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Alienating Justice: On the surplus value of the twelfth camel

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I.Consequences of Legal Autopoiesis

An old wealthy bedouin sheikh wrote his will and divided his fortune, a large herd of camels, among his three sons. Achmed, the eldest son, was to inherit the first half of the fortune, Ali, the second son, should get a fourth, Benjamin, the youngest son, a sixth. When the father died, unfortunately only eleven camels were remaining. Achmed, of course, demanded six of them and was at once contested by his brothers. Finally, when everything broke down, they turned to the khadi. He decided: 'I offer you one of my camels. Return it to me, Allah willing, as soon as possible'. Now, with 12 camels, the division was easy. Achmed got his half, 6 camels, Ali got a fourth, 3 camels, Benjamin a sixth, 2 camels. And indeed, the twelfth camel was left over which they kept and fed very well and happily returned to the khadi.

On various occasions, Jean-Pierre Dupuy and Niklas Luhmann, in their debates on self-organisation and autopoiesis had retold this old story in order to shed light on the internal paradoxes of the law, on the problematic relation of law to itself (Dupuy, 1988; Luhmann, 200b; for a general discussion of legal autopoiesis, see King and Schutz, 1994; Baxter, 1998).[1] In the dazzling light of the desert – at the same site, where Derrida observes the violence of law's self-foundation, where Kelsen had seen the *Grundnorm,* and Hart the basic rule of recognition - they see the khadi's twelfth camel grazing at a green place. But they quarrel whether the site is an oasis or a Fata Morgana. For them the twelfth camel is not a symbol representing something else, rather it performs itself the symbolic operations of law. It is the localized self-reference of the legal system which ends in the interplay of paralysing paradoxes and liberating moves.

I would like to continue this debate on the consequences of legal autopoiesis, but shift the focus from law's internal self-reference to the external relations of law to society: What is the social surplus value of the twelfth camel? This raises intricate issues of mapping social conflicts in law: How realistic is the image of the judge's camel? At the same time the problematic relation between the legal decision and its grounds comes up: Does the judge's camel filter produce only a smokescreen which hides something else or does it produce good legal arguments which determine or justify sufficiently the final decision? Finally, questions of justice are at stake: Is the twelfth camel a satisfying conflict resolution and/or does it justice to the customs and manners of the bedouin society?

II. Conflict alienation

The twelfth camel refutes a basic assumption which unites diverse strands in the sociological critique of law, from Ehrlich and the realist school, via normative thinkers like Hayek and Habermas to recent entrepreneurs in deconstruction. What they have in common is to criticize law's estrangement from its social and human origins, its violent abstraction from the relation between ego and alter, and to ask for law's return to what they see as its roots: social norms, spontaneous rules, community standards, discursive rationality, or

deconstructive justice. Most drastic is Christie's formula of law as expropriation of conflict (Christie, 1977). Law is systematically unable to understand social conflicts and to resolve them adequately. The reason is that law's formalising violence via legal procedures and conceptualisations expropriates conflicts from their proper context of social and moral understandings of the parties. The new formula is: Expropriate the expropriators! Give the conflict back to the people! With this suggestive slogan Christie expresses the wide-spread uneasiness about law's ability to resolve conflicts: non-responsive, inhuman, irrational, (non-em)pathetic...

The twelfth camel, in contrast, celebrates law's expropriation. It transforms law's original sin into its primary virtue. Indeed, by reconstructing a social conflict under highly artificial procedural conditions and with the help of a highly artificial language, the law expropriates, alienates, displaces, disseminates, falsifies the original conflict. But, witness the twelfth camel, this is the legal proprium. The law does not all develop sufficiently profound empathy to understand the original social conflicts out there; instead, it transforms them into technical legal questions. And it constructs them in such a way that they can be answered by its procedural and conceptual means. As a consequence, the *quaestio juris* has very little or virtually nothing to do with the original social conflict (Galtung, 1965). The khadi's camel is different from the sheikh's camels. Legal cases do not - and are not supposed to - map social conflicts. Law has not developed any adequate understanding of their causes, their meaning to the conflicting parties, their perspectives of acceptable solutions, their social consequences. As the debate over alternatives to the legal system has rightly shown, the law is by no means particularly suited for solving disputes among people satisfactorily to all concerned (Fitzpatrick, 1992). Mediation, arbitration and settlement do much more justice to the nature of conflicts, their causes and the needs of the people at dispute. Accordingly, one could in conflicts very well do without the law. In short, law falsifies the realities of the conflict and produces decisions that are based on self-produced fictions.

The alienating effect is a historical variable, not a universal attribute of law. Many legal orders rely heavily on the communal character of their procedures and rules, reflecting the dominant religious and political orientation of their societies. Alienation by law is the result of a specific historical configuration. On the other hand it has not been institutionalised by intentional planning and rational design. There was no political decision to build a legal machinery in order to alienate conflicts. The key to legal alienation is a phenomenon called re-entry (Spencer Brown, 1972: 56f., 69ff.; Luhmann, 1993a; Luhmann, 1997: 179ff.; Esposito, 1993). The thesis of this article is that conflict alienation is the typical by-product of a double closure of law which in its turn is created by the re-entry of legal distinctions into themselves.

Court judgements, legislative acts, but also contracts and standardisation acts are decisions that are distinguished from other economic or political decisions by the fact that they transfer the symbol of legal validity from one normative proposition to another. Transfer of validity on the basis of the binary code legal/illegal takes place exclusively in recursive chains of court judgements, legislative and contractual acts. This is the (in)famous primary closure of law: operational closure by concatenation of legal acts (Teubner, 1993a: ch.2-4; Luhmann, 1987; Luhmann, 1993b: ch. 2). The problematic aspect of this closure has, of course, been identified as empty tautologies, unproductive self-reference and insulation of law from its social environment. Critics of operational closure tend to look for social phenomena that break the boundaries of the law and recommend communal justice (Cotterrell, 1995: ch. 5, 15; for a critique of operational closure, see Kerchove and Ost, 1992). However, legal evolution has taken a different course. Operational closure has not been compensated through a return to close social embeddedness of the law's underlying structures, but paradoxically, through its opposite: through duplicating closure (Foerster, 1981; Luhmann, 200a: ch.7). Closure of legal operations has become complemented by closure of legal self-observations. The crucial transformation took place when in court litigation, legislation and contracting legal argumentation began to exclude arguments *ad hoc* and *ad hominem* and to refer to specialised legal materials (precedents, rules, principles) in a very specific way. It is the exclusion of arguments which makes it possible that the legal process begins to insulate itself

(more or less successfully) against social influences, especially clientelism, kinship, social status, friendship politics (Luhmann, 1993b: 263). 'The artificial reason of law' which Sir Coke invoked against the political interventions of the King makes it autonomous vis-a-vis the immediate validity claims of moral arguments, economic considerations, political expediency and common sense.

Why should artificial reason compensate for primary closure? The reason is 're-entry' of the extra-legal. While legal operations by virtue of their sequentialisation create the boundary between law and non-law, between legal communication and other types of social communication, legal observations begin to use this very distinction legal/non-legal within the symbolic space of the law. This is, to be sure, different from the use of the binary code, legal vs. illegal, which, as we have said, makes primary closure possible. While the distinction legal/illegal constituting the boundary between law and non-law is responsible for operational closure, the re-entry of the distinction law/non-law within the law is responsible for observational closure (Luhmann, 1993b: 67ff., 338ff.). This distinction opens an internal option for legal arguments: either they refer to internal legal operations or they refer[2] to external social operations. Now, in the second aspect lies the compensation for operational closure. Whenever the distinction legal/non-legal (in the sense of extra-legal) re-enters the sequence of legal operations, legal argumentation gains the capacity of distinguishing between norms and facts, between internal legal acts and external social acts, between legal concepts and social interests, between internal reality constructs of the legal process and those of social processes. This is the paradoxical achievement of double closure. While both, rule-producing acts as well as rule-connecting arguments remain in their closed circuit of internal concatenations, legal self-observation by virtue of the internal distinction of self-reference and hetero-reference makes law dependent on its social environment (which is their "enacted" environment (Weick, 1979; on enaction as an alternative to representation, see Varela, 1992: 235ff.), not their "real" one, to be sure). And the higher degrees of freedom that internal reconstruction of reality gains, in comparison with one-to-one relations of the external with the internal, increases the chances that re-entry compensates for primary closure.

Re-entry has drastic consequences (Spencer Brown, 1972: 56f., 69ff.). When the distinction between law and non-law is repeated within the law, it creates an epistemic confusion (à la Magritte: 'This is not a pipe') about the reality status of law's hetero-referential observations. The twelfth camel is a camel is a camel, not different from the brothers' eleven camels? Of course, it is a sheer fiction but the khadi needs to maintain the illusion that his camels are real. Result of the re-entry is the creation of an imaginary space within the law which takes itself for reality. The law cannot but create fictions about the outside world but has to treat them as hard-core realities. The twelfth camel lives only in the imaginary space of the law and still, the judge does lend it to the quarrelling brothers where it has astonishing effects. And here lies the reason why legal alienation of social conflicts is inevitable.

Conflict alienation is not just petty theft. To expropriate the parties of their conflict is poorly understood if one sees it exclusively as the usurpation of the social by legal professionals who use their specialised language as an instrument of power (Bourdieu, 1986). Alienating law helps the khadi's camels to be prolific and multiply, more generally, legal alienation increases the varieties of social signification. Estrangement by law expands communal meaning by opening new, strange worlds. There is a striking parallel between art and law: both create a second reality, an imaginary world in which there are living more camels and different camels than in the real world of the desert. In this light, social science critiques of law look like Herr Beckmesser who scorns the great artist Hans Sachs for his lack of realism. They miss the point that the imaginary worlds of art and law make things thinkable that could not have been thought before. This holds true for otherwise unthinkable artificial constructs within the world of legal doctrine. Reconstructing a conflict in the language of legal doctrine, raising the *quaestio juris*, factorising it into a sequence of questions of fact and questions of law, allows for inventing new arguments, new criteria, new rules which would not be possible at all did legal doctrine not exist. Moreover, after prohibition of *deni de justice,* a legal decision to the conflict is guaranteed even if arguments

ended in a deadlock. And under certain circumstances, when the twelfth camel is actually walking into the real world of the bedouin society, it may increase the possibilities for action there as well, which may or may not lead out of the paralysis of the social conflict. To be sure, there is no automatism. It is only under rare circumstances that legal alienation becomes more than legal theft. As a re-translation – from a social conflict into a legal issue and from there into a social event - it may, as a happy coincidence, open up new possibilities of action in the social world.

If the camel symbolises the legal proprium, what is it about? The khadi in the story is not helpful in the sense that he interprets the father's will according to higher legal standards that should govern the conflict, nor does he decide according to principles of distributive justice which serve as a refinement of the current social practices of distribution. Instead, he lends them a fiction – and this is the key. The incongruence fiction/reality is decisive. When conflicts in the social world appear non-resolvable then their falsification by law shows its potential. It creates an additional, admittedly unrealistic, artificial, fictitious world out of the issues at stake. Fictionalisation makes conflicts, in a situation of their moral and social undecidability, decidable, at least in the imaginary world of the law.

This turns the usual ideas about the social (in)adequacy of the law on their head. And it opens some different research questions and some different issues for the political agenda. The point is no longer for the law to be responsive to the self-understanding of the parties involved, to broader social norms, moral values, community standards which govern the conflict situation. Just the opposite, the point is to reconstruct the conflict straightforward against common sense. Not assimilation of legal decisions to community standards but their alienation from them makes the surplus value of legal reconstruction visible. The critical situation is when conflicts have become socially, morally, politically and economically non-resolvable and law reconstructs them in an artificial texture of topoi, concepts, constructions. Then they are almost no longer recognisable as social or moral conflicts, but as technical legal questions within an elaborate doctrine. They become decidable only if one uses legal fictions that have no correspondence in the social worlds of the litigants. And the interesting question is then not whether these fictions "correspond" to the internal complexities of the conflict, but how they come about, into what directions they develop, and whether they have different latent selective affinities to the outside world.

III. Legal argumentation

Does the contribution of the fictitious camel lie in the fact that it determines or at least justifies the legal decision of the brothers' fight over the heritage of their father? Here we enter the perennial debate between determinacy or non-determinacy of legal argumentation, but 're-entry' suggests a third position. Whenever legal operations via re-entry distinguish between the worlds of law and non-law it creates itself a non-resolvable indeterminacy within the law which cannot be resolved by its normal operations. This pushes the legal process toward differentiating internally two types of legal operations: legal decisions that convey the validity symbol and legal arguments that regulate the relation between redundancy and variety in law (Luhmann, 1995a). Two different chains of legal communication are resulting - a sequence of legal decisions and a sequence of legal arguments - which are closely interrelated but are not able to determine each other. Legal decisions, due to their binding nature, regularly are transformed into new legal arguments but they do not determine the flow of legal reasoning. Legal arguments in their turn are elements of the legal decision, but they neither determine nor do they justify legal decisions.

This goes directly against theorists of rational argumentation in law who rely on the intrinsic force of rational motivation. They make themselves blind to the non-resolvable indeterminacy of law (Habermas, 1996: ch. 5; Günther, 1988: ch. 3, 4). But it goes as well against decisionist and critical theorists of law (Schmitt, 1985; Schmitt, 1986; Kennedy, 1997; Kelman, 1987). They suffer from a similar blindness. While they are right in stressing the unavoidable indeterminacy that cannot be reduced by any legal argument, they offer no

adequate understanding of what then legal argumentation is about. How to explain the persistence of legal argumentation practices after realist disenchantment, decisionist demystification and critical trashing? Either they declare legal reasoning a masquerade which serves other purposes, preferably concealing power structures, or they reduce it to the trivial question of anticipating consensus among the legal elites.

The camel's re-entry suggests that legal reasoning never decides a conflict, but achieves nevertheless something decisive. Legal argument is transforming differences, it transforms the original decision alternative into a different one. Legal reasoning is responsible for the alienation of the social conflict. Not more, not less. It does not determine, it does not justify, nor does it hide something else. It just transforms differences but does so drastically. A decision remains necessary, before and after argumentation, but the concrete alternative that has to be decided will be totally different. It is the job of legal reasoning to lure lawyers into a situation where they have to decide a question which differs from the litigants' original question.

Now, what difference does it make, when legal reasoning transforms a conflict between individual actors into a conflict of semantic artefacts of legal doctrine? Is this a reformulation of the time-honoured problematic relation between the particular case which needs to be 'subsumed' under a general rule? Are we looking for a new golden rule, categorical imperative or veil of ignorance? Legal autopoiesis suggests the transformation takes a course quite different from ethical generalisations. One part of the answer is, of course, to invoke law's closure and self-reference. It is the recursive application of legal operations to the results of legal operations that creates the artificial network of concepts, rules and principles. The more elaborate the network becomes over time, the more it moves legal reasoning away from an adequate appreciation of the particularities of the case. The never-ending practices of the equal or unequal treatment is the alienating mechanism. To treat what is equal equally and what is unequal unequally triggers off a self-propelling series of distinctions. It is a generative mechanism, a 'historical machine' as von Foerster (1981) would call it which relentlessly increases complexity in the world of legal fictions. Precedent, 'stare decisis', and treating the equal equally are less interesting here. Rather, it is the deviation from the precedent, the 'distinguishing' and 'overruling', the unequal treatment of what is not equal, which provokes the search for more and more elaborate legal fictions.

But it is only half the alienation story to talk about internal self-reference applying past decisions and rules to new factual situations and producing new rules by this application. The other half of alienating justice is the permanent irritation by co-evolutionary contacts of the law with external social processes that redirects the changes of legal semantics, rules, concepts, principles, doctrines. The typical incongruence of legal rules and doctrines with the particular conflict is due to their co-variation with the change of distant social structures (Teubner, 1993a: ch. 4, 5; Luhmann, 1993b: ch. 12).

There is, of course, great historical variance how the co-evolutionary dynamics is structured in itself. Today, legal and social institutions co-evolve no longer via spontaneous social norms and customary law, but typically via institutionalised production regimes. Production regimes are structural links between autonomous social systems – between law, economy, politics, education, research -- but they do not themselves evolve into autopoietic systems with their own elements, structures and boundaries. As forms of structural coupling (Maturana and Varela, 1988: ch. 5), production regimes are mere configurations of quite heterogeneous components, hybrids in the gap which exists between law and society. As such, production regimes are neither functional systems nor formal organisations, nor interactions in the technical sense of systems theory (Luhmann, 1982) but are merely linkage institutions between them (Teubner, 1992).

Production regimes have internal structures of their own that exert pressures on the way how legal rules co-variate with multiple social processes (Hall and Soskice, 1999; Soskice, 1997; Teubner, 1998; Teubner, 2002). Contrary to a unified social evolution in which there is diffuse environmental pressure of various selectors on social institutions, here within one production regime several operationally closed systems participate which are each disposing of specific evolutionary mechanisms of their own. Each of them follows a different pattern of

variation, selection and retention. Result is a multitude of autonomous evolutionary processes within one production regime which in their turn influence each other via mechanisms of co-evolution. There is no unified trajectory of the production regime which would arise from the social environment by virtue of natural selection. Rather, a variety of diverging evolutionary dynamics are going on simultaneously within one regime. Independent evolutionary mechanisms in the autopoietic systems of the law, economy, politics, science, education force their institutions within one production regime to take an idiosyncratic evolutionary path. And the production regime in its turn provides for specific channels of co-evolution which regulate how these evolutionary movements are influencing each other. Thus, legal doctrine cannot follow its own logic which would be dictated by a common-law-type history of accumulating particular conflicts. It is shaped by co-evolutionary forces within the production regime which direct law into a narrow space of compatibility with economic, political and other non-legal institutions.

Thus, production regimes expose the closed network of legal operations to external irritations that take place in contexts very distant from the irritations of individual cases which are brought to the judge. This second source of external irritations creates an independent dynamics which drives the law into an inevitable incongruence of social conflicts and legal criteria for their resolution. For within production regimes, not only a process of gradual adaptation takes place where internally developed rules and doctrines are exposed to external constraints. But various independent machineries of social norm production intrude law's empire from the periphery by transforming social norms into legal rules. With the help of these machineries, heterogeneous particularistic rationalities and their normative claims infiltrate massively the litigation-oriented law which has little control over the influx. The most prolific extra-legal rule-making machines which are driven by the inner logics specialised social domains are installed in various formal organisations, informal networks, processes of standardisation and normalisation which are competing today with the legislative machinery and the contracting mechanism (Teubner, 1997a). The judicial process cannot reject these externally produced rules as alien to litigation. But what it does to these aliens is to 'litigate them through', to juridify them, to convey to them legal validity, to re-interpret them in terms of internal consistency with precedents, statutes and the political constitution, and – last not least - to draw from them criteria which are supposed to resolve the particular conflict.

Thus, conflict alienation has a double effect. It loosens the contact with the particular conflict situation of the litigants and intensifies contact with external production regimes. In a co-evolutionary process where an autonomous and self-referential legal doctrine develops via irritations from external institutions in various production regimes, the resulting normative structures - although, nay because they are necessarily 'orthogonal' to the original social conflict – are acting as 'neutral', 'disinterested', 'outside' 'third parties' to judge the individual conflict. The twelfth camel was not born in order to resolve the fight between the brothers; the twelfth camel 'as such' is the product of an alien context, where arithmetical calculations allow the division of otherwise non-divisible numbers. Today, the hiatus between what the particular conflict would require as a satisfying resolution and what a production regime produces as legal rules in co-evolution with other institutions is impressive. What is the interest of litigants fighting for their money to have their case decided according to a new policy twist in anti-trust law? Why should the criterion of allocative efficiency which is applied to a technical question of tort law be a good conflict resolver for compensating somebody who suffered from a car accident? It is not the adequacy to the intricacies of their personal conflict situation, but, if anything, it is the incongruence of perspectives – litigation versus production regime - which allows for deciding the undecidable. The only thing the litigating parties receive for sure is decidability. Forget the criteria.

And what do they pay in return? The energies of the litigants who are desperately striving to win their individual cases are exploited by the argumentation machinery of law for other purposes. They are utilised to fuel the production of distant and abstract rules, concepts and principles which are oriented toward co-evolution in production regimes. By their litigation, the parties are sacrificing time, energy and devotion for the sake of creating future normative structures of distant production regimes. This is how the quarrelling brothers indeed fulfill

Allah's will ordering them to return the twelfth camel to the judge. And the khadi makes a good profit from the camel transaction. Alienating justice? There are good reasons to change the title of this article: Exploiting justice.

IV. Production regimes

This turns our perspective around. Exploiting justice: the law exploits people's quarrelsomeness to fuel the production of future norms. The khadi, in his wisdom and generosity, knows how to exploit the brothers when they quarrel about father's heritage. They have to feed the khadi's camel with their conflict resources and have to return it to him well-nourished, well-kept, well-trained, and in much better shape than it was before. Indeed, this is what court litigation does to multiple projections of legal rules which are made in diverse productions regimes. 'Litigating through', as we said before, exposes the rules of the production regimes to the particular conflict, but at the same time creates a considerable surplus value for the production regime itself. It transforms drastically the original meaning of proto-normative structures; it changes the status of diverse social rule projections in contracts, standards, competitive market processes, intra-organisational rules and, of course, legislative statutes. Court litigation is the *via regis* of law to make binding decisions about how to select among competing rule projections and to transfer legal validity to one of them; on this road the law resolves collisions between divergent contractual obligations, different standards and legislative rules; it separates legal rules and principles from mere social norms, political goals, economic expectations that have no legal status; it clarifies ambivalences of meaning in one binding interpretation and creates new controversies of interpretation and thus fuels the dynamics of legal and social institutions within production regimes. It is through court litigation and - one would have to add - through anticipation of court litigation, too, that the production regimes enjoy the fruits of juridification: a considerable difference in clarity, stability and external support of their expectations.

However, the price is alienation, incongruence of perspectives, now the other way around. Court litigation is obstructing the good intentions of production regimes. According to evolutionary economics, a competitive market creates over time, after repeated transactions, transactional and organisational 'routines' which can be called efficient (Nelson and Winter, 1982). However, when these routines are 'tested' in court litigation they become in their turn estranged from their origins. Exposed to the multiple strategies of court litigation, their original market orientation will be contaminated by legal considerations of compensation, of distributive justice, of interest weighing, policy goals and particular aspects of the case at hand. Making them consistent with a multitude of legal topics ruins the economic purity of these routines. And re-litigation which is supposed to make law in the long run economically efficient (Cooter and Komhauser, 1980), only strengthens the deviation from the path of virtue in a positive feedback loop. Off goes efficiency.

Regulatory politics do not fare better. 'Mon code est perdu!' Napoléon broke into tears when he had found out that his famous *code civil* had undergone court litigation and had been changed by the obscure hermeneutics of shisters, sophistic advocates and judges. Contemporary regulatory politics, their definition of political goals, their choice of policy instruments, among them legal rules, their careful strategies of implementation, will be necessarily obstructed when they have to go through the litigious interaction of clients, lawyers and judges. Strategies of policy-formation are replaced by the strategies of winning a legal case. Legal rules change their content when they are transformed from policy instruments into conflict tranquillisers.

Such obstruction of the original 'institutional' orientation of legal rules happens in all types of production regimes. Not only contracting and legislation, but also standardisation, normalisation, market competition, administrative decisions, intra-organisational rule making are suffering from this inverse alienation. Several dynamics can be identified in court litigation that are responsible for obstructing institutional justice: (1) Goal displacement: the original orientation - facilitating technical processes, efficiency enhancing, regulating

behaviour, stabilising social institutions – is replaced by one overwhelming orientation: Who wins, who loses? (2) Time horizon: while the institutional perspective tends to stabilise expectations for future action, the litigation perspective is predominantly oriented toward the past. Reconstructing past events in the court room reduces complex normative structures to one *question directrice:* What was the 'right' expectation to govern the singular event? (3) Change of language: While social rules are formulated in the special language of their institutional context, court litigation translates them into the special language of rights: What legal positions do they offer for the litigating parties? (4) Reality construction: While the reality of social rules is dictated by the cognitive mapping of the respective social institution, litigation forces these diverse realities into the two-party-perspective of the legal trial.

The improbability of the arrangement is impressive. Why should this double alienation, the forced unity of highly incongruent perspectives be a stable institutional configuration? Would one not expect that the forces of social differentiation move in and divorce this unhappy marriage among aliens? To be sure, specialised institutions for conflict resolution and rule production have indeed developed within the legal system, but why do litigation and production regimes nevertheless maintain their role as strange attractors to each other? And the forces of strange attraction are increasing in recent developments. International relations where conflict resolution and rule production had been institutionally separated for centuries have been undergoing a gradual process of juridification where increasingly court litigation and production regimes serve as mutual attractors (Higgins, 1997). Similar tendencies can be identified in international markets – witness the juridification of business contracting and international arbitration in the combination of *lex mercatoria* and the gradual transformation of the WTO-bureaucracy into court-like structures where the production regimes simultaneously attract and obstruct conflict management and vice versa (Dezalay and Garth, 1995; Teubner, 1997b).

I see two competing interpretations. One is *Eigenvalues*: Both, conflict resolution through normative expectations and rule-making in production regimes are recursive, self-referential processes that due to their closure in circular processes do not find sufficient stable *Eigenvalues* so that they are desperately searching aliens to find points of stability. While social, economic, political processes do create proto-normative structures by their internal transactions they have difficulties in stabilising them. These volatile structures will be undermined by the very processes that created them, by changes in power constellations, by new market structures, by new social situations. However, when they externalise their products to the law and get them stabilised by the symbol of legal validity, they can avoid this incessant self-destruction. The other way around, a corresponding externalisation takes place in court litigation where the norm-creating dynamics of litigation in order to avoid their self-obstruction refer to external 'authorities', to the legislator, to the contracting parties, to the market, to formal organisations. The returns for alienation consist in relatively stable structures for production regimes and in decision criteria for court litigation.

The other interpretation is a 'lock-in' situation. Once the mutual attraction of litigation and production regimes is established, it develops a path-dependent evolutionary dynamics of its own which drives them deeper and deeper into their obstructive symbiosis and locks them there. Once production regimes are opened to the dynamics of court litigation, there is no chance for saving spaces of legal immunity. Any rule projection bears the risk of being 'litigated through' the courts. And once courts are borrowing their rules from external law-making authorities, they cannot stop parties and their lawyers from drawing into the trial any normative material that has been produced by the officially acknowledged authoritative sources of law.

It is difficult to decide between the two interpretations, *Eigenvalue* and lock-in. Probably, both are true and there are ample opportunities for future empirical research to measure the relative weight of the two explanations. Even more can be expected from future institutional experimentation when it tries to increase the 'rationality' of conflict resolution on the one hand and that of rule-making in production regimes on the other. This could suggest where to draw the line between *Eigenvalue* and lock-in. Knowing the line in its turn will decide about

how realistic the chances are of making conflict resolution and rule making in production regimes more responsive to their respective context.

V. Legal rationality

All this looks like another invisible hand mechanism which transforms strategic intentions into unintended social structures. But it has no benign effects. Does this kind of alienating justice create a 'just and fair' solution to the particular conflict? - No, the conflict is resolved by reference to rules from the alien context of production regimes. Justice by incongruent perspectives, that is all. Does it produce 'just and fair' rules for the production regime? - No, the invisible hand of co-evolution channels social norm projection through the filter of private litigation so that the dynamics of an particular conflict decide about public rules for production regimes. Again, justice by incongruent perspectives. The whole story is basically a matter of blind co-evolution of litigation oriented legal semantics with institution oriented social structures. Co-evolution does not guarantee – rather the opposite, it tends to obstruct - social adequacy of legal concepts in relation to external social institutions. Is here, however, a chance for another re-entry? What if legal argumentation - conscious of its double role - develops systematically social knowledge about production regimes in order to increase the social adequacy of its rules?

A good example to discuss these issues might be constitutional rights and their horizontal effect in non-political contexts (Hunt, 1998; Graber and Teubner, 1998). Recent reports on media intrusion into private lives of people, on violations of public obligations in privatised services, on discriminatory practices in the corporate sector have shown, that constitutional law tends to neglect the crucial role of constitutional rights in the so-called private sphere. Is there something to be expected from a re-entry of social knowledge into legal doctrine?

Social theory, given its engagement with latent structures, claims to see more than legal doctrine does when individuals invoke their constitutional rights in court litigation. Quite apart from the overt effect on winning/losing the case, their latency has to do, sociologists submit, with stabilising social differentiation (Grimm, 1987; Willke, 1975; Luhmann, 1965). In a nutshell, the argument goes like this. Historically, constitutional rights as individual entitlements come about with social differentiation. Their political and legal relevance is tied to the historical emergence of individual spheres of action which is typical for modern societies. Social differentiation creates a variety of spheres of action, individual and non-individual, the autonomy of which is mirrored in complementary constitutional rights. Social differentiation and the emergence of constitutional rights are complementary historical processes. In the expansionist tendencies of the modern state, the historical process of social differentiation threatens to undermine itself. In long lasting political fights, constitutional rights emerge as social counter-institutions protecting social differentiation against its inherent self-destructive tendencies. Individual conflicts between private citizens and administrative bureaucracies are transformed in legal institutional support of political self-restraint.

What happens if such a latency is destroyed and parties, lawyers, and judges become conscious of it and legal arguments are overtly dealing with a different reality of constitutional rights? Then a considerable gap between individual motivation and unintended results comes to the fore. Why should individual actors litigate for the sake of social differentiation? A predictable and recommendable reaction is then to strengthen the link between individual motivation for litigation and social effects of constitutional rights. A heavy particularistic component would have to be added to the formal and general orientation in the conflict resolving rule. The judge would have to inject a strong dose of particularism into the rigid rules of the production regime. The recommendation to bridge the gap is: Create individual rights in the public interest and allow for class actions, associative action and other forms of public litigation.

Another reaction is to refine 'social theories' within constitutional law in order to render rules more adequate to the production regimes involved (Wielsch, 2000: ch. 3). The

recommendation is: Import Williamson and/or Luhmann into constitutional argument. Economic institutionalism calls legal doctrine adequate to private governance regimes when it re-interprets particular conflicts as calculations of transaction cost minimization. This would be law's contribution to constitutionalising private governance regimes (Williamson, 1996; Williamson, 1991). Systems theory would suggest something else: to reconstruct particular conflicts between actors in the private sphere as collisions of discourses (Teubner, 1997a; Teubner, 2000). The consequences for horizontal effects of constitutional rights would be that constitutional rights do not exclusively deal with economic power relations, but curb any media of communication which tend to colonize other sectors of social life. They can no longer be seen as protecting only the individual actor against the repressive power of the state, but would need to be reconstructed as 'discourse rights' against expansive tendencies of social systems. Its normative correlate would be an extension of constitutional rights into the context of private governance regimes (corporations, media organisations, educational institutions, professional associations, quangos, international organisations). This, however, requires a fundamental transformation of the classical model of constitutional rights in all its four elements: individual - state - power - right.

These are two cases of law importing criteria from the social sciences – transaction cost minimisation / collision of discourses - and applying them to individual cases. Clearly, again the criteria would be orthogonal in relation to the particular conflict. But would the incongruence of perspectives not be compensated by a new adequacy of law: developing rules that are suited to efficient market structures or to polycontextural society?

Probably, such an illumination of law by social theory is over-optimistic. It underestimates problems of re-entry. 'Social theories' within the law – with or without subsidies from the social sciences – are nothing but another form of re-entry of the law/non-law distinction into law, but on a different level of abstraction as compared to other re-entries - facts/rules, legal acts/social acts, concepts/interests. Again one faces the inevitable confusion of internal constructs with external reality. There is no way of testing the theories by directly accessing social reality. But also radical constructivism is no practical way out. If law took radical constructivism seriously and incorporated it into ongoing operations it would end in paralysis. Perhaps, what seems to be possible is a tentative and partial self-transparence of the legal re-entry (Luhmann, 2000a: ch. 15). Law, without ever being sure about the adequacy of its reality constructs could experiment with various legal models of social reality. Wait for the result of legal decisions that have experimented with different reality constructs. Resistance of legal communication to legal communication is the only "reality test" possible.

VI. Legal persons

'Should Camels Have Standing?' Christopher Stone's imaginative claim for trees' rights to which recently Bruno Latour and Michel Serres have lent a certain sociological and philosophical credibility (Stone, 1972; Latour, 1993; Latour, 1998; Serres, 1990) offers a fascinating occasion where law experiments with its assumptions about social reality. Of course, it takes on a different meaning when translated into the language of autopoiesis. Are we moving into the new brave world of deep ecology: Mother Gaia autopoiesis as the new collective actor (Lovelock, 1979)? Or are we travelling back to the medieval times: 'What Was It Like to Try a Rat' (Ewald, 1995; Amira, 1891)? Can natural objects bring legal actions? Is law now exploiting nature itself for the sake of its relentless rule production? These questions change indeed the quantity and quality of legal subjectivity and the law's relationships to the environment. At any rate, the ecological debate has again raised the question as to which 'living' units can rightly claim the status of legal actor.

Autopoiesis reformulates the problem. No longer: What kind of ontological properties (mind, soul, reflexive capacities) does an entity possess in order to 'be' an actor, social legal or otherwise (Luhmann, 2000a: ch. 13)? Instead, two changes occur: Under what conditions does the environing social system, i.e. a closed and autonomous ensemble of recursive communications in which the entity appears, construct the semantic artefact of an 'actor'? It is

the surrounding social system – and not the entity itself – that constitutes identity, capacity for action and communication, responsibility, rights and duties, in short: creates the subjectivity of its fictions (Teubner, 1988; Luhmann, 1995b: 198ff.). It does so via attribution. A state becomes a collective actor, not because it has certain natural properties or a specific organisational form. Rather it is the international system of war and peace that constructs its actors and thereby forces ethnic/territorial entities to take on the form of an institutionalised state if they want to participate in international politics (Luhmann, 1998). Similarly, it is the market that constructs firms, otherwise they are nothing but bundles of individual contracts (Teubner, 1993b).

Nomen ossibus inhaeret - once the legal system has abandoned that old prejudice and equipped 'spiritual substances' too with *nomina* by giving them rights of action, then the law can link up to entirely different conflictual dynamics which enhance its production of norms. The invention of the legal person was law's great cultural contribution to the organisational revolution in which attribution of action was expanded from natural people to communicative processes. With the bold idea to attribute legal personality not only to individuals but to mere flows of communications, the law cloned another camel, lent it to society and profited itself greatly from the transaction when society returned the beast. Formal organisations as collective actors are the case in point. Once they were made into legal persons by giving them the right to sue and to be sued, the production of law could exploit the enormous conflict potential of formally organised action for its own rule production, which puts individuals' comparable potential well in the shade (Teubner and Hutter, 2000). 'Why the Haves Come Out Ahead' - under this slogan, legal sociologists have closely studied the great difference in conflict potential between organisations and individuals before the courts (Galanter, 1974; Röhl 1987). But this is only a side-aspect. Certainly, collective actors as a rule have different and frequently better chances of winning; what would be needed instead would be careful empirical study of what the role of organisations to trials means for legal rule production itself in the co-evolution of legal semantics and social structures.

Only human individuals can be actors - this conviction has received a new blow by the ecological movement. But how to identify actors in the new political ecology? Environment protection groups are still the easiest cases of 'new' actors. Future generations? Animal species? Plants? Landscapes? And what about languages? Cultures? The question is whether these new actors in the ecological discourse fighting for their interests and rights are just social movements in the broadest sense who ask for formal recognition as legal actors? Or is the law here linking up with other 'living' processes which would steer its rule production into new directions?

Indeed, the latter would be a consequence of legal autopoiesis. Niklas Luhmann - as well as Bruno Latour and Michel Serres - make us see ecological camels. Does this mean that subjectivity – whether human people, formal organisations, political states or other actors - is simply reduced to their status of legal fictions, communicative artefacts? No, social systems are highly selective in their attribution. They attribute only under one condition: That the soul returns into society. Not really, of course, but again in the ambivalent form of a re-entry, in a double re-entry to be precise. Social systems, before they convey subjectivity to objects – human beings, collectives, spiritual entities, animals, computers - request credible indicators for addressability (Fuchs, 1991; Fuchs, 1997). They attribute subjectivity only under the condition that they have good reasons to presuppose self-referential processes of meaning behind their social addresses and at the same time they request close structural coupling with their communication. Social systems attribute subjectivity only if (1) they presuppose the operation called *Verstehen* behind their communicative artefacts, (2) they presuppose that these artefacts presuppose the same in their partners and (3) the attributing social system itself has developed an internal irritability toward the contributions of those 'subjects'. In their operational closure, social systems do not have access to this self-referential reality of the Other, but they need to be prepared in their internal structures. Not unlike Thomas, they have to be irritated before they believe in the Other's existence. The proof of the pudding is in the irritating.

Formal organisations, for example, become collective actors only when the surrounding social system has good reasons to believe in their invisible self-reference, i.e. a closed self-referential signification process, roles and procedures for collective representation, and when it actually

"feels" irritated by the dynamics of organisational processes. Ethnic entities are recognised as states only when international law is sufficiently irritated by 'overwhelming' evidence that the famous three conditions of statehood - territory, population, actual power structures - are fulfilled. And Latour's ecological actants? Indeed, Latour observes rightly that the historical contribution of the ecological movement is constructing the '*septième cité'*. Extending Boltanski's and Thevenot's mapping of six closed and mutually incompatible discourses of justification (Boltanski and Thévenot, 1991), Latour asserts that the new discourse of political ecology has the potential to develop into a full-fledged new social system, into the 'green city' inhabited by the species of ecological actants.

> Political ecology ... bears on complicated forms of associations between beings: regulations, equipment, consumers, institutions, habits, calves, cows, pigs ...a collective experimentation on the possible associations between things and people .... a network of quasi-objects whose relations of subordination remain uncertain and which thus require a new form of political acitivity adapted to following them (Latour, 1998: 229, 234-5).

However, in the 'parliament of things' only some of Latour's actants, not all of them, have chances of social and legal recognition. Indeed, Latour stresses with good reasons, it is the attribution of autonomy to processes that decides about the actor status. But against Latour (Latour, 1993), we are, we have been and we remain modern and cannot be otherwise. Angels, temples, gods, oracles that once upon a time had been real subjects of social communication will not be social actors any more, not because they do not exist - who knows - but because modern social systems have lost their irritability toward them. For them the world is no longer populated with

> non-human addresses, with communicative chances which refer to ancestors' spirits, gods, trees, holy shrines, 'intestines, birds' flight, to all those visible and non-visible phenomena to which dealing with their own self-reference could be presupposed (which includes the potential to deceive, to lie, to trickster, and to express something by silence) (Fuchs, 1996: 120f.)

But ecological entities, socio-technical artefacts, cyborgs, hybrids, networks and other information processing Latourian actants have a real chance of irritating modern society and thus participating in the political ecology.

And the judge's camel? There are signs that the law is beginning to re-engineer its procedural and conceptual machines for producing the new fictitious inhabitants of the seventh *cité*. The inclusion of ecological rights in political constitutions, the gradual juridification of animal rights, the change in legal language from the semantics of 'protection of nature' via 'ecological interests' to 'rights' of living processes, the slow process of granting standing to ecological associations, the expanding conceptualisation of ecological damages are indicators that the law is preparing again to lend a new breed of camels to society (Ogorek, 1999; Godt, 1997; Schmidt, 1996; Pfordten, 1995; Erbel, 1986). 'Actants' and 'mediators' in the emerging ecological discourse need not to dispose of full-fledged legal subjectivity in order to open new political dynamics. Multiple legal distinctions - distinctions between different graduations of legal subjectivity, between mere interests, partial rights and full fledged rights, between limited and full capacity for action, between agency, representation, trust, between individual, several, group, corporate and other forms of collective responsibility - have the potential to confer a carefully delimited legal status to associations of ecological actants. And those real fictions may do their work as actants exclusively in the ecological discourse without necessarily appearing as actors everywhere in society. Legal capacity of action can be selectively attributed in different social contexts. It looks as if the chances were good that the judges' camels will be prolific and will indeed multiply.

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[1] For further reflections on this theme, see the contributions in the special issues on Niklas Luhmann, *Zeitschrift für Rechtssoziologie* 2000 and *Droit et Société* 2000.

[2] Literally: refer to them as internal constructs, not: reach out, participate, constitute etc them.