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## Self-subversive Justice: Contingency or Transcendence Formula of Law ?\*

### I. *Law and Society Without Justice*

*Toward the middle of the sixteenth century, there lived on the banks of the Havel a horse dealer by the name of Michael Kohlhaas, the son of a schoolmaster, one of the most upright and at the same time one of the most terrible men of his day. ... the world ... would have every reason to bless his memory, if he had not carried one virtue to excess. But his sense of justice turned him into a brigand and a murderer.” – This is how Heinrich von Kleist begins his novel on Michael Kohlhaas, one of the most stirring tales ever written of the quest for justice.<sup>1</sup> – „He rode abroad one day with a string of young horses, all fat and glossy-coated.” At one of the many tollgates in old Germany he was told to stop and was requested to pay a toll fee as well as to present a pass document which was supposed to be the seigniorial privilege bestowed upon the Junker Wenzel von Tronka. The whole story about the pass was a fable. Under the pretext that he had to leave a pledge behind as security before he could get the pass Kohlhaas was forced to hand over two of his horses to the Junker. They then were used for heavy labour in the fields and treated so badly that when Kohlhaas returned after some weeks, “instead of his two sleek, well-fed blacks he saw a pair of scrawny, worn-out nags”. Kohlhaas tried to seek justice at the law. In vain. The Junker had so many kinship relations in the bureaucracy that he was always privileged against the horse dealer.*

*Deeply hurt in his sense of justice, Kohlhaas sold his house, collected a group of armed men around him and began a private vendetta. Relentlessly he pursued the Junker who escaped from his castle and, when he was hiding in Wittenberg, Kohlhaas set fire to the city. Then the Junker fled to Leipzig and Kohlhaas burnt down this city to the ground. Finally, the authorities were so terrorized that they assured Kohlhaas a fair trial and he surrendered. He won his civil law suit against the Junker, however, in a criminal trial he was sentenced to death for breach of the public peace.*

*But then a mysterious gipsy woman, endowed with witchcraft and fortune telling, takes a hand in the events. She gives Kohlhaas an amulet which would one day save his life. In the capsule there was a piece of paper which contained the date on which the Elector of Saxony would lose his power. The Elector was ready to do everything to find out the content of the amulet, he would even save Kohlhaas from the scaffold. On the day of the execution Kohlhaas before the eyes of the Elector and*

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<sup>1</sup> H. v. Kleist, 'Michael Kohlhaas' in *Kleist's Werke Bd. 1* (Weimar: Volkerverlag, 1963). English translation: H. v. Kleist, *Michael Kohlhaas: A Tale from an Old Chronicle* (New York: Melville, 2005), 3.

*the people, drew out the capsule, removed the paper unsealed and read it through, looked at the Elector – stuck the paper in his mouth and swallowed it. Kohlhaas was decapitated. His children were dubbed knights. The Elector lost the crown.*

Has legal sociology something to say on the case of Michael Kohlhaas. Apparently not, legal sociology has no idea of justice. There is plenty of empirical research on local justice, collecting people's opinion of what they think is just and fair in different contexts, and there is much theorizing about legal norms and sanctions, about the legal profession and the courts. But there is no socio-legal theory of justice.<sup>2</sup> While critical and cultural studies of law have produced alarming reports of law's *injustice* in relation to gender, race, poverty, culture, they refuse to associate a positive idea of justice with the law itself. Instead, the normativity of justice appears, if at all, as a political, not as a legal project. So, is justice itself, the most profound expectation that people have of the law, the blind spot in the distinction between law and society?

It needs external observers of law and society, Jacques Derrida and Niklas Luhmann, to shed light on this blind spot and to pose the question: Is there something specific that the sociology of law – as compared to moral, political or legal philosophy - has to contribute to a viable concept justice today? Autopoiesis and deconstruction, in my view, the most important theory irritations to law and society of the last decades, contribute two directions of thought. These are, first, reconstructing the genealogy of justice and, secondly, observing the decisional paradoxes of modern law.<sup>3</sup> Derrida on these two styles: "One takes on the demonstrative and apparently ahistorical allure of logic-formal paradoxes. The other more historical or more anamnestic, seems to proceed through reading of texts, meticulous interpretations and genealogies".<sup>4</sup>

In a genealogical agenda, justice is no longer only a construct in philosophical discourse, but is reconfigured in concrete social practices, such as in litigation, contracting, standard-setting and legislation, in the incessantly changing self-images of the practice of law. This opens up a perspective for detailed socio-historical analyses which search for varieties of justice and their affinities with changing fundamental distinctions in social structures.<sup>5</sup> Historicizing justice in this sense abandons legal philosophical claims for a temporally and spatially universal justice. But it does not indulge in anything-goes-relativism. Instead, it traces hidden

<sup>2</sup> Even Roger Cotterell takes a cautious stance: "Social theory has no direct link with the promotion of justice", R. Cotterell, *Law's Community: Legal Theory in Sociological Perspective* (Oxford: Clarendon, 2006), 2, 60.

<sup>3</sup> J. Derrida, 'Préjugés: devant la loi' in J. Derrida, *La faculté de juger* (Paris: Minuit, 1985); J. Derrida, 'Force of Law: The Mystical Foundation of Authority' (1990) 11 *Cardozo Law Review* 919; J. Derrida, *Specters of Marx* (New York: Routledge, 1994); N. Luhmann, *Rechtssystem und Rechtsdogmatik* (Stuttgart: Kohlhammer, 1974); N. Luhmann, 'Gerechtigkeit in den Rechtssystemen der modernen Gesellschaft' in N. Luhmann, *Ausdifferenzierung des Rechts: Beiträge zur Rechtssoziologie und Rechtstheorie* (Frankfurt: Suhrkamp, 1981) ; N. Luhmann, *Law as a Social System* (Oxford: Oxford University Press, 2004), 211 ff.

<sup>4</sup> Derrida (1990), n 3 above, 959.

<sup>5</sup> For different nuances, see R. Koselleck, 'Begriffsgeschichtliche Probleme der Verfassungsgeschichtsschreibung' in R. Koselleck, *Begriffsgeschichten: Studien zur Semantik und Pragmatik der politischen und sozialen Sprache* (Frankfurt: Suhrkamp, 2006), 365 ff.; Derrida (1990), n 3 above, 19; N. Luhmann, 'Subjektive Rechte: Zum Umbau des Rechtsbewußtseins für die moderne Gesellschaft' in N. Luhmann, *Gesellschaftsstruktur und Semantik Bd. 2* (Frankfurt: Suhrkamp, 1981), 48 ff.

connections between legal epistemes and social distinctions and highlights co-variations of justice and structures of society. This might result in a reformulation of a viable concept of justice, even under present conditions.

Social theory has demonstrated that the structures of segmentary and stratified societies possessed an affinity with the semantics of distributive and commutative justice, orientating them toward the equality of segments and to the ranking of social hierarchies. But, what is the relation between social structures and the semantics of justice today?<sup>6</sup> This question not only specifies directives for theoretical and empirical research but also produces normative impulses for a different understanding of justice in contemporary legal theory and practice. The re-entry of sociological theory into legal practice could create an imaginary space for the normativity of justice today, a space which is located beyond the sites of natural law and positivism.<sup>7</sup> Here, it is the problematic hiatus between legal norms and legal decisions producing the decisional paradoxes of law that may lead to a deeper understanding of justice.<sup>8</sup> My main thesis is that justice needs then be understood as the subversive practices of law's self-transcendence which are neglected in official legal theory and doctrine. In the last instance, however, justice would be seen as a self-description of law which undermines its own efforts because in its realization it creates new injustice. Heinrich von Kleist anticipated this experience in his Michael Kohlhaas – self-subversive justice.

## **II. Against Reciprocity: The Asymmetry of Juridical Justice**

A sociological theory of law criticizes the most prominent philosophical theories of justice today for being neither historical enough nor sociological enough. John Rawls and Jürgen Habermas conceive of justice without history, justice without society. Although they claim to reformulate the Kantian concept of justice under contemporary historical conditions – Rawls adapts modern economic theory, Habermas introduces intersubjectivity and the evolution of normative structures –, their ideas still reflect the old-European structure-semantics-relation when they define the basic components of justice: universal reciprocity, consensus, rationality<sup>9</sup>. After Derrida and Luhmann, each one needs to be replaced by different key-concepts: particularistic asymmetry, ecological orientation, and the non-rational other of justice.

Rawls and Habermas build on the moral principle of reciprocity between human beings and its universalization into general, abstract norms that form the basis of a just society. The “veil of ignorance” conceals the norm projections of individual rational actors from their particular circumstances and induces them to

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<sup>6</sup> Luhmann (2004), n 3 above, 218f., 221 ff., 225 ff.

<sup>7</sup> For the concept of re-entry, G. Spencer Brown, *Laws of Form* (New York: Julian Press, 1972), 56 f.; 69 ff.

<sup>8</sup> For a detailed discussion of paradoxes in law G. Teubner, 'Dealing with Paradoxes of Law: Derrida, Luhmann, Wiethölter' in O. Perez and G. Teubner (ed), *On Paradoxes and Inconsistencies in Law* (Oxford: Hart, 2006).

<sup>9</sup> J. Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971); J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge, Mass.: MIT, 1996). For an insightful analysis of their concepts of justice, R. Forst, 'Die Rechtfertigung der Gerechtigkeit. Rawls' Politischer Liberalismus und Habermas' Diskurstheorie in der Diskussion' in H. Brunkhorst and P. Niesen (ed), *Das Recht der Republik. Festschrift for Ingeborg Maus* (Frankfurt am Main: Suhrkamp, 1999).

design fair political institutions. In Habermas' "ideal speech situation", formal procedures are supposed to guarantee the undistorted reciprocal expression of individual interests as well as their universalization into morally just norms. However, polycontextuality, one of the most disturbing experiences of our times, thoroughly discredits these recent variations of a Kantian concept of justice.<sup>10</sup> With polycontextuality understood as the emergence of highly fragmented intermediary social structures based on binary distinctions, society can no longer be thought of as directly resulting from individual interactions, and justice can no longer be plausibly based on universalizing the principle of reciprocity between individuals.<sup>11</sup>

A variety of social theories have identified the problematic relation between polycontextuality and justice. The fundamental analysis of society's fragmentation begins not with contemporary theoreticians of discourse plurality. Rather, it arises with Emile Durkheim's organic solidarity, Max Weber's polytheism of modern formal rationalities, Wittgenstein's plurality of language games, and Theodor Adorno's sociological critique of Kantian morality.<sup>12</sup> Max Weber in particular analysed modernity as "rationalization" of different value spheres which led to insoluble conflicts between depersonalised powers of belief. In such a situation justice cannot be achieved via reference to the One Reason, to reciprocity and to universalisation. In Wittgenstein's plurality of "language games" the idiosyncratic rules of each language game can be justified neither by principles of reason nor by abstract values, but only by the practice of the real "form of life". According to Adorno, a Kantian universal justice necessarily runs against the structures of modern society; its incommensurability with the vertical and the horizontal differentiation of society turns the moral impulse of justice into its opposite: its orientation of action becomes irresponsible and its good intentions produce bad consequences.

In contemporary debates, social fragmentation finds its expression in François Lyotard's distinction between *litige* and *différend* of hermetically closed discourses, Michel Foucault's ruptures between incompatible *epistèmes* and Niklas Luhmann's plurality of closed self-referential systems.<sup>13</sup> Other theories are operating in the vicinity: Michael Walzer's spheres of justice, and Nelson Goodman's ways of worldmaking.<sup>14</sup> In particular, theories of legal pluralism and pluralist versions of neo-materialism point to the relation between societal fragmentation and the unsurmountable differences of

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<sup>10</sup> For the concept of polycontextuality, G. Günther, 'Cybernetic Ontology and Transjunctional Operations' in G. Günther, *Beiträge zur Grundlegung einer operationsfähigen Dialektik I* (Hamburg: Meiner, 1976); G. Günther, 'Life as Poly-Contextuality' in G. Günther, *Beiträge zur Grundlegung einer operationsfähigen Dialektik I* (Hamburg: Meiner, 1976).

<sup>11</sup> For a reformulation of reciprocity under conditions of polycontextuality, R. Wiethölter, 'Zur Argumentation im Recht: Entscheidungsfolgen als Rechtsgründe?' in G. Teubner (ed), *Entscheidungsfolgen als Rechtsgründe: Folgenorientiertes Argumentieren in rechtsvergleichender Sicht* (Baden-Baden: Nomos, 1994), 119.

<sup>12</sup> E. Durkheim, *The Division of Labor in Society* (New York: Free Press, 1933), 111 ff.; M. Weber, *Gesammelte Aufsätze zur Wissenschaftslehre* (Tübingen: Mohr & Siebeck, 1968), 603 ff.; L. Wittgenstein, *Philosophical Investigations* (Oxford: Blackwell, 1989), 225 ff., 572; T. W. Adorno, *Negative Dialectics* (London: Routledge, 1990); T. W. Adorno, *Problems of Moral Philosophy* (Stanford: Stanford University Press, 2000), 75 f., 84 f.

<sup>13</sup> J.-F. Lyotard, *The Differend: Phrases in Dispute* (Manchester: Manchester University Press, 1987), Ch. 2; M. Foucault, *The Order of Things: An Archaeology of the Human Sciences* (London: Tavistock, 1974), Chap. 2, 3, 7; M. Foucault, *Discipline and Punish* (New York: Vintage/Random House, 1979); N. Luhmann, *Die Gesellschaft der Gesellschaft* (Frankfurt: Suhrkamp, 1997), 595 ff.

<sup>14</sup> M. Walzer, *Spheres of Justice: A Defence of Pluralism and Equality* (New York: Basic Books, 1984); N. Goodman, *Ways of Worldmaking* (Indianapolis: Hackett, 1978), Ch. 7.

various legal orders.<sup>15</sup> In these perspectives, irreconcilable incompatibilities result from colliding social practices each of them endowed with their own rationality and normativity and with an enormous potential for mutually-inflicted damage. The highest degree of abstraction has been reached by Gotthard Günther who radicalizes polycentricity into a more threatening polycontextuality, that is, a plurality of mutually exclusive perspectives which are constituted by binary distinctions. They are not compatible with one another and can be overcome only by rejection values which in their turn lead to nothing but to different binary distinctions.<sup>16</sup> All these accounts, despite their differences in other respects, concur in one point - that the collision of today's idiosyncratic worlds of meaning makes their reconciliation by a society-wide justice impossible.

The consequences for a concept of justice today are drastic. Under contemporary conditions of social fragmentation, an Aristotelian or Kantian concept of a just society has lost its plausibility. So it is only to the social fragments that the attribute of justice can be ascribed today. Even if we applied Rawls or Habermas under contemporary conditions, if we universalized reciprocity between human beings, we would have to start with fragmented reciprocal relations and we would end up with a fragmented, not a comprehensive justice. Suppose, for example, we apply the "veil of ignorance" or the "ideal speech situation" to an economic exchange between two rational actors governed by the efficiency principle within an ideal market. We end up with a universalized justice which is, however, only economic in its nature and does injustice to the moral, legal and political aspects of our life, not to speak of the ecology. Rawls purposely confines his concept of justice to politics developing a model for distributional processes exclusively for institutionalized politics and not for the whole social fabric. And when he attempts to move beyond political institutions into broader social structures, his model of society as a "social union of social unions" turns out to be sociologically untenable.<sup>17</sup>

Even if we were to restrict justice to the fragments, under polycontextuality, the reciprocity relation between human actors fails as a starting point. The injustice committed by the fragmented institutions does not occur in relation to their internal members. This could be corrected by the principle of generalized reciprocity. Rather, they commit injustice to external constituencies which are exposed to their actions without being members. The justice or injustice of a fragmented institution becomes then asymmetrical, the relation of a partial rationality to its society-wide public. And justice would have to be reformulated as a super-norm for a highly developed partial rationality in its asymmetric relation to this public, but not at all as a relation of reciprocity. In the language of systems theory: if justice is grounded on the reflexivity of social systems, then the reflexivity of interaction, with reciprocity as its core, is not suited as a model for formal organizations and functional subsystems. They need different forms of reflexivity based on internal logic which at the same time push them to go beyond their internal logic. A reflexivity that focuses on justice will depend

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<sup>15</sup> For example, H. Petersen and H. Zahle, *Legal Polycentricity: Consequences of Pluralism in Law* (Aldershot: Dartmouth, 1995); G. Teubner, 'Altera Pars Audiatur: Law in the Collision of Discourses' in R. Rawlings (ed), *Law, Society and Economy* (Oxford: Clarendon, 1997). For neo-materialism, S. Buckel, *Subjektivierung und Kohäsion: Zur Rekonstruktion einer materialistischen Theorie des Rechts* (Weilerswist: Velbrück, 2007), 226 ff.

<sup>16</sup> Günther, n 10 above.

<sup>17</sup> For his pre-sociological concept of society, see Rawls, n 9 above, 528 ff.

crucially on the institutions' ability to thematize the restrictedness of their specialized perspective and to infer self-limitations for their expansionist course of action.<sup>18</sup>

Thus, a sociological account will register a paradigm lost – justice as the ideal of a good society. But this does not mean, as Kelsen suggested, that legal sociology has to abandon the idea of justice tout court.<sup>19</sup> It needs to reformulate the old idea under new conditions and to distinguish carefully between different monocontextures of justice, between moral justice, political justice, economic justice and – juridical justice. Searching for the one pancontexture where principles of a just society can be formulated is in vain. To be sure, the quest for a just society is as relevant as ever, perhaps more relevant today than ever, but the cause of societal justice has no forum, no procedure, no criteria through which it could be litigated. The search for a just society cannot follow one path. From the beginning it is split into different avenues. Each different concept of justice is realized in one specific social practice, obeys one partial rationality and one partial normativity. These cannot be fused into common principles of justice. In his brilliant book on “Spheres of Justice”, Michael Walzer has demonstrated in relation to property how different social contexts necessarily produce different principles of justice.<sup>20</sup> This needs to be generalized. Political justice deals with accumulation of power and consensus for producing collective decisions and forms basic institutions of the political constitution as a precarious relation between power-compromises, interest aggregation, policy-considerations on the one side and the claims of external social configurations on the other. Rawls and Habermas do indeed come up with important contributions to such a political justice. But they have little to say in support of a specific juridical justice that deals with the authoritative resolution of individual conflicts, with litigation and rule application to concrete cases, with the infinite singularity of persons and situations, and with the decentralized normative order that is created by myriads of judicial decisions. No wonder that Rawls' “Justice as Fairness” had great success in political contexts, but turned out to be a failure in the law in action. If justice in litigation means taking careful account of the singularities of the case, of the specific claims of the parties, of the particularity of the underlying conflict, and of the persons' concrete infinity, then Rawls' veil of ignorance is just counterproductive.<sup>21</sup> Legal sociology needs to develop a concept of justice which is specific to the law, that is, juridical justice. This does not mean, of course, that law monopolizes justice. Rather, that in contemporary society, different concepts of justice co-exist in different contexts, with no meta-principle which could give them unity.

Equality, the main conceptual basis of justice on which both Habermas and Rawls rely, has a fundamentally different meaning in law and in politics. Political equality results from the aggregate equality of the citizens. Juridical equality in contrast results from an individualization process that looks for the (in-)equality of new cases with old cases. Juridical equality differs from ethical generalisation and from political aggregation. In a first approximation, it can be described as the

<sup>18</sup> G. Teubner, 'The Anonymous Matrix: Human Rights Violations by 'Private' Transnational Actors' (2006) 69 *Modern Law Review* 327.

<sup>19</sup> H. Kelsen, 'Das Problem der Gerechtigkeit' in H. Kelsen, *Reine Rechtslehre* (2nd ed, Wien: Denticke, 1960).

<sup>20</sup> Walzer, n 14 above. For a contextualization of justice in relation to equality, H. Pauer-Studer, *Autonom leben: Reflexionen über Gleichheit und Freiheit* (Frankfurt am Main: Suhrkamp, 2000), 25.

<sup>21</sup> Thorough analyses of this conflict between political equality and individual justice can be found in C. Menke, *Spiegelungen der Gleichheit: Politische Philosophie nach Adorno und Derrida* (Frankfurt: Suhrkamp, 2004), particularly 203 ff.

recursive application of legal operations to the results of legal operations in numerous litigation processes that creates the artificial network of juridical concepts, rules and principles and that shapes simultaneously concepts of justice. The never-ending practices of the equal or unequal treatment is the mechanism which makes legal equality differ from political equality. To treat what is equal equally and what is unequal unequally triggers off a self-propelling series of distinctions. It is a generative mechanism, a "historical machine" as von Foerster would call it which relentlessly increases complexity in the world of legal constructs.<sup>22</sup> Less interesting here are precedent, "stare decisis", and treating like cases alike. Rather, it is the deviation from the precedent, the "distinguishing" and "overruling", the unequal treatment of what is not equal, which provokes the search for more and more elaborate legal constructs and the search for a specific juridical justice.

Of course, it is only a partial account if one relates juridical justice to litigation, to law's internal self-reference applying past decisions and rules to new factual situations. The other part is the permanent irritation of the law by external social processes that redirects permanently the juridical semantics of justice. Here appears the typical incongruence of legal rules and doctrines with the particular conflict due to their co-variation with changing social structures.<sup>23</sup> The closed network of legal operations reacting to external irritations takes place in contexts far away from the irritations of individual cases which are brought to the judge. This second source of external irritations creates an independent dynamic which drives the law into an inevitable incongruence of individual conflicts, legal criteria for their resolution and principles of justice. Various independent machineries of social norm production intrude into law's empire from its periphery by transforming social norms into legal rules. The most prolific extra-legal rule-making machines are installed in various formal organisations, in informal networks, and in standardization and normalisation processes which are competing today with the legislative machinery and the contracting mechanism<sup>24</sup>. The search for juridical justice cannot reject these externally produced rules as alien to the conflict at hand. Instead, in the judicial reconstruction of these rules, it draws from them the very criteria which are supposed to resolve the particular conflict while simultaneously reviewing them in the name of law's *ordre public* - thus developing, step by step, both new and shifting substantive aspects of justice.

In this way, principles of juridical justice are permanently changing in their recursive confrontation with these two dynamics - case by case litigation and social norm production. This sets the semantics of juridical justice on a different track from both, political and moral justice. These follow their idiosyncratic paths of universalization. Modern experience is not just their difference, rather their mutual contradiction. Legislation driven by concerns of political justice undermines the juridical justice of litigation and vice versa. Likewise, principles of moral justice, developed on the basis of mutual respect in daily interaction and systematized by philosophical ethics, exist in a similar relation of mutual contradiction with claims of juridical justice.

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<sup>22</sup> H. v. Foerster, 'Through the Eyes of the Other' in F. Steyer (ed), *Research and Reflexivity* (London: Sage, 1991).

<sup>23</sup> For social processes irritating law, G. Teubner, *Law as an Autopoietic System* (London: Blackwell, 1993), 47ff., 64ff.; Luhmann (2004), n 3 above, 464 ff.

<sup>24</sup> Teubner, n 15 above, 150 ff.

### III. *Against Consensus Theories: Ecological Justice*

Under conditions of polycontextuality, Niklas Luhmann offers a sociological concept of justice as “law’s contingency formula”.<sup>25</sup> The concept is difficult and it is easily misunderstood. Invoking justice incites disturbing social dynamics, beginning with the emergence of social conflicts, in their translation into the artificial language of law, in the practice of litigation, in lawyer’s tactical manoeuvring, in the controversies concerning rule-interpretation, in judicial decisionmaking, in the enforcement of law, in people’s compliance and – most important - in their non-compliance with legal rules and decisions, in their protest and revolt against unjust law. How does justice work in these practices? Neither as a legal rule, nor as a principle, nor as a value, nor as a decision criterion within the law. Neither does justice appear as something external to the law against which the legal decisions can be measured, neither as a moral virtue, nor as a political objective, nor as a regulative idea. All these could be weighed against other internal rules, principles, values, criteria, and against other external virtues, objectives and ideals. Within the boundaries of law, justice cannot be weighed against anything. In this respect juridical justice differs from its counterparts in morality, politics and economics. For them justice is one normative program among many – legitimacy, welfare, efficiency - while within the law, justice is invoked as the central non-contestable orientation formula. As law’s program of programs, justice will not compete with any other legal or extra-legal formula. As law’s contingency formula, justice has a similar status as other contingency formulas have in other fields: legitimacy in politics, god in religion, scarcity in the economy, *Bildung* in education, limitationality in science.<sup>26</sup> Contingency formula means: prohibition of negation, canon, uncontestability. And its dynamics reveal a paradox. The necessary search for uncontestability produces again and again new contingencies. Necessary contingency, contingent necessity.

As law’s contingency formula, justice is a necessary “scheme for the search for reasons or values, which become legally valid only in the form of programmes”.<sup>27</sup> It is not a principle internal or external to the law but a social process, a process of self-observation of law’s unity on the basis of its programmes, a legal self-control which works via the above-mentioned “historical machinery” of law, in the never-ending practices of the equal or unequal treatment. Thus Luhmann arrives at the definition of justice: “adequate complexity of consistent decision making”.<sup>28</sup>

In the subsequent socio-legal discussion, this definition has been met with skepticism.<sup>29</sup> If justice is unable to furnish substantive criteria for individual decisions, if it does not identify a legal value or principle, if it produces no external ethical or political maxim, then it is reduced to a purely formal justice which boils down to the simple request for conceptual consistency. Then it does not differ from the logic of *stare decisis* and the systematicity of legal doctrine. This critique however, misses the point. It ignores the element of “adequate complexity”. Justice as law’s contingency formula

<sup>25</sup> Luhmann (2004), n 3 above, 214 ff.; cf. R. Dreier, 'Niklas Luhmanns Rechtsbegriff' (2002) 88 *Archiv für Rechts- und Sozialphilosophie* 305, 315 ff.

<sup>26</sup> Luhmann, n 13 above, 469 f.

<sup>27</sup> Luhmann (2004), n 3 above, 218.

<sup>28</sup> Luhmann (1981), n 3 above, 388 ff.; Luhmann (2004), n 3 above, 219.

<sup>29</sup> For example, J. Esser, *Vorverständnis und Methodenwahl in der Rechtsfindung:*

*Rationalitätsgarantien der richterlichen Entscheidungspraxis* (Frankfurt: Athenäum, 2nd ed, 1972), 201 ff.; T. Raiser, *Grundlagen der Rechtssoziologie* (Stuttgart: Mohr Siebeck, 2007), 139 ff.; K. F. Röhl, *Allgemeine Rechtslehre: Ein Lehrbuch* (Köln: Heymann, 2nd ed, 2001), § 53.



explicitly goes beyond internal consistency. It is located at the boundary between the law and its external environment and means both the historical variability of justice and its dependency on this environment. Invoking justice – and this is the core of the contingency formula - makes explicit law's dependency on its ecologies, on its social, human and natural environment. Thus, beyond formal consistency, substantive aspects of orientation come into play. In the definition “adequately complex consistency of legal decisions“, the crucial aspect is ecological adequacy as against internal consistency.<sup>30</sup> Justice's intention is not to maximize doctrinal consistency but to respond sensitively to extremely divergent external demands and to strive at the same time for high consistency. Justice as contingency formula is not justice immanent to the law but a justice that transcends the law. Internal consistency plus responsiveness to ecological demands - this is the double requirement of juridical justice.<sup>31</sup>

In contrast to neo-Kantian theories of justice which refine more and more various formal and procedural requirements of consensus and universalization, a sociological concept concentrates on the substantive relation of law to its ecology: Does the law, in its tests of equality or inequality of cases, do justice to contemporary polycontextural society? Does it do justice to its natural ecology? Does it do justice to individual minds and bodies? Such an ecological orientation of the law in the broadest sense is probably the most important aspect that systems theory with its insistence on the system/environment distinction adds to the debate on justice. Justice redirects law's attention to the problematic question of its adequacy to the outside world.

But it does so with a specific qualification. At this very point, systems theory with its (in)famous insistence on law's self-referential closure, reveals a strong contradiction with an ecological orientation of justice. The extreme hetero-referentiality of the law which would be required by justice as proof of law's adequacy in relation to society, people and nature, cannot be achieved by law's reaching into the outside world. Rather, hetero-referentiality is only inside the law, which remains caught in the chain of its self-referential operations. In this contradiction lies the core aspect of the practice of justice today: How is justice possible as a transcendence of law's boundaries when it is inescapably caught in the self-referential closure of the legal system? Justice as the necessary but impossible self-transcendence of law's closure - this seems thinkable only as law's *coincidentia oppositorum*.

How can justice ever transcend the closure of law if the transfer of validity on the basis of the binary code legal/illegal takes place exclusively in recursive chains of court judgements, legislative and contractual acts? Justice is confronted with the primary closure of law: operational closure by concatenation of legal acts – legal structures – legal acts. In the tautological self-reference and radical insulation of law

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<sup>30</sup> The line of reasoning is close to David Nelken's “ecological approach to law”, D. Nelken, 'Law in Action or Living Law? Back to the Beginning in Sociology of Law' (1984) 4 *Legal Studies* 157, 174 f. 54.

<sup>31</sup> For such an ecological concept of justice Teubner, n 23 above, 100 ff., 121 f.; Teubner, n 15 above, 175 f.; G. Teubner, 'Alienating Justice: On the Social Surplus Value of the Twelfth Camel' in D. Nelken and J. Pribán (ed), *Law's New Boundaries: Consequences of Legal Autopoiesis* (Aldershot: Ashgate, 2001), 28 ff.; G. Teubner, 'Dreiers Luhmann' in R. Alexy (ed), *Integratives Verstehen. Zur Rechtsphilosophie Ralf Dreiers* (Tübingen: Mohr Siebeck, 2005), 201 ff.; Teubner, n 18 above, 345 f.

from its social environment,<sup>32</sup> the operative closure has become in itself a major source of injustice. With good reason, communitarian critics of modern law ask for radical change to break the boundaries of the law, to re-integrate law into society and to establish alternative fora, procedures and criteria of “communal justice”.<sup>33</sup> However, as we know, the practices of justice in the modern world have taken a different course. Juridical justice does not break the operational closure and return to the social embeddedness of the law’s primary operations. Instead, paradoxically, it “transcends” the positive law via its second closure, via legal self-observation.<sup>34</sup> From the moment of the crucial transformation of law when in court litigation, legislation and contracting, legal argumentation began to exclude arguments *ad hoc* and *ad hominem* and to refer to specialised legal materials (precedents, rules, principles), the discourse on justice has become that part of legal self-observation that focuses on the boundaries of law and attempts to transcend them. Whenever the closure of legal operations has been complemented by closure of legal self-observation the practices of justice have concentrated on the adequacy of law to its environment.

Why should justice as a self-observational practice within the law be able to overcome law’s primary closure? The reason is “re-entry” of the extra-legal into the legal. While legal operations by virtue of their sequentialisation create the boundary between law and non-law, between legal communication and other types of social communication, legal self-observations use this very distinction legal/non-legal within the symbolic space of the law.<sup>35</sup> Whenever the distinction between legal and non-legal (in the sense of extra-legal, not of illegal!) re-enters the sequence of legal operations, legal argumentation gains the capacity to create an “enacted” environment,<sup>36</sup> by distinguishing between norms and facts, between internal legal acts and external social acts, between legal concepts and social interests, between internal reality constructs of the legal process and those of social processes. That is the moment in which the discourse on justice confers judgement on these distinctions and raises the question of whether legal decisions are doing justice to their “enacted” ecologies. This is the paradoxical achievement of double closure – operational and observational. Both rule-producing legal acts as well as rule-connecting arguments remain in their closed circuit of internal concatenations. But justice by virtue of the internal distinction of self-reference and hetero-reference relates law to its social environment and asks for its ecological adequacy.

Justice as a discursive practice within the law works on the drastic consequences that the re-entry of its ecologies has created. It makes use of the

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<sup>32</sup> Teubner, n 23 above, 13 ff.; N. Luhmann, 'Closure and Openness: On Reality in the World of Law' in G. Teubner (ed), *Autopoietic Law: A New Approach to Law and Society* (Berlin: de Gruyter, 1988); Luhmann (2004), n 3 above, 76 ff.

<sup>33</sup> Cotterrell, n 2 above, 65 ff.; R. B. M. Cotterrell, *Law's Community: Legal Theory in Sociological Perspective* (Oxford: Oxford University Press, 1995), 91 ff., 315 ff.; for a critique of operational closure, see also M. v. d. Kerchove and F. Ost, *Le droit ou les paradoxes du jeu* (Paris: Presses Universitaires de France, 1992), 101 ff.

<sup>34</sup> For double closure as a necessary condition of self-organisation, in general, H. v. Foerster, *Observing Systems* (Seaside, Cal.: Intersystems Publications, 1981), 288 ff., 305 ff.; in formal organisations, N. Luhmann, *Organisation und Entscheidung* (Opladen: Westdeutscher Verlag, 2000), Ch. 7.

<sup>35</sup> Luhmann (2004), n 3 above, 98 ff., 305 ff.

<sup>36</sup> K. E. Weick, *The Social Psychology of Organizing* (Reading: Addison-Wesley, 1979); on enaction as an alternative to representation, F. J. Varela, 'Whence Perceptual Meaning? A Cartography of Current Ideas' in F. J. Varela and J. P. Dupuy (ed), *Understanding Origins: Contemporary Views on the Origin of Life, Mind and Society* (Dordrecht: Kluwer, 1992), 235 ff.

epistemic confusion (à la Magritte: “This is not a pipe”) about the reality status of law’s hetero-referential observations. One result of the re-entry is the above mentioned imaginary space within the law which takes itself for reality.<sup>37</sup> In its judgement on the ecological adequacy of law, justice cannot but create fictions about the outside world which it must treat as hard-core realities. Justice thus appears only within this imaginary space within the law which is created by the re-entry of the ecology into the law, by the internal reconstruction of external demands stemming from society, people and nature within the law.

As law’s contingency formula justice is dependent upon the great historical principles of social differentiation. At this point a theory of justice is directly subsidized by social theory. In their claim to be expressions of justice, the criteria of law’s consistency are not simply historically changing in a random way. They co-variate with the varieties of social differentiation mentioned above. In a stratified society it is accepted as a natural and necessary requirement of justice that the judge takes full account of the social rank of the litigating parties. Justice is not blind. The famous formula of *suum cuique* which seems to us today a rather hollow formula, makes sense to people living in legitimate hierarchies of social stratification. Each person gets something different according to his social rank. As Lawrence Rosen has shown in his empirical studies on the anthropology of justice, this is true for traditional Islamic law where justice demands that the social position of the parties and their social networks are meticulously reconstructed within the trial and are taken explicitly into account for the final decision.<sup>38</sup> Max Weber got it wrong when he called this pejoratively “Khadi-justice” which in his judgement did not live up to the most basic demands of universal justice.<sup>39</sup> And it was also true for old European society where it was natural and legitimate that the law treated members of the nobility different from clergymen, town people and peasants. It is only on the threshold to modernity that Michael Kohlhaas protests violently against the law privileging aristocratic horse thieves against him, the common horse dealer.<sup>40</sup> While the *justitia mediatrix* of the middle ages mediated in a vertical-hierarchical mode between divine, natural and human law,<sup>41</sup> the justice of modernity mediates in a horizontal-heterarchical mode between the proper normativity of the law and the proper normativity of its social, human and natural ecologies. Today, the law searches for its peculiar criteria of justice, i.e. criteria for treating like cases alike and unlike cases unlike, in its environment, i.e. in different social discourses, in educational, scientific, medical, political, and economic discourse. It validates them after a complicated process of their legal reconstruction. In spite of the equality clause in the constitution, constitutional law legitimates unequal treatment when it is legitimized according to paedagogical, scientific, medical etc., i.e. “reasonable” criteria.

Is this a new natural law which replaces god, nature and reason by differentiation principles of society, a sociological concept of natural law? Actually, this concept of justice undercuts the distinction between positivism and natural law and declares them both right and wrong. It shares with natural law the impulse that

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<sup>37</sup> Spencer Brown, n 7 above, 56 f.; 69 ff.

<sup>38</sup> L. Rosen, *The Anthropology of Justice: Law as Culture in Islamic Society* (Cambridge: Cambridge University Press, 1989), 58 ff.

<sup>39</sup> M. Weber, *Economy and Society* (Berkeley: University of California Press, 1978), 213 ff.

<sup>40</sup> Kleist, n 1 above.

<sup>41</sup> Placentinus, 'Quaestiones de iuris subtilitatibus' in H. Fitting (ed), *Quaestiones de iuris subtilitatibus des Irnerius* (Berlin: J. Guttentag, 1192 (1894)), 53.

justice searches for an extra-legal orientation, but with positivism it has in common that the search for justice can only be done by the law itself, not by external authorities, whether god, nature, or natural reason. Justice turns against natural law when it refutes the idea that outside authorities will furnish substantive criteria of justice. But it turns also against positivism insofar as justice is not something that can be produced by a legal decision.

Neither natural law nor legal positivism. Instead, justice is sabotaging legal decisions. Against law's relentless desire for certainty, juridical justice creates a vast space of uncertainty and indeterminacy. Justice re-opens the space that has been closed by the routine of legal decisions and asks obstinately whether in the light of external demands on the law the case needs to be decided differently. Justice works as an internal subversive force with which the law protests against itself. Justice protests against law's natural tendencies to stare decisis, to routine, security, stability, authority and tradition. Against law's inbuilt tendencies to orderly self-continuation it infuses into the legal order a tendency towards disorder, revolt, deviation, variability and change. It protests in the name of society, people and nature but does so from within the law. Subversive justice stirs up the law. The mutiny on the bounty – this is what sociology tells about juridical justice.

#### **IV. *Against Rationalism: The Irrational in Law's Self-transcendence***

But why mutiny? Why not just external attacks on the law in the name of society? That people who put their hopes into the law and after having lost, blame the law for its injustice is to be expected. But when the resistance originates in the inner *arcanum* of law – this is the scandal. The cause for the internal revolt, for the subversion from within the law in the very name of justice, lies in the glaring failure of law to live up to its own promise - to supply convincing reasons for its decisions, to produce a legitimate basis of rational argumentation that people accept as just. Legal reasoning does not and cannot justify legal decisions – whoever had to decide a legal case has been exposed to this disturbing experience. In other words: law cannot stop in principle the intrusion of irrationality into its rational world of norm-oriented decision making and reason-based argument. This is why practitioners of law have always been sceptical toward rational theories of justice, Rawls and Habermas style. The philosophers of justice, of course, are aware of the irrational element in legal decisions, but they desperately practice a kind of exorcism. By ever aggrandizing the role of rational argument in law in order to give a firm basis to their judgement, they try to get rid of the devil, to exorcise the paradox of self-reference.<sup>42</sup> In vain, of course.

By contrast, the most provocative recent analyses of law's fundamental failure have been formulated by Jacques Derrida pointing to the aporias of justice and by Niklas Luhmann pointing to the paradox of legal decisions.<sup>43</sup> To be sure, they are re-analysing a centuries-old experience of the law which has resorted into the time-honoured double formulas - *ratio et voluntas* as well as *ratio et auctoritas* - in order to

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<sup>42</sup> Typical for this strategy, J. Habermas, 'Vorbereitende Bemerkungen zu einer Theorie der kommunikativen Kompetenz' in J. Habermas and N. Luhmann, *Theorie der Gesellschaft oder Sozialtechnologie - Was leistet die Systemforschung* (Frankfurt: Suhrkamp, 1971), 123 ff., J. Habermas, 'Wahrheitstheorien' in H. Fahrenbach (ed), *Wirklichkeit und Reflexion: Walter Schulz zum 60. Geburtstag* (Pfullingen: Neske, 1973), 255 ff.

<sup>43</sup> Derrida (1990), n 3 above, 961 ff.; Luhmann (2004), n 3 above, 281 ff.

cope with the limits of reason in legal decisions. Even analytical jurisprudence, which in contrast to deconstruction or autopoiesis is not under suspicion of irrationalism, has to acknowledge the limits of rational argument in law and to admit that the logical application of norms to cases will work only when the judge introduces additional ad-hoc-assumptions into the syllogism.<sup>44</sup> They have to admit as well that any attempt to justify rules by rules and principles in the last instance inevitably ends up in Münchhausen's trilemma: infinite regress, arbitrary rupture or circularity.<sup>45</sup> The failure of reason to ground legal decisions is driving critical legal studies' further into their obsession with the indeterminacy of law. It is driving Carl Schmitt into his obsession with decisionism. No wonder that all kinds of interdisciplinary analyses step in to cure law's disease with their specific remedies: psychology with the affective element, psycho-analysis with the unconscious, economics with efficiency, sociology with class structure, political science with policy-considerations or social antagonisms and so on. But what today is law's own reaction to its fundamental failure?

It is the discourse of justice comes that reacts to law's failure. As I have said, it is a social dynamic within the law and cannot be identified with a philosophical construct or with a criterion for legal decision. To put everything that follows into one short formula, *juridical justice is an idiosyncratic process by which law's self-observation interrupts, blocks and sabotages the routinized recursivity of legal operations. After rendering law self-transcendent, justice forces the law to return to its immanence and to continue its operations under massive constraints, thus creating new injustice – self-subversive justice.*<sup>46</sup>

In other words, after "going through the desert", i.e. after an "irrational" experience of self-transcendence justice is compelled to reconstruct this infinite experience under the restrictive conditions of the legal system – under the triple constraint of decision, rule-making and justification. As a consequence of this pressure to continue its rule production, justice produces new injustice against which it protests, only to find itself in its turn under the renewed constraints of the legal process. And so on and so on – in a permanent self-agonizing oscillation.

As a discursive practice, justice subverts not only positive law in the name of its ecologies, but subverts itself in a self-propelling cyclical process. Justice becomes self-subversive when, after protesting against positive law, it returns to legal positivization. Obviously, this circularity disappoints the hopes of legal philosophy. It cannot produce just results, nor can it perfect an imperfect value of justice, nor does it approximate asymptotically to an ideal of justice. What it does is to reconstruct permanently both positions – positive legal decisions and the infinite experience of justice – in order to destruct them at once. This practice creates and annihilates

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<sup>44</sup> Just one example, R. Alexy, 'On Balancing and Subsumption: A Structural Comparison' (2003) 16 *Ratio Juris* 433.

<sup>45</sup> H. Albert, 'Das Problem der Begründung' in H. Albert, *Traktat über kritische Vernunft* (Tübingen: Mohr Siebeck, 1968).

<sup>46</sup> This concept of self-subversive justice is object of a recent debate, see J. Clam, 'Wie dicht sind Opfer? Zur Entscheidung der Frage nach dem Ort der Transzendenz in heutiger Gesellschaft' (2008) 29 *Zeitschrift für Rechtssoziologie* 37; K.-H. Ladeur, 'Das subjektive Recht als Medium der Selbsttransformation der Gesellschaft und Gerechtigkeit als deren Parasit' (2008) 29 *Zeitschrift für Rechtssoziologie* 109; A. Schütz, 'Von einem neuerdings erhobenen gerechten Ton in der autopoietischen Jurisprudenz' (2008) 29 *Zeitschrift für Rechtssoziologie* 53; F. Steinhauer, 'Derrida, Luhmann, Steinhauer: Über Dekonstruktion, System und Rhetorik' (2008) 29 *Zeitschrift für Rechtssoziologie* 167.

justice in a permanent cyclical movement from the immanence of law to its transcendence back to immanence. At the very end it does nothing but re-incite the inner restlessness of law, the great legal nervousness, the permanent oscillation between two poles, the necessary contingency of law.

This self-observation of law should not be confused with a diffuse yearning for justice that shadows the rational legal process and from time to time incites it to produce a better legal rule. Instead, juridical justice can be analyzed theoretically and identified empirically as an ongoing discursive process within legal practice itself. Of course, by legal practice is not simply meant organized litigation and legislation by the legal profession. Rather, it means the whole range of serious communication about law wherever it happens in society, including citizens' protest against the law. In a Derriding manner one could speak of "justiciance" in order to characterize the iterative movements, the permanent changes, the deferment and displacement of meaning, the incompleteness of justice and its futurization.

What is more, the search for juridical justice takes place under severe restrictions. The search formula itself contains a strange combination of high indeterminacy and high structuration. The combination has nothing to do with mediation, compromise, middle ground, or "relative indeterminacy". Instead, it radicalizes both to the extreme. "Bringing chaos into order" – the double meaning of Theodor Adorno's famous formulation reveals the radical character of juridical justice: to derange the orderly legal process, to create temporary order out of this chaos, derange it again ...<sup>47</sup>

Juridical justice as a discursive process cannot be separated from the initial conditions nor from the subsequent constraints which are both dictated by modern law's historical situation. This excludes from the outset a societal and a historical universalization of the concept of justice. A detailed analysis of these constraints would be the task of a socio-legal theory of justice. The differences between juridical justice and a diffuse yearning for justice can be described by the following four characteristics.

### **1. Initial Conditions**

As against a general desire for justice in the world, juridical justice is invoked in a specific situation. Whenever legal procedure and argumentation stumble across the "hiatus" of law, the ongoing legal process comes to a sudden halt. In terms of systems theory, the hiatus opens up a gaping chasm in the recursive sequentiality of operation – structure – operation (legal act – legal rule – legal act). Against fantasies of legal autopoiesis as automatic social machinery,<sup>48</sup> systems theory has stressed again and again that the chain of communicative self-production is interrupted in virtually every transition from structure to operation (expectation to communication). Operations produce structures, but structures cannot in their turn produce subsequent operations. They can only create a condensed space of possibilities, a

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<sup>47</sup> Wiethölter transferred the famous formula from art to law, Wiethölter (1994), n 11 above, 107. T. Adorno, *Minima Moralia: Reflections on a Damaged Life* (London: New Left Books, 1974), Part 3, 1946/47, 222.

<sup>48</sup> H. Rottleuthner, 'Biological Metaphors in Legal Thought' in G. Teubner (ed), *Autopoietic Law: A New Approach to Law and Society* (Berlin: De Gruyter, 1988), 117.

space in which the new operation “happens”. The new operation needs to overcome a moment of fundamental indeterminacy.<sup>49</sup>

Within the law every legal act (legislative, judicial and contractual decisions) changes the legal situation by producing a legal rule. But these rules cannot produce new legal acts, only more or less condensed references to possible new legal acts.<sup>50</sup>

This is the point where in order to overcome the hiatus, legal argumentation begins its relentless work – with considerable success but in vain. Legal reasoning never decides a conflict, but achieves nevertheless something decisive. Legal argument transforms differences. It transforms the original decision alternative into a new one, it transforms a social conflict into a technical legal question. Legal reasoning does not determine, it does not justify, nor does it hide something else. It just transforms differences but does so drastically. In any case, a decision is necessary, before and after argumentation, but the concrete alternative that has to be decided will be a different one. It is the job of legal reasoning to lure lawyers into a situation where they have to decide a question which differs from the litigants’ original question.<sup>51</sup>

It remains in the dark which new legal act will happen. It is at this place, at the transition point from structure to operation, from legal rule to legal act, from argument to decision, where the hiatus gapes, where the interstice between rule and decision cannot be bridged by argumentation. The aporias of legal decision cannot be overcome by rational discourse, neither by legal reasoning nor by moral or political justification. They are in themselves neither just nor unjust. However, if justice is to be done, then the hiatus cannot be leapfrogged by Carl Schmitt’s pure decisionism nor can it be plastered over by Jürgen Habermas’ continuous rationalization. The discourse of justice invokes the rejection value of the alternative decisionism versus rationalization. By a reflexive act of self-observation the rejection value offers the aporia to the attention of legal consciousness. It does not attempt to circumvent or to negate it. It simply articulates it as the limit of rational reasoning transforming it into a painful, almost unendurable experience.<sup>52</sup> It is an attempt to transform by reflexivity the aporia of law into law’s self-transcendence. This situation is the initial condition for the discourse of juridical justice. No philosophical theory of justice or other external authority can dictate the normative content. It is law itself that puts the law on trial.<sup>53</sup>

## **2. Law’s Self-transcendence**

The most difficult question to answer is what is meant by law’s self-transcendence in its exposure to the hiatus between structure and operation. Above we had tried a first answer by reconstructing Niklas Luhmann’s ecological concept of justice which via the re-entry of the external into the internal can go beyond the operative closure of law while remaining within it. The criteria for ecological justice are not found outside the law, rather, the law transcends itself by “enacting” its

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<sup>49</sup> N. Luhmann, *Social Systems* (Stanford: Stanford University Press, 1995), Ch. 8 II.

<sup>50</sup> Luhmann (2004), n 3 above, 85 f.

<sup>51</sup> Teubner (2001), n 31 above, 27 ff.; Luhmann (2004), n 3 above, 305 ff.

<sup>52</sup> Derrida (1990), n 3 above, 961 ff.; Luhmann (2004), n 3 above, 281 ff.

<sup>53</sup> R. Wiethölter, 'Just-ifications of a Law of Society' in O. Perez and G. Teubner (ed), *Paradoxes and Inconsistencies in the Law* (Oxford: Hart, 2005), 73.

ecologies – society, people, nature – and developing adequate legal concepts. This excludes the importation of external material. Instead, law constructs criteria of ecological justice from its own world-knowledge. It is this re-entry into the equal/unequal decisions of law which establishes the special traits of juridical justice as opposed to popular images of justice, to collective decisions of political justice and to reciprocal recognition in moral justice. Law's search for justice cannot externalize its criteria, cannot put its hope in either democracy or morality, not to speak of rational choice, but is thrown back onto itself. By enacting its ecologies, law alone bears responsibility for its criteria of justice.

With three bold moves Jacques Derrida exceeds by far Niklas Luhmann's ecological concept of justice. His ideas give enormous impulses for the actual debate on justice. In his first move, Derrida experiments with new modes of dealing with the paradox of law. Luhmann, after identifying the decisional paradox of law, demands its de-paradoxification, i.e. to hide the paradox whenever it emerges and to introduce instead a new and more robust distinction. But Derrida directs juridical thought to expose itself fully to the disturbing experience of the paradox. He drives the law into an obscure world where Luhmann would anticipate only paralysis and horror. Justice, according to Derrida, is more than a mere consistency formula, more than a contingency formula, it is law's transcendence formula – 'invocation, abyss, disruption, experience of contradiction, chaos within the law.'<sup>54</sup> This excess has profound consequences for legal decision-making: changing the situation into a decision *sub specie aeternitatis*, not just *sub specie societatis*.

Derrida's second move radicalizes the meaning of law's self-transcendence. Luhmann claims that justice transcends the law in the direction of its enacted ecologies and stops there. Thus, he gives in to the deficiencies of the re-entry. If re-entry means only to reconstruct internally the external, if it cannot mirror it but only "enact" the outer world, then it means simultaneously to include the outer world and to exclude it. But what is excluded from the law, demands relentlessly to be let in, as a matter of justice. This perturbation, the confusion and the concussion it creates, remain strangely neglected in Luhmann's analyses. It is the *distinction directrice* between system and environment that produces its own blind spot, which does not permit to analyse the in-between of perturbation. Luhmann can only see what happens within the boundaries of the law and he focuses only those distinctions that are drawn after the perturbation. But Derrida transgresses this boundary as well and expects of justice a transcendence beyond any meaning - "walking through the desert" which in his words opens the "necessarily indeterminate, abstract, desert-like experience that is confided, exposed, given up to its waiting for the other and for the event".<sup>55</sup> This is a deeply alienating style of thought for contemporary scholarship: a reference to transcending any signification, to mystical violence in Walter Benjamin's sense and to alterity in Emmanuel Levinas' sense. Derrida provokes the cold spheres of modern rationality, with their transcendent counterparts: "pure" justice, generosity, friendship and forgiving.

In his third move he constructs an idiosyncratic juridical transcendence which he separates strictly from religious transcendence. While Luhmann concentrates the experience of transcendence in one world of meaning, religion, thus implicitly excluding other social spheres, Derrida's deconstructive thought liberates it from this

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<sup>54</sup> Derrida (1990), n 3 above.

<sup>55</sup> J. Derrida, *Specters of Marx* (New York: Routledge, 1994), 90.



isolation and brings back the disquieting awareness of transcendence into the highly rationalized and secularized worlds of the economy, science, politics, morality and law. With this bold idea Derrida draws the consequence from a phenomenon which is also well-known to Luhmann that despite all division of labour, specialization and functional differentiation, knowledge is produced everywhere in society, not only in science, that in spite of the state's monopoly, power emerges also outside institutionalized politics, that in spite of law's formalization, the distinction legal/illegal is practised in many different social sites. Similarly, the experience of transcendence toward which religious practices concentrate their energies cannot be limited to the world of religion and theology but emerges in other worlds of modernity and creates effects that are quite different from the effects of their religious counterpart. Max Weber's strange formula of a "new polytheism" in modernity gains a more profound meaning if transcendence is seen to have an influence on the various spheres of rationality. It gets lost if the plurality of rationalities is reduced to a mere polycentrism of reason. A plurality of gateways to transcendence – this is how one could read Max Weber's new polytheism. Indeed, it was the achievement of the old polytheism to use differences in transcendence to legitimize differences in immanence, in particular social roles, competences and functions – a situation which repeats itself under different conditions in modernity. I suggest to interpret Derrida as identifying idiosyncratic modes of self-transcendence in diverse modern rational institutions. His astonishing theses refer to the strange paradoxical effects of transcendence in fragmented spheres of rationality, of the "pure gift" as against the profit-led economy, of "friendship" as against professionalized politics, of "forgiveness" as against secularized morality and of "justice" as against highly formalized law.<sup>56</sup> All of these are the excesses of reference to transcendence, reactivating in secularized discourses utopian energies from quite different sources.

If one continues along those lines, then the search for justice opens up an experience of juridical transcendence which cannot be identified at all with that of religion and theology. In what respect do they differ? What is the peculiarity of law's transcendence? The answer, I submit, lies in the peculiarity of the legal paradox. Justice begins where the law ends. This is the point where the hiatus between structure and operation gapes, where the legal paradox emerges and where the discourse of justice is forced to overstep the limits of legal signification. The legal paradox is not empty, it is different from the paradoxes of other institutions. It poses the question: Is it lawful to apply the distinction between lawful and unlawful to the world? Thus, as soon as the law encounters its own paradox, then it is exposed to the question of justice. This is separate from any other transcendence formula, from generosity, from friendship, from forgiving, not to speak of salvation. The peculiarity of the legal paradox – questioning the lawfulness of the legal code – is ever-present in the process of transcending the law. This question is necessary when law overreaches the limits of its own signification, but it cannot be expressed any more in the rational language of legal argumentation. It can only be expressed in an enigmatic language, in unreal idealization, in parables, symbolization, literature, delirium, utopia. No wonder that this is the very moment of the much-criticized romantic rupture in the Michael Kohlhaas novella. Now the gipsy woman, endowed with witchcraft and

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<sup>56</sup> J. Derrida, *Given time* (Chicago: University of Chicago Press, 1992); J. Derrida, *Politics of Friendship* (London: Verso, 1997); Derrida, *Le siècle et le pardon. Le monde des débats*, n° 9 dec. 1999, <http://www.celf.fr/mdderrid.htm>, English translation in J. Derrida, *On Cosmopolitanism and Forgiveness* (London: Routledge, 2001); Derrida (1990), n 3 above.

fortune telling, takes the lead in the conflicting demands on justice: “An amulet, Kohlhaas, the horse dealer; take good care of it, some day it will save you your life.”<sup>57</sup>

To summarize the argument up to this point, the discourse of juridical justice can no longer hope to identify any criteria of justice, neither within the law itself, nor in any social world, nor in the world of religion. It needs to go beyond the law in order to make the experience of transcendence under the impression of which it needs to go back to the immanence of law. However, is any experience of transcendence possible if Nietzsche is right: “God is dead”? In a secularized society, can one think the transcendence of law without religion? this not a natural law without god, and also a natural law without reason? And finally, is there any meaning left in the most enigmatic formulation of justice which is found in St. John: “Of righteousness, because I go to my Father, and ye see me no more”?<sup>58</sup>

Can there be a transcendent concept of justice without religion? This is the point of departure for Emmanuel Levinas to determine a “philosophical transcendence” in contradistinction to a purely religious one. Levinas contrasts the totality of meaning with the exteriority of transcendence in which the infinite demands of alterity and of justice appear.<sup>59</sup> Here one needs to be aware of the radical difference of alterity in Levinas’ as well as in Derrida’s thinking. Alterity is misunderstood if it is conceived only as the principle of solidarity with the other or as the singularity of the individual perspective.<sup>60</sup> Alterity means something else, the non-linguistic, non-phenomenological concrete experience of the other, an experience of the transcendence of consciousness and communication in the face of the other. As against reasoned justification, as against the rationality of public speech, the experience would be the non-justifiable, the non-rational other of justice. Justice would be located at the boundary between the immanence and the transcendence of law. In the last instance, justice is the attempt to overcome the rupture between immanence and transcendence –, to transform the immanence of law in a non-conceivable manner. Justice is not a standard of “impeccable ideality”, but a “process of transformation of injustice into law.”<sup>61</sup>

There is an additional, more profound meaning to the first part of John’s formula. Justice would be realized only after actually enduring injustice, suffering and pain. Justice would be transformation of pain, would be self-sacrifice which transforms immanence in transcendence. When Michael Kohlhaas refused to reveal the content of the mysterious amulet to the Elector of Saxony, he paid with his life, but he was gratified with the reverence of the people for being ready to die for the sake of justice. In this sense, “going to the Father” would mean to end the separation of immanence and transcendence via the transformation of injustice. Suffering would stem from the search for justice – a search in vain which realizes itself only in the non-perfect order of immanence. In short, justice would be a process of

<sup>57</sup> Kleist, n 1 above, 106.

<sup>58</sup> John 16: 10. For a subtle interpretation, H. Folkers, 'Johannes mit Aristoteles ins Gespräch über die Gerechtigkeit vertieft: Epilegomena zum 12. Kamel des Niklas Luhmann' (2000) 21 *Zeitschrift für Rechtssoziologie* 61, 68 ff.

<sup>59</sup> E. Levinas, *Otherwise Than Being: Or Beyond Essence* (Pittsburgh: Duquesne University Press, 1998); E. Levinas, *Totality and Infinity: An Essay on Exteriority* (The Hague: Nijhoff, 1979), Section I.C.3.

<sup>60</sup> But see A. Honneth, *Das Andere der Gerechtigkeit: Aufsätze zur praktischen Philosophie* (Frankfurt am Main: Suhrkamp, 2000), 154 ff., 165 ff.

<sup>61</sup> Folkers, n 58 above, 71 f.

transformation of law which were possible only by going through the real experience of injustice. This idea is echoed today in Emile Durkheim's *colère public* and also in those legal theories that stress a sense of injustice as the underlying cause for legal norms. The second part in the formula, invisibility, means not only the non-accessability of transcendence but also a "liberation of every individual's rights from the finite conditions of human norm production". However, only in a world with spiritual authority could such a hope for salvation exist. If in a secularized society transcendence could only be thought as transcendence without god, then salvation through justice is impossible.

What remains is nothing but a desperate searching which produces the permanent inner restlessness of law. New criteria of justice are relentlessly invented and new legal arguments constructed, and these very constructions destroy the possibility of justice. The search for justice becomes the addiction of law, destructive and inventive at the same time.

## **2. Constraints of positivity**

The most important differences between a diffuse desire for justice and a specifically juridical justice surface when the drastic constraints which modern law imposes on its contingency formula become visible after the experience of self-transcendence. Juridical justice cannot deal with the totality of injustice in the world, but must bridge the hiatus with its own mechanisms – however unsatisfactorily. Here is the point of difference with the "legal pietism" of the German free law school which denied any possibility of "treating like cases alike and any possibility to generalize concrete duties into universal norms".<sup>62</sup> It is at this point that infinite juridical justice is exposed to three different harsh constraints.

Juridical justice is under pressure to make a decision which connects structure and legal act within the limiting framework of law's binary code and its existing programmes, even if this decision contradicts its own experience – constraint of decision-making. Even if the judge after a long and painful process of soul searching and debates knows that both parties to the trial are right, even if he knows that whatever he decides will do injustice to one of the parties, he must decide in favour of the one or of the other.<sup>63</sup> *Tertium non datur*.

At the same time the legal system imposes on the search for justice heavy cognitive constraints. It is not free to indulge in the irrational sentiment of injustice or in the vague desire for justice. The aporias of justice which led into the experience of alterity, into irrational legal sentiment, into human suffering and pain, and into the wealth of transcendence, force the law to transform these experiences into rational reasons, technical arguments and doctrinal concepts – constraint of rational justification. Here again is the difficulty described by Luhman to answer responsively with rational arguments to the extreme demands of law's ecologies, and simultaneously to fulfil the internal requirements of normative consistency.

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<sup>62</sup> F. Wieacker, *A History of Private Law in Europe: With Particular Reference to Germany* (Cambridge: Cambridge University Press, 1996), § 29 III 3 c fn. 57.

<sup>63</sup> See the famous paradox of the rabbi, retold by H. Atlan, *Enlightenment to Enlightenment: Intercritique of Science and Myth* (New York: State University of New York Press, 1993), 17.

Finally, the options of juridical justice are drastically reduced by the poverty of law's own instruments. In aspiring to justice, law does not have at its disposal much power or influence. It has comparatively impoverished operations and structures - legal acts and legal rules. No arbitrariness of the power sovereign, no generous distribution of monetary resources, no precise prediction of future events, no dark oracle, no mystic revelation. The overwhelming experience of alterity, that is, the experiences of the infinity of the other will be reduced to an absurdly simplified legal rule which claims to be adequate to the social conflict – constraint of rule-making.<sup>64</sup>

One cannot overestimate the disciplining effects that these three constraints exert on juridical justice. Constraint of decision: the conflict cannot possibly be suspended, one party has to be right, the other wrong. Constraint of rational justification: the decision must be founded on reasons which pretend to combine consistency and responsiveness. Constraint of rule-making: the decision reduces the complexity of the conflict to an over-simplified rule. In such conditions, how can responsive structures be created? How is the jump that overcomes the hiatus possible? In the face of the infinite demands of juridical justice, only a modest secular order is established.

However, theories of justice that attempt to ignore these constraints – and these are the most sensitive among them – do nothing but discredit themselves. They take justice to be a radical self-transcendence of law, but they close their eyes to the countervailing demands of legal transcendence, to realize in the name of omnipresence its claims in the immanence.<sup>65</sup> Such theories exclude themselves from the discourse on juridical justice which forces its participants both to transcend the law and to translate this experience into legal decisions, arguments and rules. Theories that escape from such constraints, may continue to work as philosophical theories of justice. They may even become a thorn in the flesh of law. But the pain will fade. After a certain amount of time it will not be registered any more. It is particularly critical theories of law which suffer from this growing irrelevance. They collapse before the iron law of deconstructability: Critique without a substitute suggestion does not count.<sup>66</sup> A “juridical negativism” can establish itself only as a temporary phenomenon. Eventually, it must formulate the conditions under which legal prohibitions will be enacted.<sup>67</sup> The constraints of juridical justice produce a situation different from Theodor Adorno's alternative in moral philosophy and his preference for a “concrete denunciation of the inhuman” and against a “non-committed abstract identification of human being”<sup>68</sup> The passionate engagement of Critical Legal Studies merits a detailed sociological case study to demonstrate the self-marginalization of gifted and committed jurists. And with the juridical “*Hic Rhodus hic salta*” a Heideggerian attentism cannot cope at all, whether Giorgio Agamben's hopes for a new community, or Philip Nonet's patient waiting for....<sup>69</sup> Both Luhmann and Derrida insist on this point. Derrida, in his critique of Walter Benjamin, even goes

<sup>64</sup> W. Fikentscher, *Methoden des Rechts in vergleichender Darstellung* (Vol. 4, Tübingen: Mohr & Siebeck, 1977), 201 ff.

<sup>65</sup> Folkers, n 58 above, 76 f.

<sup>66</sup> Luhmann (2004), n 3 above, 428.

<sup>67</sup> R. Wiethölter, 'Recht und Politik. Bemerkungen zu Peter Schwerdtners Kritik' (1969) *Zeitschrift für Rechtspolitik* 155, 158; Wiethölter (2005), n 53 above, 20 f.

<sup>68</sup> Adorno (2000), n 12 above, 261.

<sup>69</sup> G. Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford, California: Stanford California Press, 1998), 166 ff.; G. Agamben, *State of Exception* (Chicago: University of Chicago Press, 2005), 74 ff; P. Nonet, 'Time and Law' (2007) *Theoretical Inquiries in Law* 311, 322 ff.

so far as to blame legal philosophy as complicity with the worst if it refuses to return to the immanence of positive law and remains with the distinction between mythical and mystical violence the criteria of which remain inaccessible.

But there are positive aspects to the disciplining constraints. They put the law under enormous pressure to innovate. Against the double imperative “bring chaos into order”, no legislative act, no judicial decision and no doctrinal construct can resist, the discourse on juridical justice puts them all on trial. However, to fulfil the simultaneous request of substitute formulation is much more demanding. It puts juridical justice under permanent pressure to invent new legal rules, judicial judgements and doctrinal constructs. This introduces a comparative dimension into the law which allows or even compels us to distinguish between higher and lower degrees of juridical justice. A legal order would dispose of a higher degree of juridical justice when it allows for the self-transcendence of its boundaries and at the same time produces decisions, arguments and rules that claim to be more just than those of comparable legal orders. At the same time pressure for innovation means chances of improvement. The peculiarity of law’s contingency formula, namely the combination of high indeterminacy and high structuration favours creative energies. In the “imaginary space” of the re-entry, institutional imagination finds new opportunities. It is not by chance that the *longue-durée* inventions of the juridical person, the consensual contract, and the construct of the state count as achievements of the first order. And the often retold parable of the “twelfth camel and the khadi” points to hidden affinities between artistic and juridical creativity.

#### **4. Effets pervers**

But strangely, in the last instance those legal theoreticians who refuse to find substitute formulations are right. They are not ready to pay the price for the triple constraint of justice. The price for reducing the infinite experience of justice to a binarily coded decision, to its rational justification and to its conditional programming is high – new injustice. Due to the poverty of legal formalization, but also, as Levinas has stressed again and again, due to the insensitivity of philosophical norm-universalization, the search for juridical justice itself produces new injustice which in its turn provokes its renewed self-transcendence and then again new constraints. Levinas: “General and generous principles can be inverted in their application. Every generous thought is threatened by its own Stalinism.”<sup>70</sup> At this moment the difference between self-subversive justice and a universalizing rational justice is felt painfully. It reveals that one of the highly praised virtues of justice, its founding on rational decisions, justification and norms is actually one of the most pernicious origins of injustice.

The darkest side of juridical justice, however, is its relentless drive toward universalization. The temptation toward “justicialization” of the world means that its binary logic – self-transcendence of law and its legal re-correction – is extended to society as a whole. Instead of restricting itself to the equal/unequal judgments in conflict resolution as opposed to the different requirements of political distributional justice and the recognition justice in morality, it attempts with an “acute fever of righteousness” to realize a just society applying the instruments of juridical justice. It is just to decide the problems of the world with the help of the binary code of law –

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<sup>70</sup> Levinas (1998), n 59 above.

this is the summum jus summa injuria of functional differentiation. The expansionist drive can be observed in other contingency formulas as well, with that of the economy describing all the problems of the world as a question of scarcity which can be solved only by economic means, with the legitimacy formula of politics and with the limitationality formula of science. All these contingency formulas promise to produce the good society, although in fact they can give only partial answers for their limited sector. “Justicialization” as an attempt to bring the whole of society to justice with juridical instruments is disastrous: the imperialism of legal rationality, parallel to economic, political and scientific expansionism – a unidirectional growth of juridical justice which needs to be resisted politically. This imperialism of a partial rationality is dangerous because it meets the human desire for a non-divisible justice. Although it is well-known that this desire cannot be fulfilled in modernity, juridical justice as societal justice continues to offer the false promise of salvation. Both produce a dangerous mixture of unanswerable questions and hypocritical answers. Human rights ideology as the ideal of a just society – the imperialism of juridical justice produces the totalitarian seeker of justice who projects the limited juridical justice onto the whole society, the Michael Kohlhaas of our times – “one of the most upright and at the same time one of the most terrible men of his day”.<sup>71</sup>

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<sup>71</sup> Kleist, n 1 above, 81; R. Ogorek, 'Adam Müllers Gegensatzphilosophie und die Rechtsausschweifungen des Michael Kohlhaas' (1988) 96, 121 ff.