DE COLLISIONE DISCURSUUM: COMMUNICATIVE RATIONALITIES IN LAW, MORALITY, AND POLITICS

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I.

At the end of the seventeenth century, Johan Nikolaus Hert, a German legal scholar of Roman private law, wrote the treatise *De Collisione Legum*. He was dealing with one of the most disturbing experiences in his epoch of the emerging nation states—the experience that on earth there was more than one law, more than one justice.[1] Hert stood in stark contrast to his more famous French contemporary, the brilliant Blaise Pascal, who reacted to the same problem with critique, deconstruction, and irony: "A funny justice that ends at a river! Truth on this side of the Pyrenees, error on that."[2] Invoking systematic construction and elaborate casuistry, Hert was the first and only German to date to make a serious and thorough attempt to resolve nagging questions of conflict of laws.[3] To work out collision rules was the solution. Hert complexified the so-called statutist method according to which collision rules determined jurisdiction by analyzing the nature of the statutes involved. Developing a complex rule system for the collision of laws, Hert felt compelled to distinguish the incredible amount of sixty-three different casuistic constellations in order to fight Pascal's paradox. For this scholarly exercise he became famous, and rightly so. But his immortality in legal circles is based on the desperate sigh which he hove while drawing his tortured distinctions: "*quam sudent doctores*." How the doctors are sweating!

De Collisione Discursuum, the collision of discourses, is a variation on this theme which makes modern and postmodern doctors sweat. It is no more the fragmentation of universal justice in different national laws that haunts us, but the fragmentation of universal rationality into a disturbing multiplicity of discourses. And today,

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† The translations in this Article are those of the author.

1 *See* GERHARD KEGEL, INTERNATIONALES PRIVATRECHT VI § 3 (C.H. Beck ed., 7th ed. 1995).

2 BLAISE PASCAL, PENSÉES 151 (1964).

3 For details, see HERRMANN, JOHAN NIKOLAUS HERT UND DIE DEUTSCHE STATUTENLEHRE (1963).

we are faced with a similar alternative of a deconstructive and a reconstructive answer: Blaise Pascal or Johan Nikolaus Hert? Funny rationality that ends at the boundary of discourse? Or a tormented casuistry of collision rules for interdiscursivity?

Jürgen Habermas's earlier work,[4] as he himself concedes, could still be understood as constructing one and only one communicative rationality which integrated discursivity and morality.[5] If, in a plurality of social situations, we raise the question of validity of norms, we enter into a discourse which, under certain procedural conditions and under the guide of the universalization principle, leads us to a consensus about valid norms which we can call rational. Various institutionalized patterns of practical argumentation, like the procedures of legal or political deliberation, are certainly historically contingent. However, their bewildering multitude can be measured against the one ideal of rational discourse which serves as a regulative idea and a standard of critique.[6] In a somewhat different interpretation of Habermas's theory, legal argumentation could be seen as a "special case" of a rational discourse on practical questions which develops its own peculiarities. But the hierarchical relation between general discourse and legal discourse makes sure that there is one—and only one—communicative rationality.[7]

Now, in *Faktizität und Geltung*, Habermas makes a decisive move towards a plurality of discourses—and their concomitant rationalities.[8] Modern plurality, he argues, does not result one-dimensionally from social differentiation as theorists in the Durkheim tradition would have it. Habermas reconstructs several historical processes of differentiation in which various communicative practices emerge with highly peculiar procedures, logics of argumentation, and internal rationalities.[9] Not only do different system rationalities appear, but the lifeworld itself becomes auton-

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[4] *See, e.g.*, JÜRGEN HABERMAS, LEGITIMATIONSPROBLEME IM SPÄTKAPITALISMUS [LEGITIMATION CRISIS] (1973); JÜRGEN HABERMAS, ZUR REKONSTRUKTION DES HISTORISCHEN MATERIALISMUS [COMMUNICATION AND THE EVOLUTION OF SOCIETY] (1976) [hereinafter HABERMAS, REKONSTRUKTION].

[5] *See id.*

[6] *See* HABERMAS, REKONSTRUKTION, *supra* note 4, at 265.

[7] *See* ROBERT ALEXY, THEORIE DER JURISTISCHEN ARGUMENTATION: DIE THEORIE DES RATIONALEN DISKURSES ALS THEORIE DER JURISTISCHEN BEGRÜNDUNG 261 (1978).

[8] JÜRGEN HABERMAS, FAKTIZITÄT UND GELTUNG: BEITRÄGE ZUR DISKURSTHEORIE DES RECHTS UND DES DEMOCRATISCHEN RECHTSSTAATS 140 (1992). For the English translation, see JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTION TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans., 1996).

[9] *See id.* at 77.

omous as against functional systems (politics, economy). Moreover, the lifeworld in its turn differentiates internally into diverse spheres—personality, culture, and societal community. Finally, culture develops into several autonomous fields of knowledge, each of them following a specific *Eigenlogik*.[10]

This complex reconstruction enables Habermas to separate autonomous argumentative practices along different dimensions, among others morality from legality,[11] morality from ethics,[12] law from politics, and discourse from negotiation.[13] At the very end, Habermas observes the interplay of five distinct "types of discourse and negotiation."[14] Moral discourses specialize around the principle of universalization; ethical discourses aim at individual and collective identity; pragmatical discourses relate purposes to means and set priorities among collective goals; legal discourses care for the internal consistency of legal rules; and negotiations develop a culture of fair compromise between nongeneralizable interests.

With this move toward discursive plurality, Habermas does not merely render his theory analytically richer and moves it closer to institutional realities. In addition, he systematically brings together two separate intellectual traditions, so that they considerably profit from each other: social differentiation and fragmentation of discourses. Sociologists have observed that modern society has become divided into several social systems and autonomous spheres of rationality. Philosophers have observed language to become fragmented in different language games, logics of argumentation, and apparently incommensurable discourses. Habermas's theory integrates these two traditions and relates them to each other in the interplay of external and internal, in the "double perspective" of functional analysis and rational reconstruction.[15]

But there is a decisive difference. Theories of systemic and discursive plurality tend to stress separation, incommensurability, and nonreconcilable difference. As for interdiscursivity, if these theories recognize it at all, they observe mainly closure and indifference, perhaps structural coupling, at best a certain elective affinity. The most radical position toward the collision of discourses can be found in Lyotard's "victimology," which is comparable to Pascal's "funny justice" in the conflict of laws. For Lyotard, dis-

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10 *See id.* at 107, 124-35.
11 *See id.* at 135-38, 286-91.
12 *See id.* at 127, 188.
13 *See id.* at 192.
14 *See id.* at 196-207.
15 *See id.* at 57-60.

courses are hermetically closed; if they "meet" they can only do "injustice" to each other; one discourse is the other discourse's "victim."[16]

Habermas's insistence on practical reason and communicative power makes him opt for the opposite: for unity, not for difference; for integration of discursive plurality, not for their sheer fragmentation. Therefore, discursive plurality, taken seriously, creates a much more dramatic challenge for Habermas's theory that relies ultimately on discursive reason and does not content itself playing around with social differentiation or with linguistic diversity. After the move to pluridiscursivity, the success of Habermas's theory now depends on a plausible solution to the collision of discourses. If Habermas's "proceduralization" of reason is supposed to make sense it needs now to be developed in a double direction: rational procedures for various discourses and rational meta-procedures for interdiscursivity. If practical reason were not to disintegrate into a Pascalian "funny rationality" of discourses, then we are today again in the situation of Johan Nikolaus Hert. Complex rules of collision need to be worked out, tortured distinctions have to be made, even if the doctors are sweating. But here, Rudolf Wiethölter,[17] an erudite scholar in both legal theory and conflict of laws, warns us, predicting not only sweat, but sweat, blood, and tears in the desperate search for a meta-discourse that resolves the conflict of discourses. He calls it a "*Rechtsgottesgericht*": Where is the forum, who sets the standards, which are the procedures?

II.

Habermas is well aware of the collision problem.[18] His answer in *Faktizität und Geltung*: No hierarchy of discourses—especially no superiority of morality over legality—but discursive compatibility! For the conflicts between pragmatic discourses, procedurally regulated negotiations, ethical-political discourses, and moral and legal discourses, he concludes: the universal concern demanded by the discourse principle finds its guarantee in the compatibility of all discursive programs with what can also be morally justified.[19]

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16 JEAN-FRANÇOIS LYOTARD, LE DIFFÉREND [THE DIFFEREND: PHRASES IN DISPUTE] 21, 42, 43 (1983).

17 Rudolf Wiethölter, *Zum Fortbildungsrecht der (richterlichen) Rechtsfortbildung: Fragen eines lesenden Recht-Fertigungslehrers*, 3 KRITISCHE VIERTELJAHRESZEITSCHRIFT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT 1, 22 (1988).

18 *See* HABERMAS, *supra* note 8, at 141.

19 *See id.* at 206.

On several other occasions, Habermas insists on "complementarity,"[20] "double perspective,"[21] "congruence,"[22] "noncontradiction," "mediation," and "commensurability."[23] These are all variations of the same theme: If we have to take seriously the diversity and the autonomy of discourses, then the unity of practical reason needs to be replaced by discursive compatibility. But, obviously, with compatibility Habermas does not offer a solution. At best, he formulates a problem.

What does compatibility of discourses mean? I have distinguished at least five versions of discursive compatibility—all of which can be traced in Habermas's book.

A. *Indifference?*

Habermas refers to Kant's famous formulation that law needs to be indifferent to devils and angels.[24] The results of legal reasoning should be indifferent to the motives and reasons of moral angels and rational choice devils. In general, this could mean that discourses are free in developing their idiosyncratic argumentation, and need not care about external consistency with reasons of other argumentation practices if ever their results fit together.

B. *Smallest Common Denominator?*

Some of Habermas's formulations seem to point in the direction of the famous "ethical minimum" of the law, especially when he demands that law should be compatible with morality, and should not contradict moral reasoning.[25]

C. *Ad-hoc Conciliation?*

The idea of an "application discourse" apparently points in this direction.[26] The conflict of moral principles, ethical identities, political values, and legal rules cannot be resolved *in abstracto*. Rather, it is the richness of the concrete case-constellation, the "situational reference" that allows one to identify "adequate" criteria for their mutual delineation.[27]

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[20] *Id.* at 137, 145.
[21] *Id.* at 107.
[22] *Id.* at 128.
[23] *Id.* at 206.
[24] *See id.* at 144.
[25] *See id.* at 193.
[26] *See id.* at 266; *see also* KLAUS GÜNTHER, DER SINN FÜR ANGEMESSENHEIT: ANWENDUNGSDISKURSE IN MORAL UND RECHT (1988).
[27] *See* HABERMAS, *supra* note 8, at 267.

D. *Mutually Exclusive Jurisdictions?*

Discourses would claim exclusive areas of competence within the boundaries of their symbolic territories and would mutually respect their sovereignty.[28]

E. *Moral-Legal Superdiscourse?*

Although the discourse principle is too abstract to resolve practical questions, at least on the meta-level it can develop procedures and criteria able to be universalized to resolve conflicts of jurisdiction between moral, legal, and political discourses.[29]

Although Habermas experiments with all of these different versions of compatibility, his sympathies are with a combination of versions D and E, with a philosophical superdiscourse that delineates exclusive areas of jurisdiction. Discourse theory has the legislative competence to enact collision rules. The method is similar to the above-mentioned old statutists, Bologna's famous conflict-of-law school that distinguished criteria of jurisdiction according to a correspondence of the nature of the *statuta* and the cases involved: *statuta realia, statuta personalia, statuta mixta*.[30] In his "process model" of colliding discourses, Habermas distinguishes various areas of jurisdiction according to the nature of the discourse and the nature of the "issue" involved. "Various types of discourses and forms of negotiation," he asserts, "correspond to the logic of these issues."[31] Thus, the logic of issues determines discursive jurisdiction in five areas: pragmatic, ethical, moral and legal discourses, and procedures of fair negotiation. He systematically defines the nature of these discursive *statuta*: purpose/means relation, collective identity, universalization principle, normative coherence, and fair compromise. He even begins to elaborate a complex casuistry which attributes concrete issues of political life to abstract logics of discourses: abortion and social policies are under the jurisdiction of the moral discourse; in contrast, protection of animals and urban policies are under the jurisdiction of the ethical discourse, and so on.[32] This is where we begin to sweat. The distinctions become tortured. Greetings from Johan Nikolaus Hert!

But at this point we feel a certain hesitation in Habermas's thinking. After having dethroned the moral superdiscourse in

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[28] *See id.* at 196-207.
[29] *See id.* at 201-07.
[30] *See* KEGEL, *supra* note 1, at III § 3.
[31] HABERMAS, *supra* note 8, at 196.
[32] *See id.* at 204.

favor of a "*Gleichursprünglichkeit*," an original equality, of relative discourses, Habermas hesitates to subsequently crown the philosophical discourse king which would now be hailed to possess the competence of competences. Habermas himself does not seem to believe in the distinguishing power of his rules of discursive jurisdiction. After all, moral and legal questions refer certainly to the same problems. In the vocabulary of a collision doctrine, we would call this the "transdiscursive" character of most concrete political issues that does not allow us to plausibly identify a *sedes materiae* in a one-to-one correlation of issue to discourse. And it is not by chance that Habermas stops short of speculating about how to identify concrete institutions in which separate spheres of discursive jurisdiction are exclusively represented.[33] Only tentatively he searches for a certain temporal institutionalization of these differences in a "process model"[34] which, however, he hastens to relativize again by introducing manifold feedback-relations between different phases.[35] And when it comes to existing institutions of political legislation and legal adjudication, the five discourse types remain there in an undifferentiated mix.[36] What seems possible, at best, is to reconcile them ad hoc.

Thus, facing the conflict of discourses, Habermas is oscillating between two positions: leaving it to the heterarchy of relative discourses versus erecting the hierarchy of a superdiscourse. He is confronted with a somewhat uncomfortable alternative. Either practical reason is limited to only one of the five partial aspects—moral justice, collective identity, choice of collective goals and means, fair compromise, and legal consistency—whose interrelation remains unclear. Or there is a superdiscourse which has the legislative capacity to set rules in case the discourses collide.

III.

Perhaps there is something wrong with the clear-cut alternative of heterarchy versus hierarchy, relative discourse versus superdiscourse. Can legal history teach us here a lesson in its century-old and down-to-earth experience with conflict of laws? Indeed, the doctrine of conflict-law did develop a third position between heterarchy and hierarchy which is worthwhile to be looked at more closely. The turning point was the territorial differ-

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[33] *See id.* at 207.
[34] *Id.* at 201-07.
[35] *See id.* at 207.
[36] *See id.* at 191.

entiation of European society in autonomous nation states. Before this point, Bologna's statutists were successfully governing conflicts between local jurisdictions and a universal *jus commune*. However, the more national laws were gaining in autonomy, historicity, and uniqueness, the less convincing became an international *jus commune* of collision rules which maintained the unity of law—at least at a meta-level—deciding about national jurisdictions. With the nation-state and its claim for sovereignty, territorial domination and exclusive jurisdiction, a strange entangling of the norm-hierarchy occurred among particular substantive rules and universal collision rules. The ground-level became indistinguishable from the meta-level, but, paradoxically, remained distinguishable at the same time. What happened was a historical process in which even international collision rules became nationalized. As a clear *contradictio in adiectu*, international private law became national in its character. Instead of one international private law that decided jurisdictional conflicts, there emerged a national multitude of international private laws. Every nation-state developed autonomously its own, idiosyncratic law of conflict between legal orders. Funny justice: The party to a legal conflict became judge in her own cause!

Many international lawyers deplore this "tangled hierarchy"[37] and attribute the (con)fusion of levels to the weakness or the non-existence of a global legal order. For them, lack of globality is the reason why we do not have a truly international law of conflict which, institutionally, would keep rules and meta-rules apart. I think there is a deeper reason for the strange asymmetry. I find it in Habermas's concept of "*Gleichursprünglichkeit*," in the original equality or equal originality of discourses, and, in our case, of laws of nations. If the *diversitas legum* is no longer seen as emanating from the unity of divine or natural law, in any case, from one *jus commune*, if national laws are seen as separate chains of legal distinctions each having its own irreversible history, each stemming from an obscure national filiation, each provided with a myth of origin, then universally applicable collision rules do violate the unique "spirit" of each of these autonomous laws. If the unique characteristics of a cultural identity defines the idiosyncracies of a national law, then such law must also have the power to define the perception of its outside world from its unique perspective. Na-

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37 *See* DOUGLAS R. HOFSTADTER, GODEL, ESCHER, BACH: AN ETERNAL GOLDEN BRAID (1979); *see also* Douglas R. Hofstadter, *Nomic: A Self-Modifying Game Based on Reflexivity in Law*, *in* METAMAGICAL THEMES: QUESTING FOR THE ESSENCE OF MIND AND PATTERN 70-86 (Douglas R. Hofstadter ed., 1985).

tional laws claim the right to a domestic construction of foreign law, literally, to its incorporation in the body of the *lex fori*. Ago gives an especially purist version of this view claiming that collision rules do not deal with the question "Should we apply foreign or domestic law?"[38] Rather, national meta-rules produce themselves national substantive law by using outside rules as material and reconstructing them anew in the context of domestic law: "*l'ordre juridique est toujours nécessairement exclusif dans le sens qu'ils exclut le caractère juridique de tout cequi ne rentre pas en lui-mème.*" (the legal order is always necessarily exclusive in the sense that it excludes the legal character of everything that does not enter into itself.)

In more abstract terms, the strange paradox of self-justice in the conflict of domestic and foreign law—the peculiar asymmetry of a law that decides its own conflicts with other laws, and thus violates flagrantly the principle of impartiality—can be reformulated with the concept of re-entry. Once an original distinction has been drawn, it reproduces itself in a subsequent chain of distinctions which builds on the original distinction (legal/illegal). The chain distinguishes itself from the outside world through its very reproductive operations (legal operations/rest of the world). It integrates itself with the outside world neither by reaching into the world outside its own distinctions nor by appealing to a higher authority (be it of divine or natural law, be it of the doctors of Bologna). Rather, it repeats in itself the difference between two symbolic spaces by distinguishing between its self-perceived identity and a constructed outside world (domestic/foreign law). This is re-entry: a chain of distinctions reformulates its difference to the outside world in the language of its own distinctions (national rules on international collisions). It cannot connect itself to other chains of distinctions except by re-entry, by a reconstruction of these other chains in its own terms. The main effect of this re-entry: If, for an outside observer there was incommensurability of different sorts of distinctions, after the re-entry, there is comparability and compatibility. An internal meta-level can be constructed that transforms the former external heterarchy into an internal hierarchy (substantive rules versus meta-rules of rule collision).

If Habermas takes his idea of discursive *Gleichursprünglichkeit* seriously, then "re-entry" seems to offer itself as a formal model of how to deal with interdiscursivity. Due to *Gleichursprünglichkeit*, none of the partial discourses—neither

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[38] KEGEL, *supra* note 1, at X § 3.

morals, ethics, law, nor philosophy—is a natural candidate for a superdiscourse. Otherwise, we would have to admit, all of these original equals actually are superdiscourses. The moral discourse reformulates the conflict of different discourses in terms of generalizable interests, the ethical discourse reformulates in terms of individual and collective identity, the legal discourse reformulates in terms of treating norm-case-relations equally or nonequally, and so forth. Each of these discourses has an internal dynamics that propels its chain of distinctions not only for substantive questions, but also for questions of discourse collisions. Discourse collisions search in vain for one central meta-discourse. There is only a plurality of decentralized meta-discourses that reformulate collisions in their own idiosyncratic language. After all, Lyotard seems not so wrong with his assertion that in the conflict of discourse no *litige* takes place, but rather a *différend*: By reconstructing foreign rationalities in its own domestic language, each discourse necessarily does "injustice" to the inner essence of the others.

"Justice" would then take on a specific meaning. Under modern conditions, it would not be rendered meaningless, as Kelsen asserted. Nor would justice be identical with the partial and highly specialized rationality of the moral discourse, applying nothing but the stern and rigorous universalization principle, as Habermas suggests today. Rather, justice would have to be reformulated as a relational concept. However, at the same time, this justice is nonhierarchical and asymmetric. Justice relates discursive identity and discursive otherness not from "above," but from the unique perspective each discourse has to the rest of the world of discourses. Legal justice then becomes a matter of degree, not a binary choice. Justice can be realized to the degree as a concrete historical legal discourse is simultaneously able, externally, to incorporate the rationalities of other discourses and, internally, to observe its own requirements of legal consistency. Denoting the richness of the idiosyncratic world construction of the legal discourse, legal justice would be universal and particular at the same time. This is more than "adequate complexity" of the legal system that looks exclusively to the question of how, under the condition of extreme social differentiation, internal legal consistency can still be achieved.[39] Justice will be realized to the degree a concrete legal order is able to respond at the same time to an additional question. Not only to

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[39] *See* NIKLAS LUHMANN, AUSDIFFERENZIERUNG DES RECHTS: BEITRÄGE ZUR RECHTSSOZIOLOGIE UND RECHTSTHEORIE (1981); NIKLAS LUHMANN, RECHTSSYSTEM UND RECHTSDOGMATIK STUTTGART (1974).

what degree does law justice to its own requirement of legal equality, but also to what degree does law justice to the *Eigenlogik* of other discourses. This results in a third question: If law increasingly gives justice to outside discourses, is it capable of changing the internal criteria of coherence accordingly? And Michael Walzer's *Spheres of Justice* would take on a different meaning. Not only would a multitude of specific social and professional contexts develop a multitude of specialized moralities. But specialized argumentation practices would reflect discourse specific norms in their relation to norm projections of other spheres of life.

IV.

If "re-entry" is the third position that marks the difference to Habermas's treatment of interdiscursivity, what are the consequences for legal argumentation? Does the distinction make a difference when moral, ethical, pragmatic, and interest-oriented arguments actually enter the legal discourse? My answer in a nutshell: "enslavement." Indeed, Habermas rightly stresses the point that despite the profound differentiation of morality and legality, moral and ethical arguments do reappear frequently, and legitimately, in legal reasoning. And he overcomes the obvious contradiction between autonomy and reappearance by the metaphor of "translation." Moral contents, Habermas argues, do not enter law as such; they are "translated" into the "legal code," whatever this means.[40] Thus, he can reject pure legalism *à la* Windscheid, the (in)famous German pandectist who maintained that political, moral, and economic arguments were irrelevant to the "lawyer as such," as being hopelessly out of step with argumentative reality.

In his turn, Habermas constructs legal decisionmaking as a process model in which pragmatic, ethical, moral, and interest-oriented arguments are freely interchanged; only at the end does the result need to go through the filter of legal argument: a test of coherence with established legal norms, especially constitutional norms. This ultimately makes judicial review necessary in which the new programs are examined for their ability to fit into the existing legal system.

Similarly, in the application discourse of judicial adjudication, Habermas identifies a plurality of pragmatic, ethical, moral, and interest-oriented arguments which again are disciplined by the legal requirement of "conditions of decisional consistency."[41]

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[40] *See* HABERMAS, *supra* note 8, at 250.

[41] *Id.* at 268.

Legal consistency appears in both cases as a screening method that filters out some of the solutions that have been found in the free interplay of discourse types and negotiations. In the collision of discourses, it is an excluding device that rules out certain extravagant results.

To my mind, Habermas underestimates in both cases the "legal proprium." Legal consistency is not only a filtering device. It is the very productive mechanism that opens the gates for a whole cascade of distinctions. "Treat equal cases equally and unequal cases unequally" should not be seen as the *Grundnorm*, the static basic norm but the *Grundverfahren*, the dynamic basic procedure of the legal discourse that opens a self-propelling process of a chain of distinctions. It deals not only with the problem of normative coherence, as Habermas suggests—if and how a consented rule fits into a system of rules. Rather, it triggers a generative mechanism, a "historical machine" as von Foerster would say,[42] when it asks the *question directrice* if a new case should be treated "alike or not alike" to a historically given relation between rules and cases. And in this context, it is not so much "stare decisis" which is of interest, the binding effect of precedents, of treating equal cases equally. Rather it is "distinguishing" and "overruling," treating unequal cases unequally, that unleashes law forces.[43] It is legal unequality that opens a definite conceptual framework for the infinite search for alternative rules and facts, principles and values, and that produces innovations which in their turn reproduce for the next chain of cases the dialectics of "alike or not alike."

And it is this historical machine that legal discourse, on its own territory, uses to "enslave" other discourses. Relentlessly searching for criteria of equal/unequal, the legal discourse freely borrows ideas, rules, and principles from other discourses, exploits moral, ethical, pragmatic, and strategic arguments, but subdues them to the very basic procedure of determining legal equality/inequality. There is no free interplay of arguments, but rather the stern discipline of a legal search procedure that defines, on the basis of its historical configuration, which aspects are relevant and which not, which arguments are admitted and which not, how priorities have to be set, and how conflicting perspectives have to be resolved. For moral philosophers, it is one of the most frustrating experiences when their eloquent suada is brusquely interrupted by a lawyer's argument: "Legally, this is irrelevant." And this inter-

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42 *See* HEINZ VON FOERSTER, OBSERVING SYSTEMS 201 (1981).

43 *See* NIKLAS LUHMANN, DAS RECHT DER GESELLSCHAFT 110-17 (1993).

ruption is not merely due to arbitrary *auctoritas* of the judge, but equally to the *ratio* of legal doctrine and procedure. It is the present state of the law—*die gegenwärtige Rechtslage*—in its historical evolution that decides about production, admission, and the foundation of unequality. Disposition about unequality is the privilege of the law in the interplay of discourses; the dynamic realization of the "legal proprium" which dictates also the legitimate/nonlegitimate use of nonlegal arguments.

This enslavement of foreign arguments under the basic procedure of law expresses, I submit, a different aspect of the proceduralization idea. Habermas tends to reserve the idea of "proceduralization" for the very general procedural requirements of an ideal discourse on practical questions. Legal procedures, he contends, do not interfere with the "inner logic of argumentation."[44] But is this really true? "Treating new cases alike/not alike" is a procedure that determines the scope and quality of admitted arguments, the sequence of equality tests, and the criteria of what equality in this context means. As a basic procedure for the legal discourse, it interferes deeply with the inner logic of argument, be it legal argument or the legal assimilation of moral, ethical, or pragmatical arguments. It would have as its counterparts other autonomous discourses—the "universalization procedure" of morality in its Kantian, Rawlsian, or Habermasian version, or an "identity search procedure" in ethical discourses, or the utility calculus of "rational choice"—which in their turn typically proceduralize argumentation and incorporate, but thereby enslave foreign arguments, among them legal concepts, rules, and principles.

V.

But how should such a mundane enterprise like the law be able in its tormented casuistry to "incorporate" the vast multitude of high-culture discourses such as morality, ethics, and pragmatics on the one side and powerful economic and political arguments on the other? Why should the legal discourse be able to make highly diverse aspects compatible, a feat that a philosophical superdiscourse was not supposed to be able to accomplish? Let us have a closer look—with empathy and compassion—at the victims of this semantic slavery. "Alike or not alike—that is the question" which attracts other discourses to law. Once selectively admitted, they

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[44] *See* HABERMAS, *supra* note 8, at 288.

suffer a peculiar transformation. Moral maxims, ethical self-realization, pragmatic recommendations, and policy requirements—to use Habermas's very typology—lose their specific identity. They all reappear now in the guise of sheer legal norms, rights, and duties, principles, and values—simple components of the legal discourse. Habermas uses the metaphor "translation" to analyze this transubstantiation of morality into law.[45] As long as the differences of languages is maintained, the immigration of moral contents into law does not signify any immediate moralization of law.[46]

Indeed, it signifies the very opposite, a juridification of morality with the result of leveling out discursive differences. Originally, there were incommensurable rationalities directed into different dimensions of meaning. Now their legal enslavement makes them commensurable, comparable, and decidable—only within the boundaries of law, of course. Here, we find the reason for the shameless eclecticism of law that treats moral maxims and economic policies equally as "values" among which the law can establish priorities according to prior legislative or judicial decisions. Here, we find the reason why high culture is inevitably trivialized whenever lawyers begin to incorporate it in their briefs, as German lawyers tend to say self-critically: *zu kleiner Münze verrechtlicht* (juridified into small coins).

With high sensitivity Habermas analyzes this transformation from moral rules into legal rules: moral contents are translated into the legal code and are endowed with a different mode of validity.[47] This leads him to an informative typology of differentially "moralized" legal norms. However, he seems to underestimate the simplifying effect of this translation when he, in his polemics against Alexy's theory of balancing goods, insists that within legal practice, the difference between deontological principles and teleological values needs to be respected. In my view, this is a paradigmatic case. It shows how the legal discourse deals with fundamental differences between other discourses. Certainly, Habermas is right:

> Norms and values are different, first in their reference to obligatory versus teleological action; second, in their binary versus gradual coding of their validity claims; third in their absolute versus relative oligartoriness; and fourth in the criteria which are applied to the coherence of rule systems or value systems.[48]

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45 *See id.* at 250-53.

46 *See id.* at 253.

47 *See id.* at 252.

48 *Id.* at 311.

There are many legal theorists who would support this distinction and base whole systems of legal theory on it (deontological versus consequentialist theories). Legal practitioners, however, show no interest at all to respect these distinctions; they are determined to resolve collision issues and to transform them into a decidable form. Thus, the argumentative practice of law decides about collisions of discursive logics by leveling out their fundamental differences. For lawyers, their method of *Abwägung* (balancing) has exactly the same structure, be it balancing between principles, between values, or even between interests. They identify them in terms of the case at hand; they determine the degree to which they collide, they evaluate them as legitimate, they weigh them against each other and find the criteria for this weighing in legislative and judicial decisions. Worse, the trivialization of different logics enables them to treat incommensurable things alike and balance—*horribile dictu*—principles, values, and interests against each other. Pears and apples! Justitia is blind!

Maybe Habermas effectively points to the limits of solving discursive collisions by legal trivialization. Maybe he signals an overload of the traditional way in which discourse collisions are translated first into one-dimensional conflicts between legal norms, principles, and values, and then decided via legal doctrine and the hierarchy of courts. This should make us sensitive to other ways—less hierarchical and doctrinal, yet more decentral and processual—in which law deals with the collision of different worlds of meaning.

VI.

Fight fire with fire! Increasingly, law's response to the fundamental collision of discourses seems to be to fight fragmentation by fragmentation! This is the opposite strategy to mapping external conflicts within the uniting conceptual framework of one and only one legal doctrine and relying on the hierarchical unity of the court system to decide doctrinal conflicts.

Now, instead of relying on the unity of law, there are tendencies to translate external discourse collisions into internal conflicts between specialized legal fields. And, in their turn, substantive legal fields find again an asymmetrical, self-referential way of resolving their conflicts. We could call this a "double re-entry." The distinction between different discourses reappears first in legal assimilation of other discourses and reappears a second time in the

asymmetric collision rules in the conflict between different legal fields.

Internal differentiation of law can be seen as a response to the fragmentation of society in various systems and discourses. As is well known, internal differentiation of law has long since moved beyond the traditional broad distinctions between public law, private law, and criminal law. For example, the fragmentation of private law into a multitude of special fields (*Sonderprivatrechte*) has destroyed the conceptual-dogmatic unity of private law.[49] What is important for our context of discursive plurality, is that this internal differentiation lead to a close symbiosis between discursive domains outside the law and special fields within the law. Joerges puts responsibility on "the prevailing conditions in the social domain concerned which entail the specific differentiation of private law and lead to the fragmentation of the private law doctrine and legislation."[50] And this internally differentiated law looks more and more like a Russian doll that contains in itself ever smaller dolls. Even key areas within private law, such as tort law, can no longer be integrated by means of unified normative principles. The "compartmentalization of the classic 'general' law of tort into a law of specialized torts," for example, seems an irreversible state of affairs, to which the law reacts by providing differentiated "solutions for specific interests and social fields."[51] Nowadays, legal doctrine develops different theories of tort for different social fields, and this is no accident.[52] The practice of the courts has destroyed the old unity of law guaranteed by doctrine and has replaced it by a multiplicity of fragmented legal territories that live in close contact with their neighboring territories in other social practices.

Demands for restoring the "unity of the legal order" are, of course, merely rhetorical in character, or are used tactically when the occasion arises.[53] Attempts to establish a conceptual or axio-

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[49] *See* CHRISTIAN JOERGES, VERBRAUCHERSCHULTZ ALS RECHTSPROBLEM: EINE UNTERSUCHUNG ZUM STAND DER THEORIE UND ZU DEN ENTWICKLUNGSPERSPEKTIVEN DES VERBRAUCHERRECHTS (1981); Christian Joerges, *Quality Regulation in Consumer Good Markets: Theoretical Concepts and Practical Examples*, *in* CONTRACT AND ORGANIZATION: LEGAL ANALYSIS IN THE LIGHT OF ECONOMIC AND SOCIAL THEORY 142-63 (T.C. Daintith & Gunther Teubner eds., 1986).

[50] Christian Joerges, *Die Überarbeitung des BGB-Schuldrechts, die Sonderprivatrechte und die Unbestimmtheit des Rechts*, 20 KRITISCHE JUSTIZ 166, 166-82 (1987).

[51] GERT BRÜGGEMEIER, DELIKTSRECHT: EIN HAND-UND LEHRBUCH 82-89 (1986).

[52] *See id.* at 313-463.

[53] *See, e.g.*, HORST JAKOBS, WISSENSCHAFT UND GESETZGEBUNG IM BÜRGERLICHEN RECHT (1983); Ernst Wolf, *Kein Abschied vom BGB*, 15 ZEITSCHRIFT FÜR RECHTSPOLITIK 1-6 (1982).

logical unity through legal dogmatics are doomed to failure.[54] This is as true for private law as it is for the law in general.

How to deal with these internal conflicts that represent larger discursive collisions is still an open question. The idea of the "relative autonomy of legal fields"[55] seems to be both realistic and normatively acceptable. Explicitly, this idea uses concepts developed in the international private law for the collision of legal fields. Prominent among them figures the conflict-of-law principle of *ordre public*. *Ordre public* excludes the domestic application of foreign law in case that foreign law violates fundamental legal principles of domestic law. In its application to intralegal collisions, the starting principle is that doctrinally and procedurally specialized legal fields are essentially independent, and are only subject to limitations in situations where *ordre public* happens to be relevant. Each legal field will develop its own doctrinal structures according to the demands of the social practice involved, but in cases where problems of *ordre public* arise, the particular legal field would have to respect the fundamental principles and policies of the other legal fields. It would have to incorporate them into its own autonomous doctrine as a limitation on its activities. This seems to be a realistic way of reformulating the old idea of the unity of the legal order. In modern legal systems characterized by a high degree of internal differentiation, a close integration is no longer possible, neither through concepts and values nor through the court hierarchy. This is the revenge of the slaves! Certainly, they are enslaved by legal trivialization. But they still have the power to destroy the doctrinal unity of law from the inside. They compel the legal discourse to give up the goal of legal unity. Instead, what can be achieved, at best, is only a measure of compatibility between the doctrines of autonomous legal fields and the mutual reflexive adoption of their fundamental principle.

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[54] *See* Wolfgang Zöllner, *Zivilrechtswissenschaft und Zivilrecht im ausgehenden*, 188 ARCHIV FÜR DIE ZIVILISISCHE PRAXIS 86, 100 (1988).

[55] *See, e.g.*, RAINER WALZ, STEUERGERECHTIGKEIT UND RECHTSANWENDUNG: GRUNDLINIEN EINER RELATIV AUTONOMEN STEUERRECHTSDOGMATIK (1980); Rudolf Wiethölter, *Materialization and Proceduralization in Modern Law*, *in* DILEMMAS OF LAW IN THE WELFARE STATE 221-49 (Gunther Teubner ed., 1985); Rudolf Wiethöler, *Social Science Models in Economic Law*, *in* CONTRACT AND ORGANIZATION: LEGAL ANALYSIS IN THE LIGHT OF ECONOMIC AND SOCIAL THEORY 52-67 (T. Daintith & Gunther Teubner eds., 1986); Rudolf Wiethöler, *Proceduralization of the Category of Law*, *in* CRITICAL LEGAL THOUGHT: AN AMERICAN-GERMAN DEBATE 501-10 (C. Joerges & D. Trubek eds., 1989).

VII.

Let me try a final analogy. Frequently, private international law decides against domestic law and opts for the application of foreign law. Such an "externalization" happens when the case at hand seems to have a "closer relation" to the foreign legal order than to the domestic one. In the conflict of discourses, there is an equivalent to this externalization. The legal discourse resolves the collision by externalizing certain normative questions from its domain and delegating them to other normative practices. *Boni mores* and *bona fides* are the classical examples of resolving a discursive collision by referring it to morality, whatever this meant to be. More modern examples are references to "reasonable man," "public policy," "commercial practices," and "professional standards." Here is a remarkable difference from what we had called "enslavement." There, the law did simulate other argumentative practices by reconceptualizing them in terms of legal norms, principles, and values. Here, the law delegates its norm-creating task to other on-going argumentative practices. And it reads the result of such practices and then tries to assimilate them into legal rules. To be sure, the law plays quite an active role in this assimilation. But the fact remains that it is the ongoing argumentative practice outside the law that has an upper hand in determining the normative result.

How should we interpret this externalization? We might say that the collision of discourses is resolved by a mutual influencing of two argumentative practices that actually take place. In this case, two discourses are simultaneously reading and misreading their results. And in this process, certain *eigenvalues* emerge that have proven themselves in the practice of two discourses. These *eigenvalues* have greater plausibility and greater stability than the above mentioned results of legal trivialization or internal differentiation.

To conclude, I ask why employ these somewhat counter-intuitive tendencies toward asymmetry, re-entry, internal differentiation, and re-externalization? Why opting against a superdiscourse, against unity of law, against central court hierarchy? My tentative answer is: historicity. It is the accumulated experience of institutionalized argumentative practices that is rich enough to develop concrete criteria of relevance, to determine the sequence of distinctions, and to suggest topics of evaluation in order to cope with the disquieting reality of conflicting discourses.