HOW THE LAW THINKS: TOWARD A CONSTRUCTIVIST EPISTEMOLOGY OF LAW

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I. JABBERWOCKY

Twas brillig, and the slithy toves did gyre and gimble in the wabe: all mimsy were the borogoves; and the mome raths outgrabe.

American law professor commenting on Niklas Luhmann, "The Unity of the Legal System"

European and American scholars of law and society apparently have problems in communicating with each other. To invoke Lewis Carroll's authority on a piece of legal theory indicates how serious the problems are. After all, traced to its true origins, "Jabberwocky," the famous "Stanza of Anglo-Saxon Poetry" (Carroll, 1855; 1871: 151), means "weeks of woe" in its original German version (Scott alias Chatterton, 1872). And inextricably involved in the interpretation of the poetry is a certain Hermann von Schwindel...

This lack of mutual understanding is only a recent phenomenon. Communication was still easy when Merton's regime of middle-range theories was governing law and society. There was a consensus that from the patient observation of the real law in the real world, a body of nonspeculative, nonmetaphysical theories would evolve. And this consensus was reflected in a common, sober, professional, comprehensible language. However, with the "Return of Grand Theory," (Skinner, 1985), with the invasion of poststructuralism, critical theory, discourse theory, and autopoesis in the sociological world, the unified discourse of law and society is falling apart again into different cultural provinces. The deplorable result is a fragmentation of theory languages, the "Jabberwocky" of sociological theory.

Obscurity of language, then, is the most common critical comment on those recent European theory fashions, be they of Pari
tian, Frankfurter, or Bielefeldian origin. The language is said to be overly complex, often incomprehensible, and to conceal usually

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trivialities behind a smokescreen of trendy words like legal discourse, communicative rationality, and legal auto-poi-sis.

Of course, hard translations play an unfortunate role in this exchange of ideas. And national cultural contexts are still so diverse today that the transplantation of a theory from one context to the other leads to a degree of incomprehensibility that can only be gradually reduced by careful explanation. And one should also concede that sometimes personal idiosyncrasies of theorists render their texts needlessly difficult to understand. However, the core of the problem lies elsewhere. It is a question of whether the language is complex enough to match the complexity of the subject matter. The new theories on law claim to construct sociological realities that cannot be adequately expressed by ordinary language. For them, to give in to the demands of easy comprehensibility would be to compromise on the content of their message.

Let us take a concrete example. In the context of legal auto-poi-sis, several authors are working on a new theory of the legal person (collective actor, corporate personality; cf. Luhmann, 1984: 27ff.; Toubenk, 1988a: 150ff.; Knyphasen, 1988: 120ff.; Hutter, 1989: Ch. 4; Ladur, 1995: Vaday, 1999). In their language, "the social reality of a legal person is to be found in the collectivity: the socially binding self-description of an organized action system as a cyclical linkage of identity and action." What? More jabberwocky? Do organizations think? How can they have the capacity to describe themselves? Linkage of identity and action? All this sounds like those infamous mystifications of collectivities. Obvi-
ously, collectivities do not act, but only individuals, and it is nothing but individual actions that are aggregated into collective action. So why not go back to Max Weber’s more sober and comprehensible formulation of the same subject matter?

These concepts of collective entities... have a meaning in the minds of individual persons, partly as something actually existing, partly as something with normative authority. This is true not only of judges and officials, but of ordi-
inary private people as well. Actors thus in part orient their action to them, and in this role such ideas have a powerful effect, often a decisive, causal influence on the course of actions of real individuals. (Weber 1978: 14).

But is it still the same? Certainly, one can now easily understand the words. The message, however, is lost. The novelty of the construction lies in the following 'issues' that depart from the world views invoked by ordinary language:

1. Organizations do not consist of human individuals as mem-
bers, but of communications, more precisely of decisions as
their self-constituted elements.

2. Organizations do "think." It is through internal communi-
cation that they construct social realities of their own,

quite apart from the reality constructions of their individ-
ual members. In short, organizations are epistemic subjects.

3. Organizations are not per se capable of collective action. They transform themselves into collective actors by communica
tively constituting their identity.

4. The capacity for collective action emerges when organiza
tions in their collective identity produce actions and, vice
versa, organizational action produces their collective iden

tity.

Obviously, these four issues suggest a social reality of the legal
person that lies far beyond the well-known territories of fiction,
group or entity theories of corporate personality (for the ongoing
discussion in terms of those classical theories, cf. Horwitz, 1988;
Dan-Cohen, 1986; Schane, 1987; Roos, 1988).

This example should have made clear that the above-men
tioned communicative problem is not due to obscurity in language
but to the limited capacity of our language to express the construc
tion of newly perceived social realities. This, at least, is what the
following new theories on law—post-structuralism, critical theory,
and auto poiesis—have in common. It is true that Michel Foucault,
Jürgen Habermas, and Niklas Luhmann “gyre and gybble in the
wake,” but they do so because they imagine social realities whose
reconstruction clearly goes beyond the limits of ordinary language.
What makes them seemingly incomprehensible is their radical de
parture from epistemological premises that are deeply embedd
ed in contemporary thinking on law and society, particularly, from
what Piirno (1999) poetically calls the reification of a
“metaphysic a quotid ian a”—epistemological realism and methodologi
cal individualism. Although poststructuralist, critical theory, and
the theory of auto poiesis develop quite different visions of modern
law, they converge in their anti-réalism and their anti-individuali
sm.

One should boast to add that anti-réalism does not mean epis
tepological idealism, and anti-individualism does not mean meth
odological holism/collectivism. We are not confronted with a revi
cal of the old dichotomies realism/idealism and individualism/
collectivism that dominated the legal theory debates in the first
half of the twentieth century. It is neither Kelsen nor Duguit who

1 Given the humanistic orientation of critical theory, it might sound
strange to characterize this theory as anti-individualistic. However, we are not
talking about moral-political options, but theory constructions. In a theo
dratic sense, this theory is anti-individualistic: (1) in its critique of methodologi
cal individualism in economic and rational actor theories, (2) in its replacement
of monological theories of norm formation by dialogical ones, (3) in locating the
discourse in the center of cognition, and not the classical epistemological sub
ject (cf. “communicative versus subject-centered reason” in Habermas, 1987a:
Ch. 11; and Habermas, 1984: Ch. 3 in general).
is on the agenda of legal theory today. Rather, in the return of
Grund Theory, epistemological realism is transformed into a new
epistemological constructivism, and the agents of methodological
individualism are replaced by constructs such as discourse, social
self-reflection, and self-organization. What does this radical re-
orientation of social theory mean for law?

For law, the crucial point is the combination of both the
development in epistemology and the new perception of individuality:
constructivism rules out the naive reality assumption that human
actors through their intentional actions make up the basic ele-
ments of society. From this combination follow the main thesis of
this article.

1. Under a constructivist social epistemology, the reality per-
ceptions of law cannot be matched to a somehow corre-
sponding social reality "out there." Rather, it is law as an
autonomous epistemic subject that constructs a social real-
ity of its own.

2. It is not human individuals by their intentional actions
that produce law as a cultural artifact. On the contrary, it is
law as a communicative process that by its legal opera-
tions produces human actors as semantic artifacts.

3. Since modern society is characterized on the one side by a
fragmentation into different epistemes, on the other side by
their mutual interference, legal discourse is caught in
an "epistemic trap." The simultaneous dependence on and
independence from social discourses is the reason
why modern law is permanently oscillating between pos-
tions of cognitive autonomy and heteronomy.

"Social construction of reality" apparently has become, after
Berger and Luckmann (1966), received wisdom in sociology (see,
e.g., Bloor, 1976; Latour & Woolgar, 1978; Knorr-Cetina, 1984; Gil-
bert & Mulkay, 1984; Collins, 1985; Fuller, 1988). However, our
three theses show that there is a more profound version of social
epistemology than the usual understanding of "law as social institu-
tions, scientific communities, and laboratory cultures influence in-
dividual perception. There is more to social epistemology than the
"interests" of social agents that are responsible for the manipula-
tion of knowledge (Burnes, 1974). The three new theories under
consideration here—poststructuralism, critical theory, and theory of
autopoiesis—have radicalized the notion of the "social" in social
cognition which is worthwhile being examined in our context of
legal cognition. What is the precise meaning of the somewhat am-
biguous statement that law constructs an autonomous reality?
Similarly, what is meant by saying that the individual is a mere
construct of society and law? And, above all, how does the law
"think"?
II. DISCOURSE AND AUTOPOIESIS

It is comforting, however, and a source of profound relief to think that man is only a recent invention, a figure not yet two centuries old, a new wrinkle in our knowledge, and that he will disappear again as soon as that knowledge has discovered a new form (Foucault, 1974: xxii).

Not only are law and economics irritated by Michel Foucault’s antirealist and anti-individualist provocation, but most strands of social theory that are influencing modern legal thought feel uncomfortable with poststructuralism’s decentering of the subject. Under the enormous influence of the “founding fathers” of methodological individualism, Hayek (1948, 1973) and Popper (1953), the quasi-natural reality of individual human actors is assumed by contemporary economic and social theories, such as theories of microfoundations (Weintraub, 1979; Nelson, 1984) and rational actor theories (Elster, 1983, 1985), which demand that any collective phenomenon be reduced to intentional actions of human individuals. In an analogous fashion, the reduction of social macrophenomena to characteristics of individuals is quasi-axiomatic for sociological behaviorism (Hawkins, 1961). But also for sociological theories on law in the tradition of Max Weber’s interpretive sociology, the reality of the acting individual is a fundamental assumption. “After all, the actions of individuals form society” (Aubert, 1980: 119). And even social theorists pursuing structuralist and systemic approaches feel compelled to correct them with an infusion of individualism (e.g., Crozier and Friedberg, 1977; Giddens, 1987-9ff.; for the legal system, Feinbrano, 1985: 136; Kerchove and Out, 1988: 15ff.; Out, 1988: 87).

And it is indicative of the epistemic character of the individual-as-reality syndrome that even critical legal authors who are deeply influenced by Foucault’s ideas and enthusiastically take over his political messages plainly refuse to draw the epistemological consequences. Duncan Kennedy, in his recent analysis of legal indeterminacy (1986: 518) reveals a highly individualist bias for the reflective legal subject and law’s communicative aspects. Thus, concentrating on the individual judge’s reflections and strategic considerations, he is as far away from a discourse analysis as are his “liberal” adversaries. And Robert Gordon (1984: 11ff.) explicitly rejects the anti-individualist tendencies in structuralism and poststructuralism as undermining the humanistic intentions of critical legal thought.2

What makes this combination of realism and individualism in contemporary legal thought so viable is not so much its inherent

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2 There are important exceptions among the critical scholars who develop serious alternatives to the prevailing individualism, above all Thomas Heller (1984, 1988) and David Kennedy (1985). But these exceptions confirm our rule: it is their language, even in their own intellectual circles, that has to struggle with the Jabberwocky syndrome.
virtue but the lack of credible alternatives. The traditional alter-
natives, epistemological idealism and methodological collectivism,
are seen as unattractive—and rightly so. But is it true that the
only available alternatives are those that read “as if these inper-
social structures had a life of their own, and human beings were en-
slaved to the needs of that life-cycle, building or demolishing as
the World-Spirit might dictate” (Gordon, 1964; 117)?

As I will discuss in the following pages, there are alternatives to
the prevailing realist and individualist modes of thinking. From
the diffuse contemporary movement toward “social construction of
reality” and “decentering of the subject,” I would like to single out
three theorists who have contributed to a more profound under-
standing of sociocultural cognition and who represent at the same
time the most important intellectual strands in Western Europe
Michel Foucault (poststructuralism), Jürgen Habermas (critical
theory), and Niklas Luhmann (theory of autopoiesis). What they
have in common is to replace the autonomous individual, not with
super-individual entities, but with communicative processes. They
differ, however, in their identification of the new cognizing unit.
In Habermas’s version of critical theory, correspondence theories of
truth are overturned by consensus theories and “intersubjectivity”
takes the place of the epistemic subject. Foucault and Luhmann
are even more radical in their disenchantment of the human indi-
vidual. For Foucault, the human individual is nothing but an
epistemological construction of an historically contingent power/dis-
course constellation, which dictates the epistemé of a historical ep-
och. Luhmann completely separates psychic processes from social
ones and perceives the human individual in society as a communi-
cative artifact, as a product of self-observation of social autopoiesis.
The new epistemic subjects are autopoietic social systems.

III. JÜRGEN HABERMAS: INTERSUBJECTIVITY AND
CONSENSUS

To arrive at a legal epistemology that really deserves its name,
three important changes in our perception of law and society have
to be made: first, from realism to constructivism; second, from in-
dividual to social, construction of reality; and third, from law as a
rule system to law as an epistemic subject. While the first one
leads to a certain modification of Kantian positions, the other two
changes break new ground in social and legal theory. The second
change reveals the social foundations of cognition in a more radical
way than traditional sociology of knowledge ever has done, and the
third one attributes to the discourse practices of law the produc-
tion of an autonomous social reality.

In this recorientation of social and legal cognition Habermas’s
theory of communicative rationality (Habermas, 1978a, 1971b, 1974,
key concept of "rational discourse" highlights the crucial role of procedure in empirical and normative cognition and at the same time his "universal pragmatics" takes account of the social dimension in moral and legal cognition, as against a predominately individualist epistemology.

Habermas rejects traditional correspondence theories of truth (from Aristotle to Tarski) according to which statements are true if they correspond to an external reality. Instead, he follows a consensual theory of truth, which declares as the criterion of truth the "potential" consensus of all discourse participants (Habermas, 1972b: 123; 1973: 210). This move, of course, creates the need to identify an independent criterion in order to distinguish true from false consensus. Going through a sequence of different criteria, Habermas finally finds it in the presupposition of an "ideal speech situation" which in itself is defined by certain formal and procedural characteristics (Habermas, 1984: Ch. 3).

It is this proceduralization of the truth criterion which has rendered Habermas' discourse theory so important for law (see for example, Alexy, 1978: 219ff.; Günter, 1988). It makes the theoretical-empirical discourse of the sciences directly comparable to the practical-normative discourse in politics, morals, and law: their validity claims depend on the correctness of procedure (Habermas, 1984: Ch. 3). And it opens the way to a rethinking of the modernity of law in which Max Weber's thesis of the materialization of formal law is replaced by concepts of proceduralization of law (Habermas, 1985: 215ff.; 1987a: 1; Wachholz, 1985; 1986; Günter, 1988; Frey, 1989: Sff.; Joerges, 1989; Leduc, 1985a; Preuss, 1989).

Habermas's other main contribution to an epistemology of law is to take account of the social element in empirical and normative cognition. His philosophy attributes "epistemic authority" no longer to the autonomous subject, but to the communicative community (Habermas, 1985: 26; 1988: 63ff., 80). While traditional epistemology situates cognition exclusively in the consciousness of the empirical or transcendental subject, Habermas recognizes that cognition is basically a communicative process. "Intersubjectivity" takes the place of the Kantian epistemic subject. It is the authentic consensus of the communicative community and not the consciousness of the autonomous individual that determines truth in cognitive and normative settings. Thus Kant's famous question: "What are the conditions for the possibility of cognition?" is redirected from the conditions of consciousness to those of communicative interaction. And even transcendentalism becomes socialized: the new a priori is represented by the "ideal speech situation," the presupposition of which is a condition of the possibility of communication (Habermas, 1971b: 196; 1983: 53; 1984: Ch. 5).

However, the "a priori of the communicative community" (Apel, 1973; 1989; Böhler, 1985) is at the same time one of the great
problems of this theory. With the appreciation of certain features of communication, Habermas attempts to escape from the "paradoxes of self-reference" (Wormell, 1958; Quine, 1776; Krippendorff, 1984; Barwise and Etchemendy, 1987) that necessarily emerge from his hierarchy of discursive justification. The core of Habermas's theory is in the self-application of discursive practices: the procedures of discourse can be justified only by discourse whose procedures in turn have to be justified by discourse. And in order to avoid infinite regression or circularity, Habermas resorts to communicative transcendentalism.

Closely related to the transcendentalist foundation of rational discourse are the ambiguities of "intersubjectivity" that represent the other principal unresolved problem in Habermas's account of social cognition. What is meant: elements or relation? Consciousness or communication? Psychic or social processes? Habermas's epistemic subject oscillates between these two positions without ever finding its identity in either world (for the controversy on intersubjectivity versus communication, see Habermas, 1987a: Ch. 12, 1988: 92ff.; Lohmann, 1986c: 41ff.). It seems as if Habermas again attempts to avoid the paradoxes of self-reference in discourse, this time by changing the system reference. If discourse can be founded on discourse only recursively, need it not then be founded on human consciousness?

IV. MICHEL FOUCAULT: DISCOURSE AND EPISTÉMÉ

Foucault's ideas on discourse and power can be read as a radicalization of Habermas's epistemological position. Indeed, Foucault directly attacks what we have just described as the main unresolved problems in Habermas's account: the foundation of discourse in a communicative a priori, and the ambiguous role of individual consciousness in intersubjectivity. Foucault's main contribution to a social epistemology is to liberate the core concept of "discourse" from any transcendental or psychic foundation. Of course, this does not save him from the trap of self-referentiality. Foucault's escape is at the same time the most famous and the weakest point of his theory—the ubiquity of power.

Foucault's starting point is constructivist: reality is not something external to cognition, but is constituted, "constructed" by cognition itself. However, in sharp contrast to the classical tradition, it is not the individual consciousness of the subject that constitutes reality. Nor is it intersubjectivity, as in Habermas's theory, the communicative result of interaction between human actors.

3 The problem of infinite regression/circularity in Habermas’s theory of discursive justification is perhaps most clearly expressed in Habermas, 1986b: 123 ff., and 1987, 251 ff.
Rather it is "discourse"—an anonymous, impersonal, intention-free chain of linguistic events (Foucault, 1972: Ch. 2). One should hasten to add that this is not a structuralist position (see Dreyfus and Rabinow, 1982: 44ff.). Discourse in Foucault's account is much richer than the abstract orders of signs in structuralism. It is social practice, not social structure; it is parole, not langue. The basic elements of the discourse are not signs, but enunciators, that is, social usage of language that constructs reality. The task of discourse analysis does not consist, in Foucault's words, of "treat- ing discourses as groups of signs (signifying elements referring to contents or representations) but as practices that systematically form the object of which they speak" (Foucault, 1972: 49). Discourse is both event and structure, "a stream of linguistic events in space and time as well as a highly selective organization of linguistic events" (Honneth, 1985: 144). And it is this historically contingent social practice of discourse that dictates the episteme of a certain historical epoch, that defines the conditions for the possibility of cognition, not in a timeless and universal manner, but temporally, concretely, locally (Foucault, 1974: Ch. 2, 3, 7, for the sciences, 1979, for law).

Such a radical social epistemology has no place for individual consciousness and the intentional actions of human subjects and no need for an a priori foundation. The human subject is no longer the author of the discourse. Just the opposite, the discourse produces the human subject as a semantic artifact (Foucault, 1974: Ch. 9). At the same time, discourse formations are historically contingent, lacking any a priori foundation. Every society has its own order of truth, its own politics of truth.

Now, it would be a consequence of this way of thinking that discourse formations, those highly autonomous social practices, would themselves produce the criteria for their own transformation. Dreyfus and Rabinow, for example, clearly see this necessity, self-referentiality as a condition for structural change of discourses. Since "he is committed to the view that discursive prac- tices are autonomous and determine their own context ... he must locate the productive power revealed by discursive practices in the regularities of these same practices. The result is the strange notion of regularities which regulate themselves" (1982: 84). Foucault, however, stops short of these paradoxes of self-reference. He withdraws from the necessary consequences of his own con- struct and introduces the concept of power in order to externalize self-referential relationships. In his later thinking, he gives up the idea of the autonomous discourse as the new epistemic subject and resorts to the ubiquity of power as a quasi-transcendental founda- tion of discursive practices (for a critique, see Honneth, 1985: 168ff.; Habermas, 1987a: Ch. 1c).
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V. NIKLAS LUHMANN: CONSTRUCTIVISM AND AUTOPOIESIS

The paradoxes of self-reference seem to be the principal obstacle to the development of an authentically social epistemology. Habermas and Foucault have made important contributions, but the radical consequences of their ideas seem to be blocked by self-referential structures (circularity, tautology, infinite regression, paradox) in their specific versions of discourse theory. How can rational discourse be justified, if not by rational discourse itself (Habermas)? How can these discourse formations that govern the episteme of a whole historical epoch be transformed if not by those discourse formations themselves (Foucault)? Both authors are well aware that these questions necessarily lead to paradox, but their solution is to avoid the paradox at any cost. Of course, in the end, the paradoxes of self-reference cannot be avoided: they simply reappear at the termination of their escape route. When Habermas finds the transcendental foundation of communication in the distinction between the ideal speech situation and real speech situations, is this distinction, that, in itself empirical or is it transcendental? Alternatively, when he reintroduces the subject to the discourse, the classical paradoxes of the self-reflecting subject are obviously bound to reappear. When Foucault identifies the foundations of discourse in ubiquitous power-constellations he does so at the price of the self-referential paradoxes of power.

The theory of autoepistemology (Marazita and Varela, 1989; von Förster, 1961; Luhmann, 1964) deals with these paradoxes of self-reference in a different way. Do not avoid paradoxes, but make productive use of them! If social discourses are autopoietic systems that is, systems that recursively produce their own elements from the network of their elements, then they are founded on that very self-referentiality that Habermas and Foucault are desperately trying to avoid (Luhmann, 1988a: 172; 1985a: 129; 1985b: 123). As autopoietic systems, discourses cannot but find justification in their own circumscription and cannot but produce regularities that regulate themselves and that govern the transformation of their own regularities. The paradox of self-reference then, is not a flaw in our intellectual reconstruction of discourse that we have to avoid at all costs, but is in very reality that we cannot avoid at all. And the recursive application of operations to the results of these very operations does not necessarily lead to paradoxical blockchain paradox or to sheer arbitrariness, but, under certain conditions, to the emergence of "eigenvalues" (Förster, 1983: 374; 1985: 36). From continual recursive "computation of computation," social discourses "mindfully" learn those modes of operation that are valid in coping with their environment to which they have no direct access (for an elaboration of these somewhat abbe-rocany remarks, see Teubner, 1989).
The epistemological consequence is a radical constructivist (Piaget, 1971; Glaserbeld, 1970, 1981, 1985; Matruma & Varela, 1980; Förster, 1981; Luhmann, 1984: 647ff.; Roth, 1984, 1987; Arrib & Hesse, 1985; Schmidt, 1987). Any cognition—be it psychic or social, be it scientific, political, moral, or legal cognition—is a purely internal construction of the outside world; cognition has no access whatsoever to reality "out there." Any cognitive activity—be it a theory or empirical research—is nothing but an internal construction by the cognizing unit; and every testing procedure that pretends to examine the validity of internal constructions against outside reality is only an internal comparison of different world constructions.

In this radicalized version of the "social construction of reality," there is no place for individual action and thought (for the relation of individual and social observation, cf. Luhmann, 1983: 1; 1985: 465; 1986b: 312). Social autoepistemology is exclusively based on communication—defined as the synthesis of utterance, information, and understanding—that recursively reproduces communication (Luhmann, 1984: 152ff., 1986b: 172 ff.). Social construction of reality is sharply separated from psychic construction of reality. Here lies the important difference from Habermas, who in the ambiguous concept of intersubjectivity blends communication and consciousness and also from Foucault, for whom the subject is nothing but a historically contingent construct of shifting discourse/power constellations. For the theory of autoepistemology, psychic processes form a closed reproductive network of their own—psychic autoepistemology—accessible only to themselves and inaccessible to any communication. Communication in turn forms a closed autoeproductive network of its own—social autoepistemology—accessible only to communication and inaccessible to any psychic processes. Certainly, human individuals reappear in this world of communication, but only as communicative constructions, as semantic artifacts, that have no correspondence to consciousness, to the autoepistemic processes in the psychic world (Luhmann, 1984: 158ff., 1986b: 513ff.). Psychic and social processes do coexist; they are "coupled" by synchronizm and evolution, but there is no overlap in their operations. There is nothing but a symmetry of reality constructions: psychic processes produce mental constructs of society, and social processes produce communicative constructs of the psyche.

In these two aspects—radicalization of constructivism and deindividualization of discourse—Luhmann is expanding on what Habermas and Foucault have developed in their versions of social epistemology. However, there is a third aspect in Luhmann's theory of autoepistemology that clearly goes beyond discourse analysis in its Parisian or Frankfurtian version—this is the view of modernity as an irreconcilable conflict of different epistemias (Luhmann, 1988a: 333ff.). While Foucault sees in history the ruptures of discourse
formations that dictate one paradigmatic society-wide episteme for a certain historical epoch, and interprets the modern epoch as the governance of one pervasive "subjectivist" episteme following the Kantian revolution (Foucault, 1974: Ch. 8; 1979: Ch. 4). Luhmann views modernity as the fragmentation of society into a plurality of autonomous discourses, as the multiplication of epistemes in society. The crucial feature of modern society is the loss of a unifying mode of cognition. Society is seen as fragmented into a multiplicity of closed communicative networks. Each communicative network constructs a reality of its own that is, in principle, incompatible with the reality constructions of other networks. At the same time, there is a multiplication and fragmentation of individualities that correspond to the multiplication and fragmentation of social discourses. On the basis of z Specific code and programs, each specialized communicative network produces "persons"—semantic artifacts of individual actors—into which actions are attributed (Luhmann, 1984: 135ff.). The "Multiple Self" (Elster, 1986; Etzioni, 1988) is the product of the fragmentation of social discourses in modernity.

This fragmentation of society into different epistemes is one of the strongest points in Luhmann's theory—and at the same time its "blind spot." The emphasis on fragmentation, differentiation, separation, closure, and self-reference of social epistemes creates problems, to say the least, as to how their interconnection, interference, openness, and hetero-reference can be theoretically reconstructed (for a more detailed critique, see Teubner, 1990). Unlike Habermas and Foucault who, at any cost, try to avoid the traps of self-reference, Luhmann courageously faces self-referential realities in law and society. He even declares law to be founded on the paradoxes of self-reference (Luhmann, 1988b). But a theory that deals extensively with self-reference, may ultimately be caught in the self-created closure of self-referential constructions. And the obvious problem that autopoiesis theory has to face is how to deal with the interrelations of different autonomous epistemes, their conflicts, their incompatibilities, their interferences (for first steps in this direction, see Luhmann, 1985a, 1990). The open questions for a theory of fragmented epistemes are: Is there something like an epistemic minimum in modern society that serves as a common base for the autonomization of social discourses? Does one find co-evolutionary or even co-evolutionary trends among autonomous social epistemes? Or is the only way to connect them through the reconstruction of an episteme within the framework of another episteme? These questions will reappear when we examine in detail, on the basis of the foregoing discussion, how a constructive epistemology of the law reconstructs legal cognition in its conflict with other modes of cognition in society (see below VII and VIII).
VI. LAW—AN EPISTEMIC SUBJECT?

How does the law think? Mary Douglas, in a recent book, has again raised the old question *How Institutions Think* (1986). After an exciting flirtation with Emile Durkheim's "collective conscience" and Ludwig Fleck's "Denkkollektiv," she finally finds her way back to good old individualism. Of course, it is the individual member of the institution that thinks. However, his/her thinking is influenced by institutional context. In this version of social epistemology, the social element is represented by socialization of the individual mind. That's it. Collectivism is banned and individualism happily survives after a healthy dose of socialization.

From our selective reconstruction of Habermas, Foucault, and Luhmann on social epistemology, the picture changes dramatically. It is true that individual cognition is shaped by social institutions such as law. However, some constru ctivists would add that since there is no access to communication to consciousness, socialization can only be self-socialization. But this is only half the story. The other half is that institutions such as law do "think" independently from their members' minds. The law autonomously processes information, creates worlds of meaning, sets goals and purposes, produces reality constructions, and defines normative expectations—and all this quite apart from the world constructions in lawyers' minds. Such a constructivist legal epistemology is at the same time nonindividualist and noncollectivist. It needs no recourse to individual actors and intentions at the same time, it does not presuppose the existence of a supra-individual collective entity, "Denkkollektiv," "conscience collective." World III, legal consciousness, Wélgetzt...

Law is communication and nothing but communication. By this very conceptualization it is possible to avoid the trap of methodological individualism that would define law as a set of rules constraining individuals' action and that, apart from the catchphrase of unintended consequences, has no tool with which to analyze the autonomy of the social, as to speak of the "legal proprium" (Selznick, 1968). At the same time it avoids the traps of collectivism that views law as a supra-individual subject and that cannot explain who is, in fact, acting in the name of the Wélgetzt.

The precise construction is as follows (for an elaborate discussion of the characteristics of auto-optimistic law, see Teubner, 1988b, 1988c, 1990). Law is defined as an auto-optimistic social system, that is, a network of elementary operations that recursively reproduces elementary operations. The basic elements of this system are communications, not rules; law is not, as analytical-normative legal theories have it, a system of rules. On the other hand, the sociological-realistic definitions of law as a system of legal professionals and organizations are problematic as well, because they see human actors as the basic elements of law and other social institutions.
The self-reproductive character of law as a social process becomes intelligible only if one chooses communications as the law's basic elements. Law as an autopoietic social system is made up neither of rules nor of legal decision-makers, but of "legal communications," defined as the synthesis of three meaning selections: utterance, in- formation, and understanding. These communications are interre- lated to each other in a network of communications that produces nothing but communications. This is what is basically meant by autopoiesis: the self-reproduction of a network of communicative operations by the re- tractive application of communications to the results of former communications. Law as a communicative net- work produces legal communications.

Legal communications are the cognitive instruments by which the law as social discourse is able to "see" the world. Legal communications cannot reach out into the real outside world, neither into nature nor into society. They can only communicate about na- ture and society. Any metaphor about their access to the real world is misplaced. They do not receive information from the outside world which they would filter and convert according to the needs of the legal process. There is no instruction of the law by the outside world; there is only construction of the outside world by the law. This is not to say that the law arbitrarily "invents" so- cial reality. A constructivist perspective should not be confused with "methodological solipsism" (Foder, 1980); it rather looks for a "middle path" between representationalism and solipsism (Varela, 1984: 217). Legal constructivism, then, presupposes the "existence" of an environment for the law. The point is not to a cosmological isolation of the law, but the autonomous construction of legal mod- els of reality under the impression of environmental perturbations. Legal order from social noise!

What about the world perceptions of lawyers and lay people? Is it not their aggregation that forms the collective world view of the law (cf. the actor-based objections against an autopoietic law by Felbrin, 1985: 134ff.; Kerckhoff and Cot, 1988: 157ff.; and Cot, 1988: 87ff.)? Of course, the communicative process of law needs lawyers and lay people; it would not work without their intentions, strategies, and actions. But their ("subjective," internal, psychic) intentions never enter the ("objective," external, social) communi- cation of law. They only make up part of the psychic processes, ac- companying the social process of law and co-evolving with it. Law as a communicative process is not accessible to any of these accom- panying psychic processes of lawyers and lay people, and, vice versa, it has no access to them. They work only as "perturba- tions," as "choke engines" (Kerckhoff and Cot, 1988: 159) under the pressure of which the communicative process of law builds up its own autonomous order and creates the world of legal meaning (cf. Förster, 1981; Teufker, 1990).

But does the law as a social process not constantly deal with
real people? Is the law not driven by actual motives, strategies, ac-
tions of clients, professionals, judges, and legislators? Does the law
not constantly refer to mental states of real people, to their inten-
tions, goals, consent, dissent, errors, negligence, mens rea? Obvi-
ously the law does so. But the "persons" the law as a social pro-
cess deals with are not real flesh-and-blood people, are not human
beings with brains and minds, are not the above mentioned auto-
opoeic psychic systems. They are mere constructs, semantic arti-
facts produced by the legal discourse itself. Mental states are "in
reality [sic] constructs of practical discourses, necessary for the
formation of communicative circles, of discursive communities"
(Pizzorno, 1989: 9).

As social constructs, they are indispensable to legal communi-
cation, because law as a social process needs to attribute communi-
cation to actors (individual or collective ones) in order to continue
its self-reproduction. But these "actors" are only role-bundles,
character-masks, internal products of legal communication (for an
elaboration on collective actors, see Teubner, 1988c: 133ff.; 1988c:
66ff.). The densely populated world of legal persons, the plaintiffs
and defendants, the judges and legislators, the parties to a con-
tract, the corporations and the state, is an internal invention of the
legal process. Not only the corporation, but any legal person—be
it collective or individual—is nothing but that famous "artificial
being, invisible, intangible, existing only in contemplation of law,"
discovered by Chief Justice Marshall in the celebrated case of
Dartmouth College v. Woodward; 4 Wheaton 518, 627 (1819).

So human actors have a "dual identity" in the world of
autopoiesis. While in their social existence, they are pale con-
structs of autopoietic social systems, among them the law; in their
psychic existence, they are themselves vibrant autopoietic systems.
It is plainly wrong to argue, as some critics do, that autopoiesis de-
humanizes society (Grüninger, 1987), has no place for actors and
intentions (Schimanek, 1985: 421; Mayntz, 1986; Ost, 1988: 87ff.;
Rottleuhrner, 1988: 122), does not account for the individual as es-
temic subject (Podak, 1984: 734; Frankenberg, 1987: 296), and rep-
resents a "dehumanisation totale du droit" (Czeschoncny, 1989: 12).
The point is not the individual subject withering away, but the
multiplication of centers of cognition. Social discourses are the
new epistemic subjects that compete with the consciousness of the
individual. Insofar as autopoiesis insists on the epistemic autono-
my of a multiplicity of social discourses, it takes part in
"decentering the subject," that is, moving the subject away from
its privileged position as the sole and ultimate center of cognition.
To repeat, if we talk about human actors in the law we have to dis-
tinguish carefully between the autopoietic reproduction of human
consciousness, that is, the operative reality of psychic processes,
and the autopoietic reproduction of the social life of law in which
human actors are not elements but constructed social realities.
VII. THE EPISTEMIC TRAP

While discourse analysis in the tradition of Foucault sees the modern epoch in the grip of one pervasive épistème (Foucault, 1972: Ch. 2; 1974: Ch. 9) and views law like other disciplines only as a particular expression of the power/knowledge complex (Foucault, 1979: Ch. 4), autoepistemic theory characterizes modern society as fragmented into multiple autonomous épistèmes (Luhmann, 1988a: 335ff.; 1990). Autoepistemology thus throws modern legal discourse into an irreconcilable conflict between epistemic autonomy and heteronomy (for two types of cognitive conflict between social systems, see Teubner, 1989, 1990). The dynamics of social differentiation force legal discourse to produce reality constructions of its own, but the very same dynamics make law dependent upon a multiplicity of competing autonomous épistèmes.

The epistemic autonomy of law results from the fragmentation of modern society that drives the law into second order autoepistemology (for elaboration, see Dugger, 1988: 128; Heller, 1989: 263; Lateur, 1988: 242; Teubner, 1988a: 217; 1988c: 60). In the dynamics of social evolution, self-referential relations are multiplying within the legal process, culminating in a hypercycled linkage of the law's components. The law becomes autonomous from general social communication. It develops into a closed communicative network that produces not only legal acts as its elements and legal rules as its structures but legal constructions of reality as well. The autonomy of modern law refers primarily to its normative operations that become independent from moral and political normativity (cf. Marston, 1988: 9); and secondarily, autonomy refers to the law's cognitive operations that—under the pressure of normative operations—construct ideosyncratic images of reality and move them away from the world constructions of everyday life and from those of scientific discourse (for an elaboration on the "facts of law," see Nerhot, 1988).

In this context, Dauvillard (1976: Ch. 1) speaks of "hyperreality" as a movement from reality-dependent theory to theory-dependent reality. In an autoepistemic reformulation, one would describe this process as an autonomization of specialized social discourse in which reality constructions of general social communication are increasingly replaced by reality constructions of the specialized discourses. The legal discourse invents and deals with a juridical "hyperreality" that has lost contact with the realities of everyday life and at the same time superimposes new realities to everyday life. It is an "efficacité quasi magique," as Bourdieu calls it, which law possesses in its practices of "world making" (Bourdieu, 1986: 13). Grzegorczyk (1985: 21) speaks of the law as a "hermeneutique officielle du monde" that organizes the social world. "Institutional facts" such as corporate personality, contract, and the will, are only the tip of an iceberg of legal reality con-
Structs drifting in an ocean of “brute facts” of diffuse social communication. Legal discourse increasingly modifies the meaning of everyday world constructions and in case of conflict replaces them by legal constructs.

From a constructivist perspective, there is no way to challenge the epistemic authority of law, neither by social realities themselves, nor by common sense, nor by scientifically controlled observation. A social ontology on a constructivist basis can explain why law appears to be an “essentially self-validating discourse” which one should expect to be “largely impervious to serious challenge from other knowledge fields” (Cutterrell, 1986: 15). It is simply naïve to invoke social “reality” itself against legal conceptualism, against the “heaven of legal concepts” (Jhering, 1884: 245) or against the law’s “transcendental nonsense” (Cohen, 1936: 809).

There is no direct cognitive access to reality. There are only competing discourses with different constructions of reality. And all that Jhering and Cohen have to offer is their own transcendental nonsense in a different heaven of legal concepts. Is there any reason to believe that Positivist, sociological jurisprudence, or legal realism have made the legal discourse more realistic? Not at all. They have not moved legal concepts closer to social reality “out there.” They have just replaced one conceptual jurisprudence with another conceptual jurisprudence. “Social interests,” the atoms of realistic jurisprudence, are unreal fictions, artificial semantic products, just as much as the “legal subjects,” the atoms of classical jurisprudence.

“Law and society” and “law and economics” are not doing any better if they pretend to invoke the authority of controlled scientific observation against the lawyers’ “mythifications” of the social world (see for example, Aubert, 1989: 117ff.; 1983: 98ff.; Rotte- leuthner, 1980: 15ff., for sociology; Adams, 1985, for economics). If epistemological constructivism does anything it is to deconstruct the claims of modern science to having privileged access to reality (Bloore, 1976; Barnes, 1974). Science does not discover any outside facts: it produces facts. “Science is in a literal sense constructive of new facts” (Arnh and Besse, 1966: 10). Radical constructivism maintains that “science produces a construction of the world which is validated by its distinctions and not by the world as such. Thus, science cannot claim the authority to discover the only and the correct access to the real world and to communicate this to others” (Luhmann, 1988: 2; 9). If we can believe constructivist re-constructions of the scientific process, then the celebrated controlled experiment is not what it pretends to be, a test of an internal theory against external reality, but is a mere internal coherence test comparing two constructs that are produced according to different procedural requirements: the logic of theoretical reasoning and the logic of the laboratory.

Let us take an example. Social science theory on the relation
between organization and collective action is not in any way superior to legal doctrine on the relation between the corporation and legal personality; both are discursive artifacts whose construction is not arbitrary, but rationally guided by specific codes and programs. Similarly, empirical facts about distinctions in organizational life, hard facts that result from scientifically controlled inquiry, are in no sense more "true" than legal facts about the violation of corporate duties that are produced under the firm guidance of the rules of law of evidence. In both cases, rational procedures and conventions of factual inquiry lead to empirical statements about reality. They serve as "hard" evidence confirming or refuting "soft" claims based on theoretical speculations or on legal reasoning. And if these empirical facts conflict with each other—which is not so rare—then there is no superiority of scientific constructs over legal constructs, as some sociologists would like to have it (Coug, 1973). Epistemic authority is claimed by both scientific discourse and legal discourse—and rightly so. What a naive realism would call the observation of "facts" is in both cases the production of artifacts whose truth is guaranteed by formalized procedures of factual inquiry, procedures that differ consider- ably in law and science. These procedures in turn are conventions, not arbitrary ones but structural selections which reflect choices made in the history of scientific and legal discourse.1 The epistemic authority of legal discourse is an undeniable fact of modernity, and we have found ways and means to cope with the fact of multiple truths—scientific truth, legal truth, political truth. The legal product is the classical example of an institutionalized conflict between legal facts and scientific facts. Even if it can be proven with scientific evidence that a factual statement in a legal procedure is blatantly wrong, that factual statement of the court—and even worse, its legal, economic, and social consequences—will not be reverted (apart from very few, narrowly defined exceptions) unless the procedural requirements are fulfilled and the appeal procedures exhausted. Obviously, scientific facts collide with legal facts, but we are used to living with this collision, rationalizing it by invoking higher values, like legal certainty, or appealing to the relativism of our cultural provinces. However, things are not quite so easy. Widener's notorious "lawyer as such," who is entitled by the law of social differentiation not to be "concerned with ethical, political, or economic considerations" (1904: 13), is forced by the same law to give up the entitlement and to incorporate those nonlegal considerations into

1 Thus, the resulting relativism of different social discourses is not a "anything goes" relativism. It is a relativism that invites us to "raise the status if the other" mythologies by a more careful investigation of their methodological and cognitive credentials and to examine "the various kinds of criteria of acceptability that apply to different kinds of constructed models and myths" (Arth and Hesse, 1986: 19).
his/her autonomous reasoning. This is what I would call the "epi-
stemic trap" of modern law. Law is forced to produce an auton-
omous legal reality and cannot at the same time immunize itself
against conflicting realities produced by other discourses in society.
The underlying reason for this confusion is "interference," that
is, the mutual diffusion of law and other social discourses (cf. Mengoni,
1988: 22). This is one of the most challenging problems for autopoietics if this theory intends to avoid the fallacies of solips-
sim and monadism (see above V). Although the legal discourse is
closed in its self-reproduction and produces its own constructions
of reality, it remains always social communication and uses the
general social constructions of reality and influences general social
communication by its specific world constructions. Any legal act is
at the same time—two acts—an event of general social communi-
cation. One and the same communicative event, then, is linked
with two social discourses, the specialized institutionalized dis-
course of law and the diffuse and general social communication.
Interference of law and other social discourses does not mean that
they merge into a multidimensional super-discourse, nor does it
imply that information is "exchanged" among them. Rather, in-
formation is constituted anew in each discourse and interference
adds nothing but the simultaneity of two communicative events
(for details, see Teubner, 1989, 1990). Thus juridical constructs are
exposed to the constructs of other discourses in society, particu-
larly to the constructs of science. They are exposed to a test of
"social coherence" that replaces the old fiction of a test of corre-
spendence with outside reality.
In the world of nonlegal communication, legal constructs inev-
itably lose in this epistemic competition. Here, science has the ad-
vantage of having specialized in procedures for purely cognitive op-
erations, while law uses cognitive operations only secondarily and
has, thus, shaped the procedures of cognition in a different institu-
tional context. But what about the world of legal communication
in courtrooms, law offices, and legislative chambers? Here, the
legal discourse claims to be entitled to "enslave" cognitive opera-
tions according to normative context and institutional purpose.
The "empirical" models of legal communication are in the firm
grip of "strategic" and "operative" models (for an elaboration of
the mutual constraints exerted among different internal models of
the outside world, see Teubner, 1985: 96 ff.). However, it is the in-
stitutional context of the legal process itself that produces an in-
ternal contradiction. While it requires idiosyncratic reality con-
structions through legal communication, it forces legal communi-
cation to reconstruct the scientific constructs of reality
and to expose—even within the law's empire—juridical constructs
to the "higher" authority of science in cognitive questions. The
conflictual character of legal procedures—litigation as well as leg-
islation and scholarly disputes—forces legal discourse to examine
any piece of new knowledge produced outside the legal world only if it is "relevant" to the law. Any practicing lawyer who did not challenge legal evidence in the light of a new scientific research method would act against his/her interests and violate his/her professional duties. In the legislative process, political opponents on, say, health legislation will challenge legal measures once there is credible scientific evidence that the presupposed nexus between a disease and certain causal factors does not exist. And scholars in law and economics reap their highest reputational profits when they influence courts about the naive prescientific models of human behavior and propose scientifically proven alternatives.

The epistemic trap of modern law, therefore, produces a challenge of the first order to legal doctrine, legal theory, and legal sociology. Reliably, legal doctrine—through the mouths of judges and law professors—comes up with positive proposals on how to escape from the trap. Neutrally, legal theory helps to broaden the escape routes, generalizing particular solutions and importing supportive knowledge from other disciplines. And positive legal sociology zealously studies the correlations between those legal semantics and the broader sociocultural context, while it remains the privilege of critical sociological studies to "crash" these attempts, to demonstrate to lawyers in a merciless deconstruction analysis that they are still in the old trap.

VIII. ESCAPE ROUTES

To remove epistemic authority, at least partially, would be the easiest way for legal discourse to escape from these troubles. Indeed, Luhmann, who probably undermines the possibility of conflict as authority among social epistemes, seems to favor this escape route when he discharges the law from re-examining "everyday interpretations and scientific constructs, like "woman," "cylinder capacity," "inhabitant," "hallucinogen," "should questions such as whether woman, etc., really exist arise, they can be turned aside or referred to philosophy" (Luhmann, 1988: 34). Unfortunately, such a clear separation of social space does not exist. Moreover, with such a division of labor among social discourses one would not exploit the richness of the autopoietic concept, and would have to face empirical counter-evidence. In the day-to-day practice of legal decision-making, law is constantly forced to decide autonomously on cognitive questions that are supposedly within the competence of scientific inquiry or of common sense. If the normative context of law requires cognitive statements as specific matters, then it is true that the law may have to use its operations with common sense understanding and refer to science. But whenever in the legal process these cognitive statements become controversial—and this is usually the case for the politically and legally "hot" issues—then law can no longer turn them aside or refer
them to philosophy. Then, hic et nunc, the legal process must pro-
vide for procedures to settle these divergences, and must make a
decision that is based on a legal determination of those questions,
even if they are controversial or actually non-determinable in the
sciences. More particularly, political and juridical conflicts in the
environmental law area requiring much extralegal scientific and
technical expertise show the great degree to which legal decisions
have to be based on a specifically juridical assessment of scientific
controversies or have to be made without any guidance from scien-
tific results (cf. for the German situation, Kitschelt, 1984; Wolf,
1986; Winter, 1987).

The other main escape route from the law’s epistemic trap is
the integration of law and social sciences. Instead of clearly sepa-
rating the realm of juridical cognition from those of scientific cog-
nition, the legal discourse is supposed to incorporate social knowl-
edge into its world constructions and permanently revise legal
models of social reality according to the accumulation of knowl-
edge in the social sciences. From the times of Jhering, Genz, and
Pound to the most recent variations of the “law and . . .” move-
ments, this has been the most challenging intellectual adventure
of modern legal thought.

What can legal epistemology learn from almost a hundred
years of experimentation with “law and social sciences”? Although
social science thinking has been remarkably successful in influ-
encing legal practice (see for example, Cotterrell, 1984: 233 ff.),
the great expectations of legal enlightenment raised in
academia have been dashed in the courtroom. Psychiatry, sociol-
ogy, policy analysis, and economic analysis have successfully en-
tered the legal sphere, but the result is not a greater degree of
isomorphy of law and social reality that would result in more ra-
tional legal policies. Rather, the social science enlightenment of
law has resulted in unanticipated consequences—the production of
hybrid artifacts with ambiguous epistemic status and unknown so-
cial consequences.

“Interest analysis,” for example, is a surprising success of the
efforts of “sociological jurisprudence” to replace formalist, concep-
tually derivative legal reasoning (for a recent analysis of the Ger-
man and French practice in administrative law and its sophisti-
cated interpretation, see Ladeur, 1984: 1ff., 5ff.). Today, interest
analysis practically dominates legal decisionmaking in the courts:
the courts analyze legal conflicts in terms of underlying conflicting
social interests and “balance” them against each other according to
standards that they infer from legislative goals expressed in a com-
parable context. But what is sociological about this type of socio-
logical jurisprudence? No sociologist whatsoever would dare to
follow lawyers in their attempts to conceptualize, operationalize,
and empirically identify those phenomena called “social interests”
that figure prominently in legal decisions (e.g., the legal concerns
of creditors, debtors, neighbors, corporations, regions, states), not to speak of the juridical methods of “balancing” them. There are just too many explicit and implicit normative assumptions based on a complex network of legal-doctrinal considerations that enter into legal interest analysis. Simply put, juridical interest analysis cannot be legitimized from the standpoint of sociological theories or methods. In practice, interest analysis is a new conceptual jurisprudence that originally was subserviced by social science constructs but has been gaining its autonomy for a long time. It may very well be that “interest analysis” contains elements of a new legal rationality (in terms of flexibility, openness, and learning capacity, see Ladeur, 1984: 21ff.), but they are surely different from the original goals of sociological jurisprudence, and they evolve by institutional experimentation, not by the incorporation of sociological knowledge.

“Policy analysis” tells a similar story. Basically, it is a method of decision-making inspired by the instrumental use of social science knowledge (for a recent statement, see Albert, 1986: 34ff.). Define the goals centered upon in the political process, determine the factual conditions of the regulatory situation, choose among the regulatory instruments according to normological knowledge about means-ends relations, take into account side effects and, if you can, learn from practice about unanticipated consequences and perverse effects! But what has legal practice made of this “rational jurisprudence”? The lawyers have simply shifted their scholastic methods of doctrinal reasoning from the level of rules to the level of “policies,” purposes, goals, and principles supplanting social science analysis by the obscure hermeneutics of “teleological” interpretation. Legal consequentialism has in practice become a caricature of a scientifically controlled, causal analysis supported by empirical evidence (in Germany cf. the lively debate on Folgenkontrahle, Lahnmann, 1974; Lübbe-Wolff, 1981). What counts as a relevant consequence of a legal rule or decision derived from legal doctrine is in a circular fashion defined by legal doctrine itself. Thus doctrine that originally was supposed to be controlled by its social consequences, now controls its social consequences. Moreover, the rational calculation of probable consequences of decision making in practice turns out to be nothing but the commonsense projection of judges. And consequentialism is taken seriously only on the level of rules and not on the level of individual decisions that are in practice never reversed if the calculation of consequences turns out to be wrong. Again, we are faced not with social science in law but with a new type of legal doctrine dealing with “policies” as the new legal artifacts that replace old-fashioned rights and duties.

One could continue with the “poverty of psychiatry.” Is it conceivable, from the point of view of a positivist science, that a psychiatric expert give an opinion of how to distinguish, abstractly
and/or concretely, between guilt and causality (see for example, Prins 1980: Ch. 2). Although from a scientific standpoint any notion of individual guilt is nothing but a "trans-scientific issue"—questions that are unanswerable by science (see Weinberg, 1977; Majone, 1979, 1989: 3ff.)—forensic psychiatrists routinely give such opinions because they allow the law to "enslave" the basic concepts of their discipline.

"Economic analysis of law" is a more recent battlefield for epistemic competition. It has yet to be seen whether economic imperialism will prevail or, vice versa, whether juridical dogma will colonize economic thought. Especially in the hands of economizing lawyers, analytical concepts of economics undergo a subtle (and often not so subtle) change into normative constructs that serve as cornerstones for legal-doctrinal edifices. If, for example, one examines the new legal economics literature on the firm as a nexus of contracts (e.g., Aehlisch & Denmesz, 1972; Fama & Jensen, 1983; Clark, 1985; Schanzle, 1986, 1987; Roos, 1985), what is left from the methodological principles of economics, formulated by Williamson (1975): theoretical openness, readiness to learn from other fields of experience, refutability of implications and exposure to empirical falsification? Judge Easterbrook's piece "Corporations as Contracts" (1988) in any case is a prototype of ideological orthodoxy, doctrinal rigidity, and conceptual imperialism against contradicting experience.

These polemical remarks should not be misunderstood. They are not meant to defend the purity of scholarly conceptualization against strategic misuse by lawyers with ulterior motives. On the contrary, they are meant to demonstrate that social science constructs are not only transformed or distorted, but constituted anew, if they are incorporated into legal discourse. They are not imported into the law bearing the label "made in science," but are reconstructed within the closed operational network of legal communications that gives them a meaning quite different from that of the social sciences. It is not a question of the same thing being looked at from different angles, appropriately to different disciplinary interests, methods, etc. (Asbert, 1986: 117ff., 1983: 98ff.; Röttleitner, 1980: 137ff.). This would be to presuppose an underlying reality that is capable of unifying the diverse aspects stressed in different disciplines and of deciding between conflicting descriptions. Rather, the differences are to be found in the realities themselves that are produced by different disciplines and that can be neither unified nor reconciled. Thus the incorporation of social science knowledge is not really an escape from what we called the epistemic trap of modern

5 "Much depends on noticing that law's autonomy lies not in its freedom from being influenced by external causes and influences but in the way in which it incorporates and responds to them" (Nelken, 1987).
Law. It does not solve the conflict between juridical and scientific realities, but adds a new reality that is neither a purely juridical construction nor a purely scientific construction. The constructs of sociological jurisprudence, legal economics, "legal realism," and the like, are hybrid creatures, produced in the legal process with borrowed authority from the social sciences. However, epistemic authority and responsibility are no longer with the social sciences but with the law. And their "truth," their social adequacy, their viability will be decided no longer in the process of scientific inquiry but in the process of legal communication. For instance, certain psychoanalytic constructs, as well as fully deterministic models in psychology, will never be visible constructs in a juridical world, that is based upon assumptions of individual guilt and responsibility. Or to take another field, the relative success of legal economics compared to sociological jurisprudence has probably nothing to do with the intrinsic "scientific" values of the models involved, but with their structural affinity to traditional legal doctrine. If courts considering questions of, say, negligence, public policy, fairness, or properties of the "reasonable man" resort to "social norms," a sociological conceptualization would require time, energy, and money for extended empirical research, while an economic conceptualization in terms of transaction costs requires an armchair.

It would be wrong, however, to view the incorporation of social knowledge as "irrational." Given the inherent tension between scientific and juridical realities and the authority of modern sciences, it seems quite rational for the law to attempt to make the legal reality constructs at least compatible with recent developments in the sciences. In this respect, law resembles religion; (for a constructivist account of the conflict between science and religion, see Arbib & Hesse, 1968; 1969, 1971). For legal dogs and theoretical dogs alike, it is advisable to keep the world of faith compatible with the world of scientific truth. However, there is more to the integration of law and social sciences than merely making contradictory world constructions compatible. The "law and . . ." movement, it should be admitted, has benign effects for the decision-making quality of modern law in terms of justice and utility. The most recent results of the social sciences and the permanent challenge they represent can serve as a "variety pool" for legal innovation. It is a tremendously rich source for an ongoing reconstruction of the legal world, compatible only to the richness in what people find liveable and which creates legal conflicts. However, what happens to those constructs once they enter the legal system is no longer in the hands of the social sciences. Selection and retention of these variations is the job of legal evolution.

There are indications today that this legal reconstruction of scientific knowledge, if carried too far, becomes risky in itself. In the environmental law area, for example, Gerd Winter (1987) felt
a growth in the "judges' anxiety" about technical risk assessment and other legal incorporation of scientific findings together with a tendency to reduce the scope of legally relevant issues. This looks like a return to the first mentioned escape route in the permanent oscillation between epistemic autonomy and heteronomy. However, there are other attempts to cope with this situation, experimentation with a third solution, a kind of middle path between the two main escape routes. These more promising attempts can be summarized in the following formula: Law cannot take over full epistemic authority and responsibility for the reality constructions involved, but at the same time it does not totally delegate epistemic authority to other social discourses. Rather, as a precondition for the incorporation of social knowledge, the legal system defines certain fundamental requirements relating to procedure and methods of cognition.

A case in point is the decision of the German Supreme Court on codetermination in economic organizations (Bundesverfassungsgericht, BVerfGE 50, 200). For years, constitutional lawyers had judged the constitutionality of labor participation on the basis of its economic effects—in terms of efficiency of the firm, performance of the West German economy, and its position in international competition. In this way, the collective actors involved, that is, firms, employer associations, labor unions, government, and parliament, had prepared short legal reality constructions in their briefs with detailed scenarios about the socioeconomic consequences of codetermination, either with catastrophic or beneficial consequences, whichever was appropriate to their position (see Eberz et al., 1977: 127ff., 246ff.; Kessler et al., 1978: 55ff., 99ff., 145ff., 197ff.). In addition, economic and sociological experts had been mobilized on both sides. The court refused to take a substantive position on these scenarios about possible consequences and resorted to a "procedural" solution. Instead of confirming or rejecting reality constructions, the court allocated risks of information and risks of prediction among the collective actors involved, including the court itself, and created a new legal duty for the legislature: to reverse its decisions if the predictions on which they were based should turn out to be wrong (for an in-depth analysis of such a "proceduralization" of institutional cognition, see Warholter, 1983, 1986, 1989; Frey, 1989: 103ff.; cf. also Majone, 1979, 1989). In several more recent decisions this tendency has been strengthened: to abstain from a material constructions of reality and to proceduralize the legal solution; to delegate epistemic authority to different collective actors, that is, regulatory agencies, private firms, labor unions, research institutions, interest associations, governmental organizations, parliament, courts; to allocate risks of information and prediction; to define procedures and methods; to decide which collective actor must bear the "burden of proof" for reality constructions; and to define responsibilities for
failures in information and prediction. (see for environmental law, BVerfGE 48, 89; for corporation law, BVerfGE 72, 112; for the law of property, BVerfGE 74, 26).

To a certain degree, a constructivist perspective would favor such attempts to "proceduralize" the conflict between epistemic autonomy and heteronomy in modern law. Indeed, when correspondence theories of truth have to be replaced by consensus theories and coherence theories, when the authority of science is based only on its internal procedures of validation, when institutional contexts like the law are condensed to epistemic autonomy and cannot resort to external authorities, then practical and theoretical attention must focus on the procedures that dictate the premises, content, and consequences of institutional constructions of social reality.


REFERENCES


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