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Just-ifications of a Law of Society

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I. PRELIMINARY

I TALKED ON THIS theme[2] on 2 November 1998, on an invitation from D Simon, at the Max Planck Institute for European Legal History, speaking freely on the basis of notes in the form of a batch of keywords. The intense and widespread interest among the 'audience' ('Friends, Romans, Countrymen') imposed—objectively—desires for the impossible on the speaker: a 'state-of-the-law message' (from the late autumn of one's professional life?); an ad hoc arbitration ruling on rival theories (the labourer's meta-critique of royal buildings?); a 'final lecture' (as a speech to the educated among the contemptuous rabble, as a reverse prophecy, as an autobiographical fragment?). The outcome then (presumably also the observed one) was: none of that, and a bit of all of it—*omnia omnes omnino*. Or (borrowing not so freely from Theodor W Adorno), I wanted to lay my cards on the table, but that is not the same as the game. Obviously, the point then is (only!?) card games. Still more briefly, my presentation was aimed at punctations,[3] richly intertwined, enciphered and riddling, in a word: 'poietically/unsystematically.'

[1] Translator's note: The writer engages in many kinds of wordplay, often splitting the compound words common in German into their component parts to suggest several meanings at once. Most of this is untranslatable; the flavour resembles that of the styleme of some preachers in English, who split 'atonement', say, into 'at-one-ment'. I have added the occasional note, where unavoidable, to elucidate otherwise impenetrable connections.

[2] Translator's note: Both nouns in the title are hyphenated. *Recht-fertigung* (just-ification) can be etymologised as 'making/manufacturing law/right and giving reasons.' *Gesellschaftsrecht* is the ordinary word for law of associations (company law plus partnership law). Hyphenation recalls that '*Gesellschaft*' is also the ordinary word for 'society.' I have retained the law of associations here as a nod to the author's free-association style, while elsewhere mostly using 'society.'

[3] Translator's note: lists of points; often preliminary contracts.

I have dodged the imposed temptation to submit a basic paper for Florence by submitting the naked keywords from then, now in a somewhat different garb. The 'punctation' that follows thus recreates the 1998 talk, without being it. As the form, I have chosen torsos or fragments of 'key concepts.' Keys like this count for references to others or to myself, for associations, for connections: in short, for extrapolations or further calculations, for memories and hopes, or more fashionably, for areas of experience and horizons of expectations. They aim at ('radical'!?) 'disclosures' of problems, ('cautious' and 'considerate'?) 'conclusions' to discourses, and ('provisional', 'circumspect'!?) 'resolutions' of decisions.

I wish to offer as a concurrent self-reference, or as it were a virtual appendix, two earlier papers.[4]

II. FRAGMENT 1: ACCESSIONS TO INHERITANCE

Law as one's own time grasped in thought—a Promethean reaching for the stars, today unbearable. That is, law that ought to be fixed, irrespective of not being attached to or supported on anything, whether in heaven or on earth; not to be understood from itself, nor from the so-called development of the human spirit—a logic of decay as an ideal pan-Cassandra. So, as before, we are back with Sisyphus: we are contemporaries of a legal dispute about the process of law, seen from a particular vantage point. But which one?

The Trinity developed in the eighteenth century against all intermediary ('social') powers, in political philosophy (every human being has legal capacity, but only human beings), political economy (no monopolies or privileges) and political sociology (*il n'y a que l' état et l'individu*) has enabled an art of historical development in political economy that manages to have dealings with Rousseau-type trends and at the same time philosophically idealist ones. That established historical burdens of proof for the nineteenth and twentieth centuries. 'Rule of law' (the heritage of political philosophy) and 'democracy' (the heritage of political sociology) are among the characteristic features of 'political economy' that can be continually re-related anew to each other and played off against each other. For more than 200 years, thus, the 'strong state' and the 'sound economy' have been rivalling about determining society as a society where emancipation stands for freedom from all sorts of unfreedom arising in the name of objective rationality of rule, majority will of the people or free individual rights. Since the French revolution, then, a latent undecidability has been maintained as to whether the revolutionary public would be more of an (Anglo-American-type) civil society, or

[4] Reprinted in *KritV* 1988, 1–28, and in G Teubner (ed), *Entscheidungsfolgen als Rechtsgründe* (1995) 89–120.

else some continental mode of state-society dichotomy (meaning a dichotomy between politics and the economy). Germany kept to the state-society model, but as it were filled in the French analytical and technical basic pattern with Anglo-American pragmatic spirit, thus feeling able to assert democracy and liberalism as a unitary construction. What was bestowed on us, though, at any rate in Germany, was only either 'society' wishing to achieve its specific partial interest position as a higher pre-state right against the state through the state, or else the 'state,' wishing to impose its own inherited rationality of power on historical developments as permanent administration from above. What got left behind along the way was 'society as society,' as a claim to bring traditions of 'democratic' universality of duties of virtue and 'liberal' universality of freedoms reconstructively into a universality of law, which, in terms of 'political economy' and at the same time 'social morality,' and despite all the ambivalences, tips over neither into the functionalisation in public and constitutional law of 'partial' law (the historical path that Kant's philosophy took politically) nor into the total, biased taking over of all legality (the historical path of the 'strong state' and the 'sound economy' to date).

What defines us in terms of 'legal science' continues to be the fight over the 'society of law' itself. The alternative, hitherto held (at least in Germany) to be unavoidable, or at any rate unexchangeable, namely between 'public' (state) law as rationally necessary and 'private' law (of civil society) as subjectively arbitrary, or else guaranteeing necessarily rational 'freedom' as law against all conceivable ('private') systems of ownership including their ('public') guarantees, cannot help us (any longer). It is no surprise that our legal semantics of 'legal protection' (with guaranteed subjective rights at the centre) and 'institutional protection' (with temporal, material and social infrastructural guarantees at the centre) does neither 'good' nor 'justice' to the contemporary requirements of the timeless paradox of law (in brief, of a law of conflict of laws about (legally) right and wrong admitted into the law).

'Society as law of society'—that is the three-front war in ('revolutionary') permanence: for 'independent' against 'feudal' power (today, allegedly, of whatever kind!), for preservation of the established against (and for establishment of what is to be preserved through) the challenging power of the unsatisfied-unpacified 'non-independent' (today, more abstractly, the world shared with others, the social sphere and posterity—'*Mit-, Um- und Nachwelt*'), for lasting and continuing transcendences of the whole as a whole by the whole (in time and space) against its—equally lasting and continuing—deconstructions. In traditional political and legal language, these fronts are called: Front 1 = 'freedom' ('economy,' 'liberalism'), Front 2 = 'equality' ('politics,' 'socialism'), Front 3 = 'Third Way' ('democratic and social state based on rule of law'). Front 3—'transcending' the other two fronts—today defines all the debates about a societal interest of law in itself that cannot (any longer) be understood and applied exclusively from the

viewpoint of 'markets' and 'politics,' but will have to rearrange the 'right of action'—'admissibilities'—in the redistributions of social learning to change that are emerging in the longer term. This ideal overall front is the 'law.'

The whole of the legal world here (like the world in general) is in favour of 'modernisation.' What counts as modernisation—with and since Max Weber—is a timelessly abstractable and, at the same time, reflexibilisable triangle of demythologisations (copings with the past), differentiations (logics of the particular under reservations of the determinability of the general) and autonomies (emancipations into possible—and therefore more and different than any achieved—freedom, which has then to establish itself immediately and simultaneously against all sorts of unfreedom). Such efforts at change aim concretely at comparisons and gains in capacities for solutions to problems. In practice, the point is—so at bottom the lines of convergence of all the influential major theories (systems sociology, institutional economics, political philosophy) say—functional definitions as law-shaping postulates, which become the basis of general legislating or law-making doctrines, or more specifically, permissions for decisional freedoms under review.

Observation of the event as first interim consideration: enormous heritages that have not been entered into: so many beginnings for 'transcendings' there have never been (while there always were, though not this way).

Note:

One man asks: 'what comes next'
The other only 'is it right?'
And that's what differentiates
The free man from the slave.[5]

III. FRAGMENT 2: RIDDLING ENCHANTMENTS

With 'riddles' (aka 'problems', aka ...) of 'society' and 'law,' things seem for some time to have been bewitched: society, like law (once again, not so freely after TW Adorno), seemed once to have been overtaken, but are kept alive because the time for their realisation was missed. For all the rival social theories, 'society' and 'law' are central, yet they do not stand at the centre.

'Society,' Qua

1. Critical philosophy: not unsocial sociability, not a state of emergency or reason, not social humanity, no third-class or fourth-class conceptuality.

[5] Translator's note: Iambic, three tetrameters + one trimeter, rhymed *abcb*.

Instead (explicitly and comprehensively in the context of a 'critical' theory of society), efforts to extend a concept of basic antagonisms: after byways through forces of production versus relationship production, labour versus interaction versus politics, system versus life-world, we now have challenges to the institutionalised, organised manufacture of decisions by culturally mobilisable subpublics—on the discovering and learning search for a civil society that is to be created and exercised.

2. Systems sociology: the 'society of society' (Niklas Luhmann, 1997: 'Since the classics, that is, for about a hundred years now, sociology has not made any noteworthy progress in the theory of society'; 'when I was taken into the faculty of sociology of the University of Bielefeld, established in 1969, I found myself confronted with the demand to name research projects I was working on. My project, then and since, was called: theory of society; duration: 30 years; cost: none') is 'the social system itself' as the 'underlying system reference'; all in all, a 'theory of society as the proposal to describe society in society'; 'the leading question is, then, what operation this system produces and reproduces whenever it occurs. The answer ... is: communication.' (There follow 1,164 more pages).
3. Institutional economics: a constitutional monarchy without a monarch, but with a secret king, the 'law' (not so freely after G Radbruch); its 'private law of society' is not 'private,' is neither 'law' nor 'society,' but a total constitution (= society) guided by political economy (= private), defined by social philosophy in terms of content (= law).

L von Stein was unable to classify 'any concept of society yet.' Max Weber had already lost interest in it. In between had come the invention of sociology. Admittedly, it leaves 'society' lying on the left (or the right). 'Social actions,' 'social systems' take advantage of their careers as themes. For all that, the simple faith-type belief in 'state versus society' is gone forever; the 'case for both' exists (if it does?) as once did 'God' in deistic times. So *nunc et semper:* 'theory of society.'

'Law,' Qua

1. Critical philosophy: without law it does not work—and with law it does not either! The summing up in movement theory is defined 'historically and in terms of the logic of decline': pure law cannot be strong, strong law cannot stay pure. The 'traditions' that remain recall the beginnings of unavailability, and hope 'at long last' for the 'proceduralisation' dialectic of potentials that can be made actual.
2. Systems sociology: law is dead—long live law! The summing up in difference theory is defined in terms of 'Germanic inheritance law': *le mort*

saisît le vif; the dead inherits the living. No *hereditas iacens*, no interim administrations of new by old or old by new, but old by old versus new by new—'law as enforcement of law,' This looks like—both when observing the *x*th stage and in the final view—(permanently reserved!) total repudiation of inheritance. 'It may therefore very well be that the contemporary prominence of the legal system and the dependence of society itself and of most of its functional systems on the functioning of the legal code is nothing but a European anomaly that will wither away with the evolution of a world society.'

3. Institutional economics: law is (no longer) what it (anyway never) was! The summing up in enterprise theory is defined in 'conspiratorial cryptography' terms: free competition on open markets—an equation in at least four (since there are at least four 'revealed'!) unknowns.
4. 'Juridifications' (which can be joined by dejuridifications and de-dejuridifications, inclusively or successively): *Querelle des Anciens et des Modernes* in a second great edition (= 'Juridification II'; the previous stage, 'Juridification I' until the 1960s/1970s of the twentieth century, ending at the time in failure of politics and market failure as failure of law).
5. Traditional alternative: special general (especially private) law (ie, in a nutshell, 'impure' law of the sphere of circulation) and general special (especially 'private') law (ie, in a nutshell, 'situational' law of the social sphere); its exhausted energies can be summed up as follows: traditional 'formalisations' of law 'confer' their hidden materialities on citizens who are free and equal in 'money' and/or 'power' as they do their business ('wealth' as special having and being able! Correspondingly definable having and being able! Correspondingly definable inability to have and be able, or to be able to have!). 'Materialisations' on the foundations of such forms are then condemned ('cultural criticism') to swear powerlessly to ideas against realities or developments, or—in thoroughly authoritarian/totalitarian fashion—to rely on particular particularities ('interests'). Universal general (not only 'private') law is left as the unsolved riddle of the uncompleted project of modernity.
6. Observation of the event as second interim consideration: contradictions, paradoxes, agonies, as far as one can see (or can see that one does not see). Law has 'emancipated' itself radically for the whole world into self-determinacy, and is nonetheless dependent on nothing so much as on externality, normativity, structuring, if it is not to be stolen, to get lost, or be otherwise misplaced. Law now this way, now that? As if bewitched! For a social (legal) dispute about the latent, hidden, tacit 'linkage' of law in the (legal) dispute orientations of the rival social projects that have in turn left 'society' behind them and rely on 'theory of society' about the process of law—obviously—does not come about in the camps of the various parties. That is the powerlessness of all law.

Note:

'When Cicero stepped down from the rostrum,
all the people cried in delight 'no mortal speaks finer!'
when Demosthenes stepped down, what the Athenians shouted was:
'War against Philip, war!' [6]

IV. FRAGMENT 3: PROMISES OF SCEPTICISM

The short formulas for the ('bourgeois' and 'anti-bourgeois') tradition of promises which continue to dominate us are: some favour promises of a (better) future that will displace the (worse) present (and even more, the always and still worse past), others favour promises of a (better) future that is being displaced by the (worse, and made even worse by the past) present. Only, we all lack faith in salvific messages, even if they have been more fashionably formulated for some time now: ways of tying down time; to stop and to endure ... and so forth.

My vision of a productive utopia is: the constitutional law of law! Instead of 'constitution' one might also say constitutionalisation, enabling and realisation, comparison and linkage, relation or the like. The only important thing is that the point is 'conflict of laws rules' as a form (note *en passant*: PIL as a related approach, though only in spirit, not by blood!), for the sake of 'things' (as content) (note *en passant*: etymologically, thing means 'dispute'!). There are accordingly two connected—'logically-historically' determined—legal propria: 1) the uncompleted, whether in bourgeois or anti-bourgeois terms, post-feudal project of 'reciprocity'; here the point is to fasten down (aka to network, mediate, 'transcend,' etc) dependent independencies (also identifiable as independent dependencies) that can replace Immanuel Kant's 'autonomy' as—more than 'freedom' and 'equality'—determinant *materia in motu*; 2) the 'impartial partiality' (also identifiable as partial impartiality) of all law that can be unstuck only in methodological and theoretical ways; here the point is dealings with, or concessions of, autonomies (aka freedoms, experiences, caprices etc) subject to reserved review (criteria, venues/fora, procedures). The building in of law versus non-law into law by way of 'law of conflict of laws' lets 'non-law' be interpreted more briefly as eg, 'politics' (this is how 'political legal theory' wishes to be interpreted), or more specifically also as eg, 'political economy' (when one wins home to 'land' and 'house') or as 'social history' (when there is more room for memories and souvenirs) or ... (when ...).

Law of the legal constitution is 'proceduralisation,' 'just-ification,' a productive principle for 'positive law as right law,' and in its turn, thus,

[6] Translator's note: mostly iambic, rhymed *abba*.

similarly in dependent-independent independence-dependency, tied just as much to its own superfluousness and uselessness as to the caprice of 'Law and Justice,' always 'aimed' at the avoidances it carries with it, especially of failure 'of itself (of law).' Proceduralisation does not merely play off materiality against formality (or vice versa). It is not a continuation of traditional form-content definitions, but a resumption of materialisation definitions and their determinabilities by form. It does not have some other law, nor something other than law, in mind, but the other (one possible other) of law, its redeemable surpluses of enabling rather than its unredeemed ones of promise. Everything possible is possible! That is literally true. Or more briefly: 'justification' is the form of the thing 'proceduralisation.'

Law of the legal constitution can take on board the messages of institutional economics, to plan law as an incentive for purposes of action towards decision, no less profitably, and economically of resources, than the messages of systems sociology to keep richness of variation and sensitivity to retention always simultaneously available in the selection processes, or the messages of critical philosophy to 'try out' regulatory postulates of law of conflict of laws as law of challenge and improvement in disputes over practical suitability in application (ie, as a rule counterfactually!). And conversely, law of the legal constitution profits, in its decisive decisions as to distinctions, from the decisive strengths/weaknesses of the social-theory camps, from their blind spots, their presumptuous presumptions, their deceptions (which may take the form of blackouts or screens), especially at the—always indefinitely-definite—'lock-gates', ie, the 'boundaries' between system and environment in systems sociology, where 'structural linkages' or 'externalisations' are negotiated and decided, at the 'undertakings' in institutional economics, to which competence privileges are 'allotted,' at the 'passages' in critical philosophy, where validity and recognition are to be accomplished.

'Society,' which L von Stein was unable to 'classify,' observed, understood and explained by our classics not so much as an object but from methodological or theoretical perspectives, has so far been unable ('quite contrary to its intentions') 'to unite men without dividing them, nor divide without establishing the gaps between them' (GE Lessing). 'Coordination' and 'subordination' simultaneously: bringing chaos into order—such a society (paradoxically enough) can never be had; 'the point is' to bring it forth (again). Here, what is to be relied on is the hidden plans of the nature of law and the usage of legal reason, cultivated in conflict, which means, on the 'developmental dynamics' (aka dialectics, basic contradictions, challenges) of 'nets' (eg, globalisations) and 'caprices' (eg, individualisations).

Then, law of the legal constitution certainly is 'poietic non-system.' This formula is not intended as some sort of 'anti-podium' to Gunther Teubner's 'autopoietic system.' Yet the 'auto' (an Enigma system all by itself?) meets

with 'reluctant acquiescence' (J Taubes), and the 'system' is showing traces of wear (instead of endless notes and reminders, let three suffice: for the British ideal gentleman, 'man of system' meant a doctrinarian; 'the will to system is a lack of integrity' (F Nietzsche); TW Adorno explicitly saw his *magnum opus* ('Negative Dialectics') as an 'Anti-System'). 'Poietic non-system'—that is, the 'administration of justice'[7] as cultivation of the paradox of law itself, of simultaneously its preservation and its treatment; it is spontaneous, self-conscious, self-justifying 'legal games,' it is 'medicine' (healing through operations) and 'art' (as a reminder: 'wit' = 'noting the connection between distant ideas' (Jean Paul). In brief, it is 'surprising turns,' though not as adaptability or frivolity, not as a cold shower or malice; instead, 'getting' the law is justification in application, more 'production' than 'presentation,' more context of discovery than context of justification, more question than answer, more finding possibility than seeking reality, more perception than prediction[8] (in more technical legal terms, rather querying the facts than establishing the legal consequences), and in these respects, then, 'really' a work of seeking, learning and discovery. Or in older European terms: *aisthesis* as 'receptive' basic experience and expectation of/for/in perceptions and imaginations, plus *poiesis* as 'productive' basic experience and expectation of/for/in ('critical'!) constructions, 'creations,' 'reprimands,'[9] plus *katharsis* as 'communicative' basic experience and expectation of/for/in 'movements,' changes, healings. Or more briefly: 'Lichtenberg's subjunctives' (A Schöne)—realistic thinking thanks to the capacity to imagine things might be different, and the conscience that they ought to be made better.

Observation of the event as third interim consideration: to socialise the law of society in law of justification terms into law, and justify justifications in law of association terms—perhaps (but 'perhaps' would, of course, need a separate law as social theory lecture of its own) that contains a solved riddle and at the same time the power of law. Perhaps the emancipation of such law from law in the rival social theories, which, no doubt, as 'other than law' or 'other law,' does not (yet) seem out of date, into an 'other of law' contains a step towards chances of realisation, and perhaps then as 'universal' general (not solely private) law. 'Law' would then not be bowing to social theory designs, but itself be one, and therefore at any rate not 'system,' not 'discourse,' not an 'undertaking.' The problems of connections (Does that which applies to this law apply correspondingly to 'language,' to 'corresponding' language?) are stimulating—for another talk, by another speaker.

[7] Translator's note: the German term *Rechtspflege*, taken literally, can be seen as meaning care/cultivation of the law.

[8] Translator's note: the two German words etymologise as 'truth-taking' and 'truth-saying.'

[9] Translator's note: the German etymologises as 'settings to rights,' and can also mean directions/corrections.

Note:
Whether the right understanding of law
was ever known to anyone
is doubtful: all opinion
will always find something wrong.
What's doubtful, though,
can hardly be a science.[10]

V. FRAGMENT 4: TEMPTATIONS TO PROHIBITION

It is not surprising that in the law (and not just in private law), the tracks and traces of social theories are to be found. If 'lacunae in justice' (keyword: avoiding contempt and humiliation, waste, aberrations) become the predominant theme of searching, learning and discovery, then involvements in and effects from societal infrastructures will turn the careers of legal theories around: 'preventive neglect' will replace 'elimination of consequences' (*'culpa in non faciendo'!*).

Traditional 'spatial-objective' legal thinking has for some time now been replaced by 'functional' methods. These do not combine forms, causalities, freedoms, but target relations, programme performance, networks, automatisms. In sum: it is risk prevention, compensation for special sacrifice and obligations to acquiesce that are staged by the legal dramaturgies. 'Freedom' (of processes, manufacture, organisations etc) under controls (barriers, self-restraint thresholds etc) brings the infringer (of ground rules) to the fore, not 'the injured.' Guarantees of expectations become more important than instructions to act. The 'free' are (or become) those who 'guarantee' upright, authentic, appropriate status, in short 'integrity,' and/or the findings of the transactional activities concerned. 'Freedom,' like 'procedures,' like 'controls,' has to ensure legal games that are successful because they are 'tractable.'

The development was to be seen in all fields (at any rate in private law, including labour and business law, with which I am particularly familiar): provision of goods and services, industrial disputes and conflicts of opinion, accidents, etc (or more briefly, administration of things).

The proceduralisation of just-ification is—*qua* criteria, venues, procedures—tied back to social theory instructions, particularly as regards laws of historical experience and the structural conditions of compatibilities. It is here that forecasting prerogatives (with, at the top, constitutional courts and the legislator) and corresponding error prerogatives (in some circumstances also correction obligations)—familiar to lawyers as the issues of the burdens of allegation and of proof—play their parts. One magic formula

[10] Translator's note: Trochaic tetrameters, rhymed *aabbcc*.

(from the German Federal Constitutional Court) that is universalisable runs: freedom, where all experiences and all insights give convincing support. Or more briefly (linking up with Fragment III): 'just-ification' is ideally justly made where the messages (as impositions, barriers, restraints) of the rival social theory projects are 'proceduralised' and 'temporalised,' ie, 'recognised,' 'understood,' 'processed.' 'The point is' to put the theoretical possibilities, in terms of movement or difference or enterprise methodologies, to the test in practice.

In the legal toolbox—and it is again hardly surprising—old-new 'figures' are making headway: unenforceable obligations, executed contracts, arbitral awards (articles 315-317 BGB[11] as an almost crystal-clear principle of discourse!?), frustration of contract (as a reminder: *promissa in se habent tacitam condicionem si maneant res quo sunt loco* (H Grotius)).

Observation of the event as fourth interim consideration: freedoms under impositions—a project that entangles prohibitions into temptations, and temptations into prohibitions. This is the practice for coping with contingencies of an 'artificial' theory 'in being'[12] ('perhaps'!?) the paradigm of a self-righteous law of the legal constitution. And it will continue, as before, to be 'Poetry and Truth.'[13]

Note:

Motto for the First Part (this and the following relate to Goethe's *Dichtung und Wahrheit)*: 'He who is not flayed does not learn [line from Menander '[Ο μὴ δαρεὶς ἀνθρωποζο ὐ παιδε ὐεται]'.[14] This is institutional economics (insights into necessities).

Motto for the Second Part: 'What youth desires, age receives in abundance.'[15] This is critical philosophy (better late than never).

Motto for the Third Part: 'It is assured that trees do not grow into the sky.'[16] This is systems sociology (variation—selection—retention).

Motto for the Fourth Part: '*Nemo contra deum nisi deus ipse.*'[17] Is this ('perhaps'!?) 'critical law' in the compromise negotiations between autopoietic System and poietic Non-system?

[11] Translator's note: the German Civil Code.
[12] Translator's note: English in original.
[13] Translator's note: the title of Goethe's autobiography.
[14] Translator's note: used by Goethe as epigraph to his autobiography.
[15] Translator's note: quote from Goethe's autobiography.
[16] Translator's note: also in Goethe, though possibly already proverbial.
[17] Translator's note: likewise in Goethe.