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Altera Pars Audiatur:
*Law in the Collision of Discourses**

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POLYTHEISM AND (POST-)MODERNITY

It is like the days of old when the world was full of many gods and demons, only different; it is like when the Greeks made sacrifices, one time to Aphrodite, another time to Apollo and above all to the gods of their home towns, only today the magical and mythical is missing from existent conduct. It is fate that reigns supreme over all the gods and their struggles, and definitely not knowledge. (Max Weber.[1])

Today the only god left to whom law is supposed to make sacrifices is called rational choice. Over the past thirty years, a quasi-religious academic movement has spread through all the law schools of North America with a particular zeal. After its high priest, Richard Posner announced 'the demise of law as an autonomous discipline',[2] economic rationality is supposed to represent the new universality of law. Theory of transaction costs, theory of property rights, public choice and economic analysis of law are different currents in the broad stream of a movement which is intent on replacing the emaciated concept of justice with the ideal of the economic efficiency of law. This new monotheism speaks with the pathos of natural law in the name of both 'nature' and 'reason'. The internal laws of the market and of organisation are in the nature of modern society and law has to reflect them. The philosophy of 'rational choice' elaborates on the principles of reason in this new order and they apply to law as well.[3]

[1] M. Weber, *Gesammelte Aufsätze zur Wissenschaftslehre* (Tübingen, 1968) 605.
[2] R.A. Posner, 'The Decline of Law as an Autonomous Discipline: 1982–1987' (1987) 100 *Harvard Law Review* 761.
[3] B. Barry, *Theories of Justice: A Treatise on Social Justice I* (London, 1989).

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Law and economics claims to be the new victorious paradigm which eliminates older moral-political orientations of law, and it does not tolerate the co-existence of any other paradigms alongside it.[4] 'Thou shalt have no other gods but me.' Law and economics justifies its exclusivity with its historic victory in modern societies, with the society-wide, and today almost world-wide institutionalisation of economic rationality. Its strength lies here, without doubt, for who can reject the argument that modern society is economic society and that modern law has to provide market-adequate, economy-adequate legal forms?

At the same time, this is exactly the great weakness of the law and economics movement. Economic rationality does not have the privilege of society-wide institutionalisation all to itself. There has, indeed, been a paradigm shift. However, it is heading in a different direction. It is not the case of eliminating moral-political monotheism in favour of economic monotheism which law needs only to reflect. Rather, it is the case of a change from monotheism to polytheism, from the monotheism of modern rationality to a polytheism of the many discourses. There is a paradigm shift to the particularistic rationalities of the many gods to which law has to respond in other ways than by just adopting a new god.

Apart from economics, it is, above all, politics, science and technology, the health sector, the media, the law and possibly also the morality of lifeworlds which have all individually developed their own self-centred rationalities. They all expose a strange contradiction. On the one hand, they are all clearly particularistic rationalities. On the other hand, they are all institutionalised, in effect, society-wide and they all demand universal acceptance. In this way, the cost-benefit calculus of economic rationality is only institutionalised in economic transactions; however, economisation takes hold of the whole society and rational choice makes its claims in all social contexts.[5] Accordingly, rational choice also demands law's obedience. Efficiency instead of justice. The same is true for political rationality. Democratic legitimation of power is typically only institutionalised in the political context. Nevertheless the ideal of democracy demands society-wide acceptance and, accordingly, realisation in law. Democratic legitimacy today is seen as the only valid foundation of law. Again, the core of scientific rationality—uncompromising search for intersubjective truth—is essentially only institutionalised in teaching and research. However, scientification is a society-wide process which forces even the law to take a scientific approach in its regulatory aspirations. Finally, moral criteria develop typically only through concrete small-scale interactions as evidence

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[4] E.g. G.L. Priest, 'The New Legal Structure of Risk Control' (1990) 119 *Daedalus* 207
[5] H. Esser, *Alltagshandeln und Verstehen: Zum Verhältnis von erklärender und verstehender Soziologie am Beispiel von 'Rational Choice'* (Tübingen, 1991).

of mutual esteem. Nevertheless morals, especially in their academic forms of philosophical ethics systems, want to regulate all social, today especially ecological issues and request a hearing on legal issues as well.

If all these belief-systems were only airy-fairy theoretical constructs, mere philosophical abstractions, law could easily reject their claims for universality as merely academic. However, the many new gods do not just create faint theologies. They exercise their firm power grip in concrete world-regimes. Max Weber's 'iron cages' or, as one would say today, 'computer networks of a new domination' have their foundations in social practices themselves. These universal regimes of particularism have five characteristics of social effectiveness which render their influence on law well nigh irresistible.

First, their material base consists of manifest *social practices*, on which the distinctions of the various universalities have been inscribed. Markets and business organisations, elections and political associations, government and opposition, research practices and technologies, information systems of the media and the agencies of health and social security systems all demand from law specific regulatory measures which have to reflect the universal principles of particularism which each of these entities has institutionalised separately. The modern plurality of gods is not a matter of individual belief but is a hard social reality which is forced inexorably upon law. To the detriment of its effectiveness, law has to abandon the simple model of threatening (dis)obedient subjects with sanctions and must reformulate its norms in order to 'match' specific constraints in the economic, political and scientific-technological domains.[6]

Secondly, neither are these social practices mere conventions, brought about by the typical economic, political, scientific, or ethical motives of actors. Rather, the many gods have created many theologies, elaborate social abstractions in the form of self-concepts and *reflexive theories*,[7] which in turn control and rationalise the practices. As we said, they are bold enough not to respect their own boundaries. Each of these partial reflexive theories claims to be accepted as the one and only one universal rationality. Economic theory has long since crossed the borders of its specific domain of the economy and claims to be the valid theory of society which interprets society as a giant network of cost benefit calculations. The same applies to political theory which in its turn reduces society into

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[6] This is the uncontested point of departure in the otherwise highly controversial debate on the regulating potential of law. See on this aspect the contributions in A. Febbrajo and G. Teubner (eds.), *State, Law, and Economy as Autopoietic Systems: Regulation and Autonomy in a New Perspective* (Milan, 1992).

[7] N. Luhmann, *Das Recht der Gesellschaft* (Frankfurt, 1993) 496ff. (English translation: *The Law of Society* (Oxford, forthcoming)); N. Luhmann, *Die Wissenschaft der Gesellschaft* (Frankfurt, 1990) 469ff.

conflicts of interest and power between groups and political aggregates. As both these reflexive theories are not restricted to cognitive issues only, serious consequences emerge for law. Both theories develop, each by itself, mutually exclusive normative concepts about a just society which compete, as political justice or economic justice, with a specific legal justice.[8] Beyond economics and politics, sensitive observers have discovered other 'spheres of justice' in many social domains which present their own autonomous concepts of a non-legal justice.[9]

Thirdly, the many gods have even taken residence in the inner sanctum of law, in *legal theory and jurisprudence*. Of course, 'political theories of law' are not new; there is a long tradition of providing concepts of law from the perspective of political sovereignty. Today, however, political theories of law have experienced an extraordinary radicalisation, ranging from old German *Freirecht* and American legal realism, the international movement of law and society, and the more recent critical legal studies movement to feminist jurisprudence and critical race theories.[10] In their way of destructing the legal in law, they are only surpassed by recent economic theories of law. 'Law is politics' is the war cry of critical legal studies, but is now drowned out by the war cry 'law is economics'. As if that were not enough, we can hear today a crescendo of aesthetical-antirational theories of law announcing the ultimate deconstruction of the legal proprium.[11]

Fourthly, legal practice itself has not been spared the plurality of gods either. Politicisation, moralisation, scientification and economisation of legal practice itself have profoundly changed methods of judicial decision-making and their use of *legal doctrine*. Although the results are strikingly different, the new method is always the same: law plays society. Legal decision-making is invited to play-act. Legal reasoning is supposed to simulate the practices of other social subsystems in order to produce socially adequate norms, that is norms which do reflect the inner logic of law's social environments. Balancing interests as a judicial method is a typical simulation of the political process. The predominant purpose-orientation in legal practice and the regulatory spirit of modern law necessitate simulations of scientific-technical behaviour. The appeal to community values asks for a simulation of moral universalisation. The

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[8] O. Höffe, *Political Justice* (Cambridge, 1995); Barry, n.3 above; J. Rawls, *A Theory of Justice* (Cambridge, Mass., 1971).

[9] M. Walzer, *Spheres of Justice* (New York, 1983).

[10] For an insightful discussion of recent developments, see R. Cotterell, *Law's Community: Legal Theory in Sociological Perspective* (Oxford, 1995).

[11] J. Derrida, 'Force of Law: The "Mystical Foundation of Authority" ' (1990) 11 *Cardozo Law Review* 919; P. Schlag, 'Normativity and the Politics of Form' (1991) 139 *University of Pennsylvania Law Review* 808.

model of a hypothetical contract situation simulates economic behaviour, law mimics the market.

Fifthly, the most powerful weapon yet of the new polytheism may be the creation of an array of various independent machineries of *social norm production* which produce legal norms directly from outside the law, from the various subsystems of society. With the help of these machineries, heterogeneous particularistic rationalities and their normative claims massively infiltrate the law which has little control over them. The most productive extra-legal rule-making machines which are driven by the inner logics of one specialized social domain are installed in various formal organisations and processes of standardization which are competing today with the legislative machinery and the contracting mechanism.[12] In the light of their massive operations, the question as to whether or not law should remain 'pure' as against the contaminations of particularistic rationalities of society has long since been decided. It is no longer a question as to whether or not, but only as to how!

FROM POLYTHEISM TO POLYCONTEXTURALITY

This scenario may sound very much like the patchwork of post-modernity, but it by no means refutes the modernity of law. On the contrary, the pluralisation of discourses to which law is subject today is the typical modern experience which only is stylized anew in the post-modernist gesture. This is why we find the fundamental analysis of the new polytheism not with the contemporary theoreticians of discourse plurality but back with Max Weber, the grand old man of modern social and legal theory. Late modern and post-modern authors are refining and elaborating Max Weber's analyses. At the same time, however, they radicalize his ideas on the new polytheism. What can we gain from this debate stretching from Max Weber to François Lyotard as to the position of law in the plurality of discourses?

Max Weber analysed modernity as the era of absolute polytheism. Parallel historical processes of rationalising different value spheres have led to insoluble conflicts between the many gods of modernity, between depersonalised powers of belief which cannot be resolved or removed

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[12] I. Sand, 'From the Distinction Between Public Law and Private Law to Legal Categories of Social and Institutional Differentiation in a Pluralistic Legal Context' in H. Petersen and H. Zahle, *Legal Polycentricity: Consequences of Pluralism in Law* (Aldershot, 1995) 85; G. Teubner, 'Autopoiesis and Steering: How Politics Profits from the Normative Surplus of Capital', in R. in t' Veld, L. Schaapp, C. Termeer and M. van Twist (eds.), *Autopoiesis and Configuration Theory: New Approaches to Societal Steering* (Dordrecht, 1991) 127 at 134ff.

through reference to the One Reason. These conflicts, Max Weber submitted, have to be endured, have to be suffered subjectively and individually. We have to live through these conflicts in a chain of ultimate decisions.[13]

Max Weber articulated the collision of discourses only vaguely and metaphorically as 'the struggle of the gods', that is, as a conflict of the spheres of ideal values. In the later discussion, this problem has been redefined sociologically as a real phenomenon of society and analyzed more precisely by linguistics as a collision of different 'grammars'. Weber took his metaphor from the sociology of religion where the old polytheism of the Greeks appeared to be replaced temporarily by the Judaeo-Christian monotheism, only to resurface in modern times as the struggle between depersonalised powers of belief, between spheres of secularised values. The crucial aspect of the collision according to Weber is the insoluble contradiction between knowledge and values, on the one hand, and the antagonism between the different spiritual spheres, the good, the holy, and the beautiful, on the other hand.[14]

Wittgenstein's plurality of language games gives the collision of values a linguistic turn which deprives it of its transcendental motives articulated by Weber and which, as it were, naturalises it. 'Language games' collide because of their idiosyncratic structures of rules which can be referred neither to principles of reason nor to abstract values, but only to the practice of real 'forms of life' in society: 'One could say that what is given and what has to be accepted are forms of life'.[15]

The contemporary discussion elaborates in more detail the grammars of language games, analyses more accurately the social practices at their roots and assumes the incommensurability of discourses and the lack of any meta-discourse.[16] Today, at the provisional conclusion of the debate, we find François Lyotard's distinction between *litige* and *différend* of the discourses, Niklas Luhmann's plurality of closed self-referential systems and Jürgen Habermas's normative propositions as to how to resolve discourse collisions. From these perspectives, the conflicts to which law is subject today, do not result from colliding ideal values but from colliding real social practices with their own logic and with an enormous potential

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[13] Weber, n.1 above, 603ff; and on Weber: W. Schluchter, *Unversöhnte Moderne: Zwischentexte* (Frankfurt, 1996) 339 ff.

[14] Weber (1968), n.1 above, 501, 507.

[15] L. Wittgenstein, *Philosophical Investigations* I (Oxford, 1989) 572, in general see 225 ff; and on Wittgenstein: S. Kripke, *Wittgenstein on Rules and Private Language* (Cambridge, 1982).

[16] E.g. P. Dews, *Logics of Disintegration: Post-Structuralist Thought and the Claims of Critical Theory* (London, 1987); J. Rajchman and C. West (eds.) *Post-Analytic Philosophy* 1985 (New York, 1985).

for self-inflicted damage. Law is not called upon to decide the eternal conflicts between the holy, the good, the utilitarian, the true, the just and the beautiful. Law is exposed to potentially destructive conflicts between concretely conducted discourses in society, between self-reproductive concatenations of *énoncés* which are conditioned by an internal grammar and by binary codes and programmes, which reproduce their internal logic with hermetic closure.[17]

Recent theorizing has produced more than mere refinements and greater detail. Contributions from, above all, systems theory and deconstructivism have radicalised Max Weber's proposition of a new polytheism in all its three elements—plurality, god, and conflict.[18]

First, the diagnosis of plurality—the assumption of a social poly-centrism—is too harmless as it is, for instance, proposed by Schluchter in his interpretation of Weber's work.[19] Polycentricity still maintains the comforting assumption of an ultimate unity of context in which various centres of action co-exist—as it were, the Olympus of the gods. It is replaced today by a more threatening 'polycontexturality', that is, a plurality of mutually exclusive perspectives which are constituted by system/environment operations and which are not compatible with one another.[20]

Second, Max Weber's many gods who, even after secularisation, still represent basic authorities in the sphere of values are replaced today by strange paradoxes lurking at the foundation of social discourses and threatening to paralyze the observer. Quasi-religious value as the basis of a discourse has given in to paradox, the new 'fondement mystique de l'autorité'.[21]

Third, the severity of the conflict between the gods appears to have dramatically increased. This is no longer a competition between different value systems; in the contemporary view of discourse collisions the 'warring gods' have assumed almost self-destructive proportions. According to Lyotard discourses are so hermetically closed that they deny each other the right to be heard and only do 'violence', 'tort', 'injustice' to one another.[22] According to Luhmann and Habermas, social systems have

[17] N. Luhmann, *Social Systems* (Palo Alto, 1995); J. Habermas, *Faktizität und Geltung* (Frankfurt, 1992); J.-F. Lyotard, *The Différend. Phrases in Dispute* (Minneapolis, 1988).

[18] N. Luhmann, 'The Coding of the Legal System', in A. Febbrajo and G. Teubner (1992), n.6 above; J. Derrida, n.11 above, 961; for more details see G. Teubner, 'The King's Many Bodies: The Self-deconstruction of Law's Hierarchy', in D. Patterson and A. Somek (eds.), *The Indeterminacy of Social Integration* (Oxford, forthcoming).

[19] W Schluchter (1996), n.13 above; W Schluchter, *Religion und Lebensführung I* (Frankfurt, 1988) 284, n.226.

[20] G. Günther, 'Life as Poly-Contexturality' in G. Günther, *Beiträge zur Grundlegung einer operationsfähigen Dialektik I* (Hamburg, 1976) 283.

[21] J Derrida, n.11 above, 920.   [22] J.-F. Lyotard, n.17 above, 18f.

developed such powerful and uncontrollable internal dynamics that they not only overburden individuals and harm the ecology, but also have disintegrating effects upon one another.[23] Truly, the struggle between the new powers of belief produces a tortious society, if not a tortured society.

<div align="center">A NEW CONFLICT OF LAWS</div>

The recent debate has not only changed the perspective on the phenomena of collision but also questioned Weber's 'solution' of the collision problem—subjectivisation. Weber identified the individual subject as the true victim of the struggle of the gods and he celebrated the tragedy of individuals in their inevitably guilt-ridden decisions about conflicts and coping with them. Today attention has moved away from individuals to discourses. Not only individuals but also discourses, and among them law, are exposed to the conflicts which they have created for themselves. Society does harm to itself in its different discourses. Weber could still believe that the spheres of values could be kept out of the problems of collision successfully by the sophistication of their formal rationality. This explains his celebration of the formal rationality of law. This explains also why he was so suspicious about substantive rationality, why he dismissed and marginalised all the moralisation, politicisation and economisation of law.[24]

Nonetheless, Weber got it wrong. Formalisation did not protect the law against infiltration through extra-legal rationalities. Above, we have already inspected the Trojan horses which today successfully lead the extra-legal normativities into the empire of law. We found: (1) norms produced outside the legal system which compete with the norms produced in courts; (2) extra-legal references in doctrinal analysis and legal method which materialise the formal law; and (3) non-legal theories of law which destroy the unity of jurisprudential reflections of law.

Law cannot be kept immune against the collision of different rationalities by formalisation. Of course, formalisation changes the quality of the collisions because the universality of law is protected against immediate competition from other universalities by formal coding. The legal code of law/not law rejects the codes of other discourses, such as true/false moral/immoral, have/have not, government/opposition. However, this is only a matter of replacement. The other discourses which have been defeated at the level of codes return even more vigorously at the level of

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[23] N. Luhmann, n.18 above, 155f.; J. Habermas, *The Theory of Communicative Action*. Vol. 2 (Boston, 1987) ch. VIII.2 (Marx and the thesis of internal colonization).
[24] M. Weber, *Economy and Society* (Berkeley, 1978) ch.7 sec.8.

legal programmes and wreak havoc on law from that point.[25] The arguments which are used in legal argumentation, reasons of policy, cost-benefit calculations and moral grounds will always defer to the legal code of legal/illegal but will nevertheless rule as the successful criteria which control the distribution of the values of legal and illegal. Law cannot get rid of the threatening polycontexturality of society by, first, contributing to it in producing its own rationality and, second, by observing the pluralism of the other social rationalities through the looking-glass of its own rationality. No, the repressed fragmentation of society is returning in the inner workings of formalised law as a fragmentation of law itself, even if modified by the specific legal perspective.

Therefore, we are faced with legal pluralism in a more radical sense than how the term is used in current legal sociology.[26] It does not just refer to a plurality of local laws, of ethnic and religious rule-systems or of institutions and organisations. Rather, it refers to a plurality of incompatible rationalities, all with a claim to universality within a modern legal system. Different social particularistic rationalities have formed bridgeheads within the law from which they operate in the designing of mutually incompatible legal concepts, to represent alternative doctrinal arguments and methods, and to project norms which contradict each other. Given this situation, there may be a temptation in the Law's Empire to give in and to hand over the unity of law to one of those bridgeheads. If it is impossible to constitute the unity of law through its own closure, formalisation and positivity, such a unity has to be constituted by extra-legal means. Such colonialist claims come today from an economic theory of law, a political theory of law, and from a moral theory of law. Their fatal attraction is that they can provide, within one approach, a framework of legal theory, doctrinal arguments and methodological instruments. However, the question still remains: how can the law decide between them, if each one of them is legitimately institutionalised in social practice and if each one of them can demonstrate a universal rationality? Or to put it more strongly: is it possible for society to protect itself against self-destructive tendencies of the colliding discourses by giving preference to one of them? Is it not, on the contrary, plausible that these self-destructive tendencies are increased by a preferential treatment of one of the discourses?

A counter-position would be to refuse such a momentary decision of faith and the *sacrificium intellectus* connected with it, and to accept the controversial plurality within the law and to see it as an opportunity rather

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[25] N. Luhmann, n.18 above, 171ff.

[26] H. Petersen and H. Zahle, *Legal Polycentricity: Consequences of Pluralism in Law* (Dartmouth, 1995), M. Corsale, 'Alcuni nodi teorici del modello pluralistico' (1994) 21 *Sociologia del diritto* 15; S. E. Merry, 'Legal Pluralism' (1988) 22 *Law and Society Review* 869.

than as a sign of decay. The question, then, is whether such a plurality of legal 'ontologies', juridical concepts, and legal models has to be avoided, or whether one can cope with it. Does the pluralisation of the rationalities of law necessarily lead to relativism and nihilism? Or can it not be turned around constructively? One would accept the permanent conflict between ontologies within the legal system as such and without the possibility of ever deciding it. The idea would be to transform law into a discourse that maintains conflict or even increases conflict, not reduces it. This is not anything-goes-relativism but a position that argues for an increase of 'agonistic aspects of society'.[27] Is there not a case for finding ways and means to increase the plurality by 'civilising' the conflict of discourses and to use its rich tapestry of conflicts productively? Here we can see new life in Max Weber's suggestion as to how to deal with modern polytheism; but we have to shift the accent away from the individual onto legal discourse:

> . . . to lead one's life consciously, if it is not to pass by like a natural event, means to know about those contradictions, and it means to see that each singular important act, and even more so, life as a whole, are a chain of final decisions through which the soul, as seen by Plato, chooses its own fate, that is, the meaning of its actions and its existence.[28]

Can the legal discourse cope with the struggle of the gods and can it choose its own fate through a chain of decisions?

As far as current German legal theory is concerned, there are above all two authors who confess candidly to the new polytheism, Rudolf Wiethölter and Karl-Heinz Ladeur. Wiethölter's work concentrates on the question as to how law can deal with the collision between different grand theories, that is, economic theory, systems theory and critical theory. In spite of personal sympathies for the most critical among them, he avoids bias which would impoverish the discussion and puts his bets on mutual enlightenment—and on the capacity of law to syphon off productive norms from these learning processes.[29] Ladeur's work represents the turning of jurisprudence to post-modern legal theory. In analysing the plurality of

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[27] J.F. Lyotard, n.17 above, 16; A. Barron, 'Lyotard and the Problem of Justice', in A. Benjamin (ed.), *Judging Lyotard* (London, 1992) 34.

[28] M. Weber, n.1 above, 507f.

[29] R. Wiethölter, 'Zur Argumentation im Recht: Entscheidungsfolgen als Rechtsgründe?', in G. Teubner (ed.), *Entscheidungsfolgen als Rechtsgründe: Folgenorientiertes Argumentieren in rechtsvergleichender Sicht* (Baden-Baden, 1995) 89; R. Wiethölter, 'Proceduralization of the Category of Law', in C. Joerges and D. Trubek (ed.), *Critical Legal Thought: An American-German Debate* (Baden-Baden, 1989) 501; R. Wiethölter, 'Social Science Models in Economic Law', in T. Daintith and G. Teubner (eds.), *Contract and Organization: Legal Analysis in the Light of Economic and Social Theory* (Berlin, 1986) 52; R. Wiethölter, 'Materialization and Proceduralization in Modern Law', in G. Teubner (ed.), *Dilemmas of Law in the Welfare State* (Berlin, 1985) 221.

discourses and the variety of systems, he concludes normatively that the law should not again favour a doubtful unity but should rather deliberately maintain its internal plurality and guarantee mutual transparency of the discourses against their tendencies to block each other.[30] Is there scope for an elaboration of these approaches?

My suggestion is to work out the concept of a new law of conflicts.[31] The issue here is the new situation of law having to decide between colliding rationalities of different discourses, not the classic collision between national regimes of law or between competing jurisdictions. The new areas of conflicts are defined by symbolic codes and programmes delineating discourses and are not made up by territorial borders. Is there something to be learnt from the historical experience with international conflicts between laws for dealing with the conflicts between discourses and systems? In the classic international law of conflicts there are many collisions which cannot be resolved by reference to hierarchy, there is an abundance of circular references, self-references and paradoxes, which all have to be coped with in one way or other. So there may be a case for fruitful analogies for a law of interdiscursive conflicts which is faced with similar challenges.

A starting point could be the equal authority of colliding discourses, just as conflicting national legal regimes have equal authority in the international law of conflicts. This position does not allow for a permanent solution. It facilitates, on the contrary, a never-ending routine of referring the one regime to the other and vice versa, and it arrives at decisions in the course of this routine, without, however, questioning overall the respective authorities of the conflicting regimes. Accordingly, a law of disourse conflicts can only be understood as an infinite 'chain of ultimate decisions' in the sense of Max Weber, in which the legal argument 'passes through' .the different particularistic rationalities which are institutionalised in law, and arrives at decisions on this basis, without ever resolving the permanent conflict. This hardly satisfies the romantic desire to reconcile the divisions

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[30] K.-H. Ladeur, 'Post-modern Law and the Subject: Overcoming Uncertainty by "Deconstructing" the Subject', in D. Patterson and A. Somek (eds.), *The Indeterminacy of Social Integration* (Oxford, forthcoming); K.-H. Ladeur, *Postmoderne Rechtstheorie: Selbstreferenz—Selbstorganisation—Prozeduralisierung* (Berlin, 1992) 200ff; K.-H. Ladeur, 'From Universalistic Law to the Law of Uncertainty: On the Decay of the Legal Order's "Totalizing Teleology" as Treated in the Methodological Discussion and its Critique from the Left', in C Joerges & D. Trubek (eds.), *Critical Legal Thought: An American-German Debate* (Baden-Baden, 1989) 567.

[31] G Teubner, 'De collisione discursuum: Communicative Rationalities and the Law', *Cardozo Law Review* (forthcoming); G. Teubner, *Law as an Autopoietic System* (London, 1993) ch.6; G. Teubner, 'Die Generalklausel von "Treu und Glauben" ', in R. Wassermann (ed.), *Alternativkommentar zum Bürgerlichen Gesetzbuch II. Allgemeines Schuldrecht* (Neuwied, 1980) 45 ff.

in society, but it increases variety considerably and may lead to more adequate and acceptable results. By 'ceaselessly contextualizing and relativizing law's knowledges' it may open 'possibilities for productive confrontations between discourses'.[32] It reconstructs the different normative projections of the other particularistic rationalities and attains its norms through decisions on what cannot be decided.

This sounds paradoxical, and it is paradoxical. However, it only provides the situation of legal discourse in today's society with the name of the paradox of a *unitas multiplex* which is also reflected in its parts as a *unitas multiplex*. Such a *unitas multiplex* cannot be resolved by referring hierarchically to the whole, or to the centre, or to the top, but it can be 'de-paradoxified' through the grand tour of references and references back.

The traditional international conflict of laws can thus be seen as a vast network of references to foreign law and references back to the domestic law. The relevant technical terms here are called choice of law, qualification, assimilation, *ordre public*, internal and external consistency of decisions, *renvoi* as the reference back to the local order and onward to third orders. These terms provide a legal form for oscillating between inside and outside, for blending the foreign with the familiar, and for the game of confusion of self-reference and hetero-reference. Here it is in particular the legal concept of the *renvoi* which, as the reference to a foreign legal order referring back to the local legal order, has always fascinated legal scholars in conflict of laws by the very nature of its paradoxical, circular structure.[33] Should the *renvoi* be prohibited? Should the *renvoi* be aborted, or should one follow its lead? Or can it be made productive by introducing appropriate distinctions?

Is there in the collision of the discourses a similar game of confusions in form of the *renvoi*, that is, in the discursive references back and forth? Indeed, those other discourses refer to the law, when in conflict, and the law refers to other discourses, when in conflict. Are these only infinite reflections of symmetries, empty tautologies and vicious circles? There is a case to be made for observing if and how legal practice succeeds in shifting symmetries into asymmetries, in unfolding apparently empty tautologies, in turning the vicious circles of references and references back into virtuous circles.

Now, if legal theory could search into this direction, it could play an entirely different role in the game of references. It would definitely get away from merely endlessly pitting a political theory of law, a moral theory of law, and an economic theory of law against a legal (*sic!*) theory of law, and calling one of them the ultimate one. Instead of trying once more to

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[32] R. Cotterell, n.10 above, 110.
[33] G. Kegel, *Internationales Privatrecht* (München, 1995) §10.

declare one of the particularistic rationalities as the very deepest fundament of law and justice, jurisprudence should develop a theory of discourse collisions which calibrates law precisely to the plurality of social rationalities. Such a theory could delineate, in the never-ending game of references, how to arrive at the necessary asymmetries, substantiate tautologies, unfold paradoxes without reducing the plurality of the points of references, and it could—perhaps—contribute to its refinement.

So the specific mission of legal theory would be to reflect upon the infinite game of references played out between a plurality of observation posts and upon its translation into a 'constitutional' form. Will such a constitutionalisation reformulate the classical compensatory task of law in a new context? Will a constitutional form for the conflict of discourses be able to curb self-destructive dynamics? Or at the very least will it counter them with some measure of compensation? In the old inter-personal conflicts, the classical task of law has been to guarantee the mutual acknowledgment of autonomy, to curb mutual infringement and to compensate for mutually inflicted harm. Is there a way to translate these classical concepts into today's interdiscursive conflicts?

Of course, there is one fundamental difficulty of such an interdiscursive law of conflicts. It must accept the conflicting particularistic rationalities on equally authoritative footing without being able to assume the rationality of the whole. However, exactly the same has always been the situation of the international conflict of laws which does not assume a hierarchical top of world-law that would have to decide on conflicts. Historically and by default, conflict of laws has used a strangely paradoxical technique of self-application. National laws have been judges in their own case. Conflict of laws has designed a multiplicity of national *fora* which decide international conflicts by recourse to one of the laws in conflict. This multiplicity of decentralised *fora*, deciding on conflicts, fills the void of one central international conflict forum. This is indeed the situation of conflicting discourses which, as is well-known, have lost their *méta-récit* in the course of the most recent history of the Western world. Discursive collision can only be decided decentrally, only within each discourse, and in each case afresh and differently.

This leads, as it does in the case of the national *fora* of the international law of conflicts, to the further question as to what the forum for the interdiscursive law of conflicts could be like. What is the appropriate forum on which the conflict of discourses can be treated? In principle, there are two venues: either it is the *forum internum*, situated in the legal system itself or it is the *forum externum*, situated in one of the other social subsystems. Either the collision is 'incorporated' in the operations of the internal forum of law, or it is 'externalised' into the operations of an external forum. Both scenarios are institutional reality today. They reveal,

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each for itself, quite different normative perspectives which indicate how law can respond reflexively to the collision of discourses if it translates the game of references into constitutional forms.

In the following, I shall concentrate on these two scenarios and what follows from their normative perspectives. In the first scenario, the case of 'incorporation', the elements of the colliding social discourses are reconstituted *ab initio* in the forum of law. This opens up perspectives on how legal argument can respond to the conflicts of discourses. My example here will be from the field of legal reasoning—the methods of legal consequentialism. Can we gain new results for the discourse conflicts through consequentialist argumentation? In the second scenario, the case of 'externalisation', discourse collisions are dealt with in the *fora* of social subsystems other than law. Here the perspectives for a translation of the game of references into legal constitutional forms are quite different. My example will be the institution of ethics committees, a selection of social, non-legal *fora* for the treatment of social conflicts. My chosen perspective leads here to the question: is it possible to counteract the imperialism of one particularistic rationality by counterinstitutions in the fabric of social discourses?

DISCOURSE COLLISIONS BEFORE THE FORUM INTERNUM

Jürgen Habermas, in his work *Faktizität und Geltung*[34] has dealt exhaustively with the first scenario, the case of the incorporation of conflicts and the battle of autonomous social discourses before the forum of law. He pursues the question as to how different discourses find their way into the law, and how law can decide between them. He draws a distinction between moral discourses which aim for universality, ethical discourses which target individual or collective identities, pragmatic discourses which establish relations between ends and means and rank the priorities for certain collective goals, and finally forms of bargaining which constitute a culture of fair compromise. They all turn into an internal conflict for law in the moment that these autonomous forms of discourse are 'translated'—to use Habermas's word—by the legal discourse which represents an autonomous form of discourse in its own right, guided by the criterion of legal coherence.

According to Habermas, law solves conflicts of discourses by adhering to a 'processual model'. Pragmatic, ethical, moral and interest-oriented arguments are freely exchanged in legislative process, as Habermas sees it, until they reach the filter of legal argumentation at the end. Here the

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[34] J. Habermas, n.17 above, 196ff.

legislative programmes resulting from discourse are subjected to a test of norm coherence, especially constitutionality, in order to find out whether they fit the relevant legal system. According to Habermas, the situation of judicial decision-making in applying norms is quite similar. Here too, Habermas identifies a number of pragmatic, ethical, and interest-oriented arguments which are at the end controlled by the measure of legal coherence. Coherence appears in both cases as a kind of filtering device which excludes as non-consistent some of the solutions which result from the free play of discourses in the forum of law.

In my view, Habermas has found a sensitive concept for the problem of collision with this approach. However, he simultaneously overestimates and underestimates the role of law in resolving this problem. On the one hand, Habermas overestimates the communicative rationality which is actually provided by legal procedure; on the other hand, he underestimates the single-mindedness of legal dynamics which does far more than just filtering out arguments. The overestimation of law leads Habermas to believe that the procedural rationality which is incorporated in law does not only produce substantial norms discursively but can even assist in clarifying argumentatively the meta-question of the collision of different discourses. This will surely be well received by some legal scholars in their professional self-aggrandizement who celebrate, in particular, constitutional law as the place where the social divisions are healed. In fantasies of omnipotence entertained by a 'New Republicanism', constitutional law emerges as the locus of a social super-discourse of a fictitious civil society which takes over the tasks of integration of fragmented society.

It is certainly asking too much of law to achieve this, for where are the cognitive and procedural resources of the legal process which could empower it to decide between economic, political and moral rationality and claim to be binding for all society? If science which, after all, is stacked with shining intellectual riches for problem-solving cannot succeed here, how much less likely is it that law can succeed with its comparatively impoverished intellectual equipment? Instead of taking the normative projections of constitutional law scholars too seriously, one should observe legal practice itself more accurately. In doing so, it is easy to see that legal practice indeed reconstructs the arguments of the other autonomous discourses but that it, at the same time, 'deconstructs' these external universalities in a particular fashion. Law turns their universal rationality into local rationality. It produces precisely the contrary of what a super-discourse would produce in terms of substantial rules and what a meta-discourse would produce in terms of collision rules. It does not solve the conflict at the highest level of universal justice, that of the super- and meta-norms but, in fact, chooses the lowest level, that of local justice. It does not perceive the different discourses as a conflict of universalities but only

through the looking glass of a local conflict and resolves it at this level, only locally, without ever coming close to universal perspectives.

It is here that Habermas, on the other hand, underestimates the specific contribution which law can make towards coping with discourse collisions. The legal arguments which are applied locally have a greater effect than that of a mere filtering device which excludes some of a number of discursively established results as inconsistent with the past legal practices. Rather, the concrete question of applying the law, that is, the local practice of equal or unequal treatment is the crucially productive mechanism which also copes with the collision problem. To treat what is equal equally and what is unequal unequally is not only a fundamental legal norm but also a dynamic process of law-making which triggers off a self-propelling series of distinctions. It is not only a question as to the test of normative coherence, as implied by Habermas, it is above all the question as to a generative mechanism, a 'historical machine' or a 'non-trivial machine' as Förster would call it.[35] In this context, concepts like precedent, *stare decisis*, and treating the equal equally are not what is interesting. Rather, it is the deviation from the precedent, the 'distinguishing' and 'overruling', the unequal treatment of what is not equal, which provokes the search for new legal norms and produce arguments on which to ground them. Legal inequality provides the conceptual framework for the never-ending search for alternative norms and facts, principles and values. It provokes innovations which, in turn, introduce a new round of questions of 'equal or unequal?' in the chain of distinctions.[36]

Law also uses this local rationality to treat the collision of discourses. 'Equal or unequal?'—that is the question with which new constellations are absorbed by law by subsuming them under a local rule. In order to answer that question, law incorporates incrementally, *ad hoc* and eclectically some of the arguments provided by other discourses. Here it is crucial that law does not accept, as a whole, the method of universality from morality, the issue of identity from ethics, the goals-means relation from pragmatics, the cost-benefit logic of economy, and the policy method of politics. Rather, law collects from these conceptual edifices individual pieces *ad hoc* which are then fitted in its own constructs according to the blueprint of equal treatment. Constantly on the relentless search for criteria for the distinction of equal versus unequal, legal discourse is scanning its discursive environments, borrows ideas, rules and principles where it can, and exploits moral, ethical, pragmatic and strategic arguments. However,

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[35] H. v. Förster, 'Responsibilities of Competence' in H. v. Förster, *Observing Systems* (Seaside, Cal., 1981) 206.
[36] See on this W.T. Murphy, 'The Oldest Social Science? The Epistemic Properties of the Common Law Tradition' (1991) 54 *Modern Law Review* 182.

it transforms them all into legal criteria for the assessment of the issue as to whether the new constellation has to be decided differently according to norms which have yet to be found.

Contrary to Habermas's conclusions, we do not see here a free play of discourses in the forum of law but find that external rationalities are literally 'enslaved' for the purposes of the legal system. François Lyotard introduced the distinction of '*litige*' and '*différend*' in order to define that slavery.[37] Discourses are closed off from each other because of their different internal grammars in such a way that, in the case of a conflict between them, no '*litige*' is possible, and that means no fair trial in which both parties can make their cases authentically and in which a just decision can be made. Nonetheless discourses can 'meet' in spite of their hermetical closedness, but only by way of '*différend*', that is, a confrontation, in which one discourse perpetrates structural violence on the other and commits injustice.

A more accurate way to analyse the slavery perpetrated by the '*différend*' is to look how the 'history machine' of an equal/unequal treatment of cases treats arguments which are foreign to law. This machine forces the strict discipline of a legal procedure on them which decides, on the basis of the current law, which arguments are admissible, which aspects of the foreign argument are legally relevant and which are not, how priorities are set and how conflicting perspectives are treated. Indeed, the current law as the historical product of the operatively closed legal system decides how unequal cases are currently decided. To have disposition over inequality[38] is the privilege of law and this includes the legally authorised use of arguments which are foreign to law.

Just as a domestic court does not apply foreign law authentically in the international law of conflicts, legal discourse does not all of a sudden act in an authentic manner morally, ethically, scientifically, economically or politically when it uses non-legal arguments. In both situations, foreign concepts are radically reconstructed. National law of conflicts constructs, in cases which touch upon foreign law, a mixture of domestic and foreign rules from the perspective of the local forum, that is, a hybrid body of rules which is significantly different from the rules which a foreign court would apply. Ago has captured this 'constructivist' method in conflict of laws aptly:

Necessarily, the legal order is always exclusive in the sense that it excludes a legal aspect of everything which does not re-enter that order as legal.[39]

[37] J.-F. Lyotard, n.17 above, 9.
[38] N. Luhmann (1993), n.7 above, 110ff.
[39] Ago (1936): IV 302, quoted in G. Kegel, n.33 above, § 3 × 1b.

Indeed, re-entry—in the terminology of Spencer-Brown[40]—is the term which captures the remarkable transformation of foreign concepts into legal conflicts. An original concatenation of distinctions separates, through their operations, the legal system from its environment; what is legal from what is not legal. Legal operations, by their very operative closure and, as a matter of principle, cannot reach out into the domains of non-law. As a result, law can only reconstruct its environment internally through closed, self-referential operations. This internal reconstruction of the external world is never identical with the events as they happen in the external world. Even if their substance appears to be identical, they are different because they are recontextualized. For instance, at the very moment that law reconstructs moral arguments internally, they lose their relation to the criterion of universality and to the moral code. They are now subjected to the mechanics of the equal/unequal treatment, pressed into the programmes of law (rules, principles, doctrines) and ultimately linked to the binary legal code of legal/illegal. Calculations of costs and calculations of power, policy arguments and scientific constructs, they are all treated by the law in the same way. They all become strange hybrids which are now, however, the sole responsibility of the legal discourse.[41]

The most important effect of enslaving as far as discourse collisions are concerned, is that what could not be compared before can be compared now. Or what could not be decided before can be decided now. However, and this cannot be stressed strongly enough, this effect works only within the symbolic territory of law. Law does not assume the role of the super umpire of the grand society game. It can only compare discourses within the legal game, and that only in the aforementioned local way. Discourses remain incompatible outside the world of law. The re-entry to the internal side of law has the effect of making incomparable universalities appear all of a sudden as comparable entities inside law by reproducing the external world internally.

Precisely this, making slaves and comparing what was incomparable, is what happens through the re-entry of foreign meaning into law. All these concepts lose their original meaning and appear as items for decision-making in the history machine of law. Moral maxims, ethical identities, pragmatic recommendations, economic cost considerations, policy strategies all undergo a remarkable process of transubstantiation; after their re-entry they appear as mere components of the legal discourse: as legal values, legal principles, norm purposes, interests and ambits for decision-making. Consequently, this is not a case of the moralising, politicising,

[40] G. Spencer-Brown, *Laws of Form* (New York, 1972).
[41] See for more detail G. Teubner, 'How the Law Thinks: Towards a Constructivist Epistemology of Law' (1989) 23 *Law and Society Review* 727.

economising of law but it is, on the contrary, the case of the legalising of moral, economic, political phenomena with the effect that their discursive differences become neutralised. In this way, perspectives of efficiency, effects of policies and moral principles can be offset one against the other in each case—but to repeat: only in so far as the internal realm of legal discourse is concerned.

It seems as if, with this approach, legal practice is quite in touch with most recent developments. Indeed, legal practice seems to fulfil the extravagant demands of a post-modern plurality of discourses. Law does not need the *méta-récit* of a societal central agency in order to treat the conflicts between different social rationalities; nor does law itself become such a *méta-récit*; nor must law give in to an economic, political or any other particularistic rationality. Rather, the re-entry of particularistic rationalities into the realm of law makes them now reappear as comparable components of legal discourse, and can so be offset against one another on the basis of legal argument in each individual case and in a form which 'resolves' the conflict between the particularistic rationalities.

CONSEQUENTIALIST REASONING AND POLYCONTEXTURALITY

An ingenious solution, indeed! Of course, legal practice invented it and not legal theory. But there is a price to pay for it. This is not only the trivialisation of 'high-cultural' achievements which become legal petty cash. Far worse is a loss of reality which comes along with making social particularistic rationalities the slaves of law. Law seems to lose contact with social reality by enslaving it, precisely by making contact with the social reality through the incorporation of its concepts. Enslavement takes care of the conflict, at least in the single case, in the small world of law. However, what does that imply for the acceptance of the decision in the large world of society? Seen in the perspective of the international law of conflicts,[42] law has solved, with the re-entry, the problem of its 'internal consistency', that is, the problem of the coherence of its own order, satisfactorily. However, what about the 'external consistency', the acceptance in the external order? The ingenious solution is not reflected in the environment of law; it may even result in environmental damage as far as the other discourses are concerned.

A similar effect can be seen particularly clearly in the parallel case of economic calculations: just like the legal discourse the economic discourse also enslaves the world in its entirety—including events which are clearly far away from economics like love, religion or the law—in assessing them

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[42] G. Kegel n.33 above, § 21 II 3.

all as cost factors and submitting them, even if under the mute protest of the enslaved rationalities, as now comparable items to the economic calculus. However, this way of calculation has no base in the social context and it creates harmful effects on the ecology. As a consequence, the ecologisation of the economic discourse, that is, the 'external consistency' of economic calculation, is a burning political issue.

Perhaps, then, the ecologisation of the law of discursive conflicts is the point where legal theory can inform legal practice? For theory can show that the law has created an asymmetry in the form of the 're-entry' which enables society to refer to law. But at the same time, this has seriously prevented law from referring back to society completely, and has at the same time denied law a sensibility as far as society is concerned. Is there not a case to be made that law should develop conceptual sensors as to whether or not its treatment of collisions has harmful effects on its social environment? Should the law not be concerned as to whether or not its well-meaning conflict decisions are inflicting damage on its social environment? Should one not here once more introduce the circular reference of the maligned *renvoi* in order to give law a base in society?

I would like to examine this general argument using an example from legal methodology—consequentialist reasoning in law. I shall suggest a particular form of teleological orientation to legal practice which would be not to adopt teleological orientation in general but which is tailored to the problem of the ecologisation of legal discourse.

Today lawyers make, as a matter of routine, decisions contingent on their actual outcomes.[43] They do so even though they know, or at least could know, that this cannot work. However, lawyers have hoped that concrete empirical findings on the causal consequences of legal decisions will lead to general models which will warrant predictions as to judicial or legislative actions. These predictions, in turn, could then be translated into legal argument for or against a concrete legal decision.

However, there are new doubts in sociology as to the prognostic capacity of social sciences which undermine a consequentialist orientation in law. These doubts are not only related to the temporary backwardness of the social sciences when compared with the more successful natural sciences, a backwardness which may soon level out. These doubts extend to the fundamental principles of scientific methodology. There are now theories in the natural sciences which categorically deny predictability in certain constellations, even if events are fully determined and all laws governing them are well known.[44] Furthermore, the chaos character of social

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[43] See the contributions in the collection on consequentialism, G. Teubner (ed.), *Entscheidungsfolgen als Rechtsgründe: Folgenorientiertes Argumentieren in rechtsvergleichender Sicht* (Baden-Baden, 1995).

[44] H. von Förster, *Observing Systems* (Seaside, Cal., 1981).

processes is cited as a reason why predictions are impossible in principle or only possible within extremely narrow margins.[45]

A second problem for legal consequentialism is that causal chains are infinite. According to Luhmann,[46] a form for legal consequentialism has to be found which does not increase the 'variety' of law to such an unbearable degree that the functioning of law is put at risk. The challenge is to find new 'redundancies' in law mitigating uncertainty in decision-making which has been increased by consequentialist reasoning.

Here Dworkin[47] made the widely recognised suggestion that rights be rendered indispensable and be excluded altogether from consequentialist considerations. The interesting point about this suggestion is that it shifts the relation between variety and redundancy clearly in favour of redundancy by excluding whole bands of objectives for teleological considerations and thus from creating variety. However, in view of the density of interdependent social actions such a clean dissection of spheres of subjective rights will not be possible without considering the consequences of actions which are covered by law.

Therefore, the suggestion by MacCormick[48] to limit the array of the outcomes which have to be considered rather than the band of objectives for consequentialist considerations, appears to be more realistic. MacCormick permits legal consequentialism only when general rules are at stake and excludes it in relation to individual decisions. He refers such a 'rule consequentialism' to the concept of universal applicability in law. 'Rule consequentialism', in contrast to 'act consequentialism', would clearly increase redundancy and decrease variety.

A suggestion by Mengoni[49] takes a similar direction. He perceives the problem of consequentialism as caused by the, in principle, indeterminacy of infinite concatenations of consequences and wants to distinguish between long-term outcomes and short-term outcomes. Judges are advised to consider exclusively the first links in the chain. In this way, the number of external variables can be drastically reduced.

Grimm,[50] finally, counts on a more normatively defined limitation of relevant consequences. He holds that it is primarily a problem for legal doctrine to develop criteria which allow a selection from the infinite

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[45] W. Krohn and G. Küppers, 'Selbstreferenz und Planung' (1990) 1 *Selbstorganisation* 109.

[46] N. Luhmann, 'Legal Argumentation: An Analysis of its Form' (1995) 58 *MLR* 285.

[47] R. Dworkin, *Taking Rights Seriously* (Cambridge, Mass., 1978).

[48] N. MacCormick, 'Argumentation und Interpretation im Recht: "Rule consequentialism" und rationale Rekonstruktion', in G. Teubner, n.43 above, 39.

[49] L. Mengoni, 'Hermeneutik und Folgenorientierung: Zur Argumentationspraxis des italienischen Corte costituzionale', in G. Teubner, n.43 above, 123.

[50] D. Grimm, 'Entscheidungsfolgen als Rechtsgründe: Zur Argumentationspraxis des deutschen Bundesverfassungsgerichts', in G. Teubner, n.43 above, 139.

number of consequences. He hopes that a systematic development of the concept of purpose in law will lead to further impulses for legal doctrine.

We have to follow these leads, in my opinion, but must also move with our abstraction in a different direction. The relevant consequences of modern law are today no longer experienced in the diffuse lifeworlds of the subjects of law with their infinite causal chains but in the other specialised social subsystems where decisions of the legal discourse are translated, through a new form of re-entry. Only after such a translation has taken place, can it be detected in law whether a legal decision can be tolerated in the other discourse or whether it inflicts negative, disintegrative or even destructive effects. *Altera pars audiatur*. This means that not only must the other party involved in each individual case be heard before a legal conclusion but also that the other discourse involved has to be heard before the law can make a decision on the collision of discourses. With the help of a 'back translation', law should be made capable of receiving the specific linguistic form of such 'translations' and their possible damaging effects. Law should make good use of the sociological insight that, in social discourse, legal norms are not just read as expectations of the law addressed to them and demanding obedience. Rather, legal norms are reconstituted economically, politically and pedagogically in a 'second reading' by respective discourses. Rules are 'translated' as cost factors, power positions and as instruments of education. A legal observation of the consequences of decisions should now, by way of a 'third reading', limit the relevance of the, in principle, infinite consequences to the few but decisive consequences which have a negative impact on the law's discursive environment.

'Translations' matter, not causal chains! How is the legal norm translated into the other concrete discourse? How is the re-entry of the legal decision into society worked out? What does the 'second reading' of legal norms look like in other discourses? Does the legal norm have negative, disintegrative, destructive effects? And further: how can the legal discourse respond, in a 'third reading', with new norms which take its social environment into account? This should be, in my opinion, the search and find formula of a realistically defined consequentialist orientation.

This orientation is limited, as it were, to the destructive effects of discourse collisions. At the very least, this orientation could make up, in parts, for the lost contact with the social environment which came about because law legalised the conflict between colliding discourses, enslaving it and reducing it to trivial routine. Now the question could be examined as to whether or not the legal decision would have negative effects on the discursive environments of law. In essence, this means limiting the analysis to one and only one consequence of legal decision-making: how do the actors in the relevant social system really read the legal decision? As a

factor in a costs-benefits analysis? As a change of the concrete power relations? As a change to an educational programme? Does the translation have negative effects on the everyday life in that social sphere? This one consequence of decision-making has to be translated back again: what are the reactions which law can muster to respond to the negative consequences of its social transformations? There would be no need to rely on the impossible prediction as to how the actors in the respective social context would react to their second reading of legal norms. On the other hand, law would clearly gain in realism if it registered, in each case, only the one consequence, namely, whether the legal decision had a damaging effect in the second reading of the relevant social context, and whether it adjusted to these perceived effects by issuing norms which are less damaging.

Recent trends of 'contractualization' illustrate how consequentialist reasoning may be fitted to this iterative translation of discourses. Hugh Collins analyses how social discourses reread the norms of contract law and reconstruct their worlds of meaning after their 'contractualization'. Assessing their damaging effects on social relations (bilateralism, specificity, externalities, power relations) he proposes new ways of how contract law could respond to its own negative consequences.[51]

Of course, one should not overestimate the anticipatory capabilities of law. If it is correct that the prognostic potential of the social sciences is far more limited than previously thought, the only solution which is left must be to strip legal consequentialism as far as possible of predictions of possible future consequences and to focus on the observation of environmental damage which has actually materialised. Retrospective observation of consequences is what is needed, not prospective predictions of consequences. In essence, we are no longer concerned with the ambitious project of applying sociological models for the prognosis of future behaviour in a response to legal change, but we are concerned, more modestly, with collecting factual information about the environmental damage which has resulted from the concrete second reading in the other discourses after they have reconstructed the legal decision on their own terms. The legal forum which has to decide on the collision of discourses would accept a greater responsibility if it exposed itself to the consequences of the decision, that is, if it tried to find out whether the decision had disintegrative effects in the other discourses and if it tried to draw conclusions from that.

However, the question remains as to whether we have found the sought-after antidote to law's tautologies, symmetries and paradoxes if it only returns the conflict between discourses as a legal conflict loaded, as has been discussed, with arguments about consequences back to the discourses.

[51] H. Collins, 'The Sanctimony of Contracts', see Chapter 3.

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Is that not only pushing conflicts back and forth between different domains? The difference is made by the real changes which result from this process of translations and back translations. 'Re-entry' does not mean that external meaning is mirrored accurately internally, it means that external meaning is reconstructed internally and that new decisions are made on this basis. Ultimately, we can observe here a series of multiple transforming re-entries. First, the conflict between discourses enters the law and is decided there in the specific 'local' form. Second, the legal decision is reconstructed in the other discourse and leads to a reaction which is specific for this discourse. Third, the reaction is brought back to law and appears, legally reconstructed, on the screen for inspection, providing a new basis for decision-making. As the discourses are operatively closed, they can only misunderstand each other in this recursive process of reconstruction. At the same time, such misunderstand-ings are not mere fiction because they are, in fact, an internal reaction to an external irritation. They build on the 'tacit knowledge' of the other discourse.[52] This added value is given by, as it were, a series of productive misunderstandings.

Are we only projecting an ideal world of law which is supposed to translate conflicts between discourses into law, decide on them and control the consequences argumentatively? I do not think so. Here, we can refer once more to the current practice of legal economics, this time in order to show that such a game of references is already played out in an advanced version between law and another discourse.[53] First, law reconstructs here economic transactions on legal terms with the help of economic analysis; secondly, it adjusts legal argumentation to anticipated and possibly already materialised economically damaging consequences; and thirdly, it reform-ulates legal norms on the basis of these transformations. Nevertheless one has to be on one's guard as to the imperialism, or even totalitarianism of economic theory. If the law opens up to the claims of universality of economics in this way, it must be open to the other discourses as well. The task here is to generalise this game of *renvoi* as practised by legal economics and to apply it to the multiplicity of discourses in society.

DISCOURSE COLLISIONS BEFORE THE FORUM EXTERNUM

Of course, law's cognitive resources are considerably strained, if not to say overburdened, in this intricate game of *renvoi* by internalisation of

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[52] M. Polanyi, *Personal Knowledge: Toward a Post-Critical Philosophy* (Chicago, 1958) 69.
[53] See E. Schanze, 'Symbiotic Contracts: Exploring Long-Term Agency Structures Between Contract and Corporation' in C. Joerges (ed.), *Franchising and the Law: Theoretical and Comparative Approaches in Europe and the United States* (Baden-Baden, 1991) 67.

collisions and observation of their consequences. Unquestionably it is somewhat demanding to ask down-to-earth lawyers who are trained in case analysis to demonstrate multilingual attitudes which help them to reconstruct the language game of economics, politics and ethics within the language game of law. Then it is even more important to focus attention on other forums in society outside the law, in which conflicts between discourses are taking place. What can law contribute to this external treatment of the collision of discourses?

Here our attention is drawn to autonomous social fields of rule-making in which different social universalities are directly expressed in legal form. As we mentioned before, following the historical example of legislation and contract, a number of other plural sources of law have been developed, especially rule-making in formal organisation, technical-professional standardisation and other forms of private justice.[54] The trick is always the same: transactions which are specific for one discours— economic exchanges, political acts, management decisions within organisations and acts of standardisation—are misunderstood as legal actions and perceived in law as contracts, statutes, associational laws and technical or professional standards. Thus, without going into the details of a demanding economic, political or technical analysis, law attains 'implicit' knowledge about the particularistic rationality of the social sector involved, if it is only sensitive enough to assimilate carefully the concrete social process and its rule-formation.

However, in this ongoing practice of social rule-making, law is prepared to make sacrifices to one god only, and is therefore at risk of losing its polytheistic virtues. Joining forces in this way with only one of the other particularistic rationalities, law may inflict damage on other social sectors. Seen in this light, constitutional review of legislation and, to a lesser degree, judicial review of contracts and standard terms of business can be called a service for polytheism. In this sense, constitutional civil rights and general clauses in private law can be understood as collision rules in the law of conflicts, in which the particularistic universality of politics or economics is changed by the incorporation of polycontextural elements. In comparison with judicial review of statutes and contracts the judicial review of the internal laws of organisations and of technical-professional standards is clearly lagging behind.

Even more exciting is the question as to how discourse collisions arise in arenas of legal pluralism itself. This exports, as it were, the collision from law to other discourses themselves. According to Wiethölter, this creates a situation in which 'autonomy' understood as self-determination of social discourses needs to be respected by the law and, at the same time, control

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[54] See G. Teubner, n.12 above, 134ff.

by law is not exercised as outer-directed but as a possible help in the situation of impossible self-help, a maeuetic situation, not unlike counsel-ling and mediation arrangements outside of law.[55]

Can this subtle game of autonomy and heteronomy be institutionalised? Again, I have chosen an example, in order to illustrate the abstract perspective. 'Ethics committees' in the broadest sense are currently one of the politically most exciting experiments. This is perhaps less so for the national top level ethics committes which work out general rules and is more so for the small local ethics committees in hospitals, business firms and universities which review problematic decisions.[56] In the polycontex-tural perspective, they are problematic because they are highly specialised, particularistic uni-dimensional transactions that are in potential conflict with the inner logic of other discourses. The primary task of ethics committees would be to search for discourse collisions: can these decisions be justified in the light of different universalities in order to do 'local justice'? These questions should not be decided by the law, rather they provide law with a new task: to constitutionalize alternative institutions which infuse a polycontextural orientation into highly specialised discourses in society.

One aspect of this new task for law is particularly important. In order to cope with collisions, law would have to switch over from the current pluralism of interest groups to a pluralism of discourses, a pluralism of language games. Law should not attempt a micropolitical imitation of interest group pluralism as it is practised in a larger political arena with changing corporate participants. To structure ethics committees with a concept of group pluralism in mind would be a mistaken method of their 'politicisation'. The decisive question is whether or not in a rule-making process which is dominated by only one type of discourse it is possible to institutionalise competing rationalities via participation rights, demands for information, evidential procedures and decision-making procedures.[57] *Altera pars audiatur.* This would mean here that ethics committees would not just listen to different group interests but make sure that the dominant economic or medical discourse would not inflict damage on the internal life

[55] R. Wiethölter, 'Zum Fortbildungsrecht der (richterlichen) Rechtsfortbildung' (1988) 3 *Kritische Vierteljahreszeitschrift für Gesetzgebung und Rechtswissenschaft* 1 at 27f.

[56] W. van der Daele, 'Regeldurchsetzung und Normbildung bei der Kontrolle bio-medizinischer Forschung' (1990) 42 *Kölner Zeitschrift für Soziologie und Sozialpsychologie* 428.

[57] See A. Bora, 'Gesellschaftliche Integration durch Verfahren: Zur Funktion von Verfahrensgerechtigkeit in der Technikfolgenabschätzung und -bewertung' (1993) 14 *Zeit-schrift für Rechtssoziologie* 55 at 61ff; A. Bora and R. Döbert, 'Konkurrierende Rational-itäten' (1993) *Soziale Welt* 75.

of other social areas, on the conditions for their proper functioning and on their guiding principles.

<div align="center">JUSTICE FOR THE HETEROGENEOUS</div>

Here, then, are our principles for the conflict of discourses under law. The infinite game of *renvoi* reappears now in a double way. If discourse collisions are internalized and brought before the *forum internum* of law, legal reasoning should take on a consequentialist orientation which focuses on negative effects of those collisions. If the collisions are externalised and disputed before non-legal *fora* the law should be brought in to transform those uni-dimensional extra-legal rule-making processes into poly-contextural institutions.

However, in both cases we should be resigned to the fact that there are no general and substantive legal principles, no super-norms, no meta-norms which could ultimately resolve the collision of universalities. Rather, in both cases the role of law is limited to simply participating in the infinite game of *renvoi* played out by closed discourses. Law only influences this game in a particular way, constitutes it in legal forms and infuses it with elements of juridical rationality, at best, contributes to minimising destructive tendencies in the collision of discourses. Emile Durkheim could still hold that the threatening centrifugal tendencies of the modern division of labour will be countered with integration through organic solidarity, restitutive law and professional-corporative ethics. However, today in a world of radicalized polycontexturality, an 'integrative' role of law is definitely ruled out, if it means that the law signifies governing values, principles and norms as valid. Rather, law's role is externally to impose internal limits on the unfettered dynamics of a specialized discourse in the interest of other discourses. The current task of law cannot be to reconstitute the lost unity of society but to designate borders of plural identities, protect them against domination by other discourses and limit damage from the fallout of discourse collisions.

The central concept is 'justice for the heterogeneous'.[58] Lyotard says about a justice of multiplicity:

Justice would be this: acknowledging that the plurality of the interwoven language games cannot be translated into each other, and that they have their own autonomy, their own specificity which cannot be reduced to one.[59]

[58] W Welsch, 'Gesellschaft ohne Meta-Erzählung' in W. Zapf (ed.), *Die Modernisierung moderner Gesellschaften* (1991) 174 at 176; J.-F. Lyotard, 'Gespräch mit Jean-Pierre Dubost' in J.-F. Lyotard, *Das postmoderne Wissen: Ein Bericht* (Bremen, 1982) 127.

[59] J.-F Lyotard, n.58 above, 131; J.-F Lyotard, *Just Gaming* (Manchester, 1985) 100; A. Barron, n.27 above, 33.

One would extend the old *altera pars audiatur* from an individual to a social perspective that sees the plurality of discourses as the central problem of society today. No longer can these conflicts be decided by a central authority; rather, central authorities are in an intractable conflict with one another. If we insist on such a position 'beyond hierarchy', justice could be conceived as a relative term which would not be applicable in one location only, say, law or politics, but which would have currency in all discourses. So justice would denote the deeply problematic relation between discursive identity and discursive otherness, not however from a superior third party perspective but from the unique perspective of one singular discourse in relation to the meaning worlds of other discourses. Justice, then, would not be anything specifically legal, something which under current circumstances would still justify a privileged role of law. Rather, justice is a provocation for each discourse. A legal system would respond to the challenge of justice in a double way. It would not only attempt to achieve the internal consistency of law but, at the same time, would attempt to reconstruct internally the rationality of the other discourse which is involved in the conflict. Justice seen in this way would put modern law under a demand which is two-fold. The question is no longer only: is law treating what is equal equally and what is unequal unequally, but the question is now also: does the law do justice to other discourses on their own terms?

Without doubt, such a justice for discourses has to live, from its inception, with the certainty of its failure. Principally, this justice cannot rule out that discourses violate one another. It cannot reverse the fall from grace in the form of a profound social divide, functional differentiation and fragmentation of discourses with all their self-destructive tendencies. 'Compensatory' as this justice is, it can only insist less ambitiously on an *ad hoc* limitation, reduction and compensation of the harm which is inflicted by the collision of discourses.