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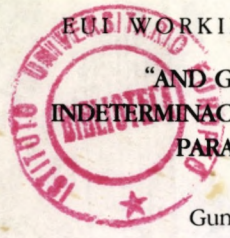

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"AND GOD LAUGHED..." INDETERMINACY, SELF-REFERENCE AND PARADOX IN LAW

by

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"And God Laughed..."

Indeterminacy, Self-Reference and Paradox in Law

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I.

The Talmud tells us how once during a heated halachic discussion, when no agreement could be reached, Rabbi Eliezer, whose detailed, elegantly justified legal opinion was not shared by the majority, said that if he were right, a carob tree outside would move to prove it. When it did move, the other rabbis remained unimpressed. Eliezer claimed that if he were right, a nearby stream would flow backwards -- and it did; he claimed that the schoolhouse walls would bend -- and they did. But the rabbis were not impressed by these wonders either. Finally he said heaven itself would prove him right. Thereupon a Heavenly

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Voice confirmed Eliezer's position. Yet the rabbis disagreed even with this voice, saying: "We pay no attention to a Heavenly Voice, because Thou hast long since written in the Torah at Mount Sinai, after the majority must one incline". And God laughed, saying "My sons have defeated Me, My sons have defeated Me". (After the Babylonian Talmud, Baba Mezia 59b).

An old story is perhaps the best way of getting across the atmosphere of a new theory - autopoiesis in law. "And God laughed" is the name of this story, which Joseph Weiler told me when we discussed whether the concepts of self-reference and autopoiesis could be made fruitful for a new understanding of law.

This story reveals indeterminacy in its relation to self-reference and paradox, in law. As with all good stories, several interpretations are possible. Starting with somewhat superficial interpretations, indeterminacy manifests itself as non-susceptibility to outside control. This lack of an Archimedean point from which to consider law precludes the possibilities of external influence or prediction. The law - as Rabbi Eliezer had painfully to find out - is determined not by external authorities, nor the authority of texts, nor worldly power, nor the law of nature, nor divine revelation; law determines itself self-referentially, relying on the contingency of its own positivity.

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Law owes its validity to this very self-reference: the application of legal operations to the results of legal operations. Thus, validity of law cannot be imported from without but only produced from within the law. Along with Luhmann, we may say (1986b: 20f.): "there is no law outside the law, and therefore, in relation to the system's social environment, neither input nor output of law". The rabbis' discourse decides about everything, even about the "fiat" of the legislative -- or divine -- will. Their legal discussion decides ultimately what is acceptable in legal practice. The first interpretation, then, is: positive law is indeterminate because it is self-produced law - not only in the sense of law made by human hands, but in the sense of law made by law.

A second interpretation would stress the connection between the law's self-reference and its lack of predictability, another indication of the lack of external control. The ideal of certainty, and hence predictability, in law, comes to grief upon the law's self-reference, regardless of whether predictability was to be achieved via broad-based sociological research or narrower inquiries in the spirit of Legal Realism. Neither an accumulation of non-legal social data nor the judge's breakfast can serve as determinants of legal development. For Eliezer, the ability to foresee the responses of the natural and the divine worlds failed to make the legal world predictable: the rabbis'

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debate took its own course.

In this connection, von Foerster would perhaps interpret Eliezer's legal dispute in the following way (cf. von Foerster, 1984: 8ff., 1985: 42ff.): God laughed because the rabbis had set the seal on the powerlessness of the Laplacian world spirit. For that spirit has power only over what von Foerster calls "trivial" machines, the operations of which link particular inputs with particular outputs in a fixed, regular way. "Trivial" machines are synthetically determined, analytically determinable, independent of the past, and predictable. Law, by contrast, if it is indeed the autonomous law of the rabbis, would have to be understood as a self-reproducing system, which, since the operations of law are dependent of its internal states, would have to be defined as a "non-trivial" machine. Law is certainly synthetically determined, but not analytically determinable; it is dependent on the past, but not predictable. The indeterminacy of law would then be directly connected with its autonomy. In fact, Hejl (1984: 64) finds the decisive characteristic of a system's autonomy in its indeterminacy, when he defines autonomy as input-independence of living systems, i.e. as indeterminacy of their operations in relation to an input that is identical for the observer.

II.

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As was said, these would be two rather elementary interpretations of the law's self-reference. For they say something only about the law's non-determinability from outside, about its inscrutability. A third interpretation reveals a deeper-lying problem of law. It traces a circular structure in the story. Rabbi Eliezer successfully mobilizes the whole of a hierarchy of norms; he successively ascends the stages of learned debate, the Talmudic text, Rabbinical law, worldly power, natural law and divine revelation, and when he gets to the top he plummets right back down again to where he started, with his colleagues' debate, completing a "strange loop". "Tangled hierarchies" is the term used by Hofstadter (1979: 64ff.) for the phenomenon where the highest level of a hierarchy "loops into" the lowest one: what ultimately decides the validity of divine law is the triviality of procedural norms ("after the majority must one incline").

Hofstadter himself (1979: 692f., 1985: 70ff.) makes it clear that even the hierarchy of legal sources is not spared from the circular "looping together" of hierarchies: "The irony is that once you hit your head against the ceiling like this where you are prevented from jumping out of the system to a yet higher authority, the only recourse is to forces which seem less well defined by rules, but which are the only source of higher-level rules anyway: the lower-level rules..." (1979: 692f.).

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The story of the dissenting Rabbi Eliezer therefore links to the ineluctable self-reference of law. This appears to us in the story in an already highly elaborated form: as a clearly delineated hierarchy of the legal sources. There is only one small flaw: the highest source is fed from the lowest one (Escher, 1961). This small flaw "makes any legal system which ranks its rules hierarchically into a completely reflexive hierarchy" (Suber, 1987: 21.30). Though, by setting the highest source of law high enough, the legal world can live very well with this circularity, even if God does laugh a little.

Things become really serious, though, if we - in a fourth interpretation - come up against the original self-reference which underlies the "tangled hierarchy" of the Talmudic law. In an elementary form, and one that is threatening for law, immediate self-reference appears when law assesses real world situations, using the simple distinction between right and wrong. When this distinction is applied not only ad hoc, but with universalist claims to the whole world, then at some time or another the right/wrong distinction falls into temptation - in fact, its very universality claim places it under a compulsion - to apply itself to itself. And "the paradoxes of self-reference" (Bateson, 1953, 1972; Wormell, 1958; Quine, 1976; von Foerster, 1984; Krippendorff, 1984; Hutter, 1986: 66ff.; Suber, 1987) emerge. The hierarchy of legal sources is, as the dissenting Rabbi Eliezer's desperate attempts show, only an inadequate

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attempt to avoid this originally given self-reference by piling up ever-new meta-levels; but the top level always collapses into identity with the lowest one.

Many, like Spencer Brown (1972: 135), wish to ban such "self-indication" since its appearance seems to eliminate the original distinction; others, like Francesco Varela (1975: 5) see "self-indication" as the big opportunity for a new logical calculus. But these are already evaluations of an operation that is potentially always available: application of a distinction to itself. This is threatening because such self-application eventually blocks decision. Statements that are false if true and true if false, are the result of some - not all - self-applications of distinctions. If the positive value of a distinction is applied to itself, the result is a (harmless) tautology: "It is right to apply the distinction between right and wrong." Things get tough, however, with the negative value. "It is wrong to apply the distinction between right and wrong" lands us in a non-resolvable paradox: right-wrong-right-wrong ...

Once one has become sensitized, one discovers self-references, paradoxes and antinomies in the law on all sides (Fletcher, 1985: 1268ff.; Suber, 1987). As Hofstadter (1985: 71) says: "In fact, reflexivity dilemmas ... crop up with astonishing regularity in the down-to-earth discipline of law". Familiar points are the major paradoxes of the law's being put out of

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force by the right of resistance and by raison d'état (Luhmann 1984c: 36); the paradoxical creation of law by the violence of revolution (Benjamin, 1977: 179ff.): "in ogni violenza vi é un carattere di creazione giuridica" (Resta, 1984: 10, 1985: 59ff.); the already mentioned paradox of the tangled hierarchy of norms; the Münchhausen-trilemma of rule-justification: infinite regress, circularity or arbitrary cessation (Albert, 1985).

These are known fundamental paradoxes in law. However, one may question their practical consequences. Do they have existential force (Solum, 1987: 479)? Do they hold "terrors in our daily lives" (Kripke, 1982: 87)?. In fact, more concrete phenomena of legal self-reference leading to paradox can be found: "Who watches the watchmen" as a problem of constitutional law (Cappelletti, 1985: 550), the change of constitutional norms via constitutional norms and the paradox of self-amendment (Ross, 1969: 1; Suber, 1987); "tu quoque" or "equity must come with clean hands" (see Teubner, 1975); renvoi in law of conflicts (Kegel, 1987: 24off.); "ignorance is no excuse"; the prohibition on bigamy; alterations of legal rulings that have future effects: "prospective overruling" (Fletcher, 1985: 1268ff.); or the fiction theory of the legal person, according to which the State as legal person has like Münchhausen to pull itself out of the swamp by its own topknot by fictionally fabricating itself (H.J. Wolff, 1933: 63f.; Flume, 1983: 13; Teubner, 1988a: 417ff., 1988b). These are some paradoxical legal phenomena that trouble

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not only legal theorists but practical lawyers as well.

III.

Self-reference - paradox - indeterminacy everywhere! The real point, however, arises after this realization, at the next stage, when one asks, how is one to handle the paradox induced by self-reference? If one is not, like Lüderssen (1986: 343) to make things easy for oneself by dismissing "fiddling with self-referentiality, which is after all unvarnishedly claimed to be circularity" as "an intellectual recreation to do with paradoxes", "that intellectual history has continually had to deal with, and rightly rejected as fruitless" (349), then there remain three intensively discussed possibilities of dealing with the "paradoxes of self-reference" (Wormell, 1958; Quine, 1976) that arise in law.

Radical criticism of law is one approach to self-reference, today cultivated by protagonists of the "critical legal studies movement", mainly from the U.S. and U.K. (cf. esp. Kairys 1982b; Stanford Law Review, 1984; Boyle, 1985; Kelman, 1987). These theorists employ subtle analyses of legal doctrine in a peculiar technique of deconstruction. Legal dogma's claims to consistency and its practical and moral premises are reduced to absurdity by pointing out contradictions, antinomies and paradoxes within the dogma's own reasoning (for a concise overview, see Gordon, 1984:

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101). This method commenced by discovering, in the doctrine of contract law, contradictions between formality and materiality, and between individualism and altruism (Duncan Kennedy, 1976: 1685, 1712f.); with pointing out the disintegrating effects and inherent instabilities of "policy-oriented" law in the welfare state (Unger, 1976: 192ff.); with deriving the paradox that, for every rule one can find a counter-rule (Duncan Kennedy, 1976: 170) and for every pronouncement of legal dogma, with the assistance of that doctrine the exact contrary could also be deduced (Unger, 1983). Trubek (1986: 68) condensed the critique of law underlying these moves to the formula: "indeterminacy, antiformality, contradiction and marginality". The method quickly spawned adherents (e.g., Singer, 1984: 1; Boyle, 1985: 685; Peller, 1985: 1151). By now there is scarcely a field of law that has not been deconstructed by the professorial critical cadre (for private law, see Feinman, 1984: 678; Dalton, 1985: 997; for public law, Kairys, 1982a: 140; Tushnet, 1983: 781; 1985: 683; Frug, 1984: 1276.)

The critics vary in their analysis of legal indeterminacy. They ascribe indeterminacy of law to quite different complexes of causes: individual case decisions, legal institutions, the logic of legal argumentation, legal doctrine, social interests, or policies (for a critical view of this see David Kennedy, 1985: 1418f.). However, the critics themselves assume stances of latent determinacy, depending upon to whichever complex they

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attribute the larger phenomenon of indeterminacy, e.g., context, institutional setting, political ideologies, "social hegemony" (see Duncan Kennedy, 1982: 49f.; Singer, 1984: 20ff.).

Given these "secret" points of determinacy, it must be asked, how radical is this critique of law actually? This is precisely the opposite of the usual objection against critical legal studies which assert that the indeterminacy-thesis is an exaggeration of the under-determinate character of law (e.g., Solum, 1987: 494). Indeed, critical legal studies is not radical enough. It seems to me that the rediscovery of indeterminacy, the demystification of legal dogma through ideological criticism, all of the "debunking", "trashing" and "demystifying", reach only superstructural phenomena of legal self-description (doctrine), but fail to push through to the basis of the fundamental paradox of law. Is not Sophocles' critique of law much more radical when he has Antigone express her opposition to Kreon's law prohibiting her from burying her brother?

> Kreon: "And yet you dared to overstep these laws?"
> Antigone: "Yes, ... for not Zeus it was who uttered them.
> Nor yet did She who dwells with gods beneath,
> Justice, ordain such laws as these for men.
> Nor did I count your edict strong enough
> For you to override, and you a mortal,
> Unwritten law, unshakeable, of Heaven.
> For not today, nor yesterday, but all time
> Does that live, and none knows from when it came."
>
> (translated from Greek by Iain Fraser)

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We should not downplay Antigone's protest as recognition of a conflict between human and divine law. Rather, she asserts an insoluble paradox, familiar to us from the earlier discussion of the self-application of the legal distinction. Antigone applies the legal code to the legal code itself by claiming that Kreon's laying down of right and wrong is as such wrong.

This claim supercedes that of the contemporary radical critique of law, which locates modern law's paradoxical indeterminacy in politically-manipulable legal doctrine and externalizes the paradox to "secret" points of indeterminacy. For Antigone, paradox inheres in the phenomenon of law itself; it is not merely a symptom of a particular historical configuration of dogma. The radicality of the Antigonean critique of law reaches a deeper level. It is not individual legal norms, principles or doctrines that lead to antinomies and paradoxes; the law itself is based on a fundamental paradox, which even alternative visions of a "communal law" (Unger, 1983) cannot escape.

Thus, the disclosure of contradictions and paradoxes cannot, contrary to all the hopes of the Enlightenment, lead to a "deconstruction" of law, but at most to a "reconstruction" of its foundations that remain latent. This achieves not the elimination of contradiction and paradox but instead a "reconstruction" of the connection among self-reference, paradox, indeterminacy and

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evolution of the law. It does not suffice for the critics to argue that the revelation of contradictions and paradoxes to jurists irreversibly destroys the latent paradox, thus achieving deconstruction by enlightenment. This argument underestimates the difference between the reflective awareness of jurists as individuals and that of the law as a social process. The enlightenment approach hereby neglects the operative closure of legal-practical discourse to the achievements of theoretical -- even legal-theoretical -- discourse. Wiethölter (1986b: 53) regards it as "the dominating phenomenon of the last 10 to 15 years that the work of lawyers as socially oriented and exercised practice has remained almost untouched by all the more fundamental challenges facing our legal system, jurisprudence and legal doctrine ..."; and Heller (1985: 185) supplies the post-structuralist explanation: "Law is essentially a cognitive and professional, rather than a normative, discipline, referring to theory only in the liminal cases where the content of the settled practice comes into crisis". This makes him rightly sceptical as to the enlightening effects of a legal critical "delegitimative analysis".

Jurists more acrobatically-minded than the critical legal scholars practice a more civilized way of dealing with the self-referential nature of law (e.g. Hart, 1964; Ophuels, 1968; Ross, 1969; Fletcher, 1985). These jurists define the problem of the law's self-reference as a problem of "paradoxes in legal thought"

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(Fletcher, 1985: 1263ff.). This definitional restriction of the problem allows them to regard the connection between self-reference and paradox as a "fallacy" (1263) of thought; thus, they can now set about restoring the consistency of legal reasoning with elan, intuition and mental gymnastics. The entire exercise reduces to a problem of insufficiently refined mental techniques, which, with improvement will effectively be able to remove paradoxes: "... the primary technique for resolving them is to elaborate distinctions" (1279). This technique finally refers to the famous theory of types, but there are other "solutions" that effectively avoid the paradoxes of self-reference in law (see Hart, 1964; Ross, 1969; for a critical discussion see Suber, 1987). In the face of unresolved paradoxes and antinomies, one can at least preserve one's attitude: "... it poses a challenge to legal theory that we cannot ignore. If we are committed to the consistency of our legal principles, we shall someday have to devise a construct or a theory that will resolve this antinomy" (1284).

Let us pay a tribute to optimism, and respect "consistency as an overriding legal value" (1265)! But who is to protect the legal mental gymnasts from being caught up, while leaping from level to metalevel and meta-metalevel, in some "tangled hierarchy", or from landing, following some bold mental leap out of the system, back where they were again, in some sort of "strange loop"? Perhaps Fletcher makes it too easy for himself

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despite all his mental gymnastic effort because he takes paradoxes only as intellectual errors.

At any rate, the dissenting Rabbi Eliezer in our story cannot be helped by a new distinction in order to escape an alleged fallacy in his thinking about law. For his penalty for losing the legal argument was exile -- a fate more real than an error in thought. His problem was not merely paradoxes in legal thought, but paradoxes in law itself. The frightening experience is that the reality of law itself, and not, say, merely thinking about law, is paradoxically constituted. Eliezer was forced to recognize the Antigonean claim. And precisely this recognition leads to the third way of dealing with the legal paradox induced by self-reference: rather than isolate the paradox in thought about law, shift it into the social reality of law. This breaks a taboo in law: the taboo on circularity. Legal dogma, legal theory and legal sociology are agreed in placing circularity under the ban of logical inadmissibility. Circular arguments are banned in all three disciplines, as petitio principii. This taboo also characterizes the efforts of our legal mental gymnasts, whose acrobatics are premised upon the ban on circularity. The critical demystifiers, as well, silently accept the taboo of circularity, and their critique of indeterminacy would fade away into vacuity if the ban were raised.

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Autopoiesis theory takes the Antigonean paradox as its starting point, but it does not violate the taboo only to declare circular conclusions logically unobjectionable. Then the outcome would in fact be empty tautologies or inpenetrable blocks on thought. Instead, the theory dodges the taboo by declaring circularity to be a problem of legal practice, rather than a problem of legal thought: the social reality of law consists in a number of circular relationships. The components of the legal system - actions, norms, processes, identity, legal reality - are cyclically linked with each other in multifarious ways (Teubner, 1988b). Self-reference, paradoxes and indeterminacies are real problems of social systems, not errors in the mental reconstruction of this social reality.

This new way of handling self-reference is more than ambitious. It claims to treat circularity, hitherto regarded in principle as a prohibited mode of thought, as a fertile and heuristically valuable model of social reality, and on this basis to revolutionize not only legal theory, but thought about society (Luhmann, 1983, 1984b, 1985a, 1986a). As Zolo (1986: 4) has shown, the basis here is a generalization of the following "circular" phenomena:

"1. linguistic self-reference of cognitive processes (W.V.O. Quine, O. Neurath),
2. theories of order through fluctuation and dissipative structures in the physics of irreversible processes (I. Prigogine),
3. logical circularity in mathematical axiomatized

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structures (K. Gödel), and more generally, paradoxes and contradictions in recurrence and in logical and linguistic self-inclusion (B. Russell, K. Grelling, A. Tarski),

4. reflexivity of the mechanisms of homeostatic or self-catalysing self-regulation in molecular biology or neurophysiology (L. von Bertalanffy, M. Eigen, H. von Förster),
5. recursive phenomena (feedback, re-entry) in cybernetics land the cybernetics of cybernetics (second-order cybernetics) (W.B. Ashby, H. von Förster),
6. processes of spontaneous morphogenesis and the self-organization of social groups (F.A. von Hayek),
7. the traditional concept of mental awareness in man and in the anthropoid apes (H. Maturana, G. Pask, N. Luhmann)."

This way of handling self-reference derives its dynamics and potential fruitfulness from a jump to a bold epistemological position: "that reality has a circular structure, independently of its cognition" (Luhmann, 1984b: 648, 1986c).

IV.

This insistence on "real paradoxes", to coin an expression loosely based on Karl Marx's real contradictions, fertilizes theories of self-reference and autopoiesis, making them rich in prospects. For the research strategy is to discover blanks on the map of social phenomena by identifying circular relationships in law and society and tracing their internal dynamics and external interactions. Of course there are already efforts in this direction. The most advanced remains legal hermeneutics, which studies the perplexities of the hermeneutic circle in "preliminary conceptions and choice of methods" (Esser, 1970). In legal theory, it was Hart (1964) and Ross (1969) who analyzed

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self-referential norm structures. Legal methodology and argumentation theory, by contrast, say little about the circular structure in the relationship between legal norm and purpose in the teleological interpretation (e.g. Alexy, 1978: 289ff.). And legal sociology has so far permitted itself the luxury of circularity only in simple feedback relationships between law and society (e.g. Weiss, 1971; Eckhoff, 1978: 41ff.).

For an autopoietic view, these phenomena appear only as a few special cases in the generally circular reality of law. For the legal system, like other autopoietic systems, is seen as nothing other than an "endless dance of internal correlations in a closed network of interacting elements whose structure is continually modulated by numerous interwoven domains and meta-domains of structural coupling ..." (Maturana, 1982: 28).

This, then, would be the last interpretation of the story "And God laughed ...": the reality of law itself is circularly structured. Not only is the rabbis' reasoning about law self-referentially constituted: so is their very subject matter. The most important consequence of this shift from thought to practice is that one no longer need falter at the hurdle of paradox induced by self-reference. After all, the rabbis do continually produce law, despite any paradoxes. They follow the second alternative in Krippendorff's(1984: 51f.) account of a paradoxical situation: "Unless one is able to escape a

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paradoxical situation which is what Whitehead and Russell achieved with the theory of logical types, paradoxes paralyze an observer and may lead either to a collapse of the construction of his or her world, or to a growth in complexity in his or her representation of this world. It is the latter case which could be characterized as morphogenesis".

Now, one can analyse how the morphogenesis of law copes with the block produced by paradoxes and, despite extreme fluctuations, achieves stability. The practice of law transforms indeterminacy into relative determinacy. Autopoiesis theory offers an analysis of the practical solutions to the indeterminacy problem via the conjunction of the following elements: self-reference - paradox - indeterminacy - stability through eigenvalues. By applying its distinction between legally right and wrong, the legal system founds itself upon a self-referential circle. This leads inevitably to the situation of tautology and paradox, and therefore into a fundamental indeterminacy of law. One need not, however, stop at this indeterminany, nor yet flinch from it. For practical solutions to the indeterminacy problem induced by paradox do exist. The attitude of the rabbis in the synagogue toward the paradox of self-reference seems to be: "If it hurts or is unfair, eliminate it or prevent its application through adjudicatory devices; otherwise smile at the sweating logicians" (Suber, 1987: 21.1o).

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But what is the principle that justifies this attitude? The key lies in the "de-paradoxification of paradoxes", in the "creative use of paradoxes, in the transformation of infinite into finite information loads, in the translation of indeterminate complexity into determinate complexity" (Luhmann, 1987: 320).

One may, with von Foerster (1981: 274, 1985: 36), embark on a fuite en avant and rely on self-reference itself to lead ultimately to stable solutions, by the emergence, from the continual recursive application of an operation, of "eigenvalues", stable in themselves. A classical example of an eigenvalue from auto-logic is: "This sentence has ?? letters". The number thirty-one is one eigenvalue of this sentence. More generally, from continual recursive "computation of computation", a system learns those modes of operation that are valid in its coping with an environment which is inaccessible to the system. Or one may, like Boaventura de Sousa Santos (1987: 281), inspired by poets who "overcome the anxiety of influence by misreading (or distorting) poetic reality", interpret law as a continuous "misreading of reality". Alternatively, one may, with Luhmann (1984a, 1986b: 16ff.), beat about the bush, seeking social solutions to self-reference by concealing paradox, belittling it, reinterpreting it as mere contradiction and by other historically identifiable techniques of "deparadoxification". The construction of the legal system on the basis of the legal code

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(right/wrong), which minimizes the paradox of self-reference into a (prohibited) contradiction, and at the same time, keeps it latent would then be a major cultural achievement.

V.

So far, our considerations indicate a need for a new direction in the critique of law. Traditionally, the critique of law implies a challenge to the status quo -- a challenge fulfilled by the unmasking of paradoxes and contradictions. If it is true, however, that the whole legal system is built up upon a fundamental paradox, then it is not worthwhile to attempt critiquing an apparent legal order by discovering ever new paradoxes and contradictions. A more fundamental question intrudes: given the basis of an indeterminacy-producing paradox, how is legal order possible at all? Since indeterminacy of law is the ordinary rule, determinacy, order and system are the exceptions that require explanation.

However, rather than merely critique the critique of law for failing to do justice to the fundamentality or pervasiveness of indeterminacy, I would prefer to continue the critique of indeterminacy but to carry it further. It is important to see that there are classes of legal indeterminacy that do not come simply from the fundamental legal paradox or the mere difference between structure and event. These exist in every kind of law.

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The contemporary critique of law rightly reacts to a new and disturbing quality of indeterminacy in law, manifested today by the emergence of such phenomena as the balancing of interests, the increased use of general clauses, the spread of sociological jurisprudence and legal economics (see Maus, 1986: 277ff.; Joerges, 1987a; Teubner, 1987a: 15ff.).

In Germany one immediately thinks of such "classics" as Franz Neumann (1937) and Max Weber (1921), or for the narrower area of private law, Justus Wilhelm Hedemann (1933) and Franz Wieacker (1956). As is well known, Franz Neumann (1957: 47ff.) made the development of capitalism into monopoly capitalism responsible for this new indeterminacy. Capitalism no longer demands a calculable formal legal order, requiring instead highly indeterminate discretionary government interventions, which are now functionally sufficient to underpin the self-created order of the economy. Max Weber (1978: 882ff.) picked out economic and social interests that favoured penetration of the formal rationality of law by utilitarian, ethical and political elements, sabotaging the law's determinacy and calculability. Such legal scholars as Hedemann (1933) were alarmed at the "escape into general clauses": were they not "softening of the bones of law"? Wieacker's attempt finally (1956) to clarify the indeterminacy of general clauses in theoretical terms by recourse to the tradition of judge-made law has not so much solved the problem of the new indeterminacy as merely shifted it on to a

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different level.

Today, a variety of theorists have emerged from the backward-looking view that perceives a "logic of decay" in the uprise of the new indeterminacy. Rather, they interpret the disquieting new indeterminacy of law as an index of a possible new rationality. I shall mention only Wiethölter's new proceduralization of law (1982a, 1982b, 1985, 1986a, 1986b), Ladeur's concept of an "ecological law" (1982, 1984a, 1984b, 1986, 1988) and Boaventura de Santos' new "legal pluralism" (1987).

Ladeur has brought these developments to a common denominator. The transformation of the "society of individuals" into a "society of organizations" brings about the replacement of universalist law by a "strategic law." To understand the latter, the thought patterns of "order from fluctuation" and "dissipative structures" (Prigogine, 1976) appear to be appropriate. I prefer different emphases, interpreting the dominant emergence of formal organization as a partial aspect of a more general phenomenon, that of the closure of social spheres - among them formal organizations - into self-referentially operating autopoietic systems. This yields a new kind of conflict situation: an irresoluble conflict between information and interference, that is, between the systems' own constructions of their environmental systems and the operative reality of those environmental systems,

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which they can really experience but not reproduce within their own operations. The result of this conflict is either disintegration of the system's specific construction of the environment, or else its high situational indeterminacy.

I cannot here reconstruct the whole theory of autopoietic systems, but merely endeavour to make its relevance for legal indeterminacy plausible. In this context, it is a problem of second-order autopoiesis (Jessop, 1988). The new indeterminacy arises only when, on the basis of general social communication, certain communicative spheres become independent as first order autopoietic systems (formal organizations, politics, law, economy, education etc.). In the course of social evolution these communicative spheres self-referentially constitute their own components - elements, structures, processes, relations with their environment - that differ from those of general social communication. When these components in turn become linked hypercyclically, so that elements produce structures and vice-versa, the process reaches a relative endpoint (Teubner, 1988b, taking up from Eigen and Schuster, 1979). The effect of this hypercyclical closure is great efficacy of the systems in dealing with their environments. They have no direct communicative contact with their social environment, but construct an environment of their own, using their own operations. This results in radical openness to the environment, based on radical operative closure. The consequence is increased possibilities of

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action; but also increased demands in respect of precision, formalization, internal consistency of decision making and determinacy of operations.

For example, the economy constructs society for itself via the language of prices; it does not treat law as binding instructions for conduct, but includes it in its calculations as a cost factor (amount and likelihood of penalties). Politcs constructs its "public" for itself via the language of power; law constructs its "legal reality" via the distinction between right and wrong, etc.

The conflictual aspect of this seemingly "harmonious" interplay of social spheres is interference (on this see Jensen, 1978: 116; Münch, 1980, 1982; Luhmann, 1981: 191ff., 1984b: 286ff., 1988a: 338ff.; Teubner, 1988c; Willke, 1988). Functional subsystems coexist not in cleanly separated fashion, as it were side by side in space, but interact in at least two possible points of friction: communications appear simultaneously in several autopoietic circuits, and people act in various system contexts. A third, and still not very clear, area of interference - the "overlap" between functional subsystem and society - may provisionally be termed structure or system interference. The consequence of such interferences is that outside descriptions of the surrounding systems conflict with their real operations. Let it be clear that this does not mean

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the "academic" conflict of different internal and external descriptions (e.g. the question whether the law's image of the economy corresponds with the economy's image of itself), but the harder conflict between the way the environment is construed within the system (the law's picture of the economy) and the operations that actually take place in the surrounding systems which are in turn autopoietically closed (actual economic processes).

Because of its own operative closure, the real operations of the other, surrounding systems are not accessible to any single system. It produces (not receives!) only information about the surrounding world that is internal to the system and controlled by its own code and its own programmes. At the same time, however, via interference phenomena, the system is exposed to the operations of surrounding systems also functioning according to their own codes, which then become clearly perceptible as interference, disturbance, noise. And no "order from noise" makes sense here. For since the order can always only be the system's own order, the system continually reacts in the same way, merely increasing the interference and noise, ultimately leading to mutual amplification of the troubles.

The system has one possibility of avoiding a positive-feedback catastrophe. It may endeavour to vary its own observations, say by incorporating the environment system's

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descriptions of itself into its own description of it. But this leads in principle only to a new and equally serious problem. Incorporation of an external code into the system's own operations, if consistently carried out, means disintegration. It signals the end of its operations based on its specific code (cf. Teubner, 1987a: 19ff). Therefore only one, unsatisfactory, compromise escape remains: leave its code untouched but adapt its programme to the other's self-descriptions, as long as they are compatible with the code. This presupposes a clear separation between code and programme (see Luhmann, 1988b). The cost of this solution is that the programme becomes extremely indeterminate. It must on the one hand adapt to the real requirements of the social environment, and on the other remain compatible with the system's code. All that remains is a situational adjustment without possibilities of universalization.

Applying this to law, one very quickly comes up against the economic and political instrumentalization of modern formal law which is the underlying source of the new indeterminacy of law. On the side of the law, there is Max Weber. In contemporary terms, modern formal law is an expression of the hypercyclical self-referentiality of law. It is distinguished not only by self-constitutive legal acts as elements, "secondary norms" as structures, reflexively normed legal procedures and an internally constructed "legal reality", but by the cyclical linkage of these

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system components through reciprocal production of elements and structures, identity and processes. Consequently heightened claims press on the internal consistency of decision-making, on dogmatic treatment, on legal determinacy certainty of decision etc. This pressure produces the motivation for a critique of legal indeterminacy in the first place.

On the side of the law's environment, we meet with a systemically generalised Franz Neumann: the reality constructions of formal law, produced in closed, self-referential fashion, enter into conflict with the actual operations of their surrounding systems. The developments in the economic system (from early capitalism to monopoly capitalism) addressed by Neumann would then be an illustrative subphenomenon of the environmental changes that induce uncertainty. The escape lies in the law's adoption of political and economic self-descriptions, in increased incorporation of political expediency and economic utility into legal calculations. If this is really taken seriously -- if the right/wrong code is in fact replaced by political expediency or economic utility -- it entails "cadi justice". Legal conflicts are decided in a fashion arbitrary from the legal system's viewpoint, in accordance with criteria external to the system. "Efficient breach of contract" (Posner, 1977: chap. 2; Harris and Veljanovski, 1986: 114f.) or the criterion of "optimal regulation" developed by Easterbrook and Fischel (1982: 1177) exemplify how the legal code can be directly

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replaced by another code, as does the direct application of policy arguments to indvidual cases.

Usually, however, legal practice chooses a different technique for handling interference. The legal code remains intact; only the programme changes so as to adapt as far as possible to the self-description of the surrounding system. Policy issues and considerations of consequences are not, therefore, reflected at the level of the individual case by having the validity of the final decision depend on the unfolding consequences or the success of the policy (cf. Luhmann, 1988c: 25). Instead, a separation of levels occurs, as with rule utilitarianism/act utilitarianism. The programme is partly determined by general considerations of consequences, policy viewpoints and efficiency criteria; but it is then subjected to the legal code, treated as valid law and converted into a decision according to right or wrong. The result of this precarious compromise is a dramatic rise in the indeterminacy of law. But law must pay the price of indeterminacy to achieve any success whatsoever in handling interferences among autonomous social spheres.

Thus, the altar of social responsiveness demands a painful sacrifice from formal law: withdrawal of the claim to internal consistency. The new responsive law works out legal categories in confrontation with various social subspheres. By their very

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nature, these categories cannot make claims to universal legal consistency. Even within the legal system, the process of internal differentiation of law parallels that of functional differentiation of society. Long ago law surpassed the traditional major subdivision into public law, private law and criminal law. Contemporary "private law" embodies a multiplicity of special private laws, long without conceptual, dogmatic unity (see Joerges, 1981: 123ff., 1983: 57ff.; 1987a: 166 ff., 1987b, 195ff.). The background of social differentiation makes the recurring calls for reintegration appear hopelessly out of step with reality (e.g. Wolf, 1982: 1ff.). Contemporary decision making practice reorganizes law, from a dogmatically controlled legal unity toward a multiplicity of functional legal territories.

VI.

Does this not rather recall Pascal's complaint: "A funny justice that ends at a river! Truth on this side of the Pyrenees, error on that"? (1964: 151). Could not today a similar complaint be made concerning the arbitrary lines drawn between areas of law, except that it would not be rivers and mountains but symbolic media, codes and programmes that would mark the boundaries? In fact not only is the problem similar; historical experience of handling such problems may also be made use of in our approach. There is a long history of the law's

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experience with system conflicts of a specific type, with conflicts between different national legal systems on a territorial basis, for which a highly developed doctrine for conflicts of law has been formulated (see Kegel, 1987: 98ff.). Is it possible to learn from that history how to transfer experience with conflict between territorial subsystems to conflicts between functional subsystems? Does it make sense to develop principles and norms of an "intersystemic law," a law of conflict between different discourses in society?

Indeed, the growth of worldwide fields of interaction in science, technology, the economy, public communication and travel tends to weaken the significance of territorial frontiers and increase that of frontiers between such functional spheres. Should the law then not shift its focus to other conflict zones: more intersystemic rather than international law of conflict? From the autopoiesis viewpoint it is entirely plausible to speak of a dominance shift in conflict from that between territorial, political and national units to that between functional subsystems of world society (Luhmann, 1975b: 51; 1982: 131; Willke, 1983: 49ff).

Similar observations stem from Boaventura de Sousa Santos (1987:297ff.), who sees in "interlegality" a dominant feature of an emerging "post-modern law": "Legal pluralism is the key-concept in a post-modern view of law. Not the legal pluralism of

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traditional legal anthropology in which the different legal orders are conceived as separate entities coexisting in the same political space, but rather the conception of different legal spaces superposed, interpenetrated and mixed in our minds as much as in our actions, in occasions of qualitative leaps or sweeping crises in our life trajectories as well as in the dull routine of eventless everyday life. We live in a time of porous legality or legal porosity of multiple networks of legal orders forcing us to constant transitions and trespassings. Our legal life is constituted by an intersection of different legal orders, that is by interlegality . Interlegality is the phenomenological counterpart of legal pluralism and that is why it is the second key concept of a post-modern conception of law. Interlegality is a highly dynamic process because the different legal spaces are non-synchronic and thus result in uneven and unstable mixing of legal codes."

And, in Germany a number of interdisciplinarily-oriented sensitive observers of recent developments in legal doctrine - such as L. Raiser (1971), Kübler (1975), Wiethölter (1977), Walz (1980), Joerges(1981), Ladeur(1984) - have begun to formulate a new law of conflict, which should be generalized in order for further development.

First reference must be made to Wiethölter (1982a, 1982b; 1985, 1986a, 1986b). His concept of proceduralization evidences a

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kinship with the development of "conflict norms", and so, Wiethölter's (1985: 247) "support goes to ... an understanding of proceduralization as a justificatory problem of 'rational' practical actions under 'system' conditions (=justification of collision rules in the exercise of judgemental competences)". To work out the more recent problem situation, he adduces the conceptual machinery of classical law of conflict:

> "In the fundamental legal principle of proportionality I have sought to define the most influential machinery of transformation for the osmosis, translation, for covariance of law and society, as the supreme and most general productive principle of an - admittedly silent, and absolutely unavoidable - justification of conflict rules for the decision of conflicting rights, interests and needs. Legal relationships are in fact (in Germany since the days of Savigny) neither pure objects of evaluations nor pure evaluations of objects, but have always been premediated general decisions on the assignments of facts to a particular law by way of connection, the qualification of legal answers to social questions".

But one thing remains remarkably vague: which units clash? Looking for an answer in Wiethölter's texts (especially Wiethölter, 1985, 1986a, 1986b), it remains unclear if they were conflicts of political interests, ideological camps, socio-legal models, general legal principles, legal subsystems, programme structures, social subsystems, subrationalities, or political strategies. Even from the viewpoint of autopoiesis, the question of identifying the relevant units that collide is not any easy one. As an attempt, I would propose the following differentiation: 1) Conflicts between autopoietic social systems; 2) conflicts between the quasi-laws of semi-autonomous social

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fields; 3) conflicts between fields within the law.

1) Law of conflicts must address clashes between different autopoietic social systems, be they functional subsystems (politics, economy, family, religion, science, culture), formal organizations or specialized interactions. Here the first major problem is whether a translation of the conflict into the legal code is desirable at all. Because of the well-known trend toward increasing legal cognition of social claims, we uncritically fail to ask this question. But the most recent experience with the phenomenon of "juridification" ought to have sensitized us to whether such conflict norms ought not to be developed (Voigt, 1980, 1984, 1986; Kübler, 1984; Kettler, 1987; Teubner, 1987b). Nonet and Selznick, for instance, propose a legal evaluation of civil disobedience based not upon formal legal criteria, but upon a "political paradigm." Such a framework would treat instances of civil disobedience as objects of political negotiation (Nonet and Selznick, 1978: 92f.). "Forgiveness for rule breaking is readily negotiated in the interest of reconstituting a framework within which cooperation can go forward." Simitis and Zenz (1975: 51) and Habermas (1985: 217ff.) similarly stress law's paradoxical capacity to preserve a non-legalistic resolution of particular conflicts in family and school contexts.

The open question is, when the rationalities of social spheres clash, can law develop conflict norms which, through

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juridification, in fact work against juridification? Can law abdicate to the conflict-solving possibilities of other social contexts? Can it develop legally codified rules about the application or non-application of its own code (Luhmann 1988b)?

The second major problem is whether law can content itself with "formal" rules referring disputes to the rationality of one or other of the conflicting spheres, or whether it must, because of the "transsystemic" nature of the conflicts, develop "substantive rules" of its own. This is a choice well known to the law of conflicts. Ladeur's ideas seem to point more in the first direction, when he says: "The strategic acting of the legal system remains bound to the horizon of the production of actions orientations in other systems, but instead of orienting itself on the equilibrium-parameter of behavior-regulation, the laws orients itself on the possibility of the (re-)equilibrizing and compatibilizing of values and action-perspectivees for complex action-networks" (Ladeur, 1986: 270). My ideas on the function of general clauses ("good faith" or "public policy" clauses) pursue the second direction. From the very process of reconciling different system rationalities substantive norms emerge in the legal process (Teubner, 1979, 1980: 44, 84ff.,see below sub VII.)

Finally, there is the intersystemic negotiation. This suggestion bears a strong resemblance to international agreements

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for solving norm conflicts. In both cases conflicts of expectations are resolved through negotiation rather than a referral to either side or a substantive legal intrusion. The oft quoted "neo-corporatist" negotiating systems are no doubt at the moment the most spectacular case of how intersystem conflicts can be dealt with by recourse to ad hoc specialized formal organizations, with no recourse to legal rules (Streeck and Schmitter, 1985: 21; Traxler/Vobruba, 1987). Yet this technique does not truly "bypass law" (Ronge, 1980), instead co-existing alongside it. Law comes in with a "secondary wave of juridification" of the self-regulatory processes themselves: law focuses on procedural and organizational premises, rather than the achievement of specific results (Simitis, 1987: 140ff.). Solutions like this meet policy needs by gearing law toward procedure and organization so as to adapt social self-regulation to systems' own learning capacity.

2) The conflict between State law and the quasi-law of various social fields, or among the latter, is a second problem area for a new law of conflict. Moore (1973: "semi-autonomous social fields"), Mnookin and Kornhauser (1979: "bargaining in the shadow of the law"), Galanter (1981: "Justice in many rooms"), Cotterell (1983: "juridical pluralism"), Fitzpatrick (1984: "law and societies"), and Griffiths (1986: "legal pluralism") have investigated the modern phenomena of an "indigenous law," indicating lines of conflict. In contrast to the inter-system

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conflicts mentioned under (1), in which functional subsystems with differing codes, programmes, and rationalities collide, here conflicts within the law itself arise - though admittedly a law understood in "pluralist" terms. Conflict resolution in economic enterprises, associations, cultural organizations or even interorganizational relationships have a genuine legal character if conflicts are defined as conflicts of expectations and decided via the singling out of binding expectations. To that extent the State has no monopoly on legal order. "Societies contain a multitude of partially self-regulating spheres or sectors, organized along spatial, transactional or ethnic-familial lines ranging from primary groups in which relations are direct, immediate and diffuse to settings (e.g., business networks) in which relations are indirect, mediated and specialized" (Galanter, 1981: 163f.).

When mediating between these sectors, courts must control standardized terms of trade, articles of association, and corporate bylaws. Early formal judicial techniques looked to them to discern "meeting of the minds" instead attempted to develop conditions necessary to manifest "subjection." Later, as courts recognized the asymmetric nature of these agreements, judicial techniques took a substantive turn, considering and changing the content of standardized agreements. The question is what the criteria are to be. Can the idea of an intersystemic law of conflict offer something here which can give formulas of

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"appropriateness", "fairness" etc. some signposts that go beyond situational considerations of equity?

The answer lies in a reformulation of the "balancing of interests." This peculiar judicial technique can be detached from reference to individual or collective actors and cast in terms of a conflict between communicative networks. Usually, interest jurisprudence finds reflected in legislation a balance between individuals and groups, and, using this as a guide, does justice by reconstructing this balance on a case by case basis. Converting balancing of interests in terms of individuals and groups to network thinking would mean that courts engaged in controlling general terms of trade or corporate bylaws would have to pick out and balance specific regularities, functional requirements and guiding principles of the conflicting social fields involved.

These are the lines along which, I feel, Joerges's analyses are aimed: they have to do with the legal control of private systems of order (general terms of trade, long-term contracts). Joerges suggests a conflict-law viewpoint which can be understood in terms of balancing competition policies and consumerist policies (Joerges, 1981, 1983, 1987a, 1987b). I would raise a number of reservations as regards Joerges' governmental policy orientation. Does judicial control over private orders have to do only with political goal conflicts? Is this not rather the secondary conflict by comparison with the basic conflict between

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the functional regularities of the market, economic organization and the demands of private life? But these are mere quibbles. The decisive thing is to detach the balancing of interests from the superficial plausibility of individual and group interests and bring it into the context of conflicts between social spheres.

This kind of system-related viewpoint ought also to prevail when it comes to, not a posteriori content control, but legal control over the constitutional conditions of quasi-legal suborders. Quite irrespective of whether it has to do with interest representation within safety-standards committees, codes of conduct adopted by associations for advertising, competition rules pursuant to the German Competition Restraints Act or the disciplinary procedures in firms and associations, judicial control ought to be so exercised so as to ensure that interests outside the system are taken into account by internal procedures and organization.

3) Finally, a functional law of conflict ought to deal with system conflicts internal to law. As previously explained fragmentation of law is nothing but the legal transcripton of functional differentiation of society. Both legislatures and courts seek reactively and ad hoc to arrive at a precarious compromise between functional requirements of social subsystems, political control objectives and requirements internal to the

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legal system. This results in very separate legal fields, administered by specialized legal experts, who identifiy with the corresponding social spheres at least as strongly as with the law. Conceptual and normative conflicts between such legal fields are unavoidable and are very much the order of the day. Considerable legitimation problems ensue. Although the discrepancy between the meanings of contract in civil law and in anti-trust law can be tolerated by relevant experts, in other cases even experts cannot justify the contradictory logics of different legal fields. The tax-deductability of bribes is a case in point. Despite such anomalies, the demands for a restoration of the "unity of the legal system" (Wolf, 1982) have only rhetorical character, or are raised only tactically on suitable occasions.

A more serious strategy is the opposing one, which enhances specialization by insisting on the purity of particularized principles in a given legal field. Thus, anti-trust lawyers executing general clauses in anti-trust law refuse to take account of legal principles recognized in other areas of law. Such legal isolationism fails to prevent inter-system clashes. Instead, the handling of these is left to happenstance: individual cases address contradictions as they crop up, with no meaningful footing in a doctrine of conflicts.

A principle that is realistic and at the same time

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normatively defensible would seem by contrast to be "relative autonomy of legal fields". Although Walz developed this theory based on the example of conflicts between private law and tax law, it can be generalized. Explicitly borrowing from thought patterns of law of conflicts, Walz recognizes a high degree of autonomy of specialised legal fields, restricting it only in cases where problems of "ordre public" arise. Each legal field will develop its doctrinal structures according to the demands of the social segment involved, but in cases where problems of "ordre public" arise, it must respect fundamental principles and policies of the other legal fields, incorporating them as self-restrictions in its own doctrine. This seems to me to be the only realistic way of reformulating the old idea of the unity of the legal order. In a legal system characterized by a high degree of functional differentiation, integration of the law cannot be achieved via values or via concepts. Rather, integration results from making compatible the autonomy of legal fields: the mutual recognition of each field's basic principles buffers the further development of principles, yielding an overall coherence.

VII.

A functional law of conflicts, thus requires internal mechanisms for solving disputes between social subsystems;

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between the quasi-laws of semi-autonomous social entities; and between fields within the law. A prominent example of such a mechanism are the general clauses in contract law ("good faith," "public policy"). The high degree of indeterminacy of these clauses suits them for dealing with conflicts between autonomous social spheres, although this was not their original purpose. Indeed, the very indeterminacy of general clauses, and the accompanying room for judicial interpretation, has earned such clauses a reputation as a prime example of the "materialization of private law" (Max Weber, 1978: 882ff.;Assmann et al., 1980). Josef Esser (1956: 556) has described this shift in their function as "judicial interventionism run riot", in the process of which "observance of statute and contract" are replaced by "regulatory, controlling and ultimately patronizing judicial power".

In one sense, this criticism is too narrow, for it assumes only judicial state interventionism upon contractual arrangements. This unduly restricts the role of general clauses in subsystem conflicts. From the viewpoint of an intersystemic law of conflict, general clauses filter not only state interventionism affecting the contract, but also influences from all other social subsystems. The ensuing materialization represents an attempt to use legal means to achieve coordination -- troublespots in highly functionally differentiated societies -- between the contradictory social demands now placed on the

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contract. In this sense, materialization means making the dependence of contractual expectations on multifarious nonconsensual normative structures including governmental interventionism, visible, and coordinating these within a contract.

To understand this view of materialization, requires a reformulation of the contractual relationship in its entirety as an autopoietic system in a world of autopoietic systems (see Deggau, 1987a, 1987b). Such an understanding replaces traditional contract theory's simple consensus model of a "meeting of the minds" with the more modern concept of the contract as a multi-faceted social relationship. Classical concepts of the system as a whole consisting of elements and relations have laid the groundwork for this reformulation. These concepts include: defining the contract as an "institution", elucidates the connection between legal norms and social structures (L. Raiser 1963: 147); conceptualizing the contract as an "organism" (Siber 1931: 1), provides a model of a living whole whose parts collaborate cohesively; regarding the contract as "structure and process", picks upon on two central system aspects (Larenz, 1987: 25 V); finally, viewing the contract as a "worked out plan", stresses its purposive organization (Esser/Schmidt).

Theories of "relational contract" have developed a similar view (McNeil, 1980, 1983; Köndgen, 1981; W. Schmid, 1983: 108ff.;

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Daintith, 1986; Joerges, 1987b: 211f.).In contrast to the simple model of contractual consensus, "relational contract" focuses on "interaction and cooperation among the participants, on resulting values and needs, on contract as process, on the marginality of formal contract law in relation to the actual behavior, on the ambivalence of 'juridification' of contract via numerous state interventions" (Joerges, 1987b: 211f.). Köndgen (1981: 12, 128) describes "relational" thinking in contract law as "distancing from the dogma of the final quasi-codificatory validity of contractual consensus". It means a " 'microscopical' analysis of expectations and perceptions of reciprocity of the parties and 'macroscopical' analysis of changes in the general expectations in the modern social state."

Such ideas, which evoke "the flexibility peculiar to the contract in dealing with social reality" (Gernhuber, 1983: 53), have been developed further into a concept of contract as a social system open to the environment. Thus, a contract not only redeems the consensus of the parties -- it has its own particular functional problems to solve in responding to outside influences while maintaining its boundaries (cf. Parsons/Smelser, 1956: 104ff, 143ff.). The contract is then defined as a complex of actions, whose internal ordering depends not only on consensus, but simultaneously on requirements of very diverse social sub-spheres (cf. Teubner, 1980: 45ff.). This simultaneous dependency prefigures the conflict issue, whereby the contract is faced with

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contradictory structural requirements.

Contract as a social system appears recently in the works of J. Schmidt (1985: 184ff.). Schmidt rightly rejects a person-oriented concept in which the parties to the contract appear as elements. Instead, "elements of the system are no longer (empirical) people or role segments from the set of roles of empirical people, but social interactions, i.e.: rationally ordered complexes of action". This move highlights the environment of the contract: politics, the economy, the law, in relation to which the contract develops its structures. This model, however, still remains entirely within the theory of open systems (similar to the "contingency theory of organization", Lawrence and Lorsch, 1967, 1969). Contractual strucures emerge in dependency on the system's environment.

In moving beyond open systems theory, an autopoietic reformulation would modify this model in a constructivist direction, building in additional levels of observation (von Förster, 1981). On this view, the contract is, in one sense, a self-reproductive interaction system that defines its own environment, and interacts with it accordingly (i.e. the environment is communicatively constructed among the contractual parties). And, in another sense, the contract is an "object of observation" for the law, part of its self-defined environment (i.e. the focus of certain legal communications.) Mutual

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interference between the contract and the law generates the dynamics of the contractual relationship: it is defined exclusively neither by the terms of the consensus itself nor the dictates of the law -- nor any other subsystem for which the contract is object.

The "nonconsensual elements of contract" (Durkheim: 1933) are then nothing but the contractual reconstruction and conversion of demands of diverse social spheres on the specific contract. These demands surface on three levels, corresponding to different levels of system formation: (1) at the "interaction level," the contract reconstructs the expectations of the contractual partners, constituting their personal relationship; (2) at the "institutional level," the contract has to deal with the demands of market and organization, surpassing the expectations of the individual parties to the agreement; (3) at the "societal level," the contract has to cope with the requirements of the large fuctional subsystems such as "politics," "economy," and "law." These levels do not inter-relate hierarchically; in principle they are distinguishable modes of system formation, yet they have the "contract" in common because it interweaves with each (on the three levels of system formation, cf. Luhmann, 1975a: 9ff.). Returning to our original quest for an internal mechanism for resolving intersystemic disputes, the general clause can now be understood as a collision rule for intersystemic conflicts. It provides room for dispute

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resolution within each level, and, in recognizing the existence of the different levels, allows for their legal synchronization.

The current debate over "materialized" general clauses converges on exactly this process: the "compatibilization" of contradictory social requirements on the specific contractual relationship. In this sense one may speak of a "socialization" of contract via general clauses, of an eruption of "social situations" (Struck, 1982: 259) into contract law. The present task of general clauses consists in reducing the random nature of this socialization, transforming its ad-hoc-character into a more systematic taking into account of social requirements.

In more detail:

(1) Interaction level. Legal sociology indicates that informal norms arise in a dyadic contractual relationship which compete with formalized contractual expectations. Mutual coordination of conduct and its stabilization across time entrench informal norms in the dyadic contractual relationship. These informal norms influence the parties' conduct no less strongly than the formalized declarations of the agreement (on this see, Max Weber 1978: 754ff.; Geiger, 1964: 46ff.; Köndgen, 1981: 167ff.; Luhmann, 1985b: 25ff.). Clashes at the interaction level result from disruptions of these norms, when the parties'

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informal norms collide with contractual expectations. Via the general clause, judges can recognize those conflicts that arise from the personal interaction of the contracting parties and develop legal solutions. The norms generated by the personal interaction system itself reduce the indeterminacy of the general clause, which, in turn, validates solution as legal.

(2) Institution level. Beyond personal expectations, a set of structural requirements on the contract emerge due to its involvement in broader institutional contexts, like market and organization. Contract law must acknowledge this contextualization of the contract, too. Thus, the general clause assumes the task of coordinating the "external relationships" of the contract, ensuring that contractual obligations suit institutional structures. For reduction of indeterminacy, the judiciary relies on standards and understandings derived from institutional context: legally sanctioning social standards; authorizing norms apt for roles as determined by institutional context; redefining roles in response to the interests of the institution.

(3) Societal level. In a differentiated society, the contract is interwoven in a multiplicity of social spheres (i.e. "politics", "economy", "family", "culture", "religion"). With this arrangement comes potential for conflict between the contract and other social spheres. As differentiation increases,

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the autonomy of the social spheres increases, but so does their interdependence; if the separate regularities of the social spheres become stronger, so do the frictions, contradictions and conflicts among them. Contracts serve to stabilize this interdependence -- acting, as it were, as islands of stability in a sea of turbulence. They can do this, however, only with the aid of mediatory devices. As with the interactional and institutional levels, general clauses take over this role.

VIII.

The mediatory role of general clauses in contract law enables us to perceive ways of coping with legal indeterminacy under modern conditions. Unlike in our original rabbis' hierarchically ordered society, here indeterminacy cannot be put off by the extreme elevation of the highest layer of authority - because functional differentiation of society means lateral interdependence, not hierarchical order. To deal with the new indeterminacy, the law must use tools like the general clause to diagnose and address failures of the rationality of diverse social discourses. Is it sufficient for the law to refer to the social discourse's own rationality or does a failure of such rationality (market-failures, organization-failures, regulation-failures etc.) necessitate a compensatory legal formulation in

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order to take demands of their environment into account? Such a legal programme which attempts to mediate between diverse spheres of social life constitutes a challenge of the first order to the reflective capacity of legal doctrine. Is legal doctrine in a position to combine consistency requirements of the legal discourse with the demands of other social spheres?

This formulation takes off from Luhmann's reformulation of the concept of justice, relating justice to the "two-fold contingency of social requirements, upon legal stabilization of conduct of life on the one hand, and level of requirement within the legal system on the other" (Luhmann, 1973, 1974). The open question, however, is whether law, as Luhmann clearly supposes, can take account of "social requirements" only in an ad-hoc way, from case to case, evolving blindly from one political scandal that sparks off legislation to another. Or is the legal discourse capable of methodically developing legal criteria for the requirements of the autopoietic systems that surround it? With an affirmative answer to this question, justice - a contemporary version of iustitia mediatrix (Placentinus, 1192) - would no longer mediate "vertically" between the positive and divine law of hierarchically structured societies. Instead, in response to functional differentiation, it would "horizontally" balance the consistency requirements of positivized law and the demands of a multiplicity of autopoietically closed social spheres.

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Yet both types of mediation, be they "vertical" or "horizontal," only reduce the impact of the original paradox of law, keeping it latent and ultimately failing to attain the proclaimed achievement of deparadoxification. Rabbi Eliezer's hierarchy of legal sources, topped by the obscure twilight of natural or divine law had symbolized the latency of this paradox. And its modern equivalent, functional differentiation of social systems, likewise serves as a repression-mechanism making invisible the fundamental paradox. As with any repression-mechanism the repressed paradox of law continually returns by a back door: "And God laughed" ... (see 1 ff.).

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BIBLIOGRAPHY

ALBERT, Hans (1985) Treatise on Critical Reason. Princeton: Princeton: University Press.

ALEXY, Robert (1978) Theorie der juristischen Argumentation. Frankfurt a.M.: Suhrkamp.

ASSMANN, Heinz-M., Gert BRÜGGEMEIER, Dieter HART and Christian JOERGES (1980) Wirtschaftsrecht als Kritik des Privatrechts. Königstein/Ts: Athenäum.

BABYLONIAN TALMUD (1935) Baba Mezia. London Soncino.

BATESON, Gregory (1953) "The Position of Humor in Human Communication", in: H.von Förster (ed.) Cybernetics. New York: Macey.

_____ (1972) Steps to an Ecology of Mind. New York: Ballantine.

BENJAMIN, Walter (1977) Gesammelte Schriften Bd. II. Frankfurt: Suhrkamp.

BOYLE, James (1985) "The Politics of Reason: Critical Legal Theory and Local Social Thought", 133 University of Pennsylvania Law Review 685.

BROWN, George Spencer (1972) Laws of Form. New York: Julian Press.

CAPPELLETTI, Mauro (1985) "Who Watches the Watchmen! A Comparative Study on Judicial Responsibility", in: S.Shetreet and J. Deschenes (eds.) Judicial Independence. Dordrecht: Martinus Nijhoff, 55o.

COTTERELL, Roger (1983) "The Sociological Concept of Law", 10 Journal of Law and Society 241.

DAINTITH, Terence (1986) "The Design and Performance of Long-Term Contracts", in: T.C. Daintith and G. Teubner (eds.) Contract and Organization. Berlin de Gruyter, 164.

DALTON, Clare (1985) "An Essay in the Deconstruction of Contract Doctrine", 94 Yale Law Journal 997.

DEGGAU, Hans-Georg (1987a) "Die Geschäftsgrundlage. Eine methodische Irritation der Zivilrechtsdogmatik". Hannover: Typoscript.

_____ (1987b) "Versuch über die Autopoiese des Vertrages". Hannover: Typoscript.

© The Author(s). European University Institute.
Digitised version produced by the EUI Library in 2020. Available Open Access on Cadmus, European University Institute Research Repository.

DURKHEIM, Emile (1933) The Division of Labor in Society. New York: Free Press.

EASTERBROOK, Frank H. and Daniel R. FISCHEL (1982) "Antitrust Suits by Targets of Tender Offers", 80 Michigan Law Review 1155.

ECKHOFF, Torstein (1978) "Feedback in Legal Reasoning and Rule Systems", 41 Scandinavian Studies in Law 39.

EIGEN, Manfred and Peter SCHUSTER (1979) The Hypercycle: A Principle of Natural Self-Organisation. Berlin: Springer.

ESCHER, Mauritius C. (1961) "Wasserfall", Lithographie. Den Haag: Haags Gemeeentemuseum.

ESSER, Josef (1956) " § 242 BGB und die Privatautonomie", Juristenzeitung 555.

_____ (1970) Vorverständnis und Methodenwahl in der Rechtsfindung. Rationalitätsgarantien der richterlichen Entscheidungspraxis. Frankfurt a.M.: Athenäum.

FEINMANN, Jay M. (1984) "Promissory Estoppel and Judicial Method", 97 Harvard Law Review 678.

FITZPATRICK, Peter(1984) "Law and Societies", 22 Osgoode Hall Law Journal 115.

FLETCHER, George P. (1985) "Paradoxes in Legal Thought", 85 Columbia Law Review 1263.

FLUME, Werner (1983) Allgemeiner Teil des bürgerlichen Rechts I/2, Die juristische Person. New York/Berlin: Springer.

FÖRSTER, Heinz von (1981) Observing Systems. Seaside, Cal.: Intersystems Publications.

_____ (1984) "Erkenntnistheorien und Selbstorganisation", 4 Delfin 6.

_____ (1985) "Entdecken oder Erfinden. Wie lässt sich Verstehen verstehen?" in A. Mohlar (ed.) Einführung in den Konstruktivismus. München: Oldenbourg.

FRUG, Gerald E. (1984) "The Ideology of Bureaucracy in American Law", 97 Harvard Law Review 1276.

GALANTER, Mark (1981) "Justice in Many Rooms", in: Mauro Cappelletti (ed.) Access to Justice and the Welfare State. Firenze: Le Monnier, 147.

© The Author(s). European University Institute.
Digitised version produced by the EUI Library in 2020. Available Open Access on Cadmus, European University Institute Research Repository.

GEIGER, Theodor (1964) Vorstudien zu einer Soziologie des Rechts. Neuwied: Luchterhand.

GERNHUBER, Joachim (1976) Bürgerliches Recht. Tübingen: Mohr & Siebeck.

GORDON, Robert W. (1984) "Critical Legal Histories", 36 Stanford Law Review 57.

GRIFFITHS, J.(1986) "What is Legal Pluralism?" 24 Journal of Legal Pluralism 1.

HABERMAS, Jürgen (1985) "Law as Medium and Law as Institution",in: G. Teubner (ed.) Dilemmas of Law in the Welfare State. Berlin: de Gruyter, 203.

HARRIS, Donald R. and Cento G. VELJANOVSKI (1986) "The Use of Economics to Elucidate Legal Concepts: The Law of Contract", in: T.C. Daintith and G. Teubner (eds.) Contract and Organisation. Berlin: de Gruyter.

HART, Herbert L.A. (1964) "Self-referring Laws" in H.L.A. Hart (1983) Essays in Jurisprudence and Philosophy. Oxford: Clarendon Press.

HEDEMANN, Justus Wilhelm (1933) Die Flucht in die Generalklauseln. Eine Gefahr für Recht und Staat. Tübingen: Mohr & Siebeck.

HEJL, Peter (1984) "Towards a Theory of Social Systems: Self-Organization and Self-Maintenance, Self-Reference and Syn-Reference", in: H. Ulrich and G.J.B. Probst (eds.) Self-Organization and Management of Social Systems. Berlin: Springer, 60.

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

HOFSTADTER, Douglas R. (1979) Gödel, Escher, Bach: An Eternal Golden Braid. New York: Basic Books.

_____ (1985) "Nomic: A Self-Modifying Game Based on Reflexivity in Law", in: D.R. Hofstadter, Metamagical Themas: Questing for the Essence of Mind and Pattern. New York: Bantam, 70.

HUTTER, Michael (1986) Die Produktion von Recht. Eine Theorie und der Fall des Arzneimittelpatentrechts. München: Habilitation.

© The Author(s). European University Institute.
Digitised version produced by the EUI Library in 2020. Available Open Access on Cadmus, European University Institute Research Repository.

JENSEN, Stefan (1978) "Interpenetration - Zum Verhältnis personaler und sozialer Systeme", 7 Zeitschrift für Soziologie 116.

JESSOP, Bob (1988) "The Economy, the State and the Law: Theories of Relative Autonomy and Autopoietic Closure", in: G. Teubner (ed.), State, Law, Economy as Autopoietic Systems. Berlin: de Gruyter.

JOERGES, Christian (1981) Verbraucherschutz als Rechtsproblem. Heidelberg: Recht und Wirtschaft.

_____ (1983) "Der Schutz des Verbrauchers und die Einheit des Zivilrechts", 28 Die Aktiengesellschaft 75.

_____ (1987a) "Die Überarbeitung des BGB-Schuldrechts, die Sonderprivatrechte und die Unbestimmtheit des Rechts", 20 2o Kritische Justiz 166.

_____ (1987b) "Franchise-Verträge und Europäisches Wettbewerbsrecht," 151 Zeitschrift für das gesamte Handels- und Wirtschaftsrecht 195.

KAIRYS, David (1982a) "Freedom of Speech", in: D.Kairys (ed.) The Politics of Law: A Progressive Critique. New York: Pantheon, 14o.

_____ (ed.) (1982b) The Politics of Law. A Progressive Critique. New York: Pantheon.

KEGEL, Gerhard (1987) Internationales Privatrecht. 6th ed. München: Beck.

KELMAN, Mark (1987) A Guide to Critical Legal Studies.Cambridge: Harvard University Press.

KENNEDY, David (1985) "Critical Theory, Structuralism, and Contemporary Scholarship", 21 New England Law Review 209.

KENNEDY, Duncan (1976) "Form and Substance in Private Law", 89 Harvard Law Review 1685.

_____ (1982) "Legal Education as Training for Hierarchy" in: D. Kairys (ed.) The Politics of Law. A Progressive Critique. New York: Pantheon, 4o.

KETTLER, David (1987) "Legal Reconstitution of the Welfare State: A Latent Social Democratic Legacy", 21 Law and Society Review 9.

KÖNDGEN, Johannes (1981) Selbstbindung ohne Vertrag. Tübingen: Mohr & Siebeck.

© The Author(s). European University Institute.
Digitised version produced by the EUI Library in 2020. Available Open Access on Cadmus, European University Institute Research Repository.

KRIPKE, Saul (1982) Wittgenstein on Rules and Private Language. Cambridge: Harvard University Press.

KRIPPENDORFF, Klaus (1984) "Paradox and Information", 5 Progress in Communication Sciences 46.

KÜBLER, Friedrich (1975) Über die praktischen Aufgaben zeitgemässer Privatrechtstheorie. Karlsruhe: Müller.

_____ (ed.) Verrechtlichung von Wirtschaft, Arbeit und sozialer Solidarität. Baden Baden: Nomos.

LADEUR, Karl H. (1982) "Konsensstrategien statt Verfassungs-interpretation?", 29 Der Staat 391.

_____ (1984a) Abwägung - Ein neues Paradigma des Verwaltungs-rechts. Frankfurt: Campus.

_____ (1984b) "Flexibilisierungsstrategien - Alternativen zum 'Steuerungsstaat' - 'Reflexives Recht' - 'Prozeduralisierung' - 'ökologisches Recht'", in: G. Brüggemeier and Ch. Joerges (eds.) Workshop zu Konzepten des postinterventionistischen Rechts. Bremen: ZERP Materialien 4, 311.

_____ (1986) "'Prozedurale Rationalität' - Steigerung der Legitimationsfähigkeit oder der Leistungsfähigkeit des Rechtssytems?", 7 Zeitschrift für Rechtssoziologie 265.

_____ (1988) "Perspectives on a Post-Modern Theory of Law", in: G. Teubner (ed.) Autopoietic Law: A New Approach to Legal Theory. Berlin: de Gruyter.

LARENZ, Karl (1987) Lehrbuch des Schuldrechts. 14th ed., München: Beck.

LAWRENCE, Paul R. and Jay W. LORSCH (1967) Organizations and Environment. Boston: Harvard University Press.

_____ (1969) Developing Organizations: Diagnosis and Action. Reading (Mass.): Addison - Wesley.

LÜDERSSEN, Klaus (1986) "Wär' der Gedank' nicht so verwünscht gescheit, man wär' versucht, ihn herzlich dumm zu nennen", 5 Rechtshistorisches Journal 343.

LUHMANN, Niklas (1973) "Gerechtigkeit in den Rechtssystemen der modernen Gesellschaft", 4 Rechstheorie 131.

_____ (1974) Rechtssystem und Rechtsdogmatik. Stuttgart: Kohlhammer.

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_____ (1975a) "Interaktion, Organisation, Gesellschaft", in: N. Luhmann, 2 Soziologische Aufklärung. Opladen: Westdeutscher Verlag.

_____ (1975b) "Die Weltgesellschaft", in: N. Luhmann, 2 Soziologische Aufklärung. Opladen: Westdeutscher Verlag, 51.

_____ (1981) "Interpenetration - Zum Verhältnis personaler und sozialer Systeme", in: N. Luhmann, 3 Soziologische Aufklärung. Opladen: Westdeutscher Verlag, 151.

_____ (1982) "The World Society as a Social System", 8 International Journal of General Systems 131.

_____ (1983) "Insistence on Systems Theory: Perspectives from Germany", 61 Social Forces 987.

_____ (1984a) "Die Rückgabe des Zwölften Kamels", Firenze, Conference Paper.

_____ (1984b) Soziale Systeme. Grundriss einer allgemeinen Theorie. Frankfurt: Suhrkamp.

_____ (1984c) "Widerstandsrecht und politische Gewalt", 5 Zeitschrift für Rechtssoziologie 36.

_____ (1985a) "Society, Meaning, Religion - Based on Self-Reference", 46 Sociological Analysis 5.

_____ (1985b) A Sociological Theory of Law. London: Routledge and Kegan.

_____ (1986a) "The Autopoiesis of Social Systems" in: F. Geyer and J.van der Zouwen (eds.) Sociocybernetic Paradoxes: Observation, Control and Evolution of Self-Steering Systems. London: Sage, 172.

_____ (1986b) Die soziologische Beobachtung des Rechts. Frankfurt: Metzner.

_____ (1986c) "The Theory of Social Systems and Its Epistemology: Reply to Danilo Zolo's Critical Comments" 16 Philosophy of the Social Sciences 129.

_____ (1987) "Autopoiesis als soziologischer Begriff", in: H. Haferkamp and M. Schmid (eds.) Sinn, Kommunikation und soziale Differenzierung. Frankfurt: Suhrkamp.

_____ (1988a) "Closure and Openness: On Reality in the World of Law", in: G. Teubner (ed.) Autopoietic Law: A New Approach

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to Legal Theory. Berlin: de Gruyter.

_____ (1988b) "Coding of the Legal System", in: G. Teubner (ed.) State, Law, Economy as Autopoietic Systems. Berlin: de Gruyter.

_____ (1988c) "The Unity of the Legal System", in: G. Teubner (ed.) Autopoietic Law. Berlin: de Gruyter, 12.

MATURANA, Humberto R. (1982) Erkennen: Die Organisation und Verkörperung von Wirklichkeit. Ausgewählte Arbeiten zur biologischen Epistemologie. Braunschweig: Vieweg.

MAUS, Ingeborg (1986) Rechtstheorie und politische Theorie im Industriekapitalismus. München: Fink.

MNOOKIN, Robert H. and Lewis KORNHAUSER (1979) "Bargaining in the Shadow of the Law. The Case of Divorce", 88 Yale Law Journal 950.

MOORE, Sally F. (1973) "Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Object of Study", in: 7 Law & Society Review 719.

MÜNCH, Richard (1980) "Über Parsons zu Weber: Von der Theorie der Rationalisierung zur Theorie der Interpenetration", 9 Zeitschrift für Soziologie 18.

_____ (1982) Theorie des Handelns: Zur Rekonstruktion der Beiträge von Talcott Parsons, Emile Durkheim und Max Weber. Frankfurt: Suhrkamp.

NONET, Philippe and Philip SELZNICK, (1978) Law and Society in Transition. New York: Harper & Row.

OPHUELS, Carl Friedrich (1968) "Ist der Rechtspositivismus logisch möglich? 21 Neue Juristische Wochenschrift 1745.

PARSONS, Talcott and Neil J. SMELSER (1956) Economy and Society. A Study in the Integration of Economic and Social Theory. London: Routledge.

PASCAL, Blaise (1964) Pensées. Paris: Garnier Frères.

PELLER, Gary (1985) "The Metaphysics of American Law", 73 California Law Review 1151.

PLACENTINUS (1192) "Quaestiones de iuris subtilitatibus", in: Hermann Fitting (ed.) (1894) Quaestiones de iuris subtilitatibus des Irnerius. Berlin: Guttentag.

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Digitised version produced by the EUI Library in 2020. Available Open Access on Cadmus, European University Institute Research Repository.

PRIGOGINE, Ilya (1976) "Order through Fluctuation: Self-Organization and Social System" in: E. Jantsch and C.H. Waddington (eds.) Evolution and Consciousness: Human Systems in Transition, 39.

POSNER, Richard (1977) Economic Analysis of Law. Boston: Little Brown.

QUINE, Willard V. (1976) The Ways of Paradox. Cambridge (Mass.): Harvard University Press.

RAISER, Ludwig (1963) "Rechtsschutz und Institutionenschutz im Privatrecht", in: Summum ius summa iniuria. Tübingen: Mohr & Siebeck, 145.

_____ (1971) Die Zukunft des Privatrrechts. Berlin: de Gruyter.

RESTA, Eligio (1984) L'ambiguo diritto. Milano: Franco Angeli.

_____ (1985) "La struttura autopoietica del diritto moderno", 5 Democrazia e diritto 59.

RONGE, Volker (ed.) (1980) Am Staat vorbei. Frankfurt: Campus.

ROSS, Alf (1969) "On Self-Reference as a Puzzle in Constitutional Law", 78 Mind 1.

SANTOS, Boaventura de Sousa (1987) "Law. A Map of Misreading. Toward a Postmodern Conception of Law", 14 Journal of Law and Society 279.

SCHMID, Walter (1983) Zur sozialen Wirklichkeit des Vertrages. Berlin: Duncker & Humblot.

SCHMIDT, Eike (1984) Schuldrecht. Allgemeiner Teil. 6th ed., Heidelberg: C.F. Müller.

SCHMIDT, Jürgen (1985) Vertragsfreiheit und Schuldrechtsreform. Berlin: Duncker & Humblot.

SIBERT, Heinrich (1931) Schuldrecht. Leipzig.

SIMITIS, Spiros (1987) "Juridification of Labor Relations" in: G. Teubner (ed.) Juridification of Social Spheres. Berlin: de Gruyter, 113.

SIMITIS, Spiros and Gisela ZENZ (eds.) (1975) Familie und Familienrecht. Frankfurt: Suhrkamp.

SINGER, Joseph W. (1984) "The Player and the Cards: Nihilism and Legal Theory", 94 Yale Law Journal 1.

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Digitised version produced by the EUI Library in 2020. Available Open Access on Cadmus, European University Institute Research Repository.

SOLUM, Lawrence B. (1987) "On the Indeterminacy Crisis: Critiquing Critical Dogma", 54 Chicago Law Review 462.

SOUSA SANTOS, Boaventura de (1987) "Law. A Map of Misreading. Toward a Post-Modern Conception of Law". Paper presented at the 6th European Conference of Critical Legal Studies, Vaucresson April 9-11.

STANFORD LAW REVIEW (1984) "Critical Legal Studies Symposium", 36 Stanford Law Review 1.

STREECK, Wolfgang and Philippe SCHMITTER (1985) "Community, Market, State - and Associations?" in W.Streeck and P. Schmitter (eds.) Private Interest Government: Beyond Market and State. London: Sage, 1.

STRUCK, Gerhard (1982) "Ungleichzeitigkeit im Zivilrecht", 10 Demokratie und Recht 259.

SUBER, Peter D. (1987) The Paradox of Self-Amendment: A Study of Logic, Law, Omnipotence, and Change. Richmond: Typoscript.

TEUBNER, Gunther (1975) Gegenseitige Vertragsuntreue. Tübingen: Mohr & Siebeck.

_____ (1979) "Die Gesellschaft des Bürgerlichen Rechts. Kommentierung zu §§ 705 ff. BGB", in: R. Wassermann (ed.) Alternativkommentar zum Bürgerlichen Recht. Neuwied: Luchterhand.

_____ (1980) "Die Generalklausel von 'Treu und Glauben'. Kommentierung des § 242 BGB", in: R. Wassermann (ed.) Alternativkommentar zum Bürgerlichen Gesetzbuch. Neuwied: Luchterhand, 32.

_____ (1982) "Die Geschäftsgrundlage als Konflikt zwischen Vertrag und gesellschaftlichen Teilsystemen", 146 Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht 625.

_____ (1987a) "Juridification. Concepts, Aspects, Limits, Solutions" in: G. Teubner (ed.) Juridification of Social Spheres. Berlin de Gruyter, 3.

_____ (ed.) (1987b) Juridification of Social Spheres. A Comparative Analysis in the Areas of Labor, Corporate, Antitrust and Social Welfare Law. Berlin: de Gruyter.

_____ (1988a) "Enterprise Corporatism. New Industrial Policy and the 'Essence' of the Legal Person", 36 The American Journal of Comparative Law 401.

© The Author(s). European University Institute.
Digitised version produced by the EUI Library in 2020. Available Open Access on Cadmus, European University Institute Research Repository.

_____ (1988b) "Hypercycle in Law and Organization", European Yearbook in the Sociology of Law.

_____ (1988c) "Social Order from Legislative Noise? Autopoietic Closure as a Problem for Legal Regulation", in: G. Teubner (ed.)State, Law, Economy as Autopoietic Systems. Berlin: de Gruyter.

TRAXLER, Franz and Georg VOBRUBA (1987) "Selbststeuerung als funktionales Äquivalent zum Recht? Zur Steuerungskapazität von neo-korporatistischen Arrangements und reflexivem Recht", 16 Zeitschrift für Soziologie 3.

TRUBEK, David (1986) "Where the Legal Action Is", in: T.Daintith and G.Teubner (eds.) Contract and Organization. Berlin: de Gruyter, 68.

TUSHNET, Mark V. (1983) "Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles", 96 Harvard Law Review 781.

UNGER, Roberto Mangabeira (1976) Law in Modern Society. New York: The Free Press.

_____ (1983) "The Critical Legal Studies Movement", 96 Harvard Law Review 563.

VARELA, Francisco J. (1975) "A Calculus for Self-Reference", 2 International Journal of General Systems 5.

VOIGT, Rüdiger (ed.) (1980) Verrechtlichung. Frankfurt a.M.: Athenäum.

_____ (1984) Abschied vom Recht? Frankfurt: Suhrkamp.

_____ (1986) Recht als Instrument der Politik. Opladen: Westdeutscher Verlag.

WEBER, Max (1978) Economy and Society: An Outline of Interpretive Sociology. Berkeley: University of California Press.

WEISS, Manfred (1971) Die Theorie der richterlichen Entscheidungstätigkeit in den Vereinigten Staaten von Amerika. Frankfurt: Athenäum.

WIEACKER, Franz (1956) Zur rechtstheoretischen Präzisierung des § 242 BGB. Tübingen: Mohr & Siebeck.

WIETHÖLTER, Rudolf (1982a) "Entwicklung des Rechtsbegriffs", in: V. Gessner and G. Winter (eds.) Rechtsformen der Verflechtung von Staat und Wirtschaft. Opladen: Westdeutscher Verlag, 38.

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Digitised version produced by the EUI Library in 2020. Available Open Access on Cadmus, European University Institute Research Repository.

_____ (1982b) "Wissenschaftskritische Ausbildungsreform - Anspruch und Wirklichkeit", in: R. Francke, D. Hart, R. Lautmann, P. Thoss (eds.) Einstufige Juristenausbildung in Bremen. Zehn Jahre Bremer Modell. Neuwied: Luchterhand, 7.

_____ (1985) "Materialization and Proceduralization in Modern Law", in: G. Teubner (ed.) Dilemmas of Law in the Welfare State. Berlin: de Gruyter, 221.

_____ (1986a) "Sanierungskonkurs der Juristenausbildung", 1 Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft 21.

_____ (1986b) "Social Science Models in Economic Law", in: T.C. Daintith and G. Teubner (eds.) Contract and Organization. Berlin: de Gruyter, 52.

WILLKE, Helmut (1983) Entzauberung des Staates. Uberlegungen zu einer sozietalen Steuerungstheorie. Königstein: Athenäum.

_____ (1988) "Societal Guidance through Law", in: G. Teubner (ed.) State, Law, Economy as Autopoietic Systems. Berlin: de Gruyter.

WOLF, Ernst (1982) "Kein Abschied vom BGB", 15 Zeitschrift fuer Rechtspolitik 1.

WOLFF, Hans J. (1933) Organschaft und juristische Person. Berlin.

WORMELL, C.P. (1958) "On the Paradoxes of Self-Reference", 67 Mind 267.

ZOLO, Danilo (1988) "The Epistemological Status of the Theory of Autopoiesis and Its Application to the Social Sciences", in: G. Teubner (ed.) State, Law and Economy as Autopoietic Systems. Berlin: de Gruyter.

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