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**The Theory of Autopoiesis as an Approach  
to a Better Understanding of Postmodern Law**

**From the Hierarchy of Norms  
to the Heterarchy of Changing Patterns  
of Legal Inter-relationships**

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# **The Theory of Autopoiesis as an Approach to a better Understanding of Postmodern Law**

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## **1. Foreword**

Trying to explain the autopoietic theory of law to readers who I suppose not to be familiar with its constructions can put one in an awkward position because some of the elements of autopoietic theory of law are based on the autopoietic theory of society. But this again needs some explanation which I will try to give. In addition, I will try to confirm my hypothesis in some respect to Robert Alexy's presentation of a discourse-ethical theory of law which might limit the confusion to an acceptable measure.

First, I will give an idea of the concept of systems based on rules and sentences that we, as lawyers, are familiar with. Second I shall present autopoietic theory, as such, in a nut shell - a hazel nut shell. Third, I shall give an outline of the theory of autopoietic law in a nut shell - a walnut shell. Fourth, I shall try to explain what the rationale of this theory, as opposed to the competing theories of Habermas, Alexy etc., really is. And finally, I shall try to explain what the use of all these clouded constructions can be in present day analysis of law i.e. the post-modern law of a rapidly changing society.

## 2. The Concept of „System“ in Traditional Legal Approaches and in Systems theory

When we talk about systems in the legal sciences we tend to think about systems of sentences or rules: there is a separation between the part and the totality - general and specific sentences - the latter being characterized by separate 'competencies' and differentiated applicability which avoids overlaps - to name but a few characteristics of a legal system in the traditional sense. With reference to law, we presuppose in our approach the unity of a system which, in the continental tradition, allows for a deductive conception of the application of a legal text to a specific case. Naturally, we would no longer accept the idea that all the specific problems we are confronted with a preformulated or, at least, a predetermined solution in the system of the statute and "the" law as such.<sup>1</sup> And, of course, Common Law allows for a different logic proceeding in a somewhat analogical approach from decision to decision instead of a deductive application of a rule to a case. But Common Law also needs some systematic structure in order to allow for the search for the right answer in the existing body of decisions.

What we can retain as a first preliminary assumption is the idea that the concept of systems used in legal thinking tends to presuppose a predetermined meaning of the law which, of course, allows for, and even demands, creative interpretation when we are confronted with new hitherto unheard of cases. This is the point where we need - as Alexy would put it - a 'supplementary normative assumption', which has to be controlled in a rational way. This would be the point where a procedural discourse-theoretical approach based on rational argumentation about the correct solution would come to the fore. It would again propose a system of rules and principles for a discourse about the solution of new cases. As Alexy puts it<sup>2</sup>: This system is

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<sup>1</sup> Cf. G.Vattimo, *Etica dell'interpretazione*, Torino 1989, who tries to open hermeneutics to conditions of post-modernity; for a more traditional approach cf. H.G.Gadamer, *Philosophical Hermeneutics*, Berkeley 1977; for legal hermeneutics cf. F.Müller, *Juristische Methodik*, 2<sup>nd</sup> ed., Berlin 1976, id., *Strukturierende Rechtslehre*, 2<sup>nd</sup> ed., Berlin 1994; M.Kriele, *Theorie der Rechtsgewinnung, entwickelt am Problem der Verfassungsinterpretation*, 2<sup>nd</sup> ed., Berlin 1976.

<sup>2</sup> Cf. R.Alexy, *A Theory of Legal Argumentation. The Theory of Rational Discourse as a Theory of Legal Justification*, Oxford 1989; id., *Recht, Vernunft, Diskurs*.

based on conceptual transparency, on clarity, empirical information, universalizability of the argumentation and freedom from prejudice<sup>3</sup>. These principles, which are not directly applicable to a case, have to structure the process of argumentation, thus aiming at the generation of a new rational solution to a case, whose definition cannot in a strict sense be derived from existing rules.

It is, namely, the open procedure which allows for the consideration of all possible arguments which should guarantee a rational use of the broader principles which do not have the character of behavioural rules but contain only partial and general preference rules; in other words, rules of balancing (not excluding but to the contrary presupposing the possibility of conflicting principles and priorities).

Alexy presents this advanced systems-concept as a model with three layers or levels: rules, principles and procedures. All of these are considered to permit an answer to the question of what the legal system tells us about which decision to make in a specific situation. Even this evolutionary and proceduralized approach presupposes a unity of the legal system based on the idea of universal practical rationality and a universalistic practice of decision-making. In this sense, it still follows the tradition of modern rule-based assumptions about rationality. Beyond simple cases of application of rules, the universality of the law has to be guaranteed by principles on the formulation and inclusion of new rules into the system. Under conditions of complexity<sup>4</sup>, decision-making can only derive legitimacy from the procedural requirement of the inclusion of all the arguments to be considered. This argumentative constructive procedure follows the model of the universal rationality of the law as a system of rules - both of which are based on a presupposed fundamental basis guaranteeing the consistency of sentences<sup>5</sup>.

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Studien zur Rechtsphilosophie, Frankfurt/M. 1995: id., Law, Discourse, and Time, in: Archiv für Rechts- und Sozialphilosophie, Beiheft 64, 1995, 4ss.

<sup>3</sup> Cf. J.Habermas, Faktizität und Geltung, Frankfurt/M.1992.

<sup>4</sup> Cf. for the interpretation of "complexity" H.Atlan, Entre le cristal et la fumée, Paris 1979; J.P.Dupuy/P.Dumouchel (eds.), L'auto-organisation. De la physique au politique, Paris 1983; H.Maturana/F.J.Varela, Autopoiesis and Cognition, Boston/Dordrecht 1980.

<sup>5</sup> Cf. K.Larenz/C.W.Canaris, Methodenlehre der Rechtswissenschaft, 3<sup>rd</sup> ed., Munich 1995.



The approach draws on a concept of unity of the law which is based on a general understanding of a potentially transparent reality. This reality may not be accessible to a rule-like order kept separate from the process of application in the traditional sense. However, rational discourse allows for a reconstruction of the universality of the law through the process of argumentation which is characterized by the willingness of participants to overcome the limitations of views narrowed by the practical constraints created by the concrete situation or the specific interests (of the parties to a contract, etc.). The ideal observation is no longer guaranteed by the presupposition of a world which is accessible to analytical distinction of properties which may be used in order to structure the flow of reality and allow for generalization of rule-like linkages and stable expectations of continuity on which universal rules can be based. But argumentation may create a functional equivalent for rules in the form of a rational superimposition of both a general reflection on concrete situations and the arguments to be considered which would have to pass a procedural test in order not to be linked to private (limited) interests.

### 3. What is Autopoiesis?

#### A. *"Closure" of the System - Animadversions on the Concept of 'Autonomy'*

The autopoietic concept of the system in general - we will come back to the legal system later - is based on the assumption of a necessary continuation, a self-production of a system<sup>6</sup> - not on some essential unity to be presupposed

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<sup>6</sup> Cf. N.Luhmann, *Soziale Systeme*, 4<sup>th</sup> ed., Frankfurt/M. 1991; id., *The Self-reproduction of Law and its Limits*, in: G.Teubner (ed.), *Dilemmas of Law in the Welfare State*, Berlin/New York 1985, p.111ss., id., *The Unity of the Legal system* in: G.Teubner (ed.), *Autopoietic Law. A New Theory of Law and Society*, Berlin/New York 1988, p.12, 20, 32; G.Teubner, *Law as an Autopoietic System*, Oxford 1993; H.Baxter, *Autopoiesis and the 'Relative Autonomy' of the Law*, in:

and reproduced - but on a process linking event to event - operation to operation - in a differential mode. It does not proceed in a top-down approach sticking to the preservation of a settled core of rules but, instead, is rather in search of network-like patterns of linkages to be generated in a bottom-up mode leading to the construction of a distributed order linked to its own process of self-generation. This would allow for a first characterization: this idea of a system is heterarchical, not hierarchical, i.e. it does not presuppose a fundamental unity or a universal rationality or the like. It generates rules which cannot be kept separate from the process of application. It does not accept the presupposition of an ideal observer who should be able to refer to a rationality which is not itself linked to the process of the self-production of the system. The focus is on the search structure - the self-production of order within a system. The system-character of this process of self-production, linking operation to operation - in the case of the legal system, this would be decisions, contracts, etc., - would consist of a functional closure establishing a self-limitation - a selectivity of linkages of the production process: as soon as there is self-organization of the reproduction of the linkages between certain operations, other operations following different patterns of combination, which may be sorted out (for example, economic operations) are excluded from being used as a part of the system's process of reproduction. A system constructs order by making differences between itself and its environment (which, to a large extent, is composed of systems itself) and it uses its own history of operations in order to find orientation for the linkage between operations and the further retention of patterns to be reused within the continuing process of self-construction<sup>7</sup>.

The identity of the system consists of a recursive closure which allows for the reproduction from operation to operation<sup>8</sup>. It is a kind of self-construction or self-constitution referring to a certain 'Eigenvalue' which is neither a fundamental rationality, nor a goal, procedure, or a concept of rationality but

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Cardozo Law Review 1998, 1987, 2003; J.Clam, *Droit et société* chez Niklas Luhmann. *La contingence des normes*, Paris 1997.

<sup>7</sup> Cf. Clam, *supra*, note 6, p.261.

<sup>8</sup> Cf. N.Luhmann, *Openness and Closure: On Reality in the World of Law*, in: Teubner (ed.), *supra*, note 6, *Autopoietic...*, p.335, 345; id., *Some Problems with "Reflexive Law"*, in: G.Teubner /A.Febbrajo (eds.), *State, Law and Economy as Autopoietic Systems*, *European Yearbook in the Sociology of Law*, Milano 1991/92, p.389, 392.; Clam, *supra*, note 6, p.267.

the set-up of a selectivity linking operations and allowing for recursivity. This is what closes the system and what makes it autonomous – again, not in the fundamental, anthropomorphic way of human autonomy. There is no absolute beginning of the system. There are no fixed rules of structures which command the process of self-preservation and self-reproduction of the system. There is no essence. The system has an emergent character, i.e. it does not exist outside its concrete operations as a set of principles, a teleological goal, etc. The system does not consist of individual or fixed components like atoms but its components, its basic elements, are events<sup>9</sup> - temporal links between operations. Its components are no less given than its structure. The operations and the relationship between them are retained and stabilized as structures - patterns which are reproduced and allow for the differentiated selectivity of the reproduction.

Recursive closure is not equivalent to the arbitrariness of connections, as connections are selective; this means past and future operations reduce and limit the complexity of possible relationships between operations. Thus, the system cannot operate on the basis of a description given from outside - a „correct“ description of reality, it does not have access to. Closure is not to be confounded with impermeability to influence from outside: the system is permanently “irritated” from outside, i.e. by its natural unstructured environment or by other systems. But systems do not share a common reality - they have to and are only able to observe and operate on certain elements of reality - because their own “identity” does not have a stable objective character, they are a product of their own operations using certain distinctions and neglecting others. Systems do not have a transcendental metaphysical identity as was attributed to the subject as the bearer of the essential law-like structure of the world beyond the fragmented character of empirical reality. That is why systems are said to be linked to a “polycontextural” conception of reality: “reality” is not a fiction, however, it is a *mixtum compositum* of different practical constructions produced by law, politics, economics, etc. which can be tested on the basis of their success which is evaluated according to internal distinctions.

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<sup>9</sup> Cf. N.Luhmann, *Die Geltung des Rechts*, in: *Rechtstheorie* 1991, 273, 280; Clam, *supra*, note 6, p.249.

## *B. Systems as 'Historical Machines' Operating with Distinctions*

This mechanism of recursive reproduction - i.e. the effective continuation of the system is linked to a binary code<sup>10</sup> - in the case of the legal system, the distinction between law and non-law - which is its guiding distinction that keeps the system and its recursivity in eternal movement: each operation opens new connections - constraints and possibilities. The retention of structure, of memory, so to speak, of successful operations opening new relations does not have a teleological function - it is connected to its own processing. This is a kind of 'machine' - even a 'historical machine' - with a memory - but a memory which is based on distinctions with no direct access to a holistic view of reality.

One could use the metaphor of a blind man using a stick to test the stability of the ground on which he walks. He draws the distinction stable - unstable and constructs a whole recursive system of orientation on the basis of this chain of operations which allows him to walk but does not permit him a full description of his environment. The paradox of closure can also be demonstrated with reference to this example: if the blind man realizes that his stick and the operations he performs allow for differentiation on a specific sensibility, he is able to set up quite a complex construction of his surrounding. It is the closure of this system - I shall come back to the theoretical questions - which allows for openness. This paradox can and must be de-paradoxified: if the system reduces itself to the organization of its operations (executed by the stick), it can find a productive way of coupling to its environment. The extreme and unstructured complexity is only accessible to the system if it develops a 'translation'-system of its own which does not correspond to its external reality. This is the explanation for the code - it is so to speak the blind man's walking stick.

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<sup>10</sup> Cf. N.Luhmann, *Das Recht der Gesellschaft*, Frankfurt/M. 1993, p.69ss.

### C. *Systems only Exist in the Plural Form*

This is why, however, the system needs an environment which is composed and structured by other systems. Systems always exist in the plural form: there are different systems, all of which operate on their own 'Eigenvalue' and allow other systems to use pre-structured complexity. For example, for the legal system it is absolutely necessary that other systems, science, economy, politics, etc. also develop their own autonomy - otherwise the autonomy will break down. Again, the example of the blind man can be helpful: he has to presuppose that there is a pre-structured order separating pavements from roads, that people in general are polite and not rude, distribution of shops, etc.. Otherwise, orientation would be impossible because of unstructured and inaccessible complexity.

The system is a kind of self-creating network of relationships which designs itself on the basis of linkages which have already been operated successfully, i.e. which fit into the structures and the patterns which have 'worked'. The closure of the system does not mean isolation from external influences - on the contrary, the system is operationally closed which means that it is open to coupling, but only on the basis of its own operational and semantic possibilities<sup>11</sup>.

## 1. **The Legal System - Some Basic Theoretical Elements**

### A. *The Guiding Distinction of the Legal System*

The legal system has to observe the economic system but only on the basis of its own distinctions, e.g. the legal system has to adapt property to a pre-structured 'reality' created by the economic system and vice-versa. The

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<sup>11</sup> Cf. Luhmann, supra, note 6 (The Self-reproduction...), p.113; Baxter, supra, note 6, 2003s.

distinction the law operates on and which allows for its self-production through legal communication is linked to the function of the legal system - a specific function which consists of the counter-factual stabilization of expectation<sup>12</sup>.

The function of the law is separated from the function of morality, which operates on a basic good/bad distinction. This differentiation produces the side-effect of blocking the immediate influence of vague feelings of justice, for example. The law does not pretend to have access to 'justice' as such. However, every approach to the establishment of a meta-norm as a stable source of validity runs counter to the necessary function of a positive validity which is self-generated by the system. But, by its operational recursivity, it destabilizes any principle of validity - it includes decisional instability into the operating mode of the system itself because it excludes any axiological reference to fundamental values and principles. The architecture of the system implies a limit to the centralization of the legal material because it uses a differentiated search and test structure and excludes moral disqualification of persons as incompatible with systemic differentiation in general, and, in particular, the set-up of a sophisticated internal structure of the system. Such a system cannot work on unstructured values or moral discriminations. It might only work on distinctions elaborated by its own memory. Of course, nobody can exclude that the autonomy of the system, including the legal system, would be destroyed or damaged, for instance, in a nazi or communist régime. But a system as such would instead reject this type of intrusion as being incompatible with its differentiation.

### *B. The Distinction of Code/Programme and Centre/Periphery in the Legal System*

We have already increasingly referred to the legal system as an example of autonomous systems in general. We should now focus a bit more on some supplementary characteristics of the law: the code of the legal system alone

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<sup>12</sup> C.f. N.Luhmann, *Ausdifferenzierung des Rechts. Beiträge zur Rechtssoziologie und Rechtstheorie*, Frankfurt/M. 1981, p.73ss.; id., *Rechtssoziologie*, 3<sup>rd</sup> ed., Opladen 1987, p.43, 50; Clam, *supra*, note 6, p.132.

would not allow for the set-up of structure within the system. The system needs programmes<sup>13</sup>, e.g. a legal act for its functioning which specifies its distinctions between law and non-law and allows for the generation of patterns, such as legal dogmatics. At this point, a supplementary transformation of the systems approach has to be introduced, which again runs counter to the hitherto established assumptions: according to N. Luhmann, the judicial decision-making system is the centre of the legal system whereas the legislature is to be located at its periphery<sup>14</sup>. The reason why is again to be located in the machine-like character of the legal system: it produces decisions and reinforces its autonomy on the basis of repeatedly creating new relationships and new constraints which, in turn, open new connections. And this pressure is mainly imposed on judges, and not on Parliament as the legislative body.

## 1. From a Universalistic to a Relational Paradigm of Law

### A. *What is the Basis of Universalistic Law?*

I would now like to make some remarks to try to explain the rationale of this construction - which may appear terribly counter-intuitive. At this point, we should perhaps take a step back to R. Alexy and his emphasis on a substantive concept of justice and a procedure of rational argumentation supplementing the weakened rationality of the liberal concept of universal law which separates the specific and individual conditions of people and their statuses from an abstract universalisable rule of collective order. It is this conception of accessibility of a hyper-complex world to a substantive stable concept of practical rationality which is at stake. This assumption of a universal stable rationality of the legal system, of justice, of a collective order and of the individual as its basic element - i.e. the conception of the enlightenment - even in its more flexible versions, loses its force once we can

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<sup>13</sup> Cf. Luhmann, supra, note 10, p.69ss.; id., Die Codierung des Rechtssystems, in: *Rechtstheorie* 1986, 171ss; Clam, supra, note 6, p.281.

<sup>14</sup> Cf. Luhmann, supra, note 10, p.333.

no longer talk of the single integrated reality to be referred to a stable framework of rules of human thinking penetrating the essence of the world.

Society has lost its centre, and the individual can no longer be regarded as the basic component of society. Rather - and at this point the systemic construction tries to take up the new challenge - the complexity of the relationships between the individuals has augmented and gone beyond a point of no return: this means they are no longer to be integrated into a common shared understanding of reality, and this was exactly the basic assumption underlying the concept of the law-like character of rationality and the universality of rules: there is a complexity of individual and specific relations which need not, and cannot be, taken into account although we can have access to the structure, the reproduction of patterns of behaviour and of collective order once we know the universalizable rules, i.e. of substantive rationality. No longer is there a stable point from which the whole of the society can be observed and, moreover, this is not even an acceptable idealization.

### *B. Why Relationships Matter*

If we accept this as a provisional hypothesis, we may accept the rather strange assumption of Luhmann's systems theory that society is not composed of individuals but of communications. This idea is not as strange as it seems: if we take a comparative look back at universal rationality, we could come to the conclusion that this conception is based on the subject only as a counterpart to universal rules, as the conscious bearer of law-like stable rationality. And once the stable law-like repetitive character of rationality is undermined it could also be acceptable to focus on the relationships between the individuals and look at the patterns of change which may be observed and may be the object of stabilization and intervention and, finally, could be used for the construction of a new heterarchical relational rationality. Such a rationality would not be accessible from a stable point of observation. But we would have to observe that this type of reality, of a world consisting of overlapping networks of interrelationships, is only accessible to the polycontextural observations generated by the differentiated systems of society. A relational concept of rationality could then be based on the search



for compatibility between different systemic logics of law, economics etc.. There is no room for a unitary approach to reality which could be reconstructed in the rule-oriented reflection of a knowing subject and this unity cannot be guaranteed by an intersubjective process of self-reflection in argumentative processes, either<sup>15</sup>.

Rationality, as an ordering principle can, nowadays, only be referred to trans-subjective systems of communication being generated by networks of inter-relationships<sup>16</sup>. These connections continuously create both constraints and options for new legal communications. This new type of sustainable relational patterns replaces the rule-based structure of universal rationality which can be mastered by the subject and its rational conscience and reflection. The new legal perspective is no longer centred on a body of rules and the rationality of its author's will which are taken to be separated from the practice of legal communications which, in turn, are regarded as its „application“. This practice, however, does not have major repercussions on the rules, which are themselves derived from rational universalistic reflection. In N.Luhmann's view<sup>17</sup>, it is judicial practice, instead, which is the core component of the legal system - and not laws and rules themselves. This does not mean that law simply does not underlie any influence from the political system (Parliament). Of course, laws are a crucial element of the legal system, but, in a longer term perspective, this is only the case if judges are able to transform them into practical decisions; and, if they do not adopt legal „systematicity“ (accepting specific legal constraints), this will be difficult or even impossible. For this reason, the legislator has to consider the relational patterns which are reproduced in the legal practice. I would even go one step further and venture the hypothesis that not only judicial decisions but also, and even primarily, individual legal acts (contracts, etc.) have to be placed at the centre of the legal system themselves.

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<sup>15</sup> Cf. generally N.Goodman, *Fact, Fiction, and Forecast*, Cambridge(MA) 1983; H.v.Foerster, *Observing Systems*, Seaside (CA) 1981; id., *Sicht und Einsicht*, Braunschweig 1985.

<sup>16</sup> Cf. W.Welsch, *Vernunft. Die zeitgenössische Vernunftkritik und das Konzept der transversalen Vernunft*, Frankfurt/M. 1996.

<sup>17</sup> Cf. Luhmann, *supra*, note 10, p. 333, id., *Die Stellung der Gerichte im Rechtssystem*, in: *Rechtstheorie* 1991, 273ss.; Baxter, *supra*, note 6, 2017.

N. Luhmann would not have accepted this idea because in his view contracts and other legal acts are not so tightly linked through connection constraints as judicial acts are. But, to my mind, this assumption does not fully exploit the advantages of a network-based legal theory. It is also private legal practice which maintains the productivity of the pool of variety within the „population of (legal)ideas“(viable forms of contracts, legal experience, trust etc.). This is all the more important because, especially in a society which undergoes a continuous process of change, cooperation is much more essential for the viability of a legal system, and not judicial interpretations and sanctions.

One of the strengths of a systems theoretical approach to law consists of the openness for legal pluralism which will be welcome once the link between law and the will of the state as its author is called into question.

## 1. The Challenge of Legal Pluralism

### A. *Standards, the New Law Merchant and the Globalization of Law*

From these reflections, a perspective on the new law merchant can be derived<sup>18</sup>: if legal methodology was able to get rid of the orientation on state-based decision-making and stress the potential of the „bindingness“ of self-generated relationships between legal communications, their observation and evaluation, it should be possible to accept the new law merchant as a form of law like any other and not to look for a public mechanism of transformation into state based law (by way of the decision of a judge, for example). The same could be valid for private standard setting (CEN, ISO and similar

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<sup>18</sup> Cf. G.Teubner, *The Global Bukowina. Legal Pluralism in the World Society*, in: id.(ed.), *Global Law without a State*, Aldershot 1996, p.3ss.

national standardization bodies)<sup>19</sup>; one could venture the hypothesis that social conventions are not just forms of coordination without a legal character but have to be regarded as forms of a special inter-organizational generation of binding relationships and thus can be accepted as normative phenomena. This might also lead to a new conception of a „network-like“ relationship between national, transnational, and supra-national forms of legal integration in the EU<sup>20</sup>: if one leaves aside the problem of the distribution of law-making competences between the EU and the Member-States and, instead, one takes into consideration the importance of the doctrinal „infrastructure“, the „systematicity“ of the reproduction of practical patterns of the networking of relationships in private law based-societies then the idea to shift the focus to a transnational component of mutual coordination or even irritation and reciprocal self-adaptation, including the optional approach of a harmonized civil code (dependent on practical experimentation) might appear quite plausible as a „third way“ between the preservation of a national legal order and a relatively homogenous supranational order. This would be an approach which might lead beyond the idea of the preservation of „national identity“, it would not confront legal integration, but, instead, try to develop cooperative horizontal forms of relationships between the infra-structures of law and would try to keep national law sensible to trans-national influences preserving the knowledge base which, hitherto, has been accumulated in national legal order and doctrine<sup>21</sup>.

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<sup>19</sup> Cf. C.Joerges/K.H.Ladeur/E.Vos (eds.), *The Integration of Scientific Expertise into Standard-setting*, Baden-Baden 1997; C.Joerges/E.Vos (eds.), *EU Committees: Social Regulation, Law and Politics*, Oxford 1999.

<sup>20</sup> Cf. K.H.Ladeur, *Towards a New Theory of Supranationality – The Viability of the Network-Concept*, in: *European Law Journal* 1997, 33ss.; for the use of the network concept in the analysis of the contemporary decline of the State cf. J.M.Guéhenno, *The End of the Nation State*, Ann Arbor 1995; for the evolution of law in “open” States cf. U.Di Fabio, *Das Recht offener Staaten*, Tübingen 1998; for a critique of the EU as a Super-State J.J.Rosa, *L’erreur européenne*, Paris 1998.

<sup>21</sup> Cf. for administrative law F.Schoch, *Die Europäisierung des allgemeinen Verwaltungsrechts*, in: *Juristenzeitung* 1995, 109ss.; K.H.Ladeur, *Transnationale Tendenzen in der Europäisierung des Verwaltungsrechts*, in: *Europarecht* 1995, 227ss.; for private law cf. C.Joerges, *The Europeanization of Private Law as a Rationalization Process and as a Contest of Disciplines – An Analysis of the Directive on Unfair Terms in Consumer Contracts*, *European Review of Private Law* 1995, 178ss.

It can be shown from the development of the new law merchant that the traditional theory of legal sources is no longer sufficient and that a pluralism of sets of rules which are only loosely coupled has to be accepted. This realistic conception attains more and more plausibility: it assumes that a new law merchant can no longer be constructed within the narrow perspective of public „recognition“ to be attained within the process of judicial implementation. The inadequacy of this approach comes to the fore if one takes into consideration the resolution of highly complex cases of liability such as „oil spills in open sea“<sup>22</sup> or international cases of bankruptcy of big firms<sup>23</sup>. These cases can only be tackled if the lawyers, firms and groups of professional enterprises involved in these cases succeed in setting up private rules of decision-making in the elaboration of which the courts (of different countries) would participate, but not in any way which would allow their role to be described as „mediators“ or as managers of legal settlements. It would be misleading to regard these arrangements as being non-law, as mere factual arrangements, because in these cases state-based law cannot function at all or cannot manage their complexity. This is not due to the inevitable factual limits of legal decision-making because these types of cases are no longer to be regarded as being exceptional . They are just the normal consequences of the rising levels of complexity of inter-organizational legal operations. These cases demonstrate that the discourse-theoretical thesis that judges have to take into consideration all possible aspects of the case is misleading. In the cases referred to above, this would end up in complete deadlock.

This position is, instead, the consequence of a fixation on public decision-making focussing on public rationality as a principle source of order, ignoring the fact that a society based on private law constantly generates new possibilities the ordering of which can neither be set up by the legislator alone nor be theoretically structured with reference to an „argumentative rationality“ to be kept separate from the interests and strategies of private actors. At this point, the potential of self-coordination and self-regulation of private actors comes to the fore. This model of self-coordination could also be copied by public regulators, who should draw on the competition of

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<sup>22</sup> Cf. J.Kellerhoff, *Oil's Empire. Civil Liability in International Law for Accidental Oil Pollution*, Ph.D.Thesis, EUI, Florence 1997.

<sup>23</sup> Cf. J.Flood/E.Skordaki, *Normative Bricolage: Informal Rule-Making by Accountants and Lawyers*, in: Teubner (ed.), *supra*, note 18, p.109ss.

institutions<sup>24</sup> and reciprocal self-observation in order to introduce learning capacity into public governance. New complex phenomena such as the crisis of the Asian financial markets can only be tackled or avoided by a strategy of mutual supervision by regulating institutions who have the intention of searching for a global „best practice“ for the direct investment which follows the globalization of markets. But this cannot be guaranteed by a quasi-public régime such as the International Monetary Fund.

#### A. *In Search of a „Meta-Doctrine“ of Legal Pluralism*

In the future, it will be more and more necessary to develop new institutions based on proceduralization (in the sense of an experimental relational rationality) and cooperation which are adapted to the strategic generation of new options by private organizations, new types of contracts, new inter-organizational cooperation and the development of new more complex products, marketing strategies and high technology set up under conditions of uncertainty to name but a few phenomena. But it is not a viable option for the future evolution of the legal system to try and formulate new approaches of state-based procedures of decision-making which aim at a self-defined substantive goal, such as justice.

In Habermas proceduralization is, in a contradictory way, linked to a concept of „materialization“ of law<sup>25</sup>: the procedure is oriented on a substantive aim, a new type of universalistic order to be presupposed in argumentative processes. Private autonomy and its results in contractual practice can only be accepted under conditions of factual equality of participants. Otherwise, its outcomes underlie the second-guessing of rational discourse which aim at substantive justice. This idea runs counter to the basic principles of liberal law. The liberal legal order has never assumed that individual contracts can be regarded as just for the sole reason of a formal agreement of the participants, nor has it ignored the problems of justice altogether. Its focus is, instead, on the search for potentially stable patterns of relationships between legal actors and not on an illusionary goal of attaining

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<sup>24</sup> Cf. L.Gerken (ed.), *Competition among Institutions*, Ipswich 1995.

<sup>25</sup> Cf. Habermas, *supra*, note 3, p. 127, 496ss.

justice in concrete cases. The establishment of such patterns is necessary for the generation of knowledge and the social coordination of actions under conditions of uncertainty. In a long term perspective liberalism expects that „a sort of justice“ will come about. But this cannot be expected in concrete cases. The intervention of a form of material justice, aiming at justice on a case to case basis, may create more problems than it will solve because it will create unexpected side-effects which will disturb the sustainability of the network of inter-relationships as the basis of the „idea population“ which is used in social coordination. Liberal law has a high respect for the potential of evolution, of the self-organization of social networks of relationships as the basis of implicit practical knowledge which is not accessible to intersubjective rational reflection.

This is why private law doctrine has to develop with the aim of guaranteeing a calculable domain of options which, in the long run, will also be useful for those participants who are not in a factually equal position compared to organized enterprises. Again and again, one has to insist on the basic assumption of Liberal law that there is no ideal position which allows for adequate self-observation of society<sup>26</sup>. One may criticize this hypothesis, but one should not ignore nor refer criticism to superficial or misleading allegations about the ignorant formalism of private autonomy which has to be corrected by responsible intersubjective reflections. Instead, the legal system has to be fine-tuned to the requirements of the preservation and stimulation of self-regulation by private actors. Responsibility has to be reformulated - it has to be detached from the hitherto established concepts based on common-sense, such as experience or negligence - the relationship between attribution and relief of responsibility has to be redefined. At this point, one should bear in mind that the concept of „rights“ does not refer to a public scheme of distribution of action potentials but is based on the idea of experimentation with options to be used in an open time-horizon which is no longer limited by the presupposition of tradition<sup>27</sup>. Rights have a creative character: they are supposed to generate more possibilities of action for all. This is the reason why responsibility for the consequences of autonomous action is limited to

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<sup>26</sup> Cf. P.H.Aranason, *The Common Law as Central Planning*, in: *Constitutional Political Economy 1992*, 289ss.; generally S.Holmes, *The Anatomy of Political Anti-Liberalism*, Cambridge (MA) 1993; id., *Passion and Constraint. On the Theory of Liberal Democracy*, Chicago 1995.

<sup>27</sup> Cf. R.Sugden, *The Economics of Rights, Cooperation and Welfare*, Oxford 1986.

harm in a stricter sense as opposed to negative externalities which cannot be regarded as restricting the subjective rights of third persons<sup>28</sup>.

This is a fundamental institutional mechanism which allows for action under conditions of uncertainty which are not accessible to centralized public decision-making. These limits are the reverse side of economic liberties: their institutionalization implies the acknowledgement of the uncertainty, complexity and distrust of institutionalized explicit public knowledge. This mechanism would be severely damaged if consequences of autonomous action could, in general, be corrected by rational discourse - which would, of course, exempt itself from the attribution of the negative consequences of such intervention. This is why it would be an illusion to restructure private law under the global aspect of the distribution of justice. Instead, a functional equivalent for the institutionalization of trial and error processes made possible by the attribution of decision rights and the release from responsibility for distant consequences in rule-based liberal law has to be found for an experimental society which is involved in a constant process of self-transformation.

## **1. The Relationship between Liberal Conceptions of Law and Practical Knowledge**

### *A. Orientation Problems of the Law in Classical Liberalism and Post-Modernism*

Any liberal legal order has to find its orientation in practical knowledge. This is why, under conditions of complexity, one has to accept the process of setting up conventions, processes of practical self-coordination, mutual self-observation and evaluation as a basis for a new proceduralized law all the

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<sup>28</sup> Cf. for the productive character of trust in self-organization processes among individuals in liberal societies A.Peyrefitte, *La société de confiance*, Paris 1995; F.Fukuyama, *Trust. The Social Virtues and the Creation of Prosperity*, London 1995.

more . Law has always been linked to a practical knowledge basis which contains the domains of options and patterns of coordination created by private actors themselves. The difference between classical liberal law and both the post-modern procedural law would, however, consist of the assumption that the generation of new options and the construction of option domains no longer follow stable paths of evolution whose transformation comes about spontaneously and continuously, but take up a more systematic and strategical form which is no longer restricted to a mere variation of normal patterns of action and relationships. This is why the established concept of „interpretation“ of rules<sup>29</sup> given by the will of the sovereign (monarch or the people), as was diffused on the continent, can no longer be the paradigm for the practical evolution of the legal order.

In this respect the continental legal system can learn a lot from Anglo-American case law approaches which do not derive solutions from the „will“ of the legislator, which have to be reconstructed by a correct interpretation and application of the rule. On the other hand, case law can learn from continental approaches about how to set up systematic relationships between cases and arguments beyond the reference to „leading decisions“ and cases. Flexibility cannot be gained from openness towards „reality“ alone, once rules are undermined by the self-transformation of society on the one hand, and the increasing strategical potentials of organized actors on the other. It is true that the law is more and more confronted with new problems whose solutions can no longer be derived from established rules. Moreover, the construction of a postmodern legal approach has to take up the basic issues of classical liberal law, and this is a reconfiguration of rights as the core elements of the legal system: a distributed order of decisions as a compensation for the impossibility of the position of the ideal observer of society.

In the same vein as traditional doctrine has searched - at least on the Continent - for a stable relationship between the universal legal rule and social experience<sup>30</sup> based patterns of coordination, it is now necessary to

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<sup>29</sup> Cf. for common law which cannot be attributed to an author A.Glass, The Author of Common Law Texts, in: Ratio Juris 1995, 91ss.

<sup>30</sup> In the process of the formulation the French Code Civil the search for a stable link between the codification of civil law and social conventions and expectations was a



develop a procedural „meta-doctrine“ which has to be fine-tuned to cooperation with private processes of self-coordination in a private law based society. At this point the economic analysis of law<sup>31</sup> could be helpful because of its orientation on problems of attribution of responsibility and rational models of comparison and evaluation of different alternatives of action in terms of economic rationality. The major strength of the economic analysis of law (which is oriented on efficiency) is to be seen in its future oriented comparative approach which allows for a relational rationality, based upon practical modelling of alternatives, opening itself for considerations of design and retention of patterns of actions in contrast to traditional doctrine which tried to develop stable types of conflict solutions from a body of law which could be presupposed as being a stable frame of reference. This classical approach avoided the illusionary alternative of a reference to a self-transparent society and the formation of a legal order based on „argumentative rationality“. Furthermore, this approach can contribute to the formulation of a functional equivalent to the bounded rationality of the traditional legal order which was characterized by the search for flexible patterns which could allow for new calculable ways of self-coordination among private actors. Moreover, this approach could also contribute to a conservation of the ‘Eigenvalue’ of the law: it would try to search for experimental patterns of relationships within the infrastructure of the law, i.e. the „trans-subjective“ network of relationships between legal communications which cannot be the outcome of „intersubjective“ processes of discursive reflections designed for the set-up of a consensus among rational individuals.

The relational rationality of the search for viable combinatory patterns of actions which generate more options for the future can be regarded as a functional equivalent for the stability of the universal legal rules which were supposed not to underlie transformation within the process of their application to the variety of concrete cases. This model had (and in many respects still has) paradigmatic model-building force for the law of the liberal society of the individuals; but in a society which has to open up for the generation of new knowledge domains and not just guarantee the stability and continuity of

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continuous preoccupation of its “father”, Portalis; cf. M.Long/J.C.Monier, Portalis. L’esprit de justice, Paris 1997.

<sup>31</sup> Cf. only R.Cooter, Law and Economics, 2<sup>nd</sup> ed., New York 1996; id./D,Schmidtchen, Constitutional Law and Economics of the European Union, Cheltenham1997.

experience (operating on a case-to-case basis), the universality of rules for individual behaviour can no longer serve as a stable frame of reference for the legal system.

### *B. Taking Bounded Rationality Seriously?*

Any liberal conception of legal order is based on the recognition that there is no position of „ideal observation“ of society. For this reason, the „opinions“ of individuals and experience based on trial and error processes are the epistemological basis of society - not „truth“. In post-modern societies this search process is no longer linked to individuals but has shifted to organizations whose strategic power does not allow for spontaneous self-coordination which is characteristic for experience<sup>32</sup>. This is why the idea of the unity of society, albeit as a unity of the rational procedure of argumentation including all citizens, has become meaningless. It is replaced by a concept of relational rationality within a trans-subjective heterarchical „network of networks“ with different fragmentary rationalities (of the economy, of politics, of law etc.). The inevitability of a change of the theoretical perspective from rules and conservation of a linear equilibrium (to be reproduced by individual actions) to the distributed practical trial and error process of self-construction of society beyond an ideal frame of reference has to be accepted. The new legal order can only be conceived with reference to the unstable heterogeneous non-linear non-equilibrium model of „order from noise“ (H.v.Foerster): order and disorder (changes of the rules) are no longer separated by stable borders. Order has repeatedly to be generated from disorder. A liberal paradigm structuring the adaptation process of the law cannot be based on a „discursive principle“ as a privileged “approach to reasonable argumentation and decision-making” (Habermas), but has, instead, to be based on the recognition of a plurality of rationalities, rule-based and experience-based legal order (for the liberal society of the individuals), pluralistic law which is group-based and linked to a logic of statistics, cultural and social autonomies (welfare-state), and the new network-related law based on cooperation of regulation and self-regulation drawing on experimental processes of knowledge generation (post-modern self-organizing society). This means that several logics coexist and overlap;

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<sup>32</sup> Cf. generally K.H.Ladeur, *Das Umweltrecht der Wissensgesellschaft*, Berlin 1995.

and one of the tasks for a meta-dogmatics consists of the formulation of flexible rules for coordination in the new types of “conflicts of laws”. “Argumentation“ within a process of intersubjective reflection which is supposed to overcome the constraints of practical legal action cannot claim to have privileged access to the legal system because of its reference to an abstract principle of justice.

Liberal societies have always presupposed that there is no way of finding a substantive consensus on basic principles of social order especially on a conception of justice. These limits cannot be called into question by shifting the focus to discursive processes of a search for justice. A liberal approach to this dilemma has always consisted of finding practical ways out of this tension through institutional separation e.g. keeping law and morality separate, on the one hand, and in using the majority vote as a practical mechanism for decision-making which presupposes that there is no consensus on fundamental principles in society, on the other. To reintroduce moral argumentation as a kind of reflexive process into legal practice as a compensation for the lack of orientation to be found in the rules as such cannot be accepted as being compatible with a liberal approach. Liberal conceptions of law have always accepted bounded rationality<sup>33</sup> - not as an all too human limit to the ability of man to meet his moral obligations but as a systematic restriction which has to be integrated in the legal system as such by way of specific institutions such as procedural rules adapted to uncertainty and conflict of values, and not as an outer ideal limit which should nevertheless stimulate us to keep the gap between the ideal and the practical necessities as small as possible.

A liberal conception of law takes this limit as the major challenge for the construction of the legal system and its internal institutional differentiation into account. This self-limitation of a relational concept of rationality is reproduced within the legal system by way of basic reference to freedom of action not in the sense of accepting arbitrariness and egoism but as the freedom to search for and experiment with new options, thus contributing to the process of self-generation of a society which is no longer bound by traditions. This type of experimental action cannot be steered by an

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<sup>33</sup> Cf. H.A.Simon, *Models of Bounded Rationality*, Cambridge (MA) 1982.

illusionary orientation on an ideal discourse because of its creativity and its capacity to transcend the limits of the established public knowledge basis.

## **8. How Does Systems Theory deal with the Transformation of Law in Post-Modernity?**

### *A. Are Courts really the Centre of the Legal System?*

Confronted with the challenge of post-modernity, N.Luhmann is, perhaps, a bit too old fashioned when he invokes the necessity to abide by the traditional “iffish” (if/then) structure of law<sup>34</sup> and to exclude the balancing of principles in judicial decision-making from legal methodology and to deny contracts and other legal communications of actors a central role in the reproduction of the legal system. N.Luhmann’s approach appears to be self-contradictory because shifting the accent to the court system as the core element of the legal system<sup>35</sup> is only plausible as a consequence of the constructive constraints of the self-production of law. But these constraints only come to the fore when the rule-like structure of law is called into question, and this is a rather recent phenomenon. In Luhmann one gets the impression that the modern legal system should have always been regarded as an autopoietic system - i.e.even during the reign of classical positivism on the continent. In my view, this is a misleading idea, notwithstanding the fact that autonomy has always been a characteristic element of modern legal systems. But - contrary to Luhmann’s assumptions - one should accept gradation of autopoiesis and not the alternative of either autonomy or heteronomy (dependence on religion, etc.). There are, for instance, common paradigms, meta-rules of self-orientation for all systems which are linked to a certain “Zeitgeist” and which structure the burden of self-production of systems in the sense of demanding more or less capacity for self-transformation or self-stabilization. A rule-based paradigm, for instance, allows more stability of self-production than a network-like rationality which is being diffused in all systems today.

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<sup>34</sup> Cf. Luhmann, supra, note 10, p. 189.

<sup>35</sup> Cf. Luhmann, supra, note 18.

In this respect, N.Luhmann's approach seems to be too rigid to open itself towards the different time-dependent evolutionary processes of self-transformation of systems, the legal system in particular. If one has a closer look at the historical evolution of the legal system, one has to be aware of the fact that the shift to the court system (as opposed to parliament as the author of a statute) is quite a recent phenomenon of a fragmentary trial-and-error process of the legal system on the continent (which parallels developments towards an increasing heterogeneity of patterns of evolution in many social domains, such as economy, family and educational structures, changing relationships between the public and private spheres, to name but a few). It is due to the weakening of the rule-based universalistic paradigm of the law, which demands more of a "creative", situative approach to legal ordering. N.Luhmann himself seems to tend towards a culture-pessimistic approach in this respect and to regard the court system as a bulwark against "bad laws" which do no longer adhere to the classical universalistic approach of liberal law and try to adapt too much to increasing societal complexity instead of reducing it by way of general norms. This does not appear to be a very convincing idea because one should ask oneself how a judge can stick to and preserve the autonomy of law under deeply changed societal conditions. The constraint to decision-making is, of course, one element but this is a position which seems to be opposed in an antithetical manner to "bad laws". But if "bad laws" are themselves to be regarded as a symptom of a deeper process of change – which I would presume – one needs a more concrete assumption on the role of judges. How is decision-making possible under conditions of increasing complexity?

### *B. The Orientation Problem of Courts*

N. Luhmann's approach is, in this respect, also antithetically opposed to conceptions of judge-made law, which he criticizes as being too situative in their balancing approach which leaves the binding force of stable rules behind as well as the constructive logic of a system which has to create self-orientation from its own practice. The discourse-oriented approaches at least offer a new strategy for the judge: instead of deducing concrete decisions from a general law, he should create justice on a case-to-case basis opening

his mind to all the elements of a situation and get rid of the traditional constraints of deductive reasoning<sup>36</sup>. This is an approach which has to be considered as incompatible with the functional approach which focuses on the internal rationality of law and thus rejects any possibility of getting a correct decision based on more or less complete information. In this respect, N. Luhmann's criticism seems convincing. On the other hand, one does not quite know how court decisions are generated once the law as their basis is no longer a reliable "source" of legality. N. Luhmann does not give much weight to legal argumentation<sup>37</sup> which takes up distinctions made in prior decisions and thus confirms the redundancy of legal concepts being adapted to changing contexts. However, reference to past decision-making alone will not do: under conditions of uncertainty legal decisions are increasingly future-oriented and past decisional practice as well as empirical experience and institutional knowledge are rapidly devaluated. (This would also be an argument against reference to discourse as a type of reasoning which is characterized by its distance towards interest-based and practice-related arguments controlling itself through an open procedure which is accessible to everybody and filters reasons through argumentation rules.) What is increasingly relevant is the ability to give an account of non-deductive decision-making creating coordination among, in particular, organizations, or between firms and groups of customers, or permitting the management of complex forms of high technology, etc. At this point, N. Luhmann appears to be even hostile towards some versions of legal decision-making which are based on risk evaluation<sup>38</sup>. This type of decision-making is suspected of trespassing the limits of the legal system: risk is a phenomenon which is supposed to undermine legality because it openly excludes the set-up of stable expectations, a risk-decision being characterized by the assumption that facts will only be known in the future.

Redundancy has a specific meaning in Luhmann inasmuch as it allows for the reactivation of stabilized „reasons“ to be reused, whereas variety as its counterpart indicates the multiplicity and number of operations „which set off

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<sup>36</sup> Cf. Alexy, *supra*, note 2.

<sup>37</sup> Cf. N.Luhmann, *Legal Argumentation: An Analysis of its Form*, in: *Modern Law Review* 1995, 285ss.; Baxter, *supra*, note 6, 2028.

<sup>38</sup> Cf. generally N.Luhmann, *Risk: A Sociological Theory*, Berlin/New York 1993; *id.*, *Protest. Systemtheorie und soziale Bewegungen*, Frankfurt/M.1996.

information processing within the system<sup>39</sup>. Apparently, the system needs both, it has to find a way of balancing innovation (by the environment) and the repetition of known formulas have to be shown to fit to different types of cases without always provoking new answers. In this respect, the „system-internal“ consequences for future decisions and the possible links with the decisions of the past have to be taken into account - as opposed to the weighing of external consequences which creates a risk for the possibility of maintaining the closure of the system. This might seem quite productive but the idea remains very general. One does not really get much information about specific ways of defining this compromise in a meaningful way.

G. Teubner<sup>40</sup> explicitly introduces the idea of the legal system being an „epistemic subject“ to which reflection may be attributed, i.e. a reflection which is structured by internal constraints but, apart from that, permits argumentative rationality in a similar way as to the human rational subject. The latter is said not to be replaced by the legal system as the subject of a specific thoughtfulness but, on the contrary, to be supported by its specifications. This can be regarded as a kind of compromise between systems theory and argumentative discourse theory. But one might have some doubt as to whether this is really a fruitful approach: one has to bear in mind that the concept of the subject is linked to a lot of connotations which are deeply rooted in assumptions about the subject as the bearer of the consciousness of the stable identity of the world. And this idea does not really fit into systems theory as an approach which tries to establish a different trans-subjective rationality which, in turn, tries to recast rationality in the relational heterarchical type of network-like patterns which may be used as viable forms of self-orientation of systems of inter-relationships. In this version, a distributed „intelligence“ is attributed to the pools of variety (generated by the diverse systems), and not to the integrative force of human thinking. (Intersubjectivity in the Habermasian sense is, in many respects, a kind of autonomisation of human thinking in a rational process of argumentation.) If one takes into account the new version of a trans-subjective relational rationality this idea might get some more contours, especially if one does not forget that the identity of the subject was constituted by the unity of reflection which reproduced itself in the law-like

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<sup>39</sup> Cf. Luhmann, *supra*, note 37, 292.

<sup>40</sup> Cf. G. Teubner, *How the Law thinks: Toward a Constructivist Epistemology of Law*, in: *Law and Society Review* 1989, 727, 730.

structure of reasoning of human reflection. In J. Habermas, this law-like structure and its relationship with human consciousness is replaced by a procedure-based inter-subjective reasoning which can no longer find its unity in human consciousness but finds it in the structure of self-reflection which is attributed to the process.

So, one should be very careful in overestimating the role of the individual in theories of the subject or of intersubjectivity: in the long run, what is interesting for analysis is always the type of coupling of „thoughts“ and not the bearer of the reflection processes, either the ideal subject representing universal rationality or the community of participants of the intersubjective reasonable discourse or the system as a quasi-subject. Thus, it should not be surprising that rationality in systems theory is attributed to the generative process of network-like structures, their relationships, and the creativity inherent to it.

### *C. Autopoietic Theory as a Theory of Post-Modernity*

If one accepts this as a starting point, one could come to the conclusion that systems theory does not draw on law-like structures of rationality which subsume the variety of empirical actions, nor on procedural generation of a rationality through argumentation which takes its distance from instrumental unreflected concatenation of actions, but instead refers to the linkages among actions which form network-like patterns to be used as stable frames of reference for future decisions. But this shows that systems theory has to open up its conception of law and, more specifically, give up its state-centred orientation on the court system. Instead the focus should be on the construction of binding relationships among private actors; an approach, which would give room for change in legal practice and its repercussions within the state. The state-centred character of liberal law should be considered as the symptom of a process of establishing an abstract market-related legal order beyond local traditions. But this does not mean that the law has to remain encapsulated in the state. There was and still is a very close link between state-based law and the set-up of conventions and forms of mutual coordination among actors even though this link may change. And it could be interesting for legal theory to have a closer look at these changing



inter-relationships between societal legal practice and state-based explicit production of law. A network-based theory would not accept the strict separation between state law and the legal practice of social actors as „applications“ of the law, albeit an explicit rule (as in traditional legal conceptions) or the meta-rules of justification which are also kept separate from the legal instrumentality of specific actions, such as contracts which underlie the scrutiny of argumentative rationality as far as their „justice“, and consequently their acceptability is concerned. Relational rationality can draw on the assumption that – even in the past – individuals (and even more so, organizations) do not base their acts on isolated calculations of interest alone, respecting laws, expectations and stability of decision-making only as an external limit imposed on them. They have to make plans which link either several acts of their own in a long term perspective or which tie with (the past or present) acts of others (natural persons or organizations) because they have to search for, and experiment with *p a t t e r n s* of acts which create trust as the inevitable basis of orientation under conditions of uncertainty which undermine the stable patterns of tradition<sup>41</sup>. More so now than in the past, state-based law has to contribute to the establishment and retention of frameworks of self-organized inter-relationships which create the inevitable “pre-commitments” by imposing constraints and opening new options for decision-making. The legal system has to observe, to adapt to, and to stimulate or restructure the potential of the self-regulation and self-organization of patterns of order inherent in networks of legal acts.

*D. From the Hierarchical Relationship between Law and its Concrete Application to the Heterarchical Cooperation of Law and the Self-organization of Societal Legal Transactions in a “Network of Networks”*

The concept of network can be referred to for the explanation of a new relationship between state-based law (including court decisions) and legal

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<sup>41</sup> Cf. E.F.McClennen, Rationality, Constitution, and the Ethics of Rules, in: Constitutional Political Economy 1993, 173ss.

transactions among individuals or organizations. In classical liberalism the spontaneous process of evolution of law which was brought about by the legal interactions and the patterns generated from them could be neglected by courts. They, instead, would focus on stable conventions (e.g. about expectations concerning the concrete mode of fulfilling a contract or meeting standards which define negligence). Conventions produced more or less stable general standards of behaviour which would fit into the general framework of the formal legal statutes that the courts had to base their decisions on. In addition, specific cases could be used to introduce more variety into the understanding of law which could not call into question the paradigm of interpretation. This conception presupposed that law was not transformed by the process of its “application”. In a complex post-modern setting this stable inter-relationship crumbles and is replaced by diverse types of linkages between law and social conventions or expectations: first of all, there is the increasing importance of explicit standards which are set out by different private, public or mixed public-private bodies. These standards try to formulate expectations and rules of appropriateness for behaviour under conditions of risk, and for quality requirements, long term contracts on cooperation, etc. This can be regarded as a new form of explicit “patterning” of inter-relationships which has to supplement the decreasing potential of the spontaneous generation of conventions.

This evolution is due to the fact that spontaneous generation of conventions can no longer be expected from the distributed practice of legal transactions because practical knowledge is fragmented, diffuse, and legal practice changing rapidly. In this context, a transformation of the relationship between state-based law and legal practice has to be brought about – a change from a stable hierarchical relationship between norms, conventions, and legal actions which could be conceived of as being fluctuations within a linear model of equilibrium (which does not call into question its point of rest) to a new heterarchical linkage – leading to an overlap of networks (of state-based legal decisions and societal legal transactions) which exercise reciprocal influence upon each other – perhaps one could call this a type of internal structural coupling : practical transactions<sup>42</sup> create more variety because of their

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<sup>42</sup> At this point, I think a reference just to “structural coupling” of the legal system and “social processes”, as explained by G. Teubner, is not sufficient; cf. *Legal Irritants: Good Faith in British*

innovative character and the state-based legal system has to fine-tune the redundance (adaptiveness) of its concepts to more challenging and innovative cases which may not be easily judged according to established legal rules and routines. The different networks of legal decisions and legal transactions have to be integrated in an overarching “network of networks”. The stability of this network can only be gained and retained if a functional equivalent for the hierarchical relationship between norms, conventions and their application can be found. This is a challenge for a new meta-dogmatics of a heterarchical legal system within which different experimental types of cooperation, coordination and competition among institutions coexist, but of course interventionist decision-making (interrupting perverse patterns of collusive societal arrangements) may also be necessary. The consequences of this new type of law (which itself coexists with traditional patterns of decision-making when their presuppositions are still valid) could only be illustrated by giving examples for different national and transnational settings. But I think that the outlines of such a paradigm of a heterarchical conception of law could be made clear: it is, in fact, one of the phenomena which demonstrate the declining integrative potential of the State – in this context the framework for the traditional hierarchical conception of law.

I think autopoietic theory should not be regarded - as Luhmann regards it - as the one and only scientific construction of modern law, but rather as a concept for the description of post-modern law because it is more open to plural concepts of law, to decision-making under conditions of uncertainty (high technology, information, society etc.) and to a renewed conception of the cooperative transformative nature of law which has become necessary because society is much more future-oriented than in the past and has to accept a constant process of the devaluation of established knowledge and of the rules or patterns based thereupon.

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Law or How Unifying Law Ends Up in New Cleavages, in: *Modern Law Review* 1998, 11 ss; cf.

also I. Maher, *Community Law in the National Legal Order: A Systems Analysis*, in: *Journal of*

*Common Market Studies* 1998, 237, 244: These “social processes” (contract making etc.) create

legal patterns of their own which are part of the legal system itself.

## 1. Global Law beyond the State

### A. *Evolution of Transnational Forms of Law*

Law has always had a close relationship to social conventions: they are, more or less, implicitly invoked by the concept of 'negligence', to name but one example. But, increasingly, the stable knowledge basis which is presupposed in the process of defining this concept is undermined by the devaluation of existing knowledge and the necessity to generate new scientific and economic knowledge and, as a consequence, new forms of self-regulation linked to experimental approaches to the management of new options<sup>43</sup>. This is why the self-organized capacity of enterprises and groups producing knowledge could be more openly integrated into a procedural conception of law focussing on new ways of linking practical operations, knowledge and a cooperative and flexible version of „order from noise“. Such a new conception would, in particular, no longer establish a close link between the law and the nation state as its source, guaranteeing both identity and consistency.

This idea would allow for a more open conception of new versions of transnational law beyond the hitherto established focus on the State as the centre of the production of national and international law. In the field of international law the role of „customs“ as the basis of non-contractarian legal obligation among states is increasingly questioned<sup>44</sup>: instead, elements of public or non-governmental transnational cooperation are in the process of being attributed legal value - if only as „soft law“, even though this approach no longer fits into the pattern of stable rules of coordination among states

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<sup>43</sup> Cf. C.Shapiro/H.Varian, *Information Rules: A Strategic Guide to the Network Economy*, London 1995; I.Nonaka/H.Takeuchi, *The Knowledge Creating Company*, Oxford 1995.

<sup>44</sup> Cf. D.P.Fidler, *Challenging the Classical Concept of Custom: Perspectives on the Future of Customary International Law*, in: *German Yearbook of International Law* 1997, p.198ss.

which were based upon settled customs which are regarded as expression of the sovereign will to establish rules for international conduct. Among liberal states new forms of transborder relationships which externalize the rise of cooperative legal schemes from domestic level to international level come to the fore: international relationships among liberal states are no longer primarily filtered through the traditional unitary representative organs of the sovereign state<sup>45</sup>. There is growing relevance of non-governmental groups and bodies which can be regarded as the agents of a new world law which is no longer linked to states as the masters of international law. The same is valid for the cooperation of public or quasi-public regulatory agencies (standardization, regulation of financial markets, etc.) which create a common view of „best practices“ whose factual influence on legal practice is so evident that the assumption that these new phenomena are just „non-law“ is no longer plausible<sup>46</sup>. This is again a new form of a transnational (soft) law which, links generation of rules and their application in concrete cases - in fact, these two levels of the implementation of law can no longer be separated in a meaningful way. These examples show that a whole range of different versions of law would have to be accepted.

What has especially to be taken into account is that cooperation, and not just rules in the traditional sense, can allow for the development of stable expectations which is the core function of law. This assumption should not be so surprising if one bears in mind that the classical concept of liberal law was based on a close link between social conventions, a shared common knowledge (experience) and the hypothesis of the unitary and identical reality accessible to a rule-based common understanding. Once the stable character of reality can no longer be presupposed, it should come as no surprise that the character of the law itself underlies a fundamental change in as much as reality itself takes up plural forms. In consequence, the law itself is transformed and has to take up a more cooperative and adaptive character focussing on the growing necessity of the management of change and of learning, instead of adhering to the traditional decision-oriented and state-based character of the law. In my view, this assumption about the rule-like

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<sup>45</sup> Cf. A.M.Slaughter, International Law in a World of Liberal States, in: *European Journal of International Law* 1995, 279ss.

<sup>46</sup> Cf. L.Lindsey, *Idealistische Vision – Über die Zukunft des IWF*, *Wirtschaftswoche* 1998/15, 2/4/98, p.234; for financial markets in general cf. K.Ohmae, *The End of the Nation State. The Rise of Regional Economics*, London 1995.

structure of law is closely linked to the presupposition of a stable knowledge basis: once this stability can no longer be taken for granted, the law itself has to open itself to a plurality of distinct versions of reality and to the requirements of a proactive model building of an experimental society.

Law as conceived of in a heterarchical systemic way, self-generating itself from the connectivity of its operations and the differentiated networks of relationships, could accept a variety of legal forms and stimulate self regulation which would, of course, not exclude state intervention - on the contrary, it would opt for the non-hierarchical conception of law which sets up exclusive links between law and the state.

*B. Law beyond the State: the Examples of the New Law Merchant, the Supranational Character of European Law, and the Rise of WTO Law*

A systems theory of law could treat the new law merchant (*lex mercatoria*) on an equal footing with state-centred law. The long term perspective of organized actors on the one hand, and the growing complexity of their inter-relationships which are due to the constraints of decision-making under conditions of uncertainty on the other, could explain why the contractual practice may have a self-organizing effect, allowing for a rise of new elements of 'bindingness' generated from relational long term contracts in a stricter sense and relational elements of contracts which demonstrate that, in many cases, they are no longer only the contracts of the parties themselves but have to integrate institutional elements, thus guaranteeing in a systematic way the inclusion of third party-interests or of the rapid devaluation of experience and the conception of negligence linked to it ( e.g.post-market control and warning duties in product liability cases). In this sense, state-based law has to observe and support the pattern-generating potential of legal practice which can no longer be controlled merely on the basis of stable universal rules.

This approach could also explain and accept the self-organized character of the new European law by the European Court of Justice, on the basis of

practical necessities of implementing European law and the lack of openness of Member States' law which denies it the necessary 'effet utile'<sup>47</sup>. This is an effect which goes beyond a reactive concept of the implementation and enforcement of European law in the traditional sense because it refers to the proactive role of the 'infrastructure' of Member State law which is used for the process of putting European law into practice. The problem comes to the fore when citizens invoke the protection of legitimate expectations granted by the general administrative law of a Member State against the revocation of a subsidy which is taken to be incompatible with European law.

In such cases, the ECJ refers in such cases to the cooperation principle in Art. 5 (TEU) as the adequate basis for the obligation of the Member State to give European law as much efficiency as possible. This is a new practice of a kind of "bottom up" effect of integration of Member State and supranational law. Member States are not only obliged to "apply" EC-law but also to open their legal structure to different forms of consideration of effect and influences exercised on other Member States and the European Community as such. At the same time, the exclusive focus of "public interest" as a frame of reference for the interpretation of administrative law on the state is set aside ( e.g. both private and public interest in decisions on the conservation of illegal administrative acts has to be balanced).

The same evolution may be brought about at international level and may lead to the direct applicability of the WTO rules both on European level and in the Member States. At this point, an important difference may come to the fore between an evolutionary point of view which would refer this development to a process of self-organization generated (primarily) within transnational practical interrelationships , on the one hand, and a „deductive“ approach, on the other, which constructs direct applicability of WTO rules „logically“ („automatisch“) as the external consequence of the internal constitutional principles of the „Privatrechtsgesellschaft“ on the national level, on the other.<sup>48</sup> The complex relationship between WTO rules and

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<sup>47</sup> Cf. Schoch, Ladeur, supra, note 21.

<sup>48</sup> Cf. J.Drexl, Unmittelbare Anwendbarkeit des WTO-Rechts in der globalen Privatrechtsgesellschaft, FS Fikentscher, Tübingen 1998, p.822, 843; cf. generally U. Everling, Will Europe slip over Bananas? The Bananas Judgment of the Court of Justice and National

European as well as Member States law is only accessible to a more elaborate network-based theoretical and doctrinal approach which no longer regards the practice of legal actors as clearly separated from legal order itself. Post-modern law cannot work on the assumption that „the law“ and its „application“ in concrete situations are logically different in the sense that practice does not have direct repercussions on the law „as such“: it has to accept that there is a continuous process of evolution in which both are interwoven and have to be „managed“ in cooperation with different private and public actors. Unfortunately, the European Court of Justice, which has, in this respect, been most creative with reference to the relationship between European law and Member State law (direct applicability/opening of national administrative law for the purposes of „effective“ implementation of EC law beyond the explicit obligations of harmonization), has shown itself to be reluctant to go one step further and accept the same openness of the European law for the integration of the WTO/GATT rules<sup>49</sup> that it has imposed on national law with reference to EC law.

The practice of the Appellate Body of the WTO dispute settlement gives in return a new example of a cooperative understanding of the „triangular“ dynamic inter-relationships between the legal order of the WTO, the EC and Member States<sup>50</sup> - of a new „overlapping network“ which can only be understood as the outcome of the increasing integration of international trade and the public-private partnership which is required for the set-up of „different ‚principles of managing interdependence‘ that would influence the techniques of co-operation“ (such as harmonization, reciprocity, and interface – to name but a few)<sup>51</sup>. If one tries to understand this development, one has to bear in mind that private law, in particular, has the potential of generating new patterns of coordination which fit into the decentralized legal order of the „Privatrechtsgesellschaft“. This development will have major repercussions

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Courts, in: Common Market Law Review 1996, 401ss.; Th.Cottier, Dispute Settlement in the World Trade Organization: Characteristics and Structural Implications for the European Union,

in: Common Market Law Review 1998, 325ss.

<sup>49</sup> Cf. ECR 1994 I-4973; Everling, loc. cit.

<sup>50</sup> Cf. Report of the Appellate Body of. 16 Jan. 1998 (WT/DS26/AB/R, WT/DS48/AB/R).

<sup>51</sup> Cf. F.H.Jackson, Global Economics and International Economic Law, in: Journal of International Economic Law 1998, 1, 21.



on public law as well, once the dynamic of self-organizational processes in society accelerates and puts the stable hierarchical conception of law under pressure. This is all the more so at international level because the hitherto closed unit of the sovereign State is in a process of „disaggregation“<sup>52</sup> which leads to the necessity of opening State-based law by mutual adaptation and coordination. One of the mechanisms for the solution of the subsequent „management“ problems consists in the search for a new type of transnational general administrative law which has to create the concrete legal infrastructure for the implementation of international law in a way which is sensitive to the difficulties in establishing procedures for decisions on complex cases (to be taken on the basis of insufficient knowledge, for instance, in the hormones case decided by the Appellate Body): new rules of discretion of States in matters of transnational relationships have to be generated and tested in an experimental way. For the time being, one cannot start from the assumption that this is just „law“ in a traditional way. However, the decisions of the Appellate Body create „legitimate expectations“, and this is just the basis for the creation of „bindingness“ in the legal order. New coordination problems arise when international standards have to be integrated in national, supra-national and international law.

Within the European Community a new conflict has arisen in recent years, which creates yet another form of conflict within the overlapping network of national and supra-national laws: it is the conflict between national constitutional law and European law. As the EC is not a State it derives – according to traditional assumptions – its legitimacy exclusively from the Treaty and the consent of Member States. The question has been raised as to whether the ECJ can decide on the interpretation of the limits of competences of the EC with binding force for Member State courts (constitutional courts, in particular) or whether a new form of resolving conflicts within „overlapping and interacting“<sup>53</sup> heterarchical networks of different legal

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<sup>52</sup> Cf. A.M.Slaughter/A.S.Tulumello/S.Wood, International Law and International Relations

Theory: A New Generation of Interdisciplinary Theory, in: American Journal of International Law 1998, 367, 383.

<sup>53</sup> Cf. N.McCormick, Risking Constitutional Collision in Europe, in: Oxford Journal of Legal

Studies 1998, 517, 530, who assumes - with good reasons – a duty of the ECJ “not to reach its

orders has to found. The question shall not be answered here; it should only be stressed that this is in my view a case for a theoretical approach to law which takes seriously the interrelationships within an evolving legal „network of networks“. Such an approach has to search for new methods and doctrines beyond the established approaches which rely on stable separation between facts and norms, and different hierarchical levels.

### *C. From Experience-based Law towards Cooperative Law for the Management of Uncertainty*

These remarks try to stress the challenges of uncertainty - of new problems which cannot be referred to stable rules, consensus, common knowledge and experience. I will not dismiss any possibility of linking legal decision-making to moral-argumentation in Alexy's terms, but as a privileged frame of reference it would not help us to find solutions for post-modernity's complex cases of decision-making under conditions of uncertainty. Post-modern law is characterized by a devaluation of established rules, values, common knowledge and experience, which is also why morality based on universal rules is undergoing a deep process of change. It is not by chance that discourse ethics itself as a reflexive theory of morality deriving value decisions from cognitive argumentation has replaced reference to universal moral rules. But this procedural approach cannot do justice to the necessity of finding new meta-rules and methods for the generation of knowledge in processes of decision-making under conditions of complexity. Such a knowledge cannot be derived from discursive reflections detached from the practice which generates new knowledge. The new type of partial information linked to a conception of bounded rationality - i.e. for the self-construction of an experimental society - is only to a very limited extent accessible to ethical reflections from outside. At this point, it could be helpful to use the distinctions on which the systemic rationalities operate in order to

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interpretative judgements without regard to their potential impact on national constitutions”; for

a more “radical” approach which favours the right to resistance by Member States, see D.Rossa

Phelan, *Revolt or Revolution: The Constitutional Boundaries of the European Community*,  
Dublin 1997.

allow for a type of self-observation of the law, its memory and the patterns it uses successfully, its deadlocks, and to find a way towards more openness to modes of coupling with the social production of coordination, as opposed to a state-based concept of law.

This could help us to find a functional equivalent for the productive links between social conventions and the law of the past in the new forms of cooperation between state centred components of the law and self-organized ways of coordination among private enterprises. This approach could also be helpful in the reform of constitutional and administrative law in the sense of introducing more sensitivity towards the necessity to design procedures for decision-making under conditions of uncertainty. This means that the state should be constrained to take into consideration the necessity to produce knowledge, to take decisions on a basis of partial information and, as compensation, to set up new forms of self-observation and self-evaluation of decisions implying an element of modelling and design of the future. This is especially valid for decisions taken in planning, environmental law and communications law. All these decisions have to be taken, not on the basis of a common experience, but of scientific models, assumptions, calculations of probabilities and other elements of more or less theoretical knowledge which are not open to the general public. In the past, technological evolution followed rather stable trajectories and was used in a decentralized structure of enterprises which evolved in trial and error processes, whereas nowadays, and even more so in the future, technical developments have to be designed by large corporate actors and are no longer based on spontaneously generated experience which allows for the separation of a stable component of common knowledge which is exempt from change and the continuous process of variation to be attributed to individual actors. State-based law could also play an active role in observing the viability of patterns generated in the process of self-organization.

The new type of knowledge to be used in complex technological processes is somewhat linked to the modeling of complex networks of inter-relationships whose creative character no longer allows for the separation of a common core of stable rules of experience and individual acts of new information which are open for private appropriation and exclusive use in private enterprises. The traditional legal system and its rules (including

methods) are based on an outdated model of economic order linked to the use of mainly material resources. This is also the frame of reference for the conception of rights as exclusionary assets. The new knowledge economy<sup>54</sup> is, instead, linked to knowledge which is integrated into collective processes of research and distributed over networks of productive inter-relationships. The type of rights which is adapted to this collective and shared knowledge is rather „fuzzy“ and dependent on agreements. Much of the knowledge has the character of a collective good and has even to be produced and guaranteed by public bodies or hybrid private and public-private joint ventures, and does not allow for „rights“ which attribute exclusive disposition. A systems' theoretical conception of law could be used to design an open legal structure which could integrate flexible institutional elements of order into the process of the generation of knowledge which has to adapt to the requirements of a productive self-organized evolution of technological and economic self-transformation of society.

## 1. Conclusions

To summarize and focus on the crucial elements of systems theory or theory of autopoietic law I would underline the heterological, poly-contextural relational search-oriented character of post-modern law as opposed to conceptions of a stable universalistic Rationality based on assumptions about possible consensus and argumentative self-reflection of participants of a discourse which is supposed to overcome their involvement in practical interests. Practical interaction of enterprises no longer follows repetitive patterns, but asks for new network-like and adaptive forms of law. Systems theory is an answer to this challenge.

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<sup>54</sup> Cf. Shapiro/Varian, *supra*, note 43.

