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« CONFLICT OF THE FACULTIES »: AN EXTINCT FORM RE-EMERGES

I.

Two professors, a German private lawyer, whose habit of referring to non-lawyerly sources far beyond the merely decorative fashion in which this is usually done, has repeatedly been requited with collegial anger, and an Italian philosopher, who had initially studied law, and in whose on-going work, the archaeo-genealogy of the Western legal tradition plays an increasingly imperious role, give rise, in two recent publications, to the re-invention of an almost forgotten genre: the conflict of the faculties (1). They do so unbeknownst, to be sure,

(1) Giorgio AGAMBEN, *Opus dei: archeologia dell'ufficio (Homo Sacer II, 5)*, Torino (Bollati Boringhieri) 2011 offers a historical analysis of the *office*, the duty that supplements and enhances the words and deeds of holders and practicians of professional competences. Though Agamben does not refer to law specifically in this study, the office of the lawyer is clearly among these duties, if only as one among several instantiations of secularized (yet not profane: still sacral) priesthoods that are disseminated today. Agamben does not refer to any contradictor. Gunther TEUBNER, *Das Recht vor seinem Gesetz: Zur (Un-)Möglichkeit kollektiver Selbstreflexion der Rechtsmoderne*, in Marc AMSTUTZ/Andreas FISCHER-LESCANO (Hg.): *Kritische Systemtheorie - Zur Evolution einer normativen Theorie*, Berlin (Suhrkamp), under press, here quoted after the PDF version *KafkaVordemGesetz2011FSAmstutz.pdf*, accessible under *www.jura.uni-frankfurt.de.*, offers a re-reading of Kafka's page *Before the law* asking what would change if the experience happened, not to an individual, but to the law, thus staging the question of the legal *officium*, in the critical discussion of which Teubner refers to relevant earlier texts of Agamben, along with Luhmann and Derrida. Mind that we lack even in Teubner's short and dense piece any specific reference to a « faculty » (understood, as in Kant, as a practice-oriented yet, validity-claim-wise, universalist institution). Yet, the substitution of *Recht* for the *Mann vom Lande* that is sug-

which is less than surprising, considering that the form "conflict of the faculties" has fallen into oblivion. University faculties have lived through a long history of conflict-ridden coexistence, from the continuing battles between theologians and masters of art at the Sorbonne of the 13th century (2) to the best known contributions so far, Immanuel Kant's "Conflict of the Faculties" (1798) a contribution to Sociology of knowledge *avant la lettre* (3), that documents a series of border incidents opposing the Philosophical Faculty to those of Theology, Law and Medicine. The author appears to act at once as judge and as party (counsel to the Philosophical Faculty). In contrast, a gaze on the state of higher education is enough to understand that no sustained disagreement, let alone conflict, exists between University faculties today, with the spectacular, but exclusive exception of funding-related matters. Which in turn shows not any passionate efforts for consensus, but both the long-term eclipse of conflict culture, and the loss that the University has suffered, since Kant's days, in its societal standing. For, it is true that the examination of competing political claims to validity appear as just the type of thing, of "public office", which a University, even university culture at large, would appear as capable and competent to deliver. However, the address, if any, at which *claims to validity* are examined within the public space, has been outsourced to the media sector.

Clearly, in such circumstances, references to a conflict of faculties are bound to be historical. The paradigm spans from early modern lawyer Albericus Gentilis's celebrated maxim of intellectual-institutional division of labour ("Shut up, theologians, outside of your faculty!"), forward to Kant's rehabilitation of the "lower faculty" Philosophy against the three "higher faculties" and backward to the rich medieval landscape of pioneering divides and syntheses between aris-

gested, is clearly sensitive to the issue of whether this observation is related to law or to philosophy.

(2) See several contributions in Olga Weijers, Louis Holtz (eds.), *L'enseignements des disciplines à la faculté des arts, Paris et Oxford, XIIIe-XVe siècles*, Turnhout (Brépols) 1997, especially Alain de Libera, « Faculté des arts ou Faculté de philosophie? », *ib.*, 429-444.

(3) Immanuel Kant, *The Conflict of the Faculties (Der Streit der Fakultäten)*, New York (Abaris) 1979.

totelian natural science and the theological anthropology drawn from the sources of Christian revelation. It is the wager of the following pages to revive the choreography of the conflict of the faculties, and that, in the midst of the conflict-averseness, it is from mutually exclusive takes on secretly identical questions that an understanding of their common subject-matter can coalesce (4).

Any attempt of defining what is at stake in the dispute of Giorgio Agamben and Gunther Teubner should start with some points they have in common. There is the fact that both are discussing legal institutions strictly speaking. The most schematic account of their standard tenets suffices to show their common avoidance of any illusory "contrast-programs" to law — for both, any non-trivial issues of law are predicated upon *law "itself"* (to the extent to which one can speak in this way of a subject the boundaries of whose "self" appear to be continually subject to revocation and resettling). To both, in other words, the legally institutionalised forms of human existence, not the provinces of the "law-*and*-*x*" type (of which we find no mention in either work), are decisive. Furthermore, none of the two has embraced the premature promise that has found, over the past two or three decades, its expression in a long list of composite words starting with "post". At the same time, both are guided by a keen sense for history and attribute an important cognitive role to newly emerging realities.

One of the principal issues at stake in the conflict is located in what appears as a denouncing gesture that the philosophical (Agamben) side seems to employ in order to distantiate itself, tacitly yet unambiguously, from the legal institutions it refers to — to distantiate itself, as it were, from the very fact of a discourse held by anyone speaking in law's name. Conversely, on the legal side (Teubner), another principal issue is the fact that, far from finding its stronghold in the self-celebratory attitude frequently adopted by lawyers praising the legal order as a sagacious and timely provider of social-life enhan-

(4) The conjecture is similar to that suggested by De Libera (see note 2 above, at p. 444) with respect to the conflict between the arts faculty and that of theology in the Middle Ages, when he locates « medieval university itself » in the « articulation asymétrique de ses deux facultés rivales ».

cing *Errungenschaften* (achievements) — the argument here stands in the sign, precisely, of the lawyerly "officium" and its *aporias*. Teubner effectively asks what would be discourse and gesture of the legal order (*Recht*) talking in its own name — it would be a prosopopoiia of the legal *officium*, understood as the job or mission required to be accomplished, not only by the individual lawyer but, rather, by *Recht* itself. For Teubner's argument here (5), the law has little to offer, no riches, no abundant possibilities of problem-solving; his point is predicated, on the contrary, upon a negatively situationist setting, a situation characterized by radical scarcity of possibilities. *Recht* faces the need of providing an acceptable way of dealing with something like a helpless trap situation, a situational enslavement. If the card of law needs to be played, this is not because it is a trump card, nor because there is a capital of enviably promising capacities attached to it; rather, the legal *officium* is confronted with a situation that challenges and indeed overstresses its capacities. Strangely enough, the solution to this is not an action: It is a passion, and one that has definitive commonalities with Christ's; making it hard to distinguish it from the action of divine (christological) *oikonomía* — from the paradigm of the salvation of mankind through the sacrifice of the good shepherd or *oikónomos* on the cross.

We are, however, far from having reached the end of the list of what lies at the centre of the common attention of both sides. Rather a lot. The debate about central issues of law have focussed on some formulation of the problematic knot between law's virtual omnipresence (the fact that every non-legal relationship is constantly capable of transsubstantiating into a legal one) and the legal order's factual law-monopoly (the fact that there is no law outside of the legal order, which thus disposes of a right of officiating as the law's lawful representative). What is at stake in our conflict of the faculties is, rather, *the non-coincidence between being and operation in law*. Both sides

(5) In another context, however, Teubner has devoted a positive self-appraisal of the law as a capable dispositive, or a specially enabled task-force, cf. his classical *Alienating Justice: On the Social Surplus Value of the Twelfth Camel*, David Nelken and Jiri Priban, *Consequences of Legal Autopoiesis*, focuses explicitly on law's «capital» of magic problem-solving capacities.

locate the salient feature of their respective theory-choices in the intimate non-coincidence with itself that underlies the routinized uses of the very *name* (not: "concept") of law. The most cursory glance on legal theory teaches that oneness, "integrity", provide law with its most insidious secular-theological attribute. Most legal subjects remain for life hooked to these monolithic conceptions. Yet, at closer looks at the object law, closer than those a legal subject is expected or entitled to, is there not something like an oscillation, a come-and-go between the law as a being thing *and* the law as an operation, a device for operations, a "dispositive"?

The experience of this split is not new. If the past fifty years of legal theory have seen a wealth of self-centered and confidently modern architectures of law, they have also seen a growing distance from claims that law is appropriately dealt with as an object of pure theory, or as an object that fits into the concept of "concept". The comfortable image of a legal system endowed with self-identity has been replaced by a series of a polycephalous or acephalous images, not least by Gunther Teubner himself, in whose work we find several relevant considerations on topics such as legal fragmentation (6), collisions of diverging legal regimes (7), and indeed on the anthropological and virtue-theoretical conditions of the flourishing of legal as well as economical systems (8). Much rather than that of an internally coherent *one*, current law offers here an image that is not entirely un-

(6) Gunther TEUBNER, Andreas FISCHER-LESCANO, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, in 25 *Michigan Journal of International Law* (2004), 999-1046; Gunther TEUBNER, Peter KORTH, *Two Kinds of Legal Pluralism: Collision of Transnational Regimes in the Double Fragmentation of World Society*, in Margaret YOUNG, ed., *Regime Interaction in International Law: Facing Fragmentation*, Oxford (Oxford University Press) 2010; Gunther TEUBNER, *Constitutional Fragments, Societal Constitutionalism and Globalization*, Oxford (Oxford University Press) 2012.

(7) Gunther TEUBNER, *Altera Pars Audiatur: Law in the Collision of Discourses*, Richard RAWLINGS, ed., *Law, Society and Economy*, Oxford (Oxford University Press) 1997, pp. 149-176.

(8) Gunther TEUBNER, Michael HUTTER, *Homo Oeconomicus and Homo Juridicus - Communicative Fictions?*, in: Theodor BAUMS, Klaus J. HOPT and Norbert HORN (eds.), *Corporations, Capital Markets and Business in the Law*, Dordrecht (Kluwer Law International) 2000, 569-584.

like to how church father Augustine had portrayed mankind, that of a *massa perditionis* — a heap of undefinably floating decision-plancton, fated to satisfy forces that exercise themselves upon it, with no more or other powers in its hands than those of compensating for its "lostness" by resisting compensatory temptations from the outside, renouncing the illusion of an outside stability *as well* and sticking to its own routines. And once again, this view does not substantially diverge from that of the philosophical account of law. In Agamben's eyes, legal institutions appear frequently as a free-wheeling machinery that serves to successfully bestowing, upon each of its decisions, its one and only relevant article, validity. Validity counts irrespective both of its content and of its agent, whose successful implementation it guarantees. But not only does the standard legal positivist account of validity clearly validate its agambenian historical correction (which traces the institutional invention known as *positivity* or *legitimacy-by-procedure*, back to the ecclesiology underlying church-father Augustine's anti-donatist writings, according to which the sacrament is effective *ex opere operato*) (9): by the same token it shows just that unresolvable *aporia* which in Teubner's legal reasoning will then generate the need — if it is a need, perhaps it is rather a vocation, a vow, a promise or indeed a duty (*officium* in Cicero's use of the word) — to which the legal system is subject, the duty of developing, within itself, by means of its own capacity of creating meaning, what Teubner calls *justice* as a *transcendence formula* (10). This dutiful therapy or therapeutic duty itself clearly results from the need, for any organisation of whatever sort — be it a Church or a legal order — to relate absolutely to the effects, and most especially to the unintended adverse effects, of its own earlier choices. The reasoning is: In order to be assured not to give rise to any unintended adverse effects, the only way to proceed would be to have no effects whatsoever. This solution being out of reach of the legal order of society as we know it, the latter, in order not to be reckless, must (ought?), instead come

(9) Giorgio AGAMBEN, *The Signature of All Things: On Method*, New York (Zone) 2009.

(10) «Self-subversive Justice: Contingency or Transcendence Formula of Law», in 72 *The Modern Law Review* (2009), 1-23.

up, in advance, with a projected routine that "deals with" its collateral accidents and damages, some means of reacting, within its internal proceedings, to the necessity of relativizing its own driving imperatives. In order to realize the law, the legal order needs to open itself up to, to meet or to hear the unintended victims of its own earlier attempts to realize the law. This is why Teubner formulates that *the legal system* (Recht) must *encounter its law* (Gesetz).

II.

Teubner illustrates this necessity by summoning and center-staging Kafka's parable "Before the law", perhaps the most interpreted piece of 20th century literature which among academic lawyers has been promoted, in the last decades, to a rank that far outshines the long-time lawyerly classics *Michael Kohlhaas*, *Bleak House*, and *The Merchant of Venice*. It is also much shorter. Kafka's parable, which at once is part, supplement, and epitome of his novel *The Trial*, stages a person called the "man from the country", whose encounter with an object called "the law" it describes. Teubner quotes Agamben's interpretation of the parable. Agamben's reading, of course, has been in itself a reaction to a long series of earlier interpretations, especially among legal theorists, the largest part of which share a mood of collegial melancholy, hesitating at best between the colorations of tragedy and elegy (none of which are, strictly speaking, part of Kafka's world). Agamben interpretation, on the contrary, is rather "upbeat". He sees in the lifelong indecision of the man from the country, in his fate — at least in part, self-chosen — as a lifelong "outcast" of the law, a life of successful resistance to the "suck" that the law exercises on its subject (11).

Teubner's critique, which does not take issue with any of these, supplements Agamben's reading with an element that, or so it is argued, it has overlooked. This is the shine, the inextinguishably penetrating beam or radiance (Glanz), that breaks from inside the law.

(11) Giorgio AGAMBEN, *Homo Sacer: Sovereign Power and Bare Life*, Torino (Einaudi) 1995, ch. 4.

Nothing much is clear about this radiance, which becomes visible to the man's eyes only in the very last moment of an apparently long life spent at the gate of the law. The divergence, on this point, between the legal and the philosophical "faculty" does not concern only the so-called legalisation thesis: the question, in other words, whether we are today witnessing an extension of legal routines and lawyerly communications in all walkways of hitherto law-external life. The conflict resides in the appraisal of this evolution: the philosophical faculty lays claim to the presence of an *outside* anterior to the law, thus also to the idea that the law is a "part" among other parts of the social universe, a being thing among other being things. On the base of this quite traditional claim, Agamben's philosophical argument unfolds as what might be seen as a form of specifically law-related *irredentism*, as a refusal to recognize, not at all, to be sure, the rule of law, but rather something which we might call, with a well-worn term (if in its post-Negri sense), "law's empire", namely an acephalic and protean network of operations without any identifiable being or "extension", or alternatively, if one prefers more traditional comparisons, a sort of King Midas, although a purely operational — and otherwise, immaterial — King Midas, one that transforms into law everything he touches, and by doing so can give rise, be it with the task of "limiting" its growth, but to ever more law. If we now look at the legal position (Teubner), the best way of describing it would probably be a certain "lack of patience" with the philosophical position. In front of concrete legal situations that stand in need to be dealt with, there is no way back out towards a law-free anthropology. At the evolutionary moment at which we are, Justice and law appear as impossible to approach, other than by forgetting these critical scruples. What is required is not "distance": it is radical involvement and knowledge of the performances and conditions of the legal system.

Two opposed "civilizing missions" animate these positions. Agamben's view finds its ultimate consistency in the repertoire and the movement of the Western philosophical tradition. What prevails in Teubner's approach is problem-orientation: it oscillates between scientifically defined operations, measurable by the difference between state before and state after, even if it has, as well, its philosophical stronghold (in the Derridean context of aporia, impossibility

and deconstruction). The coherence of the argument lies here in a question of the type "what kind of being is the law?", there in a question of recursive processes and operations, whether they result in further such processes and operations or also in mutations of the legal system. Law gives patently rise to two different duties, each gifted with some claim to legitimate exclusiveness. One side (Agamben) is faithful to what might be called existential modalisation ("what is?"), the other side is faithful to possibilistic modalization ("what happens?, and especially: "What happens next?").

What is striking here is the fact that a large part of the divergence between the two "faculties" is obviously best rendered not in that which is actually said by the one or the other side, but rather in the gestures, the attitudes, the (either modestly or ambitiously) world-changing moves that have started, as it were, much earlier than any exchange of arguments. Everything looks as if we were confronted with two compassing models of relating to the world, and as if their respective argumentative discourses would mirror their fundamental heterogeneity only superficially. The distance between the two ways starts earlier, at a more fundamental level than the "points" made by each side. This distance presents itself at the level at which one says what one says, yet its roots reach down to the level at which one does what one does, in the precise moment in which one says what one says. If this is so, we must consider the possibility that we are not dealing with the original inventions of two thinkers of our days alone, but with a long range of sedimented traditions that are put into action on each side. Teubner's criticism of what he perceives as Agamben's "manichean" position is a case in point (12).

(12) Teubner's critique of Agamben's take on «Before the Law» in *Homo Sacer* is based on the contention that Agamben has nothing to offer to make sense of the «shine» (Glanz) that the dying man from the country sees breaking from inside the law («Das Recht...», pp. 12f., 16). Kafka leaves it cunningly open whether the «shine» is not due to the failure of the dying man's diminishing eyesight, and whether it is thus not (as in a well-known Freudian case) the *glance* of the legal subject that is ultimately responsible for the *Glanz* of the law. For Teubner, salvation lies in the unconcealed aporia and freely admitted incapacity of the legal order (*Recht*) to be up to its task. The confrontation with law (*Gesetz*) serves as a mirror, a screen, a surface of inscription, of the legal order's own

Wherever we find strongly polarized views on the well-foundedness of one or the other legal and genealogical claim, specifically radical or "escalated" polarisations are frequently dubbed manicheistic. Schematically, and staying away from historical in-depth analysis at this point, manicheism is characterized by a deep split between fact and value, a split explicitly accepted, even embraced as a lasting predicament, then enriched with a whole-hearted taking-sides. In these conditions the fact of *calling* a view "manicheistic" shares its most basic feature with that which it denounces — the feature of referring, and getting accomodated, to some stable bipolar order. As already suggested, law appears today as split into two levels or species of "realities" (or rather one "reality" and one "functionality"), being and operation, entity and actuality, etc. One takes up the first way of looking, and the law presents itself as an integrating part of an existing social order, a region within the institutional entity/identity of social beings, part of the equipment of the world into which the human being is born and which it leaves after having accomplished the "run" (as the Romans, inventors of the word "curriculum", called it) of its life. One takes up the other way of looking, and it presents itself as actuality, a set of result-obtaining operations or procedures that are "in progress", giving rise to a series of ever other such operations and procedures. For this reality, the more precise name of "effectuality", "Wirklichkeit" (from the German verb "wirken", to have effects) has been helpfully suggested by the science of liturgy (13). If it is correct that the law is both being and operation,

shortcomings. These shortcomings cannot be helped or avoided structurally or once and for good. They can be helped on the long run — by means of resolutely entering the gate of the law and subjecting the law to future (especially constitutionalist) negotiations. In this way, for Teubner, the possibility of justice (*Gerechtigkeit*) would become possible — possible qua impossible, according to a well-known phrase of the philosopher Derrida that the lawyer Teubner, speaking on behalf of the legal order, subscribes to, then combining it to legal configurations such as constitutionalism and proceduralism. The « Manicheism », on the other hand, with which Teubner charges Agamben, would consist in sticking to one's hope for a coming community while continuing to keep a distance to the King-Midassian powers of law, by spending and even ending one's life without entering through the gate of the law, in the face of the fact that « everyone strives to reach the law ».

then such a doubly determined law cannot help confronting its observer with a bipolar situation, an oscillation between unmediated poles, much as in the case of the famous "Kippbilder" or pivoting images in Freud and Wittgenstein — those images which appear in our eyes as representing two totally different objects without any possible compromise or mediation.

Yet, the Western tradition shows us that the manichean solution, sticking to bipolarity qua bipolarity, in itself constitutes just one pole within a bipolar setting. Following the other pole we are lead through the valley of institutionalisation and organisation. Instead of an untreatable opposition, we find here an industry, not of course of solving the underlying split, but of providing means of unblocking it at least provisionally and procedurally, by purveying cunning supplements and helpful, life-enabling devices — here a "twelfth camel" that favours a settlement of an otherwise blocked legal dispute about dividing a succession (14), there a third hypostasis or person of the Holy Trinity that favours the overcoming of theological polarization between the Son (and the theology of redemption) and the Father (and the theology of creation), and their respective fan-clubs or politico-theological constituencies (15). All depends on how appropriately, how ambitiously, such a twelfth or third position is conceived. This can be an attempt to stage a radical "way out" of the "cold war" between the two field-constituting poles; it can as well, more ambitiously, stabilize the two and give way to an elaborate ternary setting; if organization or "legalisation" is at stake, this involves a suggestion of overcoming them by providing a *third* inflated with far more important amounts of optimism or hope, than if the stake is limited to the merely studious or erudite task of offering a genealogi-

(13) Odo CASEL, *Beiträge zu römischen Orationen*, in *Jahrbuch für Liturgiewissenschaft*, XI, 1931, p. 38ff., quoted after Giorgio AGAMBEN, *Opus dei: archeologia dell'ufficio*, Torino (Bollati Boringhieri) 2011, 61f.

(14) Cf. Gunther TEUBNER, *Alienating Justice: On the Social Surplus Value of the Twelfth Camel*, David NELKEN and Jirí PRIBÁN (eds.), *Law's New Boundaries: Consequences of Legal Autopoiesis*, Ashgate (Aldershot) 2001, 21-44.

(15) Giorgio AGAMBEN, *The Kingdom and the Glory: for a Theological Genealogy of Economy and Government*, Stanford (Stanford University Press) 2011, esp. ch.3.

cal or archaeological description or re-description of the two poles at issue. In the erudite case, the case of respecting and only studying existing borderlines, as opposed to the self-enabling case, what is generated is not a system or an agency of ever-continued recursive operations, not an operating third, but only a position an observer could take. Heidegger's well-known preference for *Verwinden* over *Überwinden*, getting round rather than overcome, is an instance here.

That which is usually called "understanding law" — and should rather be called, in most contexts, "getting round law" — thus represents by no means a feature that is specific to the current, 21st century circumstances, concerning the historical landscape of possibilities that constitutes our situation. As Paul Veyne has noted, the shape of the valleys formed by societal evolution are frequently meandering in ways creative of unforeseen and improbable proximities between configurations that are centuries, sometimes millenia away from each other; the antecedents from the history of the Church referred to in Agamben's most recent studies, his attempts of re-drawing a theological genealogy of economy and government, the importance therein of the emergence of trinitarian theology, and most specifically the theological discussions in the Eastern Church of the 3rd and 4th century, offer a series of instructive examples (16). The business of determining the respective attributes of the Father and of the Son within the Trinity has started, quite simply, as a matter of *constative exactness*, or in other words of correctly representing or portraying the effective, "existing" shape of inner-trinitarian relationships according to the (bipolar - Old/New Testament) canon of Christianity. The suitable technique for these discussions to gain historical attention was to lift them from the *constative* level to that of a *performative or illocutionary strategy* (17). While constative speech is

(16) *Ib.*

(17) The performative dimension is related to the being aspect, while the operative aspect opens up to the history of societal innovations. Both happen at once: whenever arguments are being argued, points are being made. The historian catches the point being made, if possible red-handed — a historian content to limit herself to operations that are operated, innovations that are released, evolutions that are triggered (or completed), boils down to a stage decorator for official celebrations of institutional identities. In his celebrated inaugural from 1888

predicated upon the claim of merely rendering what happens or exists, performative speech produces new facts. The question, for instance, whether one was for or against the extension to the redeemer-Son of the fundamental quality of the creator-Father who has no beginning in time (who is *anarchos*, with a word derived from the famous word *archè*, which means "power", "command", "authority", but first of all, "origin" and "beginning") (18), has clearly acted as a political point, even if it was treated as a matter of getting things "correctly" (i.e. constatively) right.

The merely constative intentions at work in them do not stop these theological claims from being readable, in retrospect, as performative deeds. This relates to the methodological war-cry of biblicists from about a century ago, "Sitz im Leben". "Sitz im Leben" means "site in life" and is shorthand for the idea that, in order to have any access to the meaning of a text that is part of the archive, we need to have an idea of how it was situated within the horizon of the social life that has given rise to it, when it first emerged/appeared. The warring schools in the trinitarian and pre-trinitarian battles around the constitution of the Nicaean creed during the 3rd and 4th century are an object that requires us to be attentive to the question, not only of the correctness of *claims to validity* (constative dimension), but of the *points made* and of the *campaigns thus triggered and promoted* (performative dimension).

It is important to name both constative and performative sides, and to carry within one reasoning both the "Sachprobleme", the objecive and potentially solvable issues, that inhabit the dimension of law as one among other being things on the horizon, and the dimension of the historical and evolutionary dynamic of law as a site of actions and operations. What Agamben follows up here is the trace of

William Maitland qualified such an attitude as *orthodox*, describing it as the legitimate attitude of a lawyer; a lawyer, he says, «must be orthodox otherwise he is no lawyer». Yet, «an orthodox history seems to me a contradiction in terms»; finally, «a mixture of legal dogma and legal history is in general an unsatisfactory compound».

(18) Giorgio AGAMBEN, *The Kingdom and the Glory*, cit., 74 f., referring to Arius (Ep. ad Alexandrum) and Gregory of Nazianzus (Oration XLII).

his own earlier observation that Foucault has not been able to work out the point of convergence between the two aspects of the history of power (19). Wherever, as it is the case of Western law, both *operation* and *being* are at stake, the twofoldness branches out into, on the one hand, an (e)merging evolutionary dynamics that compounds and transforms the arguments and claims in circulation and the *Eigendynamiken* at work in them, into specific operative recursivities and systems, thus converting successfully mobilized *attention* into effective autopoietic self-continuation, and, on the other hand, the ungraspable overall landscape that builds up as their cumulative result. This resulting landscape is what comes up in a historical and, of course, in a philosophical view: all generations in all places have inhabited some such a "landscape", however different the furniture. Some such landscape is also at stake in the undecipherable façe of the world we live in — a world which we hesitate to call *our* world. Yet, within this landscape, closed units (empires, systems, bodies), smoothly integrated or systemized zones of successful self-management, alternate with interstices, zones, no-go-areas — the abrupt discontinuities that lie in between these mutually closed and mutually indifferent insides — the no-man's-lands, deserts, crevices, and other bottomless interstices at their outside and in-between them. Yet, apart from the map of these processes of systemic *Ausdifferenzierung* which center-stage the operative or functional aspects of evolution and feature the emergence of self-enabling systems, there is the being-related aspect of it all, and while the first, opened up by the works of Luhmann, now gives rise to the innovative forms of household-science or *economy* (in the pre-Smithian sense of the word, which designates a sub-political art of managing discrete entities carefree of their correlative outsides) the second one continues, with equally perfect legitimacy, to study the conservative map of what one might call, with Agamben, "anthropogenesis" — wholly different from the innovative cartography of houses or systems or other self-enabling, self-reproducing units — that results from the unwavering re-programmation of the

(19) Giorgio AGAMBEN, *Homo Sacer: Sovereign Power and Bare Life*, Torino (Einaudi) 1995, 13f.

political dimension continually at stake in every phrase, every statement pronounced, every deed that "makes a point".

If the divided or bi-polar structure of the Western legal tradition has given rise to those "ways of worldmaking", which present themselves thus equally as divided, the decisive question is how the tension itself can be described and identified. This is the point at which the specifically Western tradition comes in. For reasons that are normatively as impossible to justify as their effectiveness is historically and sociologically undeniable, this tradition structures the global field, powerfully conditioning the arguability of every view-point therein. The theological tension between creation and redemption can thus be deciphered as the paradigmatic site of an unambiguously, if undeclaredly *political* question that relates immediately to the structures of institutions and the politics of (human) life. Usurprisingly, the element that basically distinguishes Christianity from its prehistory is redemption.

As the result of a history far too long and winded to fit under the procrustean term of *secularisation*, redemptive theology has resulted in the optimistic faith in a *sufficient* presence and availability of powers of acting, guiding, governing — the upbeat confidence that every social situation includes, if not numerous, at least one chance of action that comes complete with an assurance that it will result in its intended effects, rather than in any unintended or merely collateral ones. Based on this upbeat account of chances of action, Western Christian narratives of redemption as well as modern agendas of self-redemption stipulate an equally upbeat account of the correspondence between words and acts. According to the terms of this promise, arguments and decisions, far from only saying that which they *say* (confess, profess, argue) always also reveal what goes beyond the mere saying — a projected act or deed, something that is *done* in them. "Words are deeds", as Wittgenstein put it, in a suggestive formula that has proven rich in consequences and that is, equally undisputably, related to Christian redemption theology in its specifically *oikonomía* aspect. The notion that words are deeds epitomizes a specifically Christian and, still more specifically, Western-Christian (20)

(20) On the genesis of the Western *differentia specifica* as to its superior

additive of social existence — a secular faith and, furthermore, an optimistic account of speech efficiency, itself grounded in a particularly sanguine account of available world-shaping capacities — possibilities of translating declared intentions into observable realities by purposive action. This optimism, which clearly underlies the emergence of the more ambitious fruits of the Western institutional inventiveness, the formation of the Church and churches no less than that of Empires and states, is not simply an effect of what is generally referred to as "monotheism"; it is the outcome of the supplementation of the creative paradigm general to "monotheistic religions", with a second, redemptive phase, which can be observed only within the Western-Christian precinct. No other "monotheism" (21) has come up with an "after-creation service", a creator-God who has, subsequent to his action as a creator, also taken over the charge of successfully administering and governing his creation. This is the role of Christ. Christ, an instantiation of divine economy, is the *oikónomos* of the creation, or, as we would call this today, its *manager* (22). By fusing Christ's redemptive action, his death on the cross, with the omnipotence of the author of the creation — a fusion which will give rise to the construction of the theology of the trinity — the paradigm of house-keeping or economy is lifted to its strongest version ever, at the price of giving rise to the unexpected side-aspect that, seen from this angle, all managerial rationality now tends to appear as an unwitting and unwilling — not just "secular" — exercise of *imitatio Christi*. Yet, while Christ's self-sacrifice on the cross constitutes a unique advance in the history of the elaboration of the house-keeper motive, the motive of continuous labour in the service of enabling a preexisting good to continue, is by no means a "Christian invention",

faith in what might be called the *power of political power*, see Marinos DIAMANTIDES, *God's Political Power in Western and Eastern Christianity: A Comparative View*, in 115, *Divus Thomas*, maggio-agosto 212, 333-381.

(21) For a thoughtful and radical critique of current uses of «monotheism» see Rémy BRAGUE, *Du dieu des chrétiens et d'un ou deux autres*, Paris (Flammarion) 2008.

(22) See, for early Christian texts and further literature, AGAMBEN, *The Kingdom and the Glory*, cit., cap. 2; also, Marie-José MONDZAIN, *Image, Icône, Economie: les sources byzantines de l'imaginaire byzantin*, Paris (Seuil) 1996, 40ff.

and it would be a mistake to infer from the uniqueness of the Christian elaboration an argument for "incomparability" (23). Decisive, still today powerful impulses of the formula that has carried the most successful campaign in favour of "lifelong service", are inscribed in the line "vitam impendere vero" ("to devote one's life to what is true"), that has been referred to, among others, Rousseau and Kant. This line is taken from the pagan Roman 1st-2nd century poet, Juvenal. Teubner himself, although perfectly receptive to difficult texts from the NT (e.g. the reference to the astonishing pericope on Justice in John, 16, 10), prefers to operate with the help of a modern (kleistian) protagonist and, occasionally, that of a figure from Greek mythology, Sisyphus (24). On the other hand, the distance between the two axes of inquiry, inside and outside of the boundary of religion, should not, however, be overstated. The fact that the Son's incarnation and redeeming death on the cross clearly epitomizes the most consequential account of the operative or action-related aspects of the legal and institutional sphere, should not be an obstacle but rather a motive to relate it to narratives from other, especially non-religious contexts. The theme of acting or operating within a given situation, and specifically that of helping or enabling, be it any specific community or population whatsoever or humanity (creation) at large, to withstand crises, to succeed the passage through bottlenecks, to outlast acute environmental pressure, all this is integrating part of the Christian theology of redemption. Christ's humanity-redeeming death on the cross understood as *oikonomia tou theou*, "economy of God", or "management of the household of God" clearly refers to the Saviour's successful and eminently imitable deed of enabling the crea-

(23) On methodologico-theologico-political obstacles of comparison cf. Jonathan Z. SMITH, *Drudgery Divine: On the Comparison of Early Christianities and the Religions of Late Antiquity*, London, School of Oriental and African Studies, 1990.

(24) Cf. Gunther TEUBNER, *Self-subversive Justice: Contingency or Transcendence Formula of Law*, in 72 *The Modern Law Review* (2009), 1-23, 1ff. (Michael Kohlhaas), 18 and note 58 (John), and Anton SCHÜTZ, *Sisyphos und das Problem*, in *Soziologische Jurisprudenz: Festschrift für Gunther Teubner zum 65. Geburtstag*, hg. Von Gralff-Peter Calliess, Andreas Fischer-Lescano, Dan Wielsch, Peer Zumbansen, Berlin (De Gruyter) 2009, 163-178 (Sisyphus).

tional household to pursue its career, by unblocking the pipes of guilty humanity's progress, clogged since humanity's Fall. This continuation-enabling action belongs to the Son, in charge not only of the themes of passion and redemption that actualize and supplement those of creation and election, but also, more generally, of the management of the creational household. Redemption theology — which includes also the Christian version of the old theme of divine providence — thus allotts the center of the stage to matters operation-related (as opposed to being-related).

By the same token it centerstages the paradigm of the household-unit and the situation-adaptive way of dealing with it, rather than that of the political unit and its logic of unconstrainedly self-assertive true speech. The Father is a God who creates; the Son is a God who allows creation to go on (and has died for it). In practical terms, the social innovation brought about by Christianity consists in the fact that the entire sphere of operation has been taken over from the creating Father by the redeeming Son — and thereby integrated to the divine household (and thereby, in turn, to the sphere of possible, possibly successful, action). Owing to unintended consequences of his creation, God faces aporia. His way of dealing with it is to divide into Father and Son (with a third position as enabling and unity-keeping device), and the Son's "job", "mission" or "business", of repairing the creation. As it is absolutely easy to claim, at almost all moments, and successfully so, that mankind stands in dire need to be saved, the success of such an effective saving and crisis-managing programme goes without saying. Importantly, also, God-"Father" has no tasks, jobs, etc., whatsoever. The split between being and agency, essential to the Western, today globalized "way of doing things" is put on the rails at the moment in which God has intervened for a second time, after his creation — a corrective supplementary measure destined to help, to redeem created but fallen mankind — yet not as the same person as he who has created the world (a mode of procedure frequently suggested, with differing accents, in stoic and aristotelean philosophy of Antiquity and especially late Antiquity), but as his divine yet human son. God gives himself away, by accomplishing an action that is indistinguishably a sacrifice and a self-sacrifice of God, in order to redeem mankind, victim to its Fall and the consequences thereof.

Before and outside the Christian episode it is difficult to find an example that God had claimed to be in charge of his creation. Even short of the overwhelming programme of supplementing creation by redemption (unseparably connected to the emergence of trinitarian theology), the author of the creation has not gone far. One way found by a non-Christian God of assuaging the predicament of created humanity has been to allow it more space, by claiming ever less for himself (25).

III.

In his article on Kafka, Teubner makes the audacious move of substituting, for the simple man who is the hero of *Before the law*, an impersonation or prosopopeia of *Recht* — of the legal system. It is not the man from the country (thus not from the law) that encounters the law: It is the law that encounters *its* law. The story is thereby promoted from the level of a rather unspecified personal life to the level of an official, professional, institutionalised mode of existence or operation, and who knows perhaps only of operation. In suggesting this modification, Teubner takes up the duty of a new land surveyor, measuring the unbridgeable distances (26) between rationalities and deontologies knowledge-related vs management-related, and doing so he in turn takes part in laying the philosophical groundwork required for an adequate understanding of Western law and legal history. The case of Western legal and institutional history is in many respects a "hard case". But cases, "hard" or otherwise, are ar-

(25) On *tsim-tsum* (divine self-contraction) in Kabbalah thought, see Gershom Scholem, *On the Mystical Shape of the Godhead*, New York (Schocken Books) 1991, 83.

(26) Discussing «unbridgeable» conditions of this kind, LUHMANN, attentive to the negative dialectics of differentiation here involved, repeatedly suggests that the notion of a total difference can only mean that the relationship between its two poles is such that they relate to each other «not [as] different, but [as] indifferent».

tefacts within defined procedures, and the territory where the conflict of the faculties can break out is situated between competing such procedures. The decisive or polarity-engendering question is thus whether the "hard case" is a matter of legal procedure, that gives rise to the expectation of a valid decision, or a matter that is subject to the unending learning process of philosophically informed historical or genealogical study.

As William Maitland explains in his 1888 Inaugural, complex issues in history do not point into the same direction as complex cases in law (27). Legal cases will be decided upon by competent officials, and the decision they take, the "solving of the case", will be valid and definite. But is not the historian in a position of decision-making as well, does the historian not, as well, continually face problems of acceptance-rejection under conditions of incomplete information, and, in order to go on, does she not need to make a qualified choice in favour of one path rather than another one? The point, however, at which Maitland sees a split between the judge's intervention and that of the historian (which, as it is easily seen, applies no less to the social and human sciences), lies in the fact that only the former is effectively endowed with the chance of coming up with judgements — it lies, to use the terminology of the old-european legal tradition, in the *officium iudicis*. The judge's role is predicated on such an *officium* as the enabling condition of a power to change the situations that the judge decides upon. To be endowed with such an *officium* means to wield a competence to be operatively performed — it means that certain well-defined effects attach to it, guaranteed in advance by the socially accepted, office-holding agency known as the legal order. The judge is in this sense endowed with a "magic" power — the power that invests any judge's decision with the character of "res iudicata". The historian's "verdict", on the other hand, is bare of any such "magic" and, as a consequence, remains infinitely exposed to revision — all it offers is an ever provisional, ever perfectionable part of an unending learning

(27) F.W. MAITLAND, *Why the History of English Law is Not Written* (Inaugural Lecture), 1888, *Collected Papers, vol. 1*, London 1911, p. 488ff.

process. One could also say: it is not official, in the sense of based upon the dissymmetric privilege of a professional *officium*, but civil or conversational, in other words: What it relies on is not any office but, rather, a general regime of learning under the structurally *provisional* (that is to say, in a sense: incurably anecdotal or *un-official*) conditions of sense-making.

The point at stake here is both functionalist and systemic, but it also draws the boundary of any such: it is expressed in the simple diagnose that law is a decision-producing machine and that the functioning of such a machine relies intrinsically upon time and time-bound self-adaptation; it proceeds by (1) transforming all objective, social, political complexities into time-related ones (after every legal decision a new time starts to run — this is the meaning of *res iudicata*), and by (2) building up a sequential order, in which earlier own results can function as the basis of decisions yet to be taken.

Decisionmaking is an *officium*, in its double sense of right and duty, of mastery and ministry, it is an entitlement and in that sense a right, and it is a service — a duty (28). This is why an adequate understanding of the way in which law and legal systems have evolved in the West is not a matter of legal complexity, nor a matter of the self-discipline of a legal decisionmaker. Understanding cannot be "decided upon"; social-systemic routines, based upon events, decisions, facts, have no purchase upon it. Understanding is *not* an *officium*, and when it is instituted as an *officium* — which is in a sense the correctest short version of what a University has been within the old european tradition, and of what the term "professor" actually stands for, as both are offsprings of the wager of *instituting* (that is: elevating at the rank of an *officium*) the fact of *understanding* — the outcome has always been an uneasy sit between the two terms. The elaboration and transmission of decision-enabling practical skills, of procedural arts, of recursively applicable recipes and enabling procedures, fits much better into the requirements of the *mastery* which,

(28) Giorgio AGAMBEN, *Opus dei: Archeologia dell'ufficio...* (op. cit.), see note 1 above.

in one form or the other, had immemorially provided the routines of institutionalised (professorial and university-related) knowledge transmission, than does the elaboration of understanding-based knowledge providing routines, such as, in the 20th century, verstehende Soziologie, with its method of following up *Sinnzusammenhänge*. It is just for this reason that the adepts of verstehende Soziologie often tend to question the legitimacy of any *officium* and *officium*-related governance, and either turn toward some form of *collective self-reflection* (as it is the case of Habermas), or stake everything upon their own individual performance (Luhmann).

It is in dealing with the goal of collective self-reflection that Teubner refers, following Derrida, to the word "possible/impossible. The predicate "possible", applied to a doing, relates here, as it often does, to *someone* — namely the individual or collective agent the extensions of whose fields of possibilities, in a word: whose power, it qualifies. If there is a way to portray, in a few words, the autopoieticist contribution to the understanding of modern society, what needs to be seen as decisive, is the notion of systems, understood as agencies of self-empowerment, and thereby as devices of possibilisation. Yet, while the luhmannian *observer* is a scion of the house *devil* (29), the luhmannian *system* is, on the contrary, a scion of the house of God: the sense that resonates in the notion of a system is that of the divine household (God's *oikonomía*), it is the sense of an enabling device in charge of the survival and continuation of the creation, of defending it against crises, critical circumstances, of controlling and mastering what constitutes the "emergency" of the present moment and preparing to dismantle the next expected one (30). While during Antiquity the word "system" was in use to designate such part-composed "ones"

(29) Thus Niklas Luhmann («Der Beobachter [...] stammt aus dem Hause Teufel»). See his yet untranslated *Die Wissenschaft der Gesellschaft*, Frankfurt am Main (Suhrkamp), 1990, 118ff. See Anton Schütz, *Luhmanns unheimliches Argument*, in Albrecht Koschorke, Cornelia Vismann (hg.), *Widerstände der Systemtheorie: kulturtheoretische Analysen zum Werk von Niklas Luhmann*, Berlin (Akademie-Verlag) 1999, 96-109.

(30) Agamben, *Kingdom*, cit., see note 14 above; Marie-José Mondzain, *Image, icône, économie*, cit., see note 21 above.

as are bodies, cities, houses, poems, and the cosmos (31), the age of reform sucks power attributions off from the power-wielding actors to whom they had been attributed so far, and turns them toward anonymous and more abstract addressees (32). To claim that a society is autopoietic is to claim that it builds up units and time-binding routines: such are possible on the base not of an endless praxis of unseen increases in understanding, but of a poiesis made of discrete successive interventions (decisions, ideally, which expose themselves to further decisions). In this sense, the notion of a system depends, at least in part, from the same procedural wisdom as that of a legal order in legal positivism. Yet, both of them are delayed consequences of what should probably be understood as an unexplored case of intellectual revolution: the new conception of contingency which a group of theologians, lead by the *doctor subtilis*, alias John Duns Scotus, has come up in the years preceding and around 1300, and that has benefitted from a vast and stable following ever since (33). The term in itself was old; the profound understanding of the term's implications was new — and has not stopped to be new, think only of Scotus's often quoted line according to which "those who deny contingency should be tortured until they admit that they could as well not be tortured" (34). Beyond this we encounter here, right in Duns Scotus's work, what would look like the first instantiation of a 20th sociological concept: the concept of a *contingency formula* (35). The problem a contingency formula claims to solve is that

(31) Manfred Riedel, *System, Struktur*, pp. 285-322, in Otto Brunner et al. (eds), *Geschichtliche Grundbegriffe*, Band 6, Stuttgart (Klett-Cotta) 1989.

(32) Gorm Harste, *The Long and (not so) Winding Road of Systems Theory*, paper presented to the Danish Conference of Sociology, 2012.

(33) André de Muralt, *L'unité de la philosophie politique: de Duns Scot et Ockham à Suarez et au libéralisme contemporain*, Paris (Vrin) 2002; Anton Schütz, *A Quandary Concerning Immanence*, in 22 *Law and Critique*, 189-203, 197.

(34) «[I]sti, qui negant aliquod ens contingens, exponendi sunt tormentis, quousque concedant quod possibile est eos non torqueri» (Io. Duns Scotus, *Quaestiones in lib. primum Sententiarum* [quoted after the edition established by Wadding, Lyon 1639, vol. 5/2] dist. 39, quaest. 5). Torture as a learning technique ? Behind the innocence of the witticism lurks already the modern alliance of contingency and juridification.

(35) Luhmann, *Die Gesellschaft der Gesellschaft*, Frankfurt am Main (Suhr-

of action under contingent conditions. Is there, within the ocean of what is neither impossible nor necessary, any *terra firma* or factor that would provide an orientation here and now? In modern society, of course, there are as many "contingency formulas" as there are functionally differentiated systems. Even so, the multiplicity of systems is barely the decisive factor here — although it does produce the unease about the meaning with respect to society at large if one looks at each system-specific contingency formula. Now, while for Scot, no less than for Aristotle or ourselves, contingency is predicated of events, it is always and directly connected to God's will, in the sense that contingency is not a limit but the mode of action of God's power. In this sense, it does seem that the specific point Luhmann is lead to make about what is system-internally undisputable, and which he has given the name of contingency formula (Justice, for law, as we have seen; scarcity, for economy, etc.) has some important parallels here, or in other words, that the *doctor subtilis* has theologically re-conceived God as a contingency formula.

IV.

The two writers who are under inspection on these pages confront their reader in a particularly immediate way with these challenges. While their positions continuously adversely anticipate each other and are in that sense part of a hidden dialogue, few readers of the one read also the other one, and even less risk the double exposure, while most obey the supposed imperative of having to "take one's side". At any rate, both thinkers confront us with suggestions and claims that involve an ambitiously wide and at the same time idiosyncratic thought, doubtlessly made possible by the on-goingness of their respective "life-works". And yet, as both are well aware, and no doubt the entire generation which they are part of with them, not

kamp) 1998, 470, describes contingency formulas as *systemspezifische Unbestreitbarkeiten* («claims that cannot be disputed, if only with respect to the system at hand»).

only that theory is piece-meal today — unlike what it had been at the time and in the case of Hegel in Berlin or, to a minor degree, still of Leo Strauss in Chicago — and unfolds no longer in self-totalizing world-views, but embodied in specific claims and singular experiences.

Teubner's recent article on Kafka, and Agamben's archaeological inquiry into the extensive complex of normative matters — duty and will, *Sollen* and imperative — that Agamben understands as expressions of the expressions of the latin word *officium* and its long career in Western institutional history, offer two antagonistically opposed formulations of what, I argue, constitutes nonetheless one unique and common set of stakes (cf. footnote 1 above).

Where the first author wishes to contribute to an on-going "collective self-reflection" on law in order to enhance its operative capacity of mastering the challenges of legal and social evolution, the second offers a re-telling, as analytical as critical, of the history of one distinctive move or turn, subtle, protracted, but of heavy consequences, namely the turn from a rationality of praxis to a rationality of pragmatics, a turn that has given rise to procedural or operational legitimacy. Agamben shows how the Western institutional world's unequalled and never-ending campaign of transforming the problem of *praxis* into an industry of *pragma*, has at once transubstantiated the issue of power as core issue of politics, into a de-politicized totality of mere administrative or managerial dispositives, a laboratory of means of *Fürsorge* or *oikonomía*, of providence and governance. Agamben's choice of the ciceronian notion of "officium" as a general title for the political — unadmittedly political, thus even more significantly political — campaign of dissolving politics into an omnipresent plankton of de-politicized, legalized and responsibility-based micro-decisions, in such a way that every political question appears as fated to undergo a process of security-imposed neutralization and to end up, sooner or later, transformed into an issue of mere maintenance, might look baffling at first sight indeed. Is this not underrating the "legitimacy of modernity"? Is the long subterranean journey to always new frontiers of societal coherence and containment of violence and arbitrary injustice, the journey that has famously involved the brightest representatives of European "civil so-

ciety", correctly rendered by a notion that seems to reduce the motley crowd of ethico-political authors from Hobbes and Pufendorf to Kant, and further to Schopenhauer, Kelsen and Gehlen, to agents of an apologetic exercise solely motivated by the incentive of privileging *Sollen* over *Sein*, the institution at the expense of those imply alive? Agamben's reply to this is based on an unforgiving re-assertion of the philosophical tradition and its landmark achievements. The potent enabling device that, from the view-point of the institutions and their "working parties" is gained — Agamben never denies this — by the procedural/operational turn of institutional modernity, is, he argues, in advance disqualified by the achievements of the philosophical tradition. The philosophical problem of being has been usurped by the procedural device of will, of *Sollen*, of decision, in short of "officium", for the sake of its comparative managerial advantages.

Opposite to the philosophical side, the ridge of the mountain massive of Western normative history offers a view to its legal side. Teubner analyses Kafka's short text (however, this shortness might be an illusion as it is part of a novel) *Vor dem Gesetz*. First of all, in English, we need to be wary that "*Gesetz*" is *not* the general reference to the normative sphere that "law" is in English.

How important it is to keep this in mind becomes clear as soon as one considers that Teubner pushes the opposition to the extreme, by devoting his efforts precisely to the theme: "*Das Recht vor seinem Gesetz*". Teubner's cramming of the two signifiers into one short phrase pushes the *aporia* into its extreme — an experiment that cannot but result in an extremely helpful disambiguation device, forcing the open engagement with problems that otherwise remain unsolved, even unseen. This comes at a price. By openly unwinding to its full width the internal polarity inherent in the normative sphere (*Recht* vs *Gesetz*), Teubner's article on Kafka confronts its English reader, right from its title, with a supplementary challenge.

"*Das Recht vor seinem Gesetz*" — what does this mean? There are two terms and therefore, two potentially interrelated questions of translation. Let me start with the the second term, *Gesetz*, as its rendering with *law* does not pose a specific problem. The situation is more problematic in the case of the first term. Rendering "*Recht*" by

"right" here fails to make sense (36). The point that Teubner makes requires immediately the understanding that it is about a prosopopoieic reference to *Recht*; *Recht* here *replaces* the hero of the story, alias the "man from the country". *Recht* is thus in the position of a person, a person more specifically who is confronted with a difficult, or at least extraordinarily ambiguous situation. Linguistically, this points, neither to the "objective sense" of *Recht* (which exists in German and the other languages underlying the continental legal orders), nor to its "subjective sense" (which exists also in English). Instead, it points to the overall enterprise of law in the making, to the law as a reflective process of decisionmaking, to "how the law thinks" (37). The narrative which Kafka tells about a person who comes from far (i.e. "from the country") and who asks to get entry into the law, is replaced with a narrative that happens to *Recht*, in other words to the entire social sphere in which the dealing with norm-related issues takes place, it happens to the entire personnel of the legal order or laboratory, indeed it happens to the legal order or legal business as such. However collective or systemic, the fact that we are dealing with a prosopopeia, a non-personal actor who steps in for a person, makes it clear that what is needed here is a proper name, the proper name of the normative sphere — in English, *law* (*Recht*, in German). In which case our translation experiment for "*Das Recht vor seinem Gesetz*" results in "The law before its law". This sounds interesting, enigmatic, and disquieting. Is there an alternative? One could think of one: rendering *das Recht* with *the legal order*. This would result in "The legal order before its law".

Let us now pass from the title to the content. Gunther Teubner asks what Kafka's story *Before the law* would be able to tell us, if the entire sequence that is told about a human-all-too-human individual's

(36) In contrast, it doubtlessly is a courageous move of newer translations of Hegel's *Grundlinien der Philosophie des Rechts* to stick to the common etymon of German *Recht* and English *right* and to translate the title with the near-neologism *Philosophy of right*, rather than *of law*, in spite of thus creating new terminology and thereby an additional difficulty for the understanding of any non specially initiated public.

(37) See Gunther TEUBNER, *How the Law Thinks: Towards a Constructivist Epistemology of Law*, in 23 *Law and Society Review* (1989), 727-58.

search for the law, were told about the legal order — the legal order before *its* law. The valid positive law that cannot satisfy its inherent project or promises otherwise than by coming up with appropriate and therefore *just* decisions over the cases it has to deal with (38). The issue is thereby turned into self-referentiality; the plot happens between law and law, between law in the sense of the legal order, and law in the sense of that which the legal order must relate to and refer to in its every move and gesture, if it wishes to be up to its task. Note the displacement from existence, life and death related problems in Kafka to task and function related problems in Teubner. More specifically, what do wee see if we look at this unseen tension, this non-unity which the unitary term *law* with its deceptive compactness and solidity allows only to gloss over (39)?

Teubner sends part of the bill for his imaginative Kafka-variation to Derrida, more specifically to Derrida comments on Kafka, setting the stage on which literature encounters its law (*loi, Gesetz*) (40). Most of it however is carried by references to Kafka, first in virtue his Kafka's tendency of ascribing most of the discourses that are reported in his prose to professionally and institutionally defined agents: land-surveyors, country-doctors, investigators, new advocates, bank employees, secondly in virtue of Kafka's own professional life as an insurance agent, and of the negative experiences he had to undergo in connection with the particularities of insurance law. Why should Kafka, asks Teubner, have to be thought of as someone whose writing should necessarily specialize on human beings, "made of flesh and blood"? Why should it be so undisputably obvious that that which is exposed to painful self-examination in Kafka's 1914-written short prose, can certainly *not* be the legal institutions (Rechtsinstitutionen) of modernity? Has not the *law itself* (=Recht:

(38) Gunther TEUBNER, *Das Recht vor seinem Gesetz: Zur (Un-)Möglichkeit kollektiver Selbstreflexion der Rechtsmoderne*, in Marc AMSTUTZ/Andreas FISCHER-LESCANO (Hg.): *Kritische Systemtheorie - Zur Evolution einer normativen Theorie*, Transcript Verlag, 2013.

(39) *Ib.*, 3.

(40) See Jacques DERRIDA, *Acts of Literature*, ed. by Derek Attridge, New York 1992, 190ff.

legal discourse, legal system, legal order or network) its own legal problem that it can treat only by its incessant search *for its own law* (=*Gesetz*)? By refusing to "interpellate" (and thereby create) a legal subject, for turning its back to the motive of the arbitrary and despotic rule traditional legal critique tends to identify with "the law", the legal order gains access to a range of problems with the law's own problems with the law (41). The hidden internal ambivalence of the law can be accessed only at the price of unconcealing the tension between the constantly but unduly conflated two poles, at the price that is to say of observing (rather than joining) the epistemic community of disputing lawyers and the collective self-reflexion that is always-already enacted in their disputes — Teubner qualifies this community and this self-reflection correctly as "abyss" — which only continue their "dialectic". The law, understood according to the first sense of the word, is the instantiation or the embodiment of the normative "business", in other words, "*Recht*" or "*Rechtssystem*" in the sense of "legal system" or "legal order" or "legal discourse". It is, in other words, an *operative* unit or site of *effectuality* (42), or, in its autopoieticist description, the sum-total of communications that happen simultaneously and that recursively apply the guiding distinction "legal-illegal" (43). According, however, to the other, second sense, which cannot be discarded either, as it inhabits the hermeneutical reception and experience of law and matters legal (it can only be discarded as long as one subscribes to a specific method) law is manifesting itself, not as operations or communications, but, rather conventionally, as rule, command, or indeed "law" in the most general, least technical sense (*Gesetz*). Now, in Teubner's view, law1 (=*Recht*, legal order) must provide itself with its own justification, and in or-

(41) See Anton SCHÜTZ, *Legal critique: Elements for a genealogy*, in 16 *Law and Critique* (2005), 71-93.

(42) For Giorgio AGAMBEN, *Opus dei: archeologia dell'ufficio (Homo Sacer II, 5)*, Torino (Bollati Boringhieri) 2011, 61ff.; see also Thanos ZARTALOUDIS, *On Justice*, in 22 *Law&Critique* (2011), 135-153 (147) for the semantics of *operativity* and *actuality* on the one hand, of *energeia, poiesis*, etc., on the other hand, and their role in Agamben and Heidegger, in Teubner and Luhmann.

(43) LUHMANN, *Law as a Social System*, Oxford (Oxford Univerity Press) 2004, 99ff.

der to do so, it must expose itself to the humiliation of being permanently confronted to the verdict of the law2 (=*Gesetz*), an encounter that cannot result in anything else but in the show of the imperfection and insufficiency of law1 — the unending confession of how fallible and unjust has been the justice that the legal system has been able to provide in the foregoing "round". What is not so entirely clear is just how instructive this proceeding is looking at the handling and coping with the next following "round". Yet, law1 (Recht), law in the making, the constant, factual result of all results, the sum-total of all processes or communications of the legal species of processes and comunications, is placed under the constant risk of approval or (factually) disapproval by law 2 (*Gesetz*) as the empty, but sovereign horizon of justice. It is, following Teubner's argument, law as a verdict (in our numbering, 2) that needs to be given the last word over law as an event, as a system, etc. (1). One could easily amplify: law as a judgement needs to be given the last word over law as a discourse, law as logos, or dialogos, over law as a tautological immanence — where, for those not familiar with the luhmannian vocabulary, autopoiesis can be described as a process that comes up with what it comes up with (44).

The operation-engendering "business" of law needs to understand its own position in relation to the imperative of law. The decisive point for Teubner is the outlook, the line of divide and encounter, the threshold, that separates law 1, legal discourse, legal order, law-in-the-making, the institutional side of the law, from law 2, law's imperative side, legality's exposure to its legitimacy. The reformulation of justice in terms of law's transcendency formula (45), which

(44) Though one would have to immediately nuance this claimed proximity by drawing attention to the factors that distinguish Teubner's level of locating the site of this *dia-logical bias* especially from Habermas's. But one would have to allow for a basic objection shared by Teubner and Habermas against the opposite temptation in social theory, which might be called the *tauto-logical bias*. Both Habermas — right from the start and, with decreasing intensity up to our days — and — lately, but increasingly — Teubner take their distances from the hard-liners of circular or tautological identity-constructions: Spinoza, Luhmann and, in his analytical corollaries, Agamben.

(45) See Gunther TEUBNER, *Self-subversive Justice: Contingency or Transcendence Formula of Law*, in 72 *The Modern Law Review* (2009), 1-23.

Teubner has developed starting from Niklas Luhmann's earlier reconception of justice within positive law as contingency formula (46), draws a line of horizon that smuggles the care for justice out of law, legal life and legal process, out of the legal system understood as the sum total of legal communication ("law1"), partly into each and every functional system, partly, as well, into that *Hinterwelt* or supplement of law which Kafka's hero, the legal subject called man from the country are striving for ("law2"). The point is that law2 is located in immediate contiguity to law1, the legal order, that it figures, in other words, as an internal, or if one prefers, a private or back-yard transcendance of law1. One of the many unintended commonalities between Teubner and Agamben is their rejection of the secularisation narrative, of the idea, that is, that the modern legal present is best understood by looking into the premodern religious past, or that law follows in the footsteps of religion; in the style of: "where religion has been, law shall take over". What Teubner — not Agamben! — discusses under the name of transcendance is an internal product of the modern legal order. As well, Teubner's effort (as well as, within narrower borders, Luhmann's own) of re-habilitating the legal system against its positivist impoverishment is singularily in line with the discovery, in the most recent instalments of Homo Sacer, of the two problematics of, on the one hand, the art of administration as an art of "coping" and "dealing" with the unintended results of earlier own actions, and the emerging split between government and glory, on the other hand, the problem zone located in the triangle of operativity, institution, and personal duty. As a result of often-studied differentiation processes, law has now the form that can and has been described as that of a "legal system". Modern society encounters law in this idiosyncratic and rarified form, the experience of the legal system constitutes modernity's unique (total, constant) experience of law. However, if this is so, and this is really the point Teubner is striving to make, then the one idea that loses a large part of its attractiveness, is that the legal system, that unique "address" of law that is allowed

(46) N. LUHMANN, *Law as a Social System* (engl. tr.) Oxford (Oxford University Press) 2004, 211 ff. See G. BRYSON, *Justice as a Kontingenzformel: a hard case in Luhmannian reception history?*, pp. 309-335 in this volume.

to "embody" law in such a monopolistic way (which successfully rules out the possibility of another law than the law offered to society by its legal system), should be without access to "justice", as he formulated earlier, or to "*its* law" as he now formulates in reference to Kafka.

Teubner's supplemental logic finds its ground here: It would be effectively difficult to understand that the functional system whose very *raison d'être* is the duty of assuring the institutional self-reproduction of law, should be internally void of any equivalent of that legal exposure/orientation that it provides externally for its societal environment. Of course, is not a silly question to ask how it is that such an account of the law could have ever been received and implemented let alone with incomparably successful results, how it has been able to form one of the stable achievements of a two century long societal history, in which almost everything else has been subject to fast and continuous change. Even if the answer to it is rather obvious: the gains offered by the positivist account in terms of making a smoothly functioning legal machinery possible on the basis of the trump of a "agenealogical" institution of legality, based upon the two trump cards of positivity and validity, were undisputable and, soon, indispensable, to such a point that what was now understood only as its "costs" could simply be treated as an "externality" among others.

The two centuries — but longer or shorter chronological *découpes* could be equally meaningful — that start from the benthamite incubation onward and last, with increasing difficulty, up to us, are however, in our times, starting to show their unique and unifying historical characters. The historical experience in Western Europe had programmed — stably, for several successive generations — for what was expectable as possible and to come, a phantasmagorical horizon dominated by a steady succession of "new frontiers" in a way that starkly contrasts with any experience that had been sustainable earlier and especially later, let alone today. Incidentally, the Austro-Hungarian monarchy which provided the institutional framework in which Kafka lived until 1914 (the year in which Kafka writes *Before the Law*) and in whose categories he continued to work until his death in 1922, had been particularly backwards, which is partly explainable as a consequence of its near-inexistent share in European colonial power, in such a way that the sucking effect from the future that has unfettered the unfolding of

positive law and enabled it to take the rapid pace that has been characteristic for its overwhelming success in the Western European cultures of those same years, had barely taken root. Neither is the fact that the geographical-historical setting in which Franz Kafka's literary prose has emerged has also given rise to the theory-centered prose of another lawyer, Kelsen's *Pure Theory of Law*, which offered and offers the most uncompromising self-formulation of legal positivism, a coincidence, let alone a paradoxical riddle, but very likely the indirect effect of that same backwardness, which after extended periods of immobility enables fast dynamics to take off in a particularly unimpeded way.

Yet, what we see under the weight of current evolutions, is that the *fama* which had been assuring legal positivism, as a mode of shaping the presence of law within society, of a role of unquestionable functional superiority and factual irreplaceability, during a time-span that covers many consecutive generations, turns out to have been a "period-feature" today, or in other words, that, much as everything under the sun, it has had its moment in history. With respect to positivism, it is clear that Agamben and Teubner are both contemporaries of the moment in which the historical "datedness", as the French foucaultians would have called it, becomes visible as a new day, that of the post-positivist moment, now shines over the region of the self-description of the law. The modernist or scientific confidence underlying legal positivism during its great time, the trust in the possibility of reshaping the law as an exact science or even a branch of "social physics", a matter for competent legal-logical engineering, has by now unambiguously lost the game. As long as Western society was fuelled with highly leveraged expectations about the future, positivism received a pull as an enabler of future evolutions, of a force that was sufficient to stifle the indignation provoked by its official and indeed declared *heedlessness* for arguments from justice, morals, or anything else drawn from beyond the border of positivity (or keep it limited to some irredentist corners of the academic practice of law). The cards are now turned, geo-politically, geo-economically, geo-ecologically (47). But

(47) The inversion can be seen at work, beyond the limits of the legal evolution alone, in the work done, specifically, within the fields of post-colonial and subordinate studies. The question of rehabilitation is, for instance, well presented

compared to the step over positivism, the distance to the positivist setting is acquired at the price of important rehabilitations, if not reparations. The legal system, shielded, under legal positivism, against the requirement of ethical self-justification, of taking sides, now must learn, once again, that the legal subject, to say it in the words of Kafka's law pilgrim, can be recognized at the fact that it "strives for the law". Teubner's point, that, in addition to its outward action in favour of law, the legal system now needs an inward drive in favour of law, is, *mutatis mutandis*, intimately linked to his recent pleading for "plain money" and in favour of "non-addict" politics of credit-creation to be followed by the central banks (48). With regard to law alone, Teubner follows a comparable line against reductionist observers who tend to distinguish two domains within the legal system, a site of official rhetorics, and a result-achieving machinery. In this view, nothing — no efficient control — prevents the internal orientations of the legal system from being perfectly "lawless". Teubner's idea, which underlies a whole series of recent writing, can be described as an anti-positivist "re-legalisation of the legal order", that stages a counter-force, one could say, against the legal order's mediatisation and managementalisation. In contrast to other anti-conventional and anti-tautological argumentations (Dworkin, Habermas), Teubner's version of new constitutionalism proceeds neither by re-enforcing law's power, glory, justice, integrity, etc., against the partisans of conventions and skepticism, nor that of the public sphere against the silent decisionmaking effects of systemic processes. What might be called the *teubnerian optative* is located in a system-internal exposure to both *justice* and *law* — and should be analyzed as a product of cumulative negations of a whole

and re-presented in titles such as «Provincializing Europe» by Dipesh Chakrabarty (2000, 2nd edition Harvard University 2007). The title alone provides a fresh breeze, and from the book itself transpires a frank spirit of self-assertion and commendable awareness of where the effective stakes are — good news dealing with a region paralyzed, for a long time, by continuous inundations with critical Western crocodile tears.

(48) TEUBNER, "A Constitutional Moment? The Logics of 'Hitting the Bottom'", in POUL F. KJAER, GUNTHER TEUBNER, ALBERTO FEBBRAJO (eds.), *The Financial Crisis in Constitutional Perspective. The Dark Side of Functional Differentiation*, Oxford, Hart, 2011, 9-52.

gamut of positions, including, of course, both mainstream conservative and mainstream critical approaches, but also the "non-assertive positivity" of discourse analysis, increasingly the purely analytical and routine-based position of Luhmannian autopoiesis, as well as, of course, any position that would not accept to assign an important stance to legal decisionmaking. Instead of saving a challenged totality by applying the traditional means of politics (change) and law (restitution), Teubner has come up with a combination of proceduralism and deconstructionism. Extending a point taken from his teacher Luhmann, Teubner suggests that factuality cannot be correctly understood as providing both the problem and the solution. Luhmann has contradicted Kelsen by suggesting that Justice is not a *quantité négligeable*, or rather, not either a value or a *quantité négligeable*. Except that in Luhmanns and Teubner's view, it is nonetheless treated, within the legal system, as if it were a value: it is "canonized" (Luhmann): the strange notion of a "formula" expresses just this. The autonomy of differentiated functional systems means that there is no transcendent value that the legal system could "find" and then apply. There is, for us, no natural concept of justice, not even a utilitarian one; every term that would invite one to think of a "pre-existing" concept is misleading, no less so than that of a collective exercise of justice that could be taken somewhere, then transplanted into the functionally differentiated legal system. This is why the legal system, as every functional system, instead of professing pre-existing values, has to come up with a continuing practice of constructing justice within itself, by its own means. This construction Luhmann calls a contingency formula, a somehow laborious term, but the point he wants to make is well-portrayed by this laboriousness, as what counts for Luhmann here is the reference to the *operations* of the legal order — operations happening under conditions of contingency are difficult. Depending on whether one believes that all essential problems are solved once one is in possession of power, or that on the contrary the problems really only start at this point, there exist, roughly speaking, two ways of dealing with contingency. A contingency formula is the expression of one among them — it formulates boundaries under conditions in which no other restrictions (necessities or impossibilities) are available; it formulates the conditions for a functionally differentiated system to provide itself with an operative iden-

tity, by prescribing how to deal with the contingency it encounters. In that sense it takes the place otherwise taken by either nature or utility (without "filling" it). Yet Teubner has radicalized, unfettered and transformed, Luhmann's contingency formula with what he calls *transcendence formula* (49). His point here was to come up with a luhmannian argument that would work, at the same time, against the luhmannian routinisation of the law more than that of providing a "followable" instruction; yet one argument was clear, which is Teubner's innovative use of the word "transcendence". This is a use that is indebted to Derrida's thought of the supplemental. The idea is: for any agency that achieves its own identity through operations, there is no way of escaping its exposure to an outside, or more precisely to an at least imagined external observer. Justice is the "formula" that Teubner, dealing with law, attaches to this transcendence. And it is this reasoning that he takes up once again, in a revised version, applying it, no longer to Justice but to law "itself", to the operative law that constitutes the legal system, to law in the sense of an on-going production plant of legal decisionmaking, suggesting to confront it with what the German defines, without any ambiguity, as *das Gesetz*: law in the strict sense of the imperative that "makes the law" or stands in for the law. Yet the notion of a contingency formula or of a wider framework of what might be referred to as contingency culture, should not be seen as the sudden appearance of a supernova. Discarding certain regrettable strands of marxism, Europe, old, middle-aged, new, has been at least prolific in its suggestions about how to act under conditions of absent necessities and absent impossibilities.

(49) Gunther TEUBNER, *Self-subversive Justice: Contingency or Transcendence Formula of Law*, in 72 *The Modern Law Review* (2009), 1-23.

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