox remain the same, social processes of their invisibilisation and the threatening moments of their reemergence depend on historical contingencies. The paradox itself is, 'necessary knowledge, a transcendental necessity, the "successor of the transcendental subject"' (Luhmann, 1997: 755). By contrast, the distinctions which are used for de-paradoxification, are dependent on historical-societal conditions of plausibility, of acceptability, are contingent on binding knowledge in particular societies. This is how the social construction of systems, their continuous deconstruction and their recurrent reconstruction become subjects of the sociology of knowledge. What kind of society makes particular deparadoxifying distinctions plausible? What kinds of *choques exogènes* expose again the paradoxical foundations of a social institution? The deconstructive obsession is thereby thoroughly socialised and historicized. To exorcise the paradox of alterity always remains a possibility but remarkably it has 'no consequences' (Fish, 1989), whilst the successful reparadoxification of concrete social system which must transform itself under concrete historical conditions establishes the actual threat.

The next autopoietic monster - polycontextuality¹¹ - gives rise to other deconstructive nightmares because it again changes the historical situation drastically. The emergence of a multitude of autonomous spheres of meaning within society, the establishment of their own codes and programmes, and, particularly, their operational and observational closure against each other produces a new anti-deconstructive immunity. They become resistant to the paradoxes of other spheres of meaning. The legal system, for example, deals extensively with economic conflicts but remains indifferent towards the economic paradox of scarcity, the resolution of which is declared as an economic problem, not as a problem of

law. To give another example from law - when constitutional lawyers construct self-referring rules, actually a logical impossibility, they do not care about the Cretan paradox that haunts logicians. With cool indifference, they apply self-referring rules in legislative and judicial practice.¹² Deconstruction counts in law only if it touches upon the legal paradox itself and threatens legal practice in its application of the binary code legal/illegal. Then and only then the conceptual machineries of legal doctrine begin their relentless search for 'saving distinctions'. At the beginning of the modern age it was the collapse of natural law and today it is the effect of globalisation which amounted to a real threat to the operations of the legal system (Teubner, 1998). While natural law hierarchies have been savely replaced by the institutionalised practices of legal positivism, the threats of globalisation are still provoking modern law and up to now, saving distinctions are not in sight.

Here also, however, polycontextuality has the effect of deconstructing deconstruction. Polycontextuality makes it possible that social systems externalise their foundational paradoxes by shifting them to other social systems. When they are displaced from one social system to the other, they lose their paralysing power. The politicisation of the legal and the economic paradoxes are striking historical examples. Both social systems successfully externalised the problems when they institutionalised a differentiation between 'levels' of decision making (between the level of adjudication and legislation in law, between decisions concerning allocation of money and the actual amount of money in the economy) and defined the 'higher level' no longer as a problem for legal or economic action but as problem for the political system (legislation and central bank as political institutions).¹³

The highest degree of deconstruction resistance, however, is attained when second-order cybernetics, the difference of operation and self-observation, are firmly institutionalised in social systems. The operations of legal systems (judicial precedents, legislative decisions, contracts) then establish an autonomous network of decisions, the validity of which are not necessarily dependent on legal self-observations, i.e. on legal argumentation (concepts, doctrines, principles, policies), but are merely loosely connected with them. Such an

institutionalised insulation of self-observation and operation creates problems for deconstructive practice given that it does not systematically distinguish texts from social institutions, i.e. materialised, long lasting normative structures which are based on presumptions of consensus. Contradictions, antinomies and paradoxes, which regularly arise in the line of legal argumentation, do not necessarily have an effect on the operational decision-making of law. Only when deconstructive moves affect the validity of legislative, judicial or contractual decisions, something which recently appeared as a consequence of the globalisation crisis of law, then the hectic search for new bases of normative validity begins (Wiethölter, 1986: 53; Heller, 1985: 185).

Taken together, autopoiesis, polycontextuality, and second order cybernetics have the effect of immunising successfully social systems against their deconstruction. To be sure, their immunisation works only temporarily, given that they are time and again overtaken by their own paradoxes. Result of this almost rhythmical play of paradoxification, deparadoxification, reparadoxification is an evolutionary dynamics in which deconstruction, permanently provoked by its autopoietic subversion, is bound to change its character continuously. Variation, selection, retention - should the evolutionary mechanisms that give rise to the proliferation of monkeys and social systems also direct the hectic iterational movements of *différance*? But deconstructive darwinism would not be its worst nightmare but would instead be the amazing productivity in the interplay of deconstruction and autopoietic reconstruction. Paradoxes do not only threaten the structures of social systems (legal rules, economic routines), against which they must defend, separate and protect themselves. More important is that paradoxes provoke economic and legal institutions for the relentless production of new rules and routines. The actual deconstructive obsession is not with defensive, conservative, systems maintaining their original structures but with their insatiable impulse for the invention of new differences. The birth of autopoiesis from the spirit of deconstruction?

IV. Luhmann's Redemption: The Gift of Justice

It is often asserted that the blind spot in Luhmann's systems theory is where other people see the person, the individual, the subject (e.g., Frankenberg, 1989: 336). The assertion is plainly wrong. Destruction of the subject, personless systems, anti-humanism - this critique can be successfully levelled at discourse theories as well as at deconstruction (which, for its part, can be criticised for a resubjectification of *différance*) but not to systems theory. Luhmann explicitly attributes the dynamic of autopoiesis not only to society but also to consciousness. As said above, he circumvents the complementary failures of philosophy of consciousness and language theory by duplicating the sites of meaning production. In contrast to Derrida, who silences the distinction mind/society with his comprehensive concept of writing, Luhmann separates communication and consciousness and constructs both as autonomous worlds of meaning. In a sense, Luhmann combines Husserl with Wittgenstein: he combines the phenomenology of language games with that of consciousness, however, without merging them (as Derrida's *différance* or Habermas' intersubjectivity attempt to do) into one. The blind spot of autopoiesis lies somewhere else, not in the absence of a subject but precisely in the distinction between two 'subjects', in the distinction between communication / consciousness, society / individual, outer / inner, system/ system.

One ought not to view this as a flaw to the theory. Rather, it is its greatest achievement. Up to now it is Luhmann who has offered the most plausible construction of the autonomy of the social. Society is a web of communications, nothing else, human beings are in the environment of society. Its greatest achievement, however, necessarily makes it blind for the symbolic space where the *monades* of communication and consciousness meet each other. This is the weak point which Habermas has successfully attacked as the 'artificial' separation of psychological and social systems (Habermas, 1987: {437ff.}). Of course, Luhmann has continuously worked on the blind spot of his theory and attempted again and again to compensate for the violence of the mind/society separation. Emotionally loaded concepts such as 'structural coupling' or 'interpenetration' were introduced to reconnect psychic and social systems. But the inner logics of the theory forces him time and again to locate the linkages exclusively within the participating systems themselves. True, Luhmann

submits, systems are irritated by their outside world, but irritation is a self-achievement of the irritated system in its internal reconstruction of the outside world. With such conceptual manoeuvres, Luhmann tries to minimise, if not to eliminate, the interaction, the translation, the interrelation between consciousness and communication.

Relation, according to Luhmann, is a non-concept, not only as regards inter-subjectivity but also inter-systemicity, which can only be dealt with through compensatory observations through the synchronisation of actions and their mutual reconstruction. The same compensatory mechanism also works in the supertheory's holy of holies - in the distinction of system / environment. Autopoiesis theory is not able to conceptualise the relation between system and environment, which is then compensated with secondary constructs of structural coupling (Luhmann, 1997: 92ff.). And it is precisely in the holy of holies where autopoiesis is haunted by deconstruction. The unity (!) of *différance* begins to afflict the unrevisable multiplicity of autopoietic systems. According to Derrida, the constitution of meaning does not appear in separate parallel processes of mutually closed systems - not to speak of a separation of psychic and social systems. Rather, the Derridean *différance* exposes a differential, transformational, context dependent, continuously contingent but interconnected dynamics which resists a clear separation of its legal, economic, political, religious aspects, interactional and organisational patterns, social and psychic components, not to speak of their systemic closure (Derrida, 1982). The thesis is that while such a concept of *différance* is incompatible with autopoiesis, it is at the same time its necessary supplement. The open dance of heterogenous operations, the infinite network of relations, the interplay of various aspects which occurs continuously without transferring them to a closed system - these are dangerous supplements to autopoietic closure. This understanding of *différance* cannot be systematically integrated into autopoiesis, it comes from outside as a threatening affliction of closed systems.

The necessary blindness of the system/environment distinction has important consequences for a concept of justice. In contrast to popular prejudice, Luhmann does not dispose of justice as a hackneyed old-European idea but places it in a central position in

his theory of law. But under modern conditions, justice can no longer serve as a criterion for the decision of individual cases. Nor is justice the highest internal norm of law, nor an external political or moral value which positive law must comply with. Instead justice serves as law's contingency formula, problematising the relation between law and its social environment. As compatibility between adequate social complexity of law and its internal consistency of decisions, justice mediates internal and external requirements (Luhmann, 1993b: 214ff.; 1981: 274ff.; 1974: 23). But here again systems theory cannot deal with the environmental relation 'as such', but only asymmetrically, either from the inner perspective of the legal system or from the external perspective of an observer. The interrelations between law and society, the processes of translation from one system into the other, disappear again in the blind spot of the system/environment distinction. To be sure, this formulation of justice reflects adequately internal requirements of modern positivised law. Under conditions of extreme functional differentiation, the internal decision-making consistency of law is strained by polycontexturality - a precarious problem to which the contingency formula of justice reacts. Luhmann's concept of justice is less adequate when it comes to institutions in law's environment, as they appear only as external disturbances of law, that endanger consistency to which one can do justice only through a new kind of consistency.

Most importantly however, this concept of justice is not commensurate to the relation of law and 'world', defined as the unity of difference of law / non-law, the unity of the difference of system / environment. This is the most difficult issue for an autopoietic theory of justice.

Despite the fact that Luhmann concedes that

the intention of the observation of unity of difference remains possible and makes sense in the world of meaning. But this sense takes on the form of a paradox, the form of the basic paradox of identity of difference (Luhmann, 1996: 16).

Under this premise, the unity of difference of law and non-law, for Luhmann, can never be a suitable theme of justice, not a theme for the contingency formula of any social system. But

it is precisely at this vulnerable point where Derrida (1990: 959) places his difficult and unstable distinction between justice and positive law:

a distinction between justice and *droit*, between justice (infinite, incalculable, rebellious to rule and foreign to symmetry, heterogeneous and heterotropic) and the exercise of justice as law or right, legitimacy or legality, stabilizable and statutory, calculable, a system of regulated and coded prescriptions.

Derrida's conception of justice distinguishes itself from Luhmann's

...just because of this infinity and because of the heteronomic relation to others, to the face of otherness that govern me, whose infinity I cannot thematize and whose hostage I remain (Derrida, 1990: 959).

This conception of justice - which draws from Levinas' philosophy of alterity - is, parallel to Luhmann's, neither an internal legal norm, nor is it an external social, moral or political condition of law, but aims – now in strong contrast to the case of Luhmann - at the transcendence of law, which is unattainable to legal operations but whose demands they are continuously subject to. To the extent that deconstruction emphasises the irreconcilable difference between positive law and such a form of justice, it formulates the transcendent dimension of law. Ironically, this would, precisely in Luhmann's sense, constitute an observation of law and world as unity of the difference of law / non-law which necessarily ends in paradoxes.

This is Derrida's central thesis: justice as transcendence in an irreconcilable contrast to the immanence of positive law which, however, is haunting law constantly. And it is here where parallels to the relationship of gift to the circulation of the economy become visible. The gift is not only, as in Marcel Mauss' *Essai sur le don*, an ethical or political counter principle of the cold economic logic of capitalism. The gift transcends every social relation and provokes it - as in the metaphor of the beggar - as an unconditional demand of the Other

(Derrida, 1992: {49ff.}). The gift is not pure transcendence without any connection to the circulation of the economy, but in a contradictory relation of unrevisable separation and permanent provocation. Thus, Derrida's repeated call for political engagement which are provoked by the unsatiated demands of a transcendent justice and gift (Derrida, 1990: 933).

Luhmann's sociology does not address this question. Instead, it is solely concerned with the immanence of law, the positivity of legal acts, legal rules, and law's relation with the social environment. Luhmann goes further in only one moment. When the law is confronted with its own paradox, then indeed it is - also and particularly from the perspective of systems theory - exposed to its own transcendence. But systems theory, with its insistence on deparadoxification of law, strictly prohibits this exposure. If one is to avoid blockades of law's decisions, then one needs to invisibilise the paradox, not to confront it. Social autopoiesis, for the sake of self-continuation, needs to suppress the relationship of social systems to transcendence. There is only one social system where this issue is legitimately addressed. Only religion as an autonomous social system is entitled to thematise explicitly social paradoxes. Religion and no other social system deals with the symbolisation of the third which is excluded by the difference between system and environment (Luhmann, 1996; 1990; 1985; 1984).

By contrast, Derrida's gift of justice poses uncomfortable questions to autopoietics. Most embarrassing is one question: Is there a particular experience of the transcendence of law? In this perspective, the legal paradox is no longer exclusively observed from the standpoint of its avoidance but is observed under the question of whether legal language has the capacity to symbolise what lies beyond law as the utopia of law (Blecher, 1991). While it remains correct that positive law can only arise out of the invisibilisation of the legal paradox, a concept of justice, separate from positive law but connected to it, would then directly confront the paradox of law and no more deal only with law's internal consistency or with its environmental adequacy. Instead of being the formula for law's contingency formula, justice would be the formula of its transcendence. Questions of justice would not merely be concerned with esoteric law or with theoretical speculations but with the practical

experience which comes about when criterias of justice are considered. One should not deny that it makes an important difference in the practice of law if one is exposed to 'deconstructive justice', to extreme demands of a justice that can never be realized, to the almost unbearable experience of an infinite responsibility, to a sense of fundamental failure of law, even a tragic experience of whatever you decide in law will end in injustice and guilt. The symbolisation of transcendence would then no longer be limited to religion, as a specialised social system, but would be an authentic experience for the legal system itself, as it would also be for the economic and other social systems whose contingency formulas are based around their specific experiences of paradox. Why should the transcendence formulas of social institutions be exclusively dealt with in the system of religion and not within these institutions themselves? Justice is too important to be left up to priests (let alone to lawyers). Should one not view - and this is the question I shall end with - Derrida's profound and demanding analyses of the commonalities and the differences of gift and justice, the transcendence formulas of the economy and the law, as a new, original and actual historically adequate form of religious experience in a time of extreme polycontextuality?

References

Benjamin, Walter (1996) *Selected Writings*. Cambridge, Mass.: Belknap Press.

Berg, H. d. and Prangel, Matthias (eds.) (1993) *Kommunikation und Differenz*. Opladen: Westdeutscher Verlag.

Blecher, Michael (1991) *Zu einer Ethik der Selbstreferenz oder: Theorie als Compassion: Möglichkeiten einer Kritischen Theorie der Selbstreferenz von Gesellschaft und Recht*. Berlin : Duncker & Humblot .

Cornell, Drucilla (1992) 'The Relevance of Time to the Relationship Between the Philosophy of the Limit and Systems Theory' *Cardozo Law Review* 13: 1579-1603.

Derrida, Jacques (1978) *Writing and Difference*. Chicago : University of Chicago Press .

Derrida, Jacques (1982) *Margins of Philosophy*. Chicago: University of Chicago Press.

Derrida, Jacques (1990) 'Force of Law: The Mystical Foundation of Authority' *Cardozo Law Review* 11:919-1046.

Derrida, Jacques (1992) *Given time*. Chicago: University of Chicago Press.

Derrida, Jacques (1993) *Spectres de Marx: l'état de la dette, le travail du deuil et la nouvelle internationale*. Paris : Galilée .

Derrida, Jacques (1994) *Specters of Marx*. New York : Routledge .

Derrida, Jacques (1998) *Of Grammatology*. Baltimore: Johns Hopkins University Press.

Dupuy, Jean-Pierre (1990) 'Deconstructing Deconstruction: Supplement and Hierarchy' *Stanford Literature Review* 7:101-121.

Dupuy, Jean-Pierre and Teubner, Gunther (eds.) (1990) *Paradoxes of Self-Reference in the Humanities, Law, and the Social Sciences* . Stanford: Anma.

Felice, Lucio (1987) *Il grande dizionario Garzanti della lingua Italiana*. Milano: Garzanti.

Fish, Stanley (1989) *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies*. Oxford: Oxford University Press .

Fletcher, George P. (1985) 'Paradoxes in Legal Thought' *Columbia Law Review* 85: 1263-1292.

Frankenberg, Günter (1989) 'Down by Law: Irony, Seriousness, and Reason' in C. Joerges and D. Trubek (eds.) *Critical Legal Thought: An American-German Debate*. Baden-Baden: Nomos: 315-352.

Günther, Gotthard (1976) 'Life as Poly-Contextuality' in G. Günther, *Beiträge zur Grundlegung einer operationsfähigen Dialektik I*. Hamburg : Meiner: 283-306.

Habermas, Jürgen (1987) *The Philosophical Discourse of Modernity*. Boston : Beacon Press .

Habermas, Jürgen (1996) *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*. Cambridge, Mass. : MIT .

Hahn, Marcus (1996) 'Vom Kopfstand des Phonozentrismus auf den Brettern der Systemtheorie oder: Luhmann und/oder Derrida - einfach eine Entscheidung? Anmerkungen zu "Die Form der Schrift" von Niklas Luhmann' *Soziale Systeme* 2:283-306.

Hart, Herbert L. A. (1983) 'Self-referring Laws' in H.L.A. Hart (ed.) *Essays in Jurisprudence and Philosophy*. Oxford : Clarendon Press: 170-178.

Heller, Thomas C. (1985) 'Legal Discourse in the Positive State: A Post-Structuralist Account' in G. Teubner (ed.) *Dilemmas of Law in the Welfare State*. Berlin: de Gruyter: 173-199.

Husserl, Edmund (1950) *Husserliana*. Den Haag.

Koschorke, Albrecht and Vismann, Cornelia (eds.) (1999) *System - Macht - Kultur: Probleme der Systemtheorie*. Berlin: Akademie (forthcoming).

Levinas, Emmanuel (1979) *Totality and Infinity: An Essay on Exteriority*. The Hague : Nijhoff.

Luhmann, Niklas (1974) *Rechtssystem und Rechtsdogmatik*. Stuttgart: Kohlhammer.

Luhmann, Niklas (1981) *Die Ausdifferenzierung des Rechtssystems*. Frankfurt: Suhrkamp.

Luhmann, Niklas (1984) *Religious Dogmatics and the Evolution of Societies*. New York: Mellen.

Luhmann, Niklas (1985) *A Sociological Theory of Law*. London: Routledge .

Luhmann, Niklas (1985) 'Religion and Ultimate Paradox: A Symposium on Aspects of the Sociology of Niklas Luhmann' *Sociological Analysis* 46: 1-36.

Luhmann, Niklas (1988a) 'The Third Question: The Creative Use of Paradoxes in Law and Legal History' *Journal of Law and Society* 15: 153-165.

Luhmann, Niklas (1988b) *Die Wirtschaft der Gesellschaft*. Frankfurt: Suhrkamp .

Luhmann, Niklas (1990a) 'Society, Meaning, Religion - Based on Self Reference' in P. Colomy (ed.) *Neofunctionalist Sociological Theory*. Aldershot: Hants/Brookfield: 208-233.

Luhmann, Niklas (1990b) 'Sthenography' *Stanford Law Review* 7: 133-137.

Luhmann, Niklas (1990c) 'Verfassung als evolutionäre Errungenschaft' *Rechtshistorisches Journal* 9: 176-220.

Luhmann, Niklas (1992a) 'The Coding of the Legal System' in A. Febbrajo and G. Teubner (eds.) *State, Law, and Economy as Autopoietic Systems: Regulation and Autonomy in a New Perspective*. Milano: Giuffrè: 145-185.

Luhmann, Niklas (1992b) 'Operational Closure and Structural Coupling: The Differentiation of the Legal System' *Cardozo Law Review* 13: 1419-1441.

- Luhmann, Niklas (1993a) 'Deconstruction as Second-Order Observing' *New Literary History* 24:763-782.
- Luhmann, Niklas (1993b) 'Observing Re-entries' *Graduate Faculty Philosophy Journal* 16: 485-498.
- Luhmann, Niklas (1993c) 'Die Paradoxie des Entscheidens' *Verwaltungsarchiv* 84: 287-310.
- Luhmann, Niklas (1993d) *Das Recht der Gesellschaft*. Frankfurt: Suhrkamp.
- Luhmann, Niklas (1995a) 'Legal Argumentation: An Analysis of its Form' *Modern Law Review* 58:285-.
- Luhmann, Niklas (1995b) 'The Paradox of Observing Systems' *Cultural Critique* 31: 37-55.
- Luhmann, Niklas (1995c) *Social Systems*. Palo Alto: Stanford University Press .
- Luhmann, Niklas (1995d) 'Why Does Society Describe Itself as Postmodern?' *Cultural Critique* 30.
- Luhmann, Niklas (1996) 'Die Sinnform Religion' *Soziale Systeme* 2: 3-33.
- Luhmann, Niklas (1997) *Die Gesellschaft der Gesellschaft*. Frankfurt: Suhrkamp.
- Lyotard, Jean-Francois (1987) *The Differend: Phrases in Dispute*. Manchester: Manchester University Press.
- Prangel, Matthias (1993) 'Zwischen Dekonstruktionismus und Konstruktivismus. Zu einem systemtheoretisch fundierten Ansatz von Textverstehen' in H.d. Berg and M. Prangel (eds.) *Kommunikation und Differenz*. Opladen : Westdeutscher Verlag: 9-31.
- Ross, Alf (1969) 'On Self-Reference and a Puzzle in Constitutional Law' *Mind* 78: 1-24.
- Schmitt, Carl (1985) *Political Theology: Four Chapters on the Concept of Sovereignty*. Cambridge, Mass.: MIT Press.
- Schmitt, Carl (1996) *The Concept of the Political*. Chicago: University of Chicago Press.
- Stäheli, Urs (1995) 'Latent Places of the Political in Luhmann's Systems Theory: Towards a Politics of Deparadoxification' *Working Papers* 5. Colchester: Centre for Theoretical Studies.

Suber, Peter (1990) *The Paradox of Self-Amendment: A Study of Logic, Law, Omnipotence and Change*. New York: Peter Lang.

Teubner, Gunther (1993) *Law as an Autopoietic System*. London: Blackwell.

Teubner, Gunther (1998) 'The King's Many Bodies: The Self-Deconstruction of Law's Hierarchy' *Law and Society Review* 33.

Wiethölter, Rudolf (1986) 'Social Science Models in Economic Law' in T. Daintith and G. Teubner (eds.) *Contract and Organization: Legal Analysis in the Light of Economic and Social Theory*. Berlin : de Gruyter: 52-67.

¹ Luhmann's and Derrida's most relevant texts on law and economy are Derrida, 1993; 1992; 1990; Luhmann 1995a; 1993d; 1992a; 1988b; 1985.

² Derrida is quite explicit on this point, e.g. Derrida, 1990: 933.

³ Derrida (1990: 1004) in his analysis of the precarious relation between positive law and justice, asks explicitly for a 'compromise between two incommensurable and radically heterogeneous dimensions'.; cf. on the same issue, Derrida, 1993: 73-75. Luhmann (1993d: 225f.) argues for a difficult balance within contemporary justice, rendering 'adequate complexity of law compatible with internal decisional consistency'.

⁴ For the ongoing debate between deconstruction and systemism, Koschorke and Vismann, 1999; Hahn 1996; Stäheli, 1995; Berg and Prangel, 1993; Cornell, 1992.

⁵ On paradox and self-reference in general, see Dupuy and Teubner (eds.)1990. On the paradoxes of legal self-reference see Teubner, 1993, Ch.1.

⁶ Luhmann, 1990b: 134. His most explicit critique of Derrida's work can be found in Luhmann 1993a.

⁷ On various social practices of deparadoxification in general, Luhmann, 1995b; 1995d.; on the institutional history of deparadoxification in law, Luhmann 1988a.

⁸ Lyotard, 1987; Habermas, 1993; Levinas, 1979.

⁹ On this double movement see Dupuy, 1990.

¹⁰ Derrida, 1994: ch.3, where more or less journalistic impressions of globalisation are meant to revitalise the ambitious claims of Marx's social theory.

¹¹ On this concept, see Günther, 1976.

¹² On the legal and logical problems of self-referring rules, especially in constitutional law, see Suber 1990; Hart 1983; Ross 1969.

¹³ For this externalisation technique in law, Luhmann, 1990; in the economy, Luhmann 1988b: 100.