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Chapter 2

Dealing with Paradoxes of Law: Derrida, Luhmann, Wiethölter

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> 'grandiosity of law in the ruins'
> *Duncan Kennedy on Rudolf Wiethölter*[1]

I.   CONFLICTS OF LAWS UNDER SUSPICION OF PARADOX

Twenty-five years ago, when the great paradoxologists of our times were still engaged in quite different things – Jacques Derrida was doing grammatological exercises and Niklas Luhmann was steadily reducing complexity – Rudolf Wiethölter already had that disquieting phenomenon, the paradox of law, in his sights.[2] When in 1977 he wrote a *punctatio* in the *Festschrift* for his academic teacher Gerhard Kegel, which consisted of a list of reference points for and against Kegel's concept of conflict of laws, it was still a nagging suspicion. Could it be that, instead of the social theory Wiethölter was passionately seeking *about* conflicts of laws, there was only a grandiose paradox *behind* them? In 2002, in a *punctatio* for his academic disciples – *punctatio* now signifying both a non-binding, pre-contractual commitment and a medieval practice deriving from the Orient, of interpreting the future from points distributed randomly in the sand – his suspicion had turned into certainty. After discussing various critical, deconstructive and systems approaches, Wiethölter describes the primary task of the jurist with the riddling formula: '"administration of justice" as administration of law's paradox itself, its maintenance and its treatment at the same time'.[3] Herein, there has been an antonym substitution: no longer is identity-creating social theory the counter-concept to the concept of conflicts of laws, but a confusion-creating paradox of law.[4] In this article, I wish to consider the consequences of this substitution of opposite concepts,

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[1] D Kennedy, Comment on Rudolf Wiethölter, 'Materialization and Proceduralization in Modern Law' and 'Proceduralization of the Category of Law' in Joerges and Trubek (eds), *Critical Legal Thought: An American-German Debate* (Baden-Baden, Nomos Verlagsgesellschaft, 1989), 516. The following texts by Wiethölter are available in English: R Wiethölter, Materialization and Proceduralization in Modern Law, in G Teubner (ed), *Dilemmas of Law in the Welfare State* (Berlin, Walter de Gruyter, 1985), 221-249; R Wiethölter, Social Science Models in Economic Law, in Daintith and Teubner (eds), *Contract and Organization: Legal Analysis in the Light of Economic and Social Theory* (Berlin, Walter de Gruyter, 1986), 52-67; R Wiethölter, Proceduralization of the Category of Law, in Joerges and Trubek (eds), *ibid*, 501-510.

[2] R Wiethölter, 'Begriffs-oder Interessenjurisprudenz – Falsche Fronten im IPR und Wirtschaftsverfassungsrecht: Bemerkungen zur selbstgerechten Kollisionsnorm', *Festschrift für Gerhard Kegel* (Frankfurt, 1977), 213-263.

[3] R Wiethölter, 'Recht-Fertigungen eines Gesellschafts-Rechts', in Joerges and Teubner (eds), *Rechtsverfassungsrecht. Recht-Fertigung zwischen Privatrechtsdogmatik und Gesellschaftstheorie* (Baden-Baden, 2003), 19.

[4] The fact that antonym substitution has to do with a relevant social process and not with a mere fallacy of thinking is stressed by Holmes, 'Poesie der Indifferenz', in Baecker *et al* (eds), *Theorie als Passion* (Frankfurt, 1987), 15-45, 25ff 28.

which capture an important line of the searching and learning processes in legal theory over the last 25 years.

Detaching the specific mode of thought in conflict of laws from private international law and making it serve other areas of law, in particular a social theory of law, was the ambitious project of the Kegel *Festschrift*. The point was no longer merely to theoretically reflect conflicts between national legal systems and to cope with them in practice, but to generalize conflict-of-laws thinking itself so as to yield results for conflicts between complexes of norms, areas of law and legal institutions, and also for those between social systems, indeed even for divergences between competing social theories. The twofold recourse to the historical experience of private international law and to competing social theories managed to establish 'conflicts of laws' as the central category for a legal reconstruction of social contradictions.[5]

With this sort of generalized conflict-of-laws thinking, Wiethölter was able to build upon the classics of social theory, drawing selectively on ideas in Hegel's dialectic of negation, Marx's real social contradictions, Weber's polytheism and Simmel's productivity of conflict. Social contradictions as the driver of social dynamics was the guiding theme. But in Wiethölter's thinking, social contradictions appeared not as such, but in a specifically legal metamorphosis. In a complicated process of translation, social contradictions were transformed into conflicts of legal norms. Various social dynamics of conflict were narrowed into the constraint to take a legal decision, requiring venues, procedures and criteria. The concepts of sociology of conflict were replaced by a conflict-of-laws doctrine (comity, characterisation, assimilation, reference, *renvoi, ordre public,* internal and external consistency). Wiethölter built up towering hierarchies of norms, dovetailing norms of conflict and substantive norms, in turn vaulted over by still higher conflict norms and substantive norms. His was a continuing search for ultimate justifications, supreme norms, supreme courts. The 'self-justifying substantive norm' criticized by Kegel was outdone twice over, first by characterizing the 'self-justifying of conflict of laws' created by Kegel himself, and then in a critique of Kegel through a 'self-justifying meta-system law'.[6] But the secret judge of the whole conflict-of-laws affair was to be social theory, which was in turn searching for super-theory guidance in order to resolve the conflict of differing approaches.[7]

An exemplary illustration of this conflict-of-laws style of thought can be found in Wiethölter's critique of the dual formula of subjective rights and legal institutions. Here, Ludwig Raiser had formulated the famous conciliatory formula, 'The private actor as administrator of the overall legal system', which postulates that the exercise of the subjective has to be seen as being oriented toward institutions. Law's protection of individual rights always and already serves the protection of important social and legal institutions. The formula was, provisionally, the latest and most important outcome of a long debate between various dualisms of private/public, subjective rights/objective law, entitlements/infrastructures, contract/organization, and individual/institution, and had become

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[5] By generalizing conflict-of-laws, Wiethölter literally made a school: R Walz, *Steuergerechtigkeit und Rechtsanwendung: Grundlinien einer relativ autonomen Steuerrechtsdogmatik* (Heidelberg 1980), 199 ff; C Joerges, *Verbraucherschutz als Rechtsproblem: Eine Untersuchung zum Stand der Theorie und zu den Entwicklungsperspektiven des Verbraucherrechts* (Heidelberg, 1981), 123 ff; C Joerges, Freiheitsrechte und politische Rechte im Privatrecht Europas: Überlegungen zu einer Konstitutionalisierung des europäischen Rechtsänderungsrechts, in C Joerges and G Teubner (eds), *Rechtsverfassungsrecht: Recht-Fertigungen zwischen Sozialtheorie und Privatrechtsdogmatik* (Baden-Baden 2003), 183-212; G Teubner, *Law As an Autopoietic System* (London, Blackwell, 1993), ch 6; G Teubner, 'Altera Pars Audiatur: Law in the Collision of Discourses', in R Rawlings, *Law, Society and Economy* (Oxford, Oxford University Press, 1997), 149-176; K Ladeur and H Ridders Konzeption der Meinungs- und Pressefreiheit in der Demokratie (*Kritische Justiz*, 1999), 281 ff; M Amstutz, *Evolutorisches Wirtschaftsrecht: Vorstudien zum Recht und seiner Methode in den Diskurskollisionen der Marktgesellschaft* (2001), 326 ff.

[6] R Wiethölter, above n 2, 246, 248, 256.

[7] R Wiethölter, above n 2, 229.

widely accepted in contemporary doctrine both in private law and public law.[8] For Wiethölter, however, the formula of subjective right and legal institution was by no means the solution, but in fact was the problem in the first place. It could be taken as neither a substantive nor a conflict rule; it was itself the conflict. And in 1977, the all-too-clear tendency was towards a left-Kegelian 'paradigm shift'. Turning away from the conciliatory formula, Wiethölter advocated a 'politicization of private law' in the form of a 'transformation from *contractual constitutional law*, ie, classical "private law", into *organizational constitutional law*, ie, "modern" non-private law',[9] in which the common good resulted, not from an institution-oriented exercise of subjective rights by private actors, but from political conflicts within legally constituted social organizations.

II. CHANGING THE MODE OF THOUGHT: FROM CONFLICTS TO PARADOXES

Yet, even in 1977, nagging doubts were already visible, which later took on increasing solidity. Scarcely had Wiethölter developed his own formula of a 'self-justifying meta-system of law' than he was already bringing it under suspicion of paradox. He himself let the mutual outbidding of conflicting and substantive norms run aground on the Münchhausen trilemma of norm justification: infinite regress, arbitrary rupture, or circularity.[10] The ultimate salvation was then 'social practice', in which the hierarchical levels of conflict rules and substantive rules were blurred.[11] Behind it all, though, it became increasingly clear that what in the foreground is called conflicts of laws means paradoxes of law in the background. Conflicts of laws are nothing but epiphenomena of legal paradoxes. Ultimately, it is the antonym substitution already mentioned that is happening here: the pair of opposites, identity/difference, which appears in the relationship between identity-creating, theory-led decisions and difference-creating conflicts of norms, is converted into the pair of opposites, paradox/difference.

The shift becomes clear in exemplary fashion from the way Wiethölter is today reformulating the rights-versus-institution issue. First, the tendency to resolve conflict one-sidedly by politicizing it using social theory is (implicitly) withdrawn, in its transformation from contractual constitution to organizational constitution. The conflict itself is then interpreted as an expression of an underlying paradox, a problem that cannot be got at with decisions on the basis of venues, criteria or procedures:

> It is not surprising that our legal semantics of 'protection of rights' (with guaranteed subjective rights to the fore) and 'protection of institutions' (with temporal, substantive and social infrastructural guarantees to the fore) does not do either 'good' or 'justice' to the contemporary requirements of the timeless paradox of law (in brief, a law of conflict-of-laws within the law, deciding on the conflict between law and non-law).[12]

These are no mere semantic adaptations to fashionable paradoxologies, but well thought-out, dense formulations expressing, word for word, the structural differences between

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[8] L Raiser, 'Rechtsschutz und Institutionenschutz im Privatrecht', in *Summum ius summa iniuria* (Tübingen 1963), 145-167.

[9] R Wiethölter, above n 2, 260.

[10] R Wiethölter, above n 2, 216; R Wiethölter, Zum Fortbildungsrecht der (richterlichen) Rechtsfortbildung: Fragen eines lesenden Recht-Fertigungslehrers, *Kritische Vierteljahreszeitschrift für Gesetzgebung und Rechtswissenschaft* (1988), 1-28, 1.

[11] R Wiethölter, above n 2, 213.

[12] R Wiethölter, above n 3, 14.

conflict of laws and paradox. This no longer means reference to 'social practice', but a change in thinking. In a schematic listing, this involves:

1. Conflicts of laws are contradictions between different claims of validity: either A or not-A; law or non-law; one norm or the other; one social model or the other. Paradoxes can, of course, emerge as contradictions, but they have a more complicated structure due to their self-referentiality or to their 'self-justification'[13]: A because not-A and not-A because A; (legally) right because wrong, and wrong because right. Is the Cretan lying when he says, referring to himself, that he is lying? Is law itself just, ie, is it (legally) right/wrong to judge conflicts as right/wrong?

2. There follow differences in the consequences. Conflicts can be resolved by deciding between alternatives, or they allow for a compromise. Both ways are barred in the case of paradoxes. One cannot through decision avoid the oscillation between their poles, since each decision sets the self-referential circle off again. The situation is one of undecidability in principle. The result of paradox is paralysis.[14] This is the reason that paradoxes are ordinarily either ridiculed or tabooed.[15]

3. Conflicts require criteria, venues, procedures in order for a decision to be possible. Paradoxes cannot be got round that way. There is no *via regis* towards a 'solution' for them, at most a *via indirecta*. It is not the decision of the conflict that they call in question, but the very conflict itself. At least one has to leave the beaten track. That is what makes dealing with paradoxes so hard, and the comparison of Wiethölter with Derrida and Luhmann rewarding.

But why such fascination with paradoxes in particular? Why is a conflict-of-laws theory – which, after all, openly expresses a preference for the theory of rational discourse – interested in systems theory and deconstruction, which are obsessively engaged in revealing paradoxes? Derrida's thought, after all, amounts, as Habermas might polemically put it were he present, to a 'deconstructive process of the decay of private law': disclosing the ambivalences, uncertainties and paradoxes of law by formal logical operations and genealogical investigations. Is it, he might, present or absent, go on to ask, worth participating in a legal 'twilight of the gods'? And for the internal logic of systems theory, it is a downright absurd idea that at its core it poses paradoxes. This idea means a self-abandonment of its earlier guiding approaches: compatibility of structure and function, possibilities of cybernetic control, dealing with environmental complexity through requisite variety. Nothing is more anti-system than paradoxes. They lead only into contradiction, inconsistency, chaos, paralysis, and horror.

Allowing in these destructive tendencies with a resigned, pessimistic, melancholic undertone perceptible more than occasionally in Wiethölter's analyses of present-day private

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[13] On paradoxes in a philosophical perspective Probst and Kutschera, Paradox, in Ritter/Gründer (eds) *Historisches Wörterbuch der Philosophie* (Basel, Schwabe, 1989), 1-97. On the distinctions between contradictions and paradoxes in a pragmatic perspective, see the classic treatise by P Watzlawick *et al*, *Pragmatics of Human Communication: A Study of Interactional Patterns, Pathologies, and Paradoxes* (New York, WW Norton Books, 1967). On dealing with paradoxes in law, see GP Fletcher, 'Paradoxes in Legal Thought' (1985) 85 *Columbia Law Review* 1263; Suber, *The Paradox of Self-Amendment: A Study of Logic, Law, Omnipotence and Change*, New York 1990 and http://www.earlham.edu/~peters/writing/psa/index.htm. Cf also A Ross, 'On Self-Reference and a Puzzle in Constitutional Law' (1969) 78 *Mind* 1-24; H Hart, 'Self-Referring Laws', in *Essays in Jurisprudence and Philosophy* (Oxford, Oxford University Press, 1983) 170-178.
[14] See Gumbrecht and Pfeiffer, *Paradoxien, Dissonanzen, Zusammenbrüche: Situationen offener Epistemologie* (Frankfurt, Suhrkamp, 1991).
[15] Watzlawick, above n 13.

law, to the tune of 'everything is possible, but nothing works anymore',[16] is tempting. In fact, Wiethölter had already embarked on deconstructing the law before the word 'deconstruct' even existed in Germany: his merciless revelations of ostensible uncertainties in the doctrines of private law, revelations that made him so unpopular in the profession, show this, as do his ruthless disclosure of inconsistencies in legal and social theory.[17] Another deconstructive aspect is Wiethölter's 'legal negativism',[18] his decades of consistent refusal to give specific answers to specific legal questions, be it to 'solve' cases, 'discover' doctrinal constructions or 'decide' disputed questions of legal theory. His stance of refusal illustrates, in its ascetic severity, Derrida's famous aporias of law, in which, with unsparing inevitability, every legal argument leads into a position of suspension, of *epoche*, of undecidability.[19]

Yet this interpretation is probably too facile. For ultimately, it is not their undeniable critical and destructive potential that drives the interest in paradoxes, but it is the productive possibilities of working with them that is really fascinating.[20] Herein lies, as even cultural-theory critics admit, the advance of systems theory over deconstruction in Paul de Man and his epigones. For systems theory sees in 'the paradoxes arising from self-reference not an endpoint, but the starting-point for further evolution. That confers upon this theory, among recent post-metaphysical constructions, a relatively high degree of comprehensiveness'.[21] Not only do worlds of meaning necessarily bring out paradoxes, but paradoxes bring out new worlds of meaning. Not only do conflicts of laws produce inconsistencies, but these produce new conflicts. Paradoxes are not logical errors that have to be extirpated if one is to advance. What role they play today as a ubiquitous and central aspect of social dynamics becomes clear from the following extreme formulation: Paradoxes take the place of the transcendental subject; typical structures are historically contingent phenomena.[22]

Taking the example of human rights, here is how the thought pattern of paradox-driven legal development looks.[23] The paradoxical circular relationship between society and individual (society constituting the individual person, who in turn constitutes society) is, as it were, the a priori that underlies all historically variable human rights concepts. Flesh-and-blood people, communicatively constituted as persons, make themselves disruptively noticeable, despite all their socialization, as non-communicatively constituted individuals/bodies, and agitate for their 'rights'. This tension in the individual/society relationship brings out various socially adequate structures of meaning that are repeatedly deconstructed anew in historical development (schematized in historical phases: the nature of the person in the old natural law, the agreement of the individuals in the social contract, the

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[16] R Wiethölter, 'Zur Argumentation im Recht: Entscheidungsfolgen als Rechtsgründe?' in G Teubner (ed), *Entscheidungsfolgen als Rechtsgründe: Folgenorientiertes Argumentieren in rechtsvergleichender Sicht* (Baden-Baden, 1994) 89-120, 100.

[17] Since Wiethölter, *Rechtswissenschaft* (Frankfurt, 1968).

[18] Explicitly, Wiethölter, Recht und Politik: Bemerkungen zu Peter Schwerdtners Kritik, *Zeitschrift für Rechtspolitik* (1969), 155, 158.

[19] J Derrida, 'Force of Law: The Mystical Foundation of Authority', 5-6 *Cardozo Law Review* (1990) 919-1046, 959ff

[20] K Krippendorff, 'Paradox and Information', in Dervin and Voigt, *Progress in Communication Sciences* (Volume 5, Norwood, NJ.: Ablex, 1984) 46-71, 51; N Luhmann, 'Sthenography', 7 *Stanford Law Review* (1990) 133-137, 135ff; Watzlawick, above n 13, at ch 7.

[21] A Koschorke, 'Die Grenzen des Systems und die Rhetorik der Systemtheorie' in Koschorke and Vismann (eds), *Widerstände der Systemtheorie: Kulturtheoretische Analysen zum Werk von Niklas Luhmann* (Berlin 1999) 49-60, 56.

[22] The whole quotation reads: 'Paradoxes are the only form in which knowledge is given *unconditionally*. They take the place of the transcendental subject, to which Kant and his successors had attributed direct access to unconditioned, *a priori* valid knowledge, discernible of itself. .... This by no means rules out the possibility of asking after typical structures in which the unfoldings of paradoxes take on relatively stable forms that stand the test of history ..'. N Luhmann, *Die Religion der Gesellschaft* (Frankfurt, Suhrkamp, 2000) 132f.

[23] N Luhmann, 'Das Paradox der Menschenrechte und drei Formen seiner Entfaltung', in Luhmann, *Soziologische Aufklärung 6: Die Soziologie und der Mensch* (Opladen 1995) 229-236.

entry of persons endowed with natural rights into the state of civilization, the a priori validity of subjective rights, the political positivization of individual fundamental rights, the scandalization of human rights breaches in world society). Could, then, the reason for the obsessive interest be that, specifically, paradoxes – and no longer social contradictions or clashes of rationality – constitute the mover of legal development? And could the reason for Wiethölter's puzzling formula – that the administration of justice is not simply the ruling out of legal paradox for the sake of legal order but its 'maintenance and treatment' – lie here?

In a comparison with the contradiction-driven dynamics in classical social theory, the specific features of a paradox-driven dynamics emerge. The interplay of de-paradoxification-re-paradoxification is anything but a cumulative sequence of negations, a 'transcending' of contradiction, a progress of the spirit.[24] It is more a case of the return of the same, a continual oscillation between paradox and structure, a dialectic without synthesis. The ebb and flow between paradox and difference show an experimenting, incremental, exploratory production of orders that have to stumble over contingencies. And worlds of meaning are continually afflicted by their deconstruction, which repeatedly lets chaos break back into civilization. By comparison with Marx's 'real contradictions', the paradoxes also present themselves as having been turned on their heads, since they do not arise as disturbances in the ideal world of thought but, as 'real paradoxes' in real society, bring the relations into a dance. However, by contrast with them, no logic of decay through the primary and secondary contradictions of the social order that would then enable the revolutionary Big Bang is implied. Real paradoxes are highly ambivalent. They contain destructive, paralysing potentials, but contain at the same time productive, creative possibilities. The alternative is open: paralysis, or provocation of structural innovations? It is not some sort of determinism that prevails, but sheer contingency. The catastrophe, or the productive new order that is in turn threatened by catastrophe – both are equally likely. This ambivalence gives a plausible explanation for the oft-noted enormous pressure of innovation bearing upon today's societies.

At the same time, the quality of de-paradoxification is also remarkably pathological. It promises no solution of the crisis, but at most its temporary postponement, concealment, invisibilization, suppression, repression.[25] It is only a matter of time before crisis breaks out again. Not by chance does this recall theories of repression with the repeated return of that which is repressed being manifested in symptoms. 'There is something rotten in the state of Denmark' – this is the continuing condition of such societies, even if the temporary de-paradoxification seems to work well. And, in contrast to psychoanalysis, there is no promising therapy. What results from direct confrontation with the paradox is not liberation, but paralysis. Our society lives at best on a rationality of repression.

The question then arises, however, whether the fascination with paradoxes is no more than an intellectual fashion, or instead has something to do with their adequacy to the object. Does the shift from contradiction theories to paradoxologies reflect the experiences of the twentieth century with totalitarianisms, two world wars, ecological and psychic catastrophes in the midst of high civilization? Does it offer a plausible interpretive model for the experience that even the advanced rationality patterns of economics, politics and the law are exposed to the incursions of arbitrariness, irrationality, indeed violence, in their most everyday accomplishments? And not even from outside, but from their inmost *arcana*? Does it at the same time provide a plausible interpretive model for the dominance of a cognitive style that appears no longer as the great political project, but as groping experimentation in conditions of radical uncertainty? The following argument from Jean Clam may make the current search for non-teleological strategies of de-paradoxification plausible:

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[24] On the relation between Luhmann and Hegel, cf N Luhmann, *Social Systems* (Stanford, Stanford University Press, 1995) ch 9 I.

[25] See the articles in the collected vol Gumbrecht and Pfeiffer (eds), above n 14.

The problem of the teleological form of de-paradoxification is that it sets going a dynamics of radical denial of paradox (as an evil to rid the world of). Modern experience with this dynamics has shown that the more hopeful the impetus to attain or constrain the *telos*, in other words, the more thorough the destruction of the foundations of the paradox was, the stormier and more damaging was the return of the denied. De-paradoxification through utopian teleologies is close to treating original paradoxes as if they were not non-transcendable and system-generating, but reconcilable and overcomable. This then justifies shifting the certainty of reconciliation along the time dimension, which for the purpose receives a macrohistorical format. Trust in the possibility of transcending the paradox, combined with postponement of its confirmation to the distant future, protects blind rage at the paradox from possibilities of learning from failures.

III. LUHMANN: SOCIOLOGIZING DECONSTRUCTION

This pushes the question of dealing with paradoxes into the foreground. However much systems theory and deconstruction analyse the syntax of paradoxes, or rewrite their semantics as a combination of textuality and society, the real question is their pragmatics.[26] Here it is no doubt Luhmann who sets the tone, against merely destructive paradoxology, against a resigned, provocative presentation of the inconsistencies, against a restriction to legal negativism:

It could well be that our society is the outcome of a structural and semantical *catastrophe* in the sense meant by René Thom – that is, the result of a fundamental change in the form of stability that gives meaning to states and events. If this is so, the deconstruction of our metaphysical tradition is indeed something that *we* can do *now*. But if so, it would be worthwhile to choose the instruments of deconstruction with sufficient care so that by using them we could gain some information about our postmetaphysical, postontological, postconventional, postmodern – that is, *postcatastrophical* condition.[27]

‘By their fruits shall ye know them’. What insights into post-catastrophe conditions of law are supplied by Wiethölter's conflict-of-laws thinking by his comparison with systems-theory of law and with legal deconstructivism? What standards of ‘sufficient care’ are to be respected in choosing instruments of deconstruction that claim to provide a gain in information for today's law? In his careful dealing with paradoxes, Wiethölter first follows in Luhmann's footsteps, in order then at particular crossroads to pursue search interests that are decidedly his own.

First step – paradoxification: From the outset, the second-order observer who discloses the paradoxes must choose his instruments with sufficient care. If it is supposed to be more than an informationless deconstruction of symbols, it can find out something about the sociological and historical meaning of illusions. Why does the legal system need illusions, and which ones? Luhmann shows this for the illusion of the binary legal code, which is exposed to the paradoxes of its own self-reference. Behind the distinction between (legal) right and wrong, he finds both the foundational paradox of law and the decisional paradoxes of daily legal

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[26] In addition to the references in n 13, see Krippendorff, above n 20; for legal paradoxes, see N Luhmann, *Das Recht der Gesellschaft* (Frankfurt, Suhrkamp, 1993), 545ff. (English translation to appear in Oxford University Press.)

[27] Luhmann, ‘Deconstruction as Second-Order Observing’, 24 *New Literary History* (1993) 763-782, 777 (emphasis in the original text).

practice, and asks after the social meaning of this context of illusion, in which the legal code, despite its manifest artificiality, has remained astonishingly stable, though the forms of de-paradoxification in the programmes of law have steadily changed.[28]

Wiethölter first follows the analysis, but then looks for the central paradox of law elsewhere – not behind the legal right/wrong code, but behind the 'law of conflict of laws between law and non-law'.[29] Now, the point is no longer the empty paradoxes of the legal system's self-reference, the mere self-legitimation problems of the Münchhausen trilemma, but the much more substantial paradoxes of the law's other-reference, the question of the law's reference to the world. By disclosing the paradox of law, Wiethölter already raises the normative question of whether and how the law does justice to the world.

Second step – de-paradoxification: Since every, absolutely every, distinction can be paradoxified, with the result of paralysing thought and decision, it becomes a truly productive outcome of paradox that it provokes the counter-forces of de-paradoxification. According to Luhmann, the law arrives at autopoietic system formation at all, first, by converting the dangerous paradox into a harmless difference, by misunderstanding the endless oscillation between (legally) right and wrong as a conditionable contradiction, indeed, by technicalizing the paradox into a programmable binary code.[30]

Wiethölter follows the argument with polite interest. *Mit brennender Sorge* however he asks the question of how the paradoxes of the law's reference to the world can be transformed into decidable conflicts of norms. This seems to offer a more productive deployment of the paradox, since the direction of search goes not just to the conditions enabling the self-reproduction of legal practice but to 'worldly' venues, procedures and criteria for deciding the conflict. Not only: the form of the conflict itself changes with changing social conditions of de-paradoxification. Hence, Wiethölter's eloquent silence on the question of naming the entities in conflict – what is clashing? Norms, principles, social models, theories, rationalities?

Third step – sociologizing the paradox: Here, the point is choosing the observer who carries out the de-paradoxification. Luhmann chooses social communication and not individual decisions. Consistently sociologizing deconstruction makes for the great difference to Derrida. Stressed by the ambivalences, uncertainties, and breakdowns, social systems each find their specific new distinctions that can for a certain time keep them stable. Wiethölter instead selects a more awkward observer's viewpoint. At first, as he sets his sights on the 'law of conflict-of-laws within the law, deciding on the conflict between law and non-law', he seems to choose the legal system as observer, internalizing the opposition of law and society in a re-entry. It is here that the translation of social contradictions into decidable conflicts of norms comes about. But then comes the typical Wiethölter sleight of hand, referring to a trinitary body as observer of this re-entry, namely the magic triangle of the great social theories: critical theory, autopoiesis theory, and economic institutionalism. Here is the difference between Wiethölter's normativism and Luhmann's cognitivism, for which sociology ought to confine itself to noting the conflict-of-laws decisions. For in the translation of legal conflicts of norms into social theory, Wiethölter scents the great opportunity to gain normative criteria.

But this is not enough. Wiethölter avoids deciding the dispute among rival social theories. Despite personal sympathies for Habermas's discourse theory, he scrupulously keeps all three at equal distance, shunning any too intimate contact with them like the devil dodging holy water. Not that this reduces to non-binding theoretical relativism. Nor is any claim raised

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[28] Luhmann, above n 26, 165ff.
[29] Wiethölter, above n 3, 14.
[30] Luhmann, above n 26, 165ff.

to a super-theory, but only to marking out a puzzling void in the Bermuda Triangle of social theories, to creating a neutral area within the bounds of which the suspension of the rival theories' validity claims is the condition for putting the law on trial. Wiethölter sets his hopes on mutual irritation, indeed, on the chances for reciprocal learning by the rival theories involved, yet without identifying this meta-process with the rationality of discourse, of systems or of the market. This is presumably how his breathless to-and-fro translations of conflicts of laws into the language of discourse theory, of systems theory and of economic institutionalism are to be understood. In the process of translation they are to yield normative surplus-value. And it is only provisionally, only experimentally, that he recommends drawing the initial distinction at critical theory, in order in its light to join up with the other theories as subsequent distinctions. But he continually stresses the provisional nature of this decision, as he sees the theories' relation to each other as being to mutually illuminate their weak points.[31]

Fourth step – return of the paradox and its renewed concealment. Social catastrophes come about, according to Luhmann, in the correlations between social structure and semantics, when the change in social structures ruins the semantics. Today's problems are determined by the fact that the fundamental structural change of functional differentiation has destroyed the old European semantics without residue, and that even the most hectic postmodern *polysémies* can be understood only as a restless search for socially adequate self-descriptions. Here, a historical rhythm of continually repeated destruction and reconstruction is beating: paradoxifications provoke the search for new socially adequate distinctions, which, in turn, under particular conditions, are thrown back onto their paradoxes again. But what conditions determine the recursive revelation and concealment of paradox? Systems theory identifies two: pressure of social problems, and communicative plausibility. Under the pressure of social problems, new differences, in turn deconstructable, are accepted by social communication if they are plausible, ie, compatible within the net of other valid distinctions. Under different circumstances, if the pressure of social problems speaks for their maintenance, and their social plausibility is high, their ever-possible re-paradoxification is effectively ruled out.[32]

Wiethölter himself has always been on this sort of 'relativist' search for contemporary and socially adequate de-paradoxification as entirely suitable. Yet, he cannot content himself with a 'cool' systems-theory analysis that merely notes pressure from social problems and records plausibilities. Behind problem pressure and plausibility, he energetically seeks their conditions, which in ever-new coinages he terms 'surplus-value of law', 'factor X' of judicial activism, or 'non-law as law'.[33] Plausibilities are not simply to be noted, but provocatively to be doubted. And the point is not dispassionate observation, but active commitment in enhancing social problem pressure. This political loosening of socially crystallized structures seems to me to be the real message of his misleading formula of 'political theory of law', in contradistinction to a non-political social theory of law. Here, Wiethölter seems to be coming close to recent deconstructivist versions of systems theory, according to which struggling with paradoxes is in all social systems (not just in institutionalized politics) has to be seen as genuinely political.[34] The 'political' thus appears outside the political system, as decision in a context of undecidability: as the resolution of breakdowns of meaning into antagonistic arrangements, enciphered à la Wiethölter as dissolution of the paradox of law into conflicts between law and non-law.

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[31] Wiethölter, above n 10, 25ff.
[32] Luhmann, above n 26.
[33] Wiethölter, above n 10, 1.
[34] U Stäheli, *Sinnzusammenbrüche: Eine dekonstruktive Lektüre von Niklas Luhmanns Systemtheorie* (Weilerswist, Velbrück Verlag, 2000).

The acceptable element about systems theory is, then, to Wiethölter, the fundamental challenge from real paradoxes that inevitably recurs in structural change and calls for the construction of new social identities. Equally acceptable are the 'relativist' criteria of the topicality, material appropriateness and social adequacy of the new identities, which are thus compatible with other social distinctions and respond to the pressure of social problems. There has to be criticism, though, of the remarkable lacuna in the architecture of systems theory, which, while setting up an impressive hierarchy of levels of reflection, ultimately fails to close it off. At the first level, basic self-reference operates (self-reference of elementary events): one legal act is referring to the next legal act, and reflexively to itself. At a second level comes reflexivity of processes: legal norming is itself normed (constitution, procedural law, secondary norms). At a third level, reflection operates first as self-referential reflection in the norm theories and validity theories of law, and secondly as reflection of system-environment relations. Here, legal theory appears as social theory, as legal theories of the person and the individual, and as ecological legal theory.[35] Thus, all the boundaries of law are reflected in legal theory – except one. What is excluded from the reflection of law is the boundaries of the meaning of law itself, the questions not as to the meaningless, nor as to the negation of meaning which is in turn meaning, but those beyond meaning. While Luhmann asks about the law's justice to its environment, he does not ask about its justice to the world. According to Luhmann's system of law, the law does possess a contingency formula in the concept of justice, but not a transcendence formula. And this is what Wiethölter is looking for.

Systems theory needs to be criticized for the exclusive site it reserves for the reflection of transcendence. According to Luhmann, in traditional society transcendence was reflected at various loci in that society. The dimension of the religious was present everywhere, in law too (natural law and justice having had religious connotations as a matter of course). But then secularization is supposed to be a de-transcendentalization of all social subsystems and a concentration on transcendence in only one system of meaning, that of religion.[36] But is this not at variance with the tough resistance to secularization of social utopias (socialism, fascism, neo-liberal doctrines of salvation), palpable even, and especially, in the highly rationalized subsystems of politics, law, the economy or science? Is there not an otherwise inexplicable manifestation here of salvific doctrines, eschatological hopes, which are expressed not just in pop religion and the occult, but especially within the centres of secularized rationalities? Max Weber's characterization of the diverse social rationalities as a new absolute polytheism attests this for theory, as the ideological wars of the twentieth century, which hardly had much to do with religion as an institution, attest to this for practice. A parallel has to be drawn here to the differentiation of knowledge. While the production of knowledge seems to be concentrated in the knowledge system (universities), in parallel with this, production of knowledge and its reflection comes about in other social subsystems (legal theory, political theory, economic theory). And it remains subsystem-specific reflection even if it is administered at the universities in academic form. The argument against Luhmann's ignoring of justice to the world runs as follows: If the academic world, in the processes of social differentiation, has not managed to monopolize the reflection of the subsystems' relations with their environments, but instead has to leave it to them themselves, how then can religion succeed in monopolizing reflection on the boundaries of meaning? The empirical test would be: At what loci in society are social utopias designed?

It is this transcendence of positivity wherein Jacques Derrida's contribution to the handling of the paradox of law lies. In his more recent analyses, he directs deconstructive thought at social institutions. His main point seems to be to go beyond the mere disruptions of deconstruction and to bring a disquieting awareness of transcendence back into the highly

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[35] Luhmann, above n 26, 496ff.
[36] Luhmann, above n 22, 320ff.

rationalized worlds of the economy, science, politics, and law. His astonishing theses have to do with the paradoxical effects of the 'pure gift' as against the profit-led economy,[37] of 'friendship' as against professionalized politics,[38] of 'forgiveness' as against secularized morality,[39] and of 'justice' as against highly technicized law.[40] All of these are excesses of reference to transcendence, reactivating utopian energies from quite different sources. How far can 'political theory of law' identify itself with this?

IV. DERRIDA: THEOLOGIZING DECONSTRUCTION

Luhmann is certainly doing Derrida wrong when he accuses him of simply getting stuck in the ambivalence of deconstruction, of merely frightening people with his paradoxes, of bringing no insights into the world with his verbal acrobatics.[41] Luhmann is here constructing a false alternative between getting stuck in deconstructive ambivalence and creating systemic *eigenvalues* that does not do justice to Derrida's recent work. For since 'Force of law: the mystical basis of authority', no one other than Derrida has been seeking practical political ways out of the paralysis of deconstruction. To put it somewhat schematically, in deconstructing law, according to Derrida, only the first stage is to reduce the law to paradoxes. In the twofold nature of deconstruction, this means first of all the paradox of decision: there is no determinable meaning of law, but only *'différance'*, continuing transformation and deferment of the meaning of law, and secondly, the paradox of ultimate justification, the founding of law upon arbitrary force. But this does not lead to a paralysis of thought; instead, it is only in these abysses that justice as a problem becomes conceivable at all: 'Justice as the possibility of deconstruction'.[42] In the next stage of deconstructive thought, this leads to a 'journey through the wilderness'. And this is indeed a reference, alienating for today's scientific style, to transcendence, mystic force, encountering the other as in Levinas's philosophy of otherness, challenging modern rationalities from 'pure' justice, gift, friendship, forgiveness. Then, however, comes the third stage, which one would not expect following a deconstruction of law and a reference to transcendence: a 'compromise' of transcendence with immanence. Here, deconstruction goes back into serious, detailed calculation of rules and legal argumentation – but in the light of the unending demands of otherness.
We must, then, see in another way the difference between the systems and deconstructive ways of getting around paradox. It is not that one theory persists in paralysis while the other seeks new *eigenvalues* in de-paradoxification, but that both are looking for different ways out of paradox. A more appropriate label for these directions might be sociologization versus theologization of paradox.[43]

How far will political theory of law go here? Wiethölter likes to cite Adorno: *'Chaos in Ordnung bringen'* [bring chaos into order][44]. Luhmann's de-paradoxification stresses only one side of this double-meaning formula: avoid the sight of paradoxes as far as possible, and oppose the threatening chaos with a new order. Derrida, by contrast, chaoticizes order, by seeking through a critique of the originating force of law to plumb the dark worlds of paradox, but then striving for compromise using the arguments and calculations of legal

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[37] J Derrida, *Given Time* (Chicago, University of Chicago Press, 1992).

[38] J Derrida, trans Collins, *The Politics of Friendship* (London, Verso, 1997).

[39] J Derrida, 'Le siècle et le pardon', *Le monde des débats*, n° 9 Dec 1999, available at http://www.celf.fr/mdderrid.htm.

[40] Derrida, above n 19.

[41] Luhmann, above n 27, 765ff.

[42] Derrida, above n 19, 945.

[43] For an instructive comparison of the theories, see F Barjiji-Kastner, *Ohnmachtssemantiken: Systemtheorie und Dekonstruktion* (Frankfurt, 2002), which also contains a detailed discussion of theological and non-theological transcendence in Derrida's interpretation, with further references.

[44] Wiethölter, above n 16, 107.

practice. Justice, according to Derrida, is not an objective, not a consistency formula, not a contingency formula, but 'invocation, abyss, disruption, experience of contradiction, chaos within the law'. This has thoroughly practical consequences for legal decision: changing the situation as a decision *sub specie aeternitatis*, not just *sub specie societatis*.

However much Wiethölter as a 'poietic non-systemist', as he likes to call himself, may feel attracted by such chaoticizations of legal order, he will still not be able to fraternize with the theologization that Derrida favours. His strictly secular understanding of State and law vis-à-vis religion requires that binding legal criteria be developed in immanence only. Specifically German experience with mysticism and religiosity in the public sphere, with neo-paganism and political theology, is likely what immunizes him against a legal theology renewed in the name of deconstruction – at any rate, in the public institutions of politics and law. What Derrida fairly explicitly accuses Benjamin of, in his puzzling distinction between mystical and mythical force, which in addition is not comprehensible to man[45], is what Wiethölter would likely bring up against Derrida himself with a *Tu quoque*: namely, through recourse to a 'mystical force', possibly promoting complicity with the worst.

The central quotation, 'Deconstruction is justice'[46], perhaps brings together the common features of deconstruction and political theory of law, and their differences. Both agree that deconstructive analysis is anything but mere nihilistic disintegration, that it is looking for not just some sort of *non-foundationalism*, a proof of the impossibility of founding the law, that for all its effort at logical and doctrinal acuteness it is not aimed at a merely analytical dissection or logical critique of law, at an academic, non-binding criticism of concepts, constructs, norms, justice. Both emphatically raise the claim to be looking for the rightness of law,[47] in Derrida's formulation:

> [t]o aspire to something more consequential, to change things, and to intervene
> in an efficient and responsible though always of course, very mediated way, not
> only in the profession but in what one calls the *cité*, the polis and more generally
> the world. Not, doubtless, to change things in the rather naive sense of
> calculated, deliberate and strategically controlled intervention, but in the sense
> of maximum intensification of a transformation in progress that is occurring
> specifically in 'an industrial and hyper-technologized society'.[48]

In parallel, both theories also distinguish themselves cautiously but resolutely from a power critique in the tradition that runs from Marx to Foucault. A critique of law from political economy, revealing the law to be an instrument for maintaining power, is regarded by both as obsolete, as is an obsessive micro-analysis of power. Political economy and micro-analysis of power, while useful, are not essential enough, not complex enough, not close enough to the inwardness of law. Deconstruction, by contrast, means revealing the immanent violence at the core of law itself.[49]

Admittedly, the relation of both to the modern rationality-based critique of law is more doubtful. Both are certainly engaged in disclosing the arbitrary nature of law, and criticizing the lack of legitimacy of positive law. However, both take a rather sceptical stance on Habermas's project to re-found law upon discursive rationality. Derrida is decisive here in his deconstruction of a communicative rationality that is blind to the unavoidable element of violence in the foundational paradox and in the decisional paradox of everyday law. The force

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[45] W Benjamin, 'Critique of Violence', in Walter Benjamin, *Selected Writings I 1913-1926*, (Cambridge, Mass., Belknap Press, 1997).
[46] Derrida, above n 19, 945.
[47] Wiethölter, above n 10, 1.
[48] Derrida, above n 19, 931.
[49] *Ibid* 925.

of the founding act of law is not itself accessible to rational discourse, any more than are the uncertainties of legal decision: not foundable, not justifiable, neither just nor unjust. Wiethölter is much more cautious here, holding fast to critical theory's claim to found and legitimize law. To be sure, he distances himself from all the optimistic advocates of the possibility in principle of founding law upon rational discourse, by insisting doggedly and deconstructively on the undecidability of conflicts of laws and, hence, their paradoxicality.

Deconstruction and political legal theory definitively diverge, though, when it comes to the mystical foundation for the law's authority. Especially Derrida's recourse to Levinas's philosophy of otherness, which counterposes to the totality of meaning the exteriority of transcendence in which justice appears as an unending demand of the other, may perhaps be respected by political legal theory, which is explicitly concerned not with 'something other than law, but with a possible other of law',[50] but not followed by it. At most, it could follow the discourse of the law's transcendence as a temporalization, a futurization that cannot be made present, whereby justice can always only mean a postponement to the future. Derrida says 'justice remains, is yet to come, *à venir*'.[51] Wiethölter's formulation that 'law's constitution of law intends redeemable excesses of enabling, rather than unredeemed ones of promise' shows the closeness to temporalization and the sceptical distance towards the otherness and transcendence of Levinas and Derrida.

V. WIETHÖLTER: RECIPROCITY AND (IM-)PARTIALITY

If, then, we have more or less grasped the eigenvalues of political legal theory by contrast with systems and deconstructive paradoxologies, what are the consequences of the shift from conflict-of-laws to paradox? What then happens to the predominating conflict between protection of rights and protection of institutions?

As already stated, Wiethölter not only distances himself from Ludwig Raiser's conciliatory formula of the private person as a functionary of the whole legal system, in which the protection of individual interests through subjective rights is claimed also for institutional protection, but also takes back the conflict-of-laws norm at which he himself had first aimed, of an 'organizational constitutional law'. Why? Because the underlying conflict is itself increasingly deconstructed. The two great deconstructors are again at work: problem pressure and communicative plausibility. Today's pressure of social problems renders the venerable distinction between protection of rights and institutional protection implausible to such an extent that it can no longer evade its re-paradoxification. The law's confrontation with problems of world society, under such headings as ecological risks, consequences of reproductive medicine, or exclusion of entire population groups as an effect of world-wide functional differentiation, brings out the fact that here the law is faced with social problems that can no longer be approached through oscillation between subjective rights and institutions, guided by meta-norms.

The search for new de-paradoxifications then becomes critical. Which new distinctions should be brought into the deconstructed void of the *collision directrice* between rights and institutions? Wiethölter's formulations here are extremely cautious:

> Perhaps the most exciting hope might come from a sort of 'law', truly a 'law of
> the constitution' or 'law of the legal constitution', that occupies the conflict-of-
> laws principles for law versus morality, law versus politics, law versus the
> economy etc., or more exactly and more generally, law as a 'structural coupling'
> of 'life-world systems': 'protection of rights' and 'protection of institutions' in

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[50] Wiethölter, above n 3 (MS 10).
[51] Derrida, above n 19, 969.

contemporary translation would then become justificatory protection for the roles of freedom.[52]

Still more cautiously formulated is the attempt to establish a new leading distinction: reciprocity versus (im-)partiality. Both sides of this distinction have admittedly little to do with their traditional meaning. Reciprocity is now understood as a mutual tying down of autonomies and (im-)partiality now means engaging in autonomy under reserved control.[53] Wiethölter thereby draws up a *punctatio,* the points of which, taken together, constitute a highly risky contractual offer. I ought perhaps in conclusion to seek to go into this offer point by point, with suggestions for supplementing the preliminary contract, leaving it to others' interpretive skills to decide whether they amount to declarations of acceptance or new offers.

Point 1: Conflicts between law and society: Wiethölter asks to dissolve the central law versus non-law distinction into various 'conflict-of-laws principles for law versus morality, law versus politics, law versus the economy etc'. This means setting law's focus definitively on a radical pluralism of social autonomies. A whole bundle of distinctions now serves for de-paradoxification and becomes a substitute for de-plausibilized dichotomies of private versus public, subjective rights versus objective rights, entitlements versus infrastructures, contract versus organization, individual versus institution. What is here at the centre of the 'law of the legal constitution', cutting across the obsolete dichotomy of private and public law, is the law's relation to extremely varied social autonomies and their intrinsic rationalities and normativities.

The consequences of this shift are hard to foresee. At any rate, it means finally taking leave of the triangle of politics/economy/law and accepting a polygon of social rationalities, all equally original, that the law has to take into account. This makes the dispute over the social primacy of any one sub-rationality – under headings like the economic society, the knowledge society, or the organizational society – obsolete. The equation 'Private law equals economic law' has to be dissolved into the new equation 'Private law equals law of society', wherein 'law of society' from the outset implies a multiplicity of socially autonomous kinds of law. A law of the legal constitution must, from the outset, abandon the hope of a constitution of the whole of society, a locus where the total social identity can be defined, and adapt to an irreducible multiplicity of 'laws of society'. The challenge now can no longer be called 'law of economic constitution I, II, or III', but a multiplicity of civil constitutions in which not only is a third sector of non-profit organizations and concerned citizens covered by law, but the respective intrinsic normativities of the social autonomies can assert their claims.[54]

This should be accompanied by a new weighting of the traditional sources of law, with a devaluation of legislative law corresponding to a simultaneous higher value on law-making within society as the outcome of internal social conflicts, and on judge-made law as able to sense and reflect social normativities. The priority goal for such civil constitutions would, however, have to be to focus more decisively on the legal protection of non-economic and non-political normativities in society. The law must primarily set itself the problem of 'institutional externalities', the 'environmental damage' brought by autonomization processes.[55]

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[52] Wiethölter, above n 16, 119.
[53] Wiethölter, above n 3, 18.
[54] First steps in this direction can be found in G Teubner, 'Contracting Worlds: Invoking Discourse Rights in Private Governance Regimes', 9 *Social and Legal Studies* (2000), 399-417.
[55] On the analysis of institutional externalities, see D Sciulli, *Theory of Societal Constitutionalism* (Cambridge 1992); D Sciulli, 'The Critical Potential of the Common Law Tradition', 94 *Columbia Law Review* (1994), 1076-1124.

Point 2: Sacrificium intellectus: The shift from conflict-of-laws to paradox-based legal thinking, which is supposed to result in a 'contemporary translation' of the leading conflict between protection of rights and institutional protection into reciprocity versus (im-)partiality, has consequences for a style of legal thinking that academic moralists ought rightly to rebuke as intellectual dishonesty, obdurate dogmatism or at least *pensiero debole*. If, however, it is true that absolutely any distinction can be deconstructed, that absolutely any decision ends in undecidabilities, that absolutely any conflict of laws ends in paradoxes, then new distinctions that can be upheld even only temporarily, eg, reciprocity versus (im-)partiality, can be introduced only by making the sacrifice of waiving criticism.

That ought to be particularly hard for such an acute lawyer and passionate enlightener as Wiethölter. But once one has reached out only one's little finger to deconstructive, paradoxical thinking, then on pain of total paralysis one has to make the paradoxes of the newly proposed distinctions invisible, keep their latencies latent, repress their inconsistencies, refrain from deconstructing them, set bounds on acuity, waive criticism, set up cover-ups, deceive one's students. At any rate, one must, if social problem pressure so requires and urges plausibility in the net of socially valid distinctions.

It follows from the deconstructability of all institutions that critique without a substitute proposal does not count. 'A communication may take a critical stance on any particular norm: but if it does it has to offer a substitute proposal'.[56] This is not easy to reconcile with Wiethölter's suspension of the constraint to decide. Admittedly, this *sacrificium intellectus* is different from that demanded of the theologian in the name of faith, or the lawyer in the name of legal doctrine. For pressure of social problems and plausibility are themselves not stable quantities, but historically variable, so that there can always only be contemporary, socially adequate and therefore fluctuating justice. And both are in turn exposed to public reflection and to dispute over exactly how it fits the programme of a political legal theory. It is this level of exhaustive analysis and discussion of social problems and social consistency upon which critical thinking must accordingly concentrate, in order to be able to assess whether the newly introduced distinctions like reciprocity versus (im-)partiality are speedily to be deconstructed again, or else may claim at least temporary validity. And Sisyphus must at the same time beware of letting the toilsomely raised stone, which might in the proper circumstances rest stably on the hilltop for a while, roll back down for lack of sufficient care in deconstruction.

Point 3: Blind experimentalism: The groping character of a de-paradoxification of law versus non-law that suggests new distinctions only experimentally and is exposed to the test of social compatibility, corresponds to a way of proceeding that not so long ago was pooh-poohed as 'muddling through', namely a radical incrementalism, an experimentation under extreme uncertainty, a 'blind' stumbling by the law from case to case, a stumbling of politics from scandal to scandal. This implies doing without grand designs, the implementation of big social projects – yet not doing without social theory. Theory now changes its role. It becomes comparable with the medieval divinatory practice of *punctatio*: arbitrarily setting points in the sand for venturesome interpretations and predictions, so as to find guiding benchmarks through subsequent confirmation or non-confirmation.

Legally, this heralds a reassessment of case law. The primacy of experience holds in the particular case and of the single-case law over the overly-hasty generalizing approach of the abstract rules. Yet, this should be accompanied by a decided politicizing of case law, not just aimed at balancing individual interests in an individual case, but explicitly seen as a social experiment. If this is not to be only an empty formula for reviving the quiescent civil

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[56] Luhmann, above n 26, 503.

law, then it would have to be reflected in procedural changes to the law, changes ranging from collectivization of the right of action via rights of public involvement and hearing or more ambitious evidential procedures to an *ex post,* learning way of handling judgments at law.

Point 4: Society-wide reciprocity: This concept is as far removed from the feudal prince-vassal relation of loyalty as from the mutuality of market exchange. Seeking to set up individual contractual parity using individual judicial corrections looks like naive recourse to outmoded concepts of *ius* in a balanced relationship between individuals. What is instead to be sought is compensation for asymmetric individual relations, restoring balanced social relations by an extremely circuitous route across several system boundaries. The point is, then, reciprocity as mutual dependence of sub-autonomies, something that applies not just to the autonomy of social systems but also to that of individuals, collectives, institutions, and formal organizations. It is a normative concept through and through, and is therefore much closer to Durkheim's solidarity in conditions of a social division of labour than to Luhmann's concept of the structural linkage of areas of social autonomy.

Consequences of this sort of integration effort through society-wide reciprocity ought to go in the direction of greater dissociation between law and institutionalized politics. If it is true that politics has, if not lost its leading role in integrating the whole of society, then at least largely cut it back, then reciprocity can no longer be described as an exclusively political project in which the law has to follow up on legislative action, and especially omission, in thoughtful obedience, but as a project wherein the law itself must enter responsively into emerging forms of reciprocity in society. Such proponents of a normative sociology as Lon Fuller or Philip Selznick, but also François Ewald or Roger Friedland and Robert Alford, are perhaps the protagonists here of an inter-institutional 'morality' taking shape in society, the intrinsic potential of which is taken up by the law and can be built on in thoughtful obedience.[57] And at this point, quite numerous network phenomena come into play, overlaying if not replacing the integrative effects of institutionalized politics. Wiethölter's scepticism over the fashionable network debate should disappear, if it could, in fact, be shown not just that networks are hybrid legal formations between law of contract and company law, but that intersystem networks, because they obey different logics of action, can contribute decisively to creating society-wide reciprocity.[58]

Point 5: Impartial partiality: Through this openly paradoxical formula, political legal theory definitively distinguishes itself from systems or deconstructive paradoxologies. If the formula is to mean the law's relation to social autonomy, as the following quotation suggests:

> Autonomy was in fact never anywhere a guarantee of decentralized and sectoral 'general good' but itself a party, to which one can release activities only at the cost of 'objectively justified' criteria, venues kept open and fairness procedures kept to, in short, 'relative impartiality' and capacity for universalization…[59]

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[57] L Fuller, *The Morality of Law* (New Haven, Yale University Press, 1969); P Selznick, *Law, Society and Industrial Justice* (New York, 1969); P Selznick, *The Moral Commonwealth: Social Theory and the Promise of Community* (Berkeley, University of California Press, 1992); F Ewald, *L'État Providence,* (Paris 1986); Friedland and Alford, 'Bringing Society Back In Symbols, Practices, and Institutional Contradictions', in WW Powell and P DiMaggio (eds), *The New Institutionalism in Organizational Analysis* (Chicago, University Of Chicago Press, 1991), 232-263.
[58] For this view of networks, see K Ladeur, 'Towards a Legal Theory of Supranationality: The Viability of the Network Concept', 3 *European Law Journal* (1997) 33-54; G Teubner, 'Hybrid Laws: Constitutionalizing Private Governance Networks', in Kagan *et al*, *Legality and Community: On the Intellectual Legacy of Philip Selznick* (Berkeley, Rowman, 2002), 311-331; A Windeler, *Unternehmungsnetzwerke: Konstitution und Strukturation* (Wiesbaden, Verlag, 2001).
[59] Wiethölter, above n 10, 21.

…then the formula contains neither a sociologization of law nor its theologization, but a release of social potentials for normativity, a sort of maieutics.

This differs from Luhmann's systems sociology, which celebrates its impartial social theory distance, in its participant perspective on legal discourse through partiality, in a threefold sense: first, partiality for normativity criteria of the legal tradition and the further development of law, rightly demanded quite impartially from the autonomous sectors of society. Second, partiality for normativity criteria of the autonomous sectors themselves, for which in cases of conflict the law takes sides in order to impartially resolve disputes. Finally, partiality for one of Wiethölter's most remarkable puzzling formulas, for 'society as society', which, though explicitly building on Luhmann's deconstruction of society, as it were counterfactually and utopianly clings to it.[60]

The formula also contains a demarcation from deconstruction, pointing in its concept of justice towards a transcendent otherness of law. It is here that one of Wiethölter's most radical ideas lies, which he also formulates with appropriate caution:

> Perhaps the emancipation of such law from law in the rival social theories, which would seem not (yet) outdated as 'other than law' or 'other law', in the direction of 'another within law' contains a step towards the possibility of realization. 'Law' would then not be bowing down to a social-theory design, but would itself be one, at any rate not a 'system', 'discourse' or 'enterprise'.[61]

Such a far-reaching autonomization of law, which – in total contradiction to earlier formulations – moves away from dependency on social theories and promotes law itself into a social-theory design, would indeed cross the boundaries of law, though not in the direction of a transcendence of otherness, but of the immanence of a quasi-therapeutic relationship oriented to the healing normativity of medicine, not as externalization in the direction of public health and biopolitics, but as a 're-entry' of the logic of wounding and healing into law.[62] One question ultimately remains open about this therapeutic relationship between law and society. Which is the therapist, and which the patient?

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[60] Wiethölter, above n 16, 117.

[61] Wiethölter, above n 3, 19.

[62] 'Law, which can draw its force of validity neither from eternal ideas nor from itself, verges more on "medicine" and "biology" than on theology and technology, and is – as "poiesis" – more of an "art" than a "science"'. R Wiethölter, Verrechtlichung, MS (Frankfurt, 1995) 9.