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The Letter of the Law: Legal Reasoning in a Societal Perspective

By Marc Amstutz[*]

In order to introduce the riddle that is at the heart of my contemplations, I would like to tell a story taken from Ibn Arabis' myth of creation: God existed all alone in an eternity that has no beginning and no end. Yet, the names that were hidden within him, the most beautiful names of God that are found in the Koran in Sure 59, 24 yearned to manifest themselves. So God said: "I was a hidden treasure and wanted to be recognized; so I created the world". The names within him heeded their yearning to be recognized and broke free from the hidden, godly being, as breath that has been held too long leaves the body.[1]

Like all good stories, this story can be read in a number of different ways. One possible reading says that in order to see, hear and experience himself, God did not want to use a passive mirror, but instead preferred an autonomous, independent, self-reliant and self-willed reflection. This self-reflection is the world. The world is and is not God at the same time. The world in Ibn Arabis' tale is: the identity of a difference.

The tale also contains a parable for modern, polycontextual society: in order to be able to develop, this type of society cannot rely on introspection and has to fragment itself into individual sub-systems. However, this kind of societal movement is much more complex than that it would appear: it does not lead to air-tight, sound-proof or water-proof compartments in society. If one part differentiates itself to become the legal system, society will not pass its regulatory power to Law entirely. Foucault's unbearable description of the execution of a patricidal murderer at the beginning of Surveiller et punir[2] illustrates this point well, as it shows that the death rituals described are incompatible with western convictions of the 21st Century. In other words, even if one thinks that death penalty is an appropriate way to respond to particularly repulsive crimes (as, e.g., the US-American society does), societal values set certain limits to the atrocity of the methods of execution. If another part of society differentiates itself to become the economic system, society will maintain a certain measure of influence on the way in which resources are won

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[1] ANNEMARIE SCHIMMEL, SUFISMUS: EINE EINFÜHRUNG IN DIE ISLAMISCHE MYSTIK, 41-42 (2000).

[2] MICHEL FOUCAULT, SURVEILLER ET PUNIR: NAISSANCE DE LA PRISON, 9-12 (1975).

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and the way in which they are treated. Put differently, the economy cannot decide exclusively by itself which modes of production it will employ. Societal standards will again define certain boundaries. For instance, slavery today no longer exists (apart from a few shocking exceptions). Where another part of society differentiates itself to become the art system, society continues to participate in the aesthetic canons.[3] Would Andy Warhol have been imaginable in ancient Greece? There are some reasons to believe that the conceptual aspects of this artist's work, e.g. his oxidation paintings, would have essentially deluded art expectations in an antique community. In short, society remains the first/last instance to its sub-systems, as God is to the world.

This mysterious entre-deux, this oscillation between identity and differences, between alter and ego is the theme I have selected to elaborate on here. Of course, I will not go into the implications for Art or Economics, but only for Law. The question is: how does society manage such "situation-related ubiquity", this paradox of a simultaneous presence and absence in Law? Just as God in Ibn Arabis' theology of creation is in the world without actually belonging to it at the same time, Law is a part of society, but at the same time, something completely different. It is the "Law of society" and not merely "society".

The nature of this relationship is only seldom examined in legal scholarship. From time to time it is being made the subject of legal-sociological, external observation.[4] It is hardly ever approached from an internal perspective.[5] It does not play any role in the operations of Law, which indicates that there is a barrier in Law's ability to observe itself. The legal system has difficulties in perceiving itself as a "Law of society" and to include this information in a description of itself. The complex connections to society happen to pass by the Law, more or less by chance, without it really developing an idea of what it can and should do with them. Ladeur's impressive piece on legal reasoning shows that due to this, Law has perceivable deficits in coping with social change.[6]

The feat of the legal system that allows it to observe itself is called legal reasoning.[7] So if the "Law of society" paradox that is tangible in Ibn Arabis' parable is to become the subject of this paper, we have to start off at this "point", at the district within the polis of Law called "legal reasoning". However, in doing so, several difficulties immediately come to

[3] See the descriptions behind this concept of an operatively closed but cognitively open system in Lise Binet, *Le droit comme système social ou la méthode systèmique appliquée au droit*,,32 CAHIERS DE DROIT 439, 446 (1991).

[4] *Locus classicus*, GUNTHER TEUBNER, LAW AS AN AUTOPOIETIC SYSTEM (1993).

[5] See *e.g.* FRANZ W. JERUSALEM, KRITIK DER RECHTSWISSENSCHAFT (1948).

[6] Karl-Heinz Ladeur, *Die rechtswissenschaftliche Methodendiskussion und die Bewältigung des gesellschaftlichen Wandels*, RABELSZ 60, 64, 78 *et seq*. (2000).

[7] Marie Theres Fögen, *Rechtsverweigerungsverbot: Anmerkung zu einer Selbstverständlichkeit, in* URTEILEN/ENTSCHEIDEN, 37, 50 (C. Vismann & T. Weitin eds., 2006).

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mind: legal reasoning doctrine is a multi-faceted, widely branching and convoluted network of rules. This "net" cannot be presented summarily and cannot be analysed globally. This is why I have to take a detour in the following: instead of examining the rules of legal reasoning directly, I have chosen to observe how Law deals with the letter of the law.[8] As this treatment of law's letter depends mainly on these rules, it shows a trend that characterises these rules – as if it were their backbone –: the centricity of statute in continental legal reasoning doctrine (what Fikentscher has called "Gesetzeszentriertheit der kontinentaleuropäischen Methodenlehre").[9] What does this phenomenon actually entail? What is the social function of this centricity of the letter of the law? I would like to put forward the following argument: as counter-intuitive as this may sound, from a historical perspective the phenomenon of the centricity of statute is the reaction of Law to the social power of Politics. The centricity of statute governing legal reasoning has proven itself, as I will show, as a very effective mechanism to protect Law's autonomy.[10]

This naturally has its price. Legal reasoning's focus on statute and the reasons concealed behind this strategy, obscure the fact that Law has to be open to the polycontextuality of modern society. Since Savigny, legal reasoning remains oriented towards communities of belief that no longer exist. It is unable to absorb the contextual diversity of modern society and process it within its legal boundaries. The fact that this contemporary form of society experiences some breakthroughs in certain legal decisions, does not result from applying the rules of legal reasoning. Today, these rules are not actually used to steer legal decisions ex ante; they are used as ex post instruments that put together the way in which judicial decisions are communicated, or the manner in which they are rhetorically "packaged". Legal reasoning doctrine today is pure rhetoric. It is the form in which judicial decisions are imparted, but is no longer employed in legal decision making. What, and above all how decisions are made in modern legal practice is determined by using rationales other than those to which the rules of legal reasoning expressly profess themselves (such as the rationales of the principle of legality or of the separation of powers). [11] We then have to ask: how should Law react to these findings? Will it be necessary to dismantle our statute-centric legal order? I would like to make the following case: we will not have to dismantle the legal reasoning architecture of our existing legal order, because Law has adapted to modern society by exaptation. The letter of law is this exaptation; it is the way in which polycontextual society has differentiated into a legal system, without having to pass over entirely the regulatory power to Law or having to do without self-regulation. Contrary to

[8] See also MICHEL VILLEY, PHILOSOPHIE DU DROIT: DÉFINITIONS ET FINS DU DROIT, LES MOYENS DU DROIT, 276 (2001) .

[9] WOLFGANG FIKENTSCHER: METHODEN DES RECHTS IN VERGLEICHENDER DARSTELLUNG, BD. IV: DOGMATISCHER TEIL, 129 (1977).

[10] See Marc Amstutz*, Das Gesetz, in* RECHTSFIGUREN: K(L)EINE FESTSCHRIFT FÜR PIERRE TERCIER 155, 162 *et seq,* (Gauch Peter & Pascal Pichonnaz eds., 2003); Marc Amstutz/Vaios Karavas, *Rechtsmutation: Zu Genese und Evolution des Rechts im transnationalen Raum,* 8 RECHTSGESCHICHTE 14, 17 (2006).

[11] See the fundamental thoughts of PIERRE MOOR: POUR UNE THÉORIE MICROPOLITIQUE DU DROIT, 185 (2005).

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what is generally presumed, statute is not a tool that imposes extrinsic legal regulations on society through the Law, but more of a condition for social self-regulation. It is a social trick, which allows a functionally separate society to ensure that Law remains permanently adequate for society.[12]

A. The Machinery of Juridical Symbolism

Derrida's "Mystical Foundation of Authority"[13] has a paradox in mind: how can Law dictate something, which it has no real power to dictate? The answer can (naturally!) be found in history. The resources for executing law that are available today are mainly the result of the revolutions of the Continental-European systems of justice in the 18th and 19th Centuries.[14] During this time, courts started to emancipate themselves from the political will of the monarch, whose laws had been reserved for his sole interpretation since the beginning of the Middle Ages. Step by step they received the authorization to decide on the meaning of laws and obtained the power to create definitions. This social change can be seen as a further stage in the differentiation of Law and Politics. These historic processes had grave consequences for Law, which are brought to light by the Derridian paradox:

In the process, Law is losing its connection to the state's power resources, which society concentrates around Politics. The enforceability of its orders becomes a severe problem for Law: what good would Law be if it had to keep saying: "you are right, but unfortunately we cannot help you"[15]? Over time, Law's normativity would inevitably fall by the wayside. As a result, "a certain synthesis of political and legal functions"[16] has ensued: both the legal system and politics alternatively involve each other and "cooperate" in the sense of

[12] The fact that statutes are so important for societal structures begs the question of whether this medium recognizes an equivalent in Anglo-Saxon legal orders. The question is obviously too complex to be discussed in the context of a footnote. However, I would presume that precedent assumes the function in these legal circles that statutes do in civil law systems (an indication of this is the fact that the important decisions that have lead to formal legal rules are cited using the names of one or both of the parties [*e.g.* the names *Brown v. Board of Education*, *Lochner*, or *Addiston pipes* are quoted in the same way as we would, in civil law systems, quote Art. 2 ZGB [Swiss Civil Code] or § 823 BGB [German Civil Code]). Despite the differences in application between Continental-European statutes and Anglo-Saxon precedent cases, the textuality of both types of legal source ought to "work" according to the same pattern.

[13] Jacques Derrida, *Force of Law: The "Mystical Foundation of Authority"*, 11 CARDOZO LAW REVIEW, 919, 976 (1990).

[14] See *e.g.* DIETER SIMON, DIE UNABHÄNGIGKEIT DES RICHTERS, 3 (1975).

[15] NIKLAS LUHMANN, LAW AS A SOCIAL SYSTEM, 164 (2004).

[16] *Id*., 165.

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Parson's double interchange.[17] It is a risky strategy for Law: in allowing Politics to invade it, it risks a corruption of its juridical logic – its proprium.[18] How can it maintain its own logic permanently? How can it save its proprium from political distortion? This is where statute enters the stage. And it comes in the form of a very ambiguous character.

Genetically seen, written law is nothing juridical; at the point in time of its creation, it is a purely political act, in other words, communication of the political system, that is forced to leave it at an irritation of the legal system. Politics cannot hope for any more. Having Politics "control" the legal system is comparable to reaching up to the stars. However, this is only one side of the coin. From the perspective of the Law, statute is what structurally couples Law to Politics[19] in polycontextual societies, which is where its ambivalence lies. The act of passing legislation – which notably takes place in the context of Politics and nowhere else – permits very special processes inside Law at the same time: the legal system saves possibilities that it can use, which it can convert into information – it does not have to. [20] Passing legislation increases the autonomy of the legal system and allows it to evolve. In this process of evolution, the function fulfilled by laws in the legal system has been developed according to a pattern that evolutionary biologists have termed exaptation.[21] Exaptation is a functional transition: the original function of a biological structure (a limb, an organ, a bone, etc.) is altered; the structure is allocated a function that is different to the one for which it was originally intended.[22] In a legal-sociological sense, statute today is an exaptation.

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[17] Talcott Parsons, *General Theory in Sociology*, *in* SOCIOLOGY TODAY 3, 16 (Robert K. Merton et al. eds., 1959); See also NIKLAS LUHMANN, DIE POLITIK DER GESELLSCHAFT 62 *et seq*, 79 (2000).

[18] See also Rudolf Wiethölter, *Sozialwissenschaftliche Modelle im Wirtschaftsrecht*, KRISTICHE JUSTIZ 18, 126, 127 (1985).

[19] See, *supra*, note 10.

[20] NIKLAS LUHMANN, EINFÜHRUNG IN DIE SYSTEMTHEORIE, 3RD EDITION, 121 (2006).

[21] The concept of "exaptation" was introduced by Vrba and Gould: "[...] Vrba and I proposed that features coopted for a current utility following an origin for a different function (or for no function at all) be called *exaptations*… that is useful or *aptus*) as a consequence of (*ex*) their form in contrast with adaptations, or features directly crafted for their current utility." STEPHEN JAY GOULD, THE STRUCTURE OF EVOLUTIONARY THEORY, 1232 (2002).

[22] The perhaps most spectacular example of an exaptation for lay-people was presented by Gould in 1992: he used his own example visiting the Washington zoo, just after the pandas that had been given to the USA by China as a gift had arrived. He observed the animals whilst eating bamboo, and was very impressed by their adeptness at manipulating the bamboo sticks. Then he realized that this adeptness resulted from the fact that the pandas had a thumb in addition to the usual five fingers. "Do pandas have six fingers?" Gould asked himself. In literature on anatomy he found an answer: the pandas' thumb is no finger, but rather an extra, hypertrophic joint, that has been integrated in their joint- and finger muscle-network in the course of evolution. Nature – confronted with the need for a thumb – had re-functionalized something that already existed, instead of creating something new. Gould teaches us that it can be more genetically complex to create a new organ than to use an already existing (albeit, less than perfect) element. To a certain extent, this is Okham's razor as a pattern of evolution. Today's legal practice reflects this "exaptational" logic, as will be shown in the following.

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The original purpose of statute in modern-day society can be best deduced[23] from the legal definition of the rule-of-law state that was formalized in German administrative law in the 19th Century, largely attributed to Otto Mayer.[24] This definition aims to realize the ideal of a constitutional state that comprises all contingencies of state power exercise, without exception, in a system of norms, to which the state is bound.[25] Seen in this light, statute can be distinguished from all other forms of state "will". According to Vesting, it is the highest type, or rather, the strongest legal form of state will; modelled on court rulings, administrative acts are submissive to statute as a logical consequence.[26] Behind this connection between statute and the constitutional state lies a perception of a hierarchical definition of society that revolves around Politics: statute as a legality, defined in advance by Politics and independent from precedent.

The linguistic turn,[27] however, put an end to this concept of statute. Suddenly, it has been realized that the meanings of words are not permanent, and that the "meaning" of a word largely depends on its usage.[28] Since then, it has been established that no one – particularly not the courts, law firms or legal officers or their officials – will allow themselves to be bound by words. Only language games, as opposed to plain words, have the ability to bind.[29] We can therefore say that Otto Mayer's statutes have quite simply forgotten to account for language games.[30] Why are statutes still recognized as a "form of law" today? Judging from the continuous efforts of our legislative organs,[31] they are

[23] OTTO MAYER, DEUTSCHES VERWALTUNGSRECHT (1924/2004).

[24] See also *supra,* note 11; or on a broader basis see, *supra*, note 8.

[25] CARL SCHMITT, VERFASSUNGSLEHRE, 9, 150 (1993).

[26] Thomas Vesting, *Nachbarwissenschaftlich informierte und reflektierte Verwaltungsrechtswissenschaft - «Verkehrsregeln» und «Verkehrsströme»*, *in* METHODEN DER VERWALTUNGSRECHTSWISSENSCHAFT 253, 258 (Eberhard Schmidt-Aßmann & Wolfgang Hoffmnabb-Riem eds., 2004).

[27] For more details on the linguistic turn in legal theory, See Paul Amselek, *Propos introductif*, *in* THÉORIE DU DROIT ET SCIENCE 5, 7 (Paul Amselek ed., 1994).

[28] See Ludwig Wittgenstein, Tractatus logico-philosophicus, 45 (1922): "In the proposition, therefore, its sense is not yet contained, but the possibility of expressing it".

[29] See Marcel Alexander Niggli/Marc Amstutz, *Wittgenstein und Recht II: Über Parallelen zur Wittgensteinschen Philosophie in der rechtswissenschaftlichen Methodenlehre*, *in* GAUCHS WELT, RECHT, VERTRAGSRECHT, BAURECHT, FESTSCHRIFT FÜR PETER GAUCH ZUM 65, 161, 171 (Pierre Tercier et al. eds., 2004).

[30] See *supra*, note 11, 22.

[31] See *eg.* INSTITUT FÜR POLITIKWISSENSCHAFT (IPW), SCHWEIZERISCHE BUNDESVERSAMMLUNG: EIN AKTIVES GESETZGEBUNGSORGAN – EINE EMPIRISCHE UNTERSUCHUNG DES GESETZGEBUNGSPROZESSES IN DEN JAHREN 1995-97, 89 (1998).

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surprisingly vital, which can only be explained by a change in their function. This change has two facets[32]:

> (1) The fact that statute still acts as a supporting wall in the architecture of continental Law is, on the one hand, the result of it being unable to solve the "enforcement problem" of the legal system in an polycontextual society: as a structural coupling to Politics, it enables the Law to produce within legal communication symbols simulating that decisions issued by the courts can always be executed.[33] This symbol conceals the fact that Law does not have the means to enforce itself. This, to the extent that the symbol is not recognized as being something independent of what is symbolized, but as being something mainly identical with what it symbolizes.[34]
>
> (2) Statute, on the second hand, has developed to become an effective instrument for protecting the autonomy of the Law. And this in a very specific sense: it permits the legal system to keep Politics at a distance. It succeeds in this because it gives Law the freedom of choice, whether or not to use it. As a structural coupling between Law/Politics, it offers a "realm of possibilities" that can be made use of, but do not have to be. It is easy to recognize this if it is observed bearing in mind the distinction between the centre and the periphery of Law: the centre is comprised of the court system, while all other non-court-related areas of work in the legal system represent the periphery: "This applies to activities which are generally described as 'private', namely contracts. But it also applies to legislation".[35] Unlike the centre, the periphery is not forced to operate: "It is in the periphery that irritations are translated into legal form – or not. Here the system demonstrates its autonomy by not having to decide. Here one can find safeguards against not being able to use law simply as a slavish extension of operations outside the law".[36] The political system therefore only "infiltrates" up to the contact zone in the periphery (as "Rauschen"): a(n) (indirectly effective) possibility to enforce the law upon the centre of the legal system, in other words, to coerce the law into operatively "using" statute, does not exist.

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[32] See *supra*, note 10 Amsutz 161.

[33] See *supra*, note 10 Amsutz/Karavas 17.

[34] Marcel Alexander Niggli, *Zurück zu den 10 Geboten? Gesetzesflut und Strafrecht, in* AUFBRUCH INS DRITTE JAHRTAUSEND: MILLENIUMS-VORTRÄGE AN DER UNIVERSITÄT FREIBURG, FREIBURG I.UE.: UNIVERSITÄTSVERLAG 136, 140 (Adrian Holderegge ed., 2000), 136, 140.

[35] See, *supra*, note 15, 293.

[36] See, *supra*, note 15, 293.

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This exaptation of the statute, the transformation of one of the fundamental forms of Law from a pillar of state constitutionality to a defence mechanism against "political corruption" has deeply influenced legal reasoning as a means of Law observing itself. Presumably, it is necessary to go even a step further: the function of statute as a defence against Politics is the real pole and raison d'être of the rules of legal reasoning. Legal reasoning doctrine behaves in an extremely biased way, and this bias draws everything in legal reasoning towards it. What is this bias?

Through the lenses of legal reasoning, the Law only observes its own interactions with the political system. Legal reasoning doctrine is blind for other sub-systems of society (economics, art, the family, etc.), which are considered to be mere objects: regulatory objects that are influenced by the Law in some way (but not vice versa). Using the rules of legal reasoning, Law tries to segregate its operations from political communication,[37] and in concentrating so hard on this task, forgets to present itself as part of the context of other sub-systems in society. The fact that Law is able to merely maintain channels of communication to Politics and not to other social systems is simply not taken into account in legal reasoning doctrine.[38] It can therefore be said that the development of Otto Mayer's statute from "the legally strongest expression of state will" to the "defence structure of law against Politics" has two sides: it very effectively protects the autonomy of Law from political irritations; however, the price being paid for this closure that preserves the autonomy of Law is high, as it leads to a dramatic loss of Law's attention to other social spheres.

The main consequence of legal reasoning's one-sidedness is explained very clearly by Ryffel. According to this scholar, legal reasoning generally neglects the social reality that stands behind the legal order and carries it.[39] Society is only included peripherally and almost incidentally. Yet, this abstinence is maybe only an illusion. Maybe legal reasoning

[37] Almost paradigmatically, Ernst A. Kramer, *Juristische Methodenlehre, 2. Auflage*, 203 (2005) (holding that a judicial exception to a written rule is justified only in extreme cases; the fact that a rule leads to a inadequate or even unacceptable situation in everyday life is not enough to depart from the letter of the law); See also Theo Rasehorn, *Justiz*, in HANDLEXIKON ZUR RECHTSWISSENSCHAFT, 227, 230 (Axel Görlitz ed., 1972) (according to whom the judiciary is deeply entrenched in the belief that Law and Politics are strictly partitioned realms, although they are both, objectively, necessary to order society); with similar arguments, Lothar Schmidt*, Gesetz*, IN HANDLEXIKON ZUR RECHTSWISSENSCHAFT, 140, 145 (Axel Görlitz ed., 1972) who used an image of Law as a barrier between politicians and Law.

[38] Axel Görlitz: *Justizreform*, in HANDLEXIKON ZUR RECHTSWISSENSCHAFT, 232, 237 (Axel Görlitz ed., 1972) (Legal positivism is considered to be an ideological umbrella over such strategies of immunization [sc. Strategies that immunize judges against attempts to politicize Law], which wanted to protect jurisprudence against external influences, particularly political influences. To this end, a specific legal method was developed that seemed to provide for legal solutions only to legal problems); See also WALTER R. SCHLUEP: EINLADUNG ZUR RECHTSTHEORIE 703, 817 and 1253 (2006).

[39] HANS RYFFEL, RECHTSSOZIOLOGIE: EINE SYSTEMATISCHE ORIENTIERUNG, 231 (1974).

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doctrine closes its eyes to the interactions between Law and society that are nevertheless operative in the legal system somehow. Perhaps the legal system has long found its way of dealing with society in which the system avoids having to "officially" describe itself, much in the same way in which the subconscious of a human affects his actions more than his conscience. How are these types of "sub-conscious" contacts with social spheres possible? How does the secret exchange between Law, Economy, the Family, Art, etc., take place? Which mechanisms ensure that Law is socially adequate, despite its problematic, biased self-perception, which – as shown above – leans almost exclusively towards politics? How does Law circumvent the blindness of the rules of legal reasoning to social forums, social processes and factual values? How does it manage to connect to social realities?

The mechanism that makes it work, and which is stubbornly ignored by legal reasoning scholars, is: "the delirium of (the) text". To date, legal theory has not shown itself to be very open to findings of modern linguistics.[40] What Wittgenstein determines at the beginning of his "philosophical investigations" is therefore more current than ever before. Following a quote from Augustine's confessions I/8, this author points out what follows: "These words [of Augustine], it seems to me, give us a particular picture of the essence of human language. It is this: the individual words in language name objects – sentences are combinations of such names. – In this picture of language we find the roots of the following idea: Every word has a meaning. The meaning is correlated with the word. It is the object for which the word stands. … Augustine, we might say, does describe a system of communication; only not everything that we call language is this system. And one has to say this in many cases where the question arises, 'is this an appropriate description or not?' The answer is: 'yes, it is appropriate, but only for this narrowly circumscribed region, not for the whole of what you were claiming to describe. [...] It is as if someone were to say: 'A game consists in moving objects about on a surface according to certain rules …' – and we replied: You seem to be thinking of board games, but there are others. You can make your definition correct by expressly restricting it to those games".[41]

B: The Texture of Textus

Engaging into an extensive analysis of the various linguistic theories is not feasible at this point, and will therefore not be elaborated on here. I will restrict myself to a part of it, namely to the study of the Text from which Wittgenstein said that it "can be conceived as a language for describing sound-patterns".[42] To determine "the picture" this language uses, i.e. the pattern according to which a text works, in order to make sense of it, is crucial as

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[40] See *supra,* note 11, 169.

[41] LUDWIG WITTGENSTEIN: PHILOSOPHICAL INVESTIGATIONS, 3RD ED., 1-2 (1999).

[42] *Id*., 2.

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statutes today are dressed in text.[43] Conventional legal theory uses two approaches to explain how the written law operates. Both approaches are frequently deemed to complement and reciprocate each other: textualism on the one hand and intentionalism on the other. These approaches have particularly been contemplated in Anglo-Saxon parts of the world.[44]; they also reflect the central positions behind continental legal reasoning doctrine which primarily argue in terms of practical categories (grammar, system, teleology, etc.).[45]

The main attribute of textualism[46] is characterized by Ricoeurs "*autonomie semantique du texte*"[47], according to which meaning is imparted by inscriptions in linguistic signs. It exists independently from the author's intentions and concrete requirements for its creation/inception or from the original circle of the texts addressees[48] "Semantic autonomy" sees meaning as something created by the text alone, rather than something hidden "in the text" (such as the intention of the author). In determining meaning, Textualism generally aligns itself to ideal models of mathematical provenance, using Freges' and Carnaps' logical semantic[49] as a first point of reference. According to them, the meaning of text is understood to be the function of the signs used in it. The search for the meaning of an expression in language is extrapolated from the way in which it is currently used. It is assumed that the expression of language has a stable meaning that is not affected by the setting in which it is expressed.[50]

To a certain extent, Intentionalism works in the exact opposite way.[51] While Textualism constructs meaning as an "indigenous" phenomenon, Intentionalism interprets text using

[43] See *e.g. supra,* note 8, 295.

[44] See Thomas C. Grey *The Constitution as Scripture*, 37 STANFORD LAW REVIEW 1-25 (1984).

[45] For a good illustration of this, See Heinrich Honsell, *Art. 1 ZGB*, *in* BASLER KOMMENTAR ZUM SCHWEIZERISCHEN PRIVATRECHT: ZIVILGESETZBUCH I (ART. 1-456 ZGB) (Heinrich Honsell et al. eds., 2003,) (The prima facie equal mentioning of ‚wording' and ‚interpretation' leads us to assume that interpretation may be (such as in the Codex Theresianus) a level separate from the actual text. However, this assumption is incorrect. It is rather about that old pair of opposites letters/sense, lettre/esprit, scriptum/sententia).

[46] See Natalie Stoljar, *Interpretation, Indeterminacy and Authority: Some Recent Controversies in the Philosophy of Law*, 11 JOURNAL OF POLITICAL PHILOSOPHY, 470, 481 (2003).

[47] See in substantial detail George H. Taylor: *Structural Textualism*, 75 BOSTON UNIVERSITY LAW REVIEW 321, 338 (1995).

[48] See *Id*. 338.

[49] See JOACHIM GOEBEL, RECHTSGESPRÄCH UND KREATIVER DISSENS: ZUGLEICH EIN BEITRAG ZUR BEDEUTUNG DER SPRACHE IN DER INTERPRETATIVEN PRAXIS DES ZIVILPROZESSES, 67 (2001).

[50] *Id*. 71.

[51] See Natalie Stoljar, *Interpretation, Indeterminacy and Authority: Some Recent Controversies in the Philosophy of Law*, 11 JOURNAL OF POLITICAL PHILOSOPHY, 470, 472 (2003); Stanley Fish, *There is no Textualist Position*, 42 SAN DIEGO

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an "exogenic" factor: the intention of the author.[52] If we follow Legendre, this procedure is built up on old, honourable scholastic practices.[53] The text on its own was of little importance to early scholars, who concentrated on the ratio instead. This meant that the text was *auctoritas*. If we rely on the ratio of the text, we are, according to Legendre, implicitly invoking *auctoritas*, i.e. one of the "highest legal significants" or, in other words, as far as the Occident and scholasticism in the Middle Ages are concerned, the emperor, the pope or an instance that represented the living voice of Law (*viva vox iuris*).[54] The intentionalistic scheme of argument is basically linear: the *auctoritas*, or rather the legislator (the speaker) passes the law (communication) on to the judges (the listeners), who ultimately may limit themselves to decipher and apply the law according to the current intentions of the legislators.[55] Continental legal reasoning doctrine can be seen as a combination of textualistic and intentionalistic elements, whereas doctrinal disputes focus mainly on the "correctness" of the mixture: how much text, how much legislative intent?[56] This naturally provides for very broad – possibly too broad? – argumentative flexibility, as is exemplified by Kramer, who uses federal court precedents to make his point.[57] At the same time, this combination of textualism and intentionalism demonstrates a very static understanding of signs (as basic elements of text): the stock of signs used constitutes a system in which each expression – almost like in the blueprint of a crystal matrix – has one meaning only, which is determined by allocating it to a fixed and durable rule that allows

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LAW REVIEW 629 (2005); Jeffrey Goldsworthy, *Legislative Intentions, Legislative Supremacy, and Legal Positivism*, 42 SAN DIEGO LAW REVIEW 493 (2005); See also Walter Sinnot-Amstrong, *Word Meaning in Legal Interpretation*, 42 SAN DIEGO LAW REVIEW 465 (2003), on the various forms of intentionalisation.

[52] See Larry Alexander/Saikrishna Prakash: *"Is that English that Your're Speaking?": Why Intention Free Interpretation is an Impossibility*, 41 SAN DIEGO LAW REVIEW 967 (2004), for a comprehensive display of the intentionlist point of view.

[53] See *supra*, note 10, Amstutz/Karavas 18.

[54] Pierre Legendre, "*Die Juden interpretieren verrückt": Gutachten zu einem klassischen Text, Psyche,* 43 ZEITSCHRIFT FÜR PSYCHOANALYSE UND IHRE ANWENDUNGEN 20, 33 (1989).

[55] See JOACHIM GOEBEL, RECHTSGESPRÄCH UND KREATIVER DISSENS: ZUGLEICH EIN BEITRAG ZUR BEDEUTUNG DER SPRACHE IN DER INTERPRETATIVEN PRAXIS DES ZIVILPROZESSES, 74 (2001).

[56] In this connection, it is revealing that KARL ENGISCH, EINFÜHRUNG IN DAS JURISTISCHE DENKEN, 110 (1997), describes the "central issue" of the legal theory of interpretation in the following way: If the content of the law, and therefore also its ultimate "interpretive goal", are determined and established by the erstwhile and unique "intention" of the historic legislator in such a way that the legal theorist has to retrace the footsteps of the legal historian, can then the factual content of the law rest in itself and its 'words', as being the ‚intention of the law', as an objective sense, independent of the ‚subjective' meaning and intention of the historic legislator? This is the problem addressed by the so-called "*Streit der juristischen Auslegungstheorien"*; See also William N. Eskridge, *Dynamic Statutory Interpretation*, 135 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 1479, 1480 (1987) on the implications for anglo-saxon law.

[57] ERNST A. KRAMER 2005: JURISTISCHE METHODENLEHRE, 2nd edition, 109 (2005).

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the signs to be both differentiated and re-combined.[58] In other words: the "picture" of the text that is given to legal reasoning by textualism and intentionalism is that of a frozen textual structure. Or said in yet another way: as far as its meaning or sense is concerned, written law tends to be rigid and does not move or change with time.

Behind this static understanding of the letter of the law may lie an assumption of legal reasoning doctrine that has not been discussed or questioned sufficiently in the past. Texts (and that includes statute) may work very differently to the way in which this understanding would lead us to believe. Even our daily experiences undermine an understanding of texts merely as rigid products of human thoughts. In reality, texts are peculiar creatures that live even more peculiar lives, that extend over much more than the life of their historical (and possibly random) producers. Any encounters with a text are unique experiences that can never be reproduced in the same way again. Any time we re-approach a text, we can sense that it is different to the one we read the day before. Texts tend to help us reach a state of delirium, because texts themselves are delirious, along the lines of the Latin "de lira ire"; sidetracked, of course. Texts have the ability to detract us from everything else.

Post-modern philosophers, linguists and other social scientists have tried to get to the bottom of the mechanisms behind this state of delirium. Derrida, one of the key figures of post-modernism, focuses strongly on writing in his philosophical contemplations.[59] His work ties in directly with Saussure's semiotic theory.[60] According to Saussure, the identity of a sign is secured at the point in time in which it is expressed by being set apart from all other signs. The exact outline of a particular sign is defined by what the sign is and what other signs are not. Saussure thus relies on a negative definition of sign in stating its differences to other signs, instead of a positive description of the content of the sign. Derrida adopts this theory. By contrast to Saussure, however, he assumes that the differentiated distinction of signs does not imply a semantic identity – i.e. their content of meaning – but actually precludes it entirely.[61] With every repetition of a sign, time passes: "to this extent, each repetition of the sign can be distinguished from each other by differentiating between the first and second usage of a repeated sign".[62] This is Derrida's "differance".[63] Consequently, the meaning of signs is only a function in an open system of

[58] See, *supra* note 55, 52.

[59] See JACQUES DERRIDA, OF GRAMMATOLOGY (1976).

[60] Ferdinand de Saussure, Course in General Linguistics, 166 N 230 (1993).

[61] See, *supra*, note 59, 44.

[62] See, *supra*, note 55, 53.

[63] See, *supra*, note 59, 62.

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permanent re-differentiation. Each sign therefore stands in an open field of unpredictable possible interpretations.

The changeable, fluctuating character of texts has thus been unriddled. The way in which the "content" of signs, that is their meaning ("*sens*"[64]) emerges, remains notably vague, however. Context stands in the centre of Derrida's considerations. He maintains that a sign "[must] be surrounded by a certain interpretative context, for no more than any other conceptual element it does not signify, or suffice, by itself".[65] In other words: the game of sign differentiating always takes place in varying contexts. A new context "transforms" the meaning of the sign, but will never be able to "retain" the sign. The sign always fluctuates and can always change its context. Derrida conveys this in pictures: "[The differences] are neither fallen from the sky nor inscribed once and for all in a closed system, a static structure… Differences are the effects of transformations …" [66] But how do we arrive at these transformations of meaning?

Derrida describes these transformations using the "iterability" of the text (*écriture*). This phenomenon correlates with the absence of an addressee for a piece of text[67]: "My 'written communication' must … remain legible despite the absolute disappearance of every determined addressee … for it to function as writing, that is, for it to be legible".[83] Derrida shows that this really is so, by finding that every *écriture* has its own code; communication would not be possible without such codes. However, if a text were based on such a code, the text would be legible, regardless even of whether it is only hypothetically legible because e.g. no one on earth is actually familiar with the code used. At the same time, this makes the text iterable: "This iterability … structures the mark of writing itself, and does so moreover for no matter what type of writing… A writing that was

[64] Jacques Derrida, *Semiology and Grammatology: Interview with Julia Kristeva, in*, POSITIONS 15, 33 (Jacques Derrida ed., 1981).

[65] *Id*., 27.

[66] *Id*.

[67] When Derrida speaks of the absence of addressees, he means that we never know *whether* and *how* what we express is received by others in conversation with them. To turn this around: we can never be sure that the words we direct at persons present actually reach someone who is actually present. Any communication is therefore "suspended" *(différée)*, despite it sometimes not seeming to be so; in other words, it is "deferred" (Jacques Derrida, *Différance, in*: MARGINS OF PHILOSOPHY, 1, 13 *et seq* (Jacques Derrida, 1982). Even phonetic signs are thus immediately separated from their origin – one could also say from their *context*. (Jacques Derrida 1982a: *Signature Event Context*, *in*, MARGINS OF PHILOSOPHY, 307, 317 (Jacques Derrida, 1982)). It is, in itself, a secondary effect that is nothing other than the written sign. This is why conversation to Derrida is – as written text is – a form of *écriture* or *archi-écriture.*

[83] Jacques Derrida*, Signature Event Context*, *in* MARGINS OF PHILOSOPHY 307, 315 (Jacques Derrida, 1982).

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not structurally legible – iterable – beyond the death of the addressee would not be writing".[84]

Through its iterability, the text is given a capacity that is decisive for transforming its meaning. Derrida calls this capacity "force of breaking [of the text] with its context"[85]. Iterability provides the text with the "power" to "tear itself away" from its context. One consequence of this is that the text remains fully functional outside its original context. Derrida demonstrates this, using his own author-example: "To write is to produce a mark that will constitute a kind of machine that is in turn productive, that my future disappearance in principle will not prevent from functioning and from yielding, and yielding itself to, reading and rewrinting".[86] The principles that apply to text in general naturally also apply to legal texts, which, as any other text, are a patchwork of countless, fluctuating differences. In concrete, this means: because differences get caught up in different corners of the net, meanings constantly change in response. This "picture" of text may seem threatening to jurisprudence, as it casts a shadow over the postulate of legal security. In addition, it leads us to fear that 'decisionism' is inescapable, which could deform judicial office to be more of a qadi.[87]

Perhaps Derrida's "openness of text" has to be approached differently, because openness has a virtuous side. If openness is exploited productively, it is an effective medium for society to be drawn into the language game we call "legal interpretation". Text does not play this role in contemporary legal reasoning doctrine, which is based on a very different understanding of text, as demonstrated above. However, before we question what a doctrine of interpretation would look like that follows Derrida's understanding of text, we have to address a number of other questions first: why would the adoption of Derrida's understanding of the text enable society to be included in the process of law's application? Which social mechanisms would come into play in this connection? And how is society defined in this context anyway? What form would society's influence in Law take? Precisely what would Law make of these "societal-particles" in its framework?

C: The Morphegenesis of Normativity

[84] *Id*.

[85] *Id*., 317.

[86] Jacques Derrida,,*Différance*, *in*, MARGINS OF PHILOSOPHY 1, 316 (Jacques Derrida, 1982).

[87] See *supra*, note 11, 171.

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The openness of a text by no means denotes arbitrariness.[68] On the contrary: a text lays down very set structures.[69] However, its meaning fluctuates within these structures, according to the patterns of Derrida's différance. It is therefore possible to say that the openness of legal texts has two sides: in the measure in which they are "open", they are also – inversely – closed. As openness includes a certain number – but not: all – options, legal texts consistently exclude other options, which are not deemed to be included. The reason why legal texts can be open and closed or inclusive and exclusive at the same time is because statute represents a structural coupling between the Legal system and other social systems. One could say that it filters noises from social noise so that Law can "hear" them, and blocks out other noise *ab ovo*.

This apparently inconspicuous fact is much less harmless than it would appear at first. The fact that legal texts allow Law to hear or not hear, see or be oblivious to things – i.e. works as a kind of filter –, makes the social strategy behind it all the more explosive. Society gives itself the option of being a secret manipulator of Law. This becomes evident when we take another look at what Luhmann actually means by "structural coupling". This term, which is crucial for systems theory, means that: the Law pays particular attention to those parts of the environment to which it is structurally coupled by statute[70]. Society can exploit those areas to which Law gives preferential attention, in order to determine law. According to Luhmann, irritations that can be attributed to this section can be interpreted and solved using Law's memory. They appear to be normal from the onset and make reference to self-evident alternatives. The Law is not dependent on ad hoc learning in this area of its environment and will therefore tend less towards "suppressing" any irritations elsewhere as well.[71]

An example of Law giving preferential attention to stimuli from the economy is shown in former legal practice in courts and by agencies in relation to corporate transactions. Before the Swiss Merger Act ("*Fusionsgesetz*") came into force, such transactions were only sparsely regulated: mergers were only possible for corporations (Aktiengesellschaft; Art. 748 f. aOR), limited partnership corporations (Kommanditaktiengesellschaft; Art. 770(3)

[68] The concept of a text being "open" is – probably unsurprisingly, following the above discussions – not used homogenously in legal reasoning doctrine: See *e.g.* ALAIN PAPAUX, INTRODUCTION À LA PHILOSOPHIE DUE "DROIT EN SITUATION": DE LA CODIFICATION LÉGALISTE AU DROIT PRUDENTIEL, 190 (2006), who speaks of *open texture* and mainly means that "les notions univoques sont rarissimes" (op cit.: 191). This form of openness of text – or porosity – does not mean the same as the *sociological* openness of text, which is being discussed here. If we speak of an open legal text, we mean the phenomenon of written law as a gateway for "importing" social norms into Law, where these norms are then made into legal decisions in a morphogenetic process. This will be discussed in more detail below.

[69] See *supra*, note 64, 27 et. seq..

[70] Niklas Luhmann, *Verfassung als evolutionäre Errungenschaft*, 9 RECHTSHISTORISCHES JOURNAL 184, 206 (1990).

[71] *Id*., 206.

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aOR) and for cooperatives (Genossenschaft; Art. 914 aOR).[72] While the possibility to convert from a corporation to a limited liability company (GmbH) was known about (Art. 824 et seq. aOR), neither demergers nor direct asset transfers were possible according to Swiss law. The Federal Court and the Swiss Commercial Registry have developed remarkable legal practices to adapt to structural change.[73] In this area, the economic sub-system has obviously used the familiarity of written law (its "preferential attention") with companies and foundations in order to "invent" transactions that are required from a practical point of view but are a long way from the text of the Civil Code ("ZGB") or the Code of Obligations ("OR").

This very specific spectrum of Law's attention and non-attention makes the legal system "predictable" for society. How are we to understand this? Or to ask a more precise question: how can an environment of operatively closed social systems become predictable in the first place? The answers to these questions require closer investigation of the sequences in which interaction takes place between Law and society: society initially re-constructs the way in which Law's memory works in a trial-and-error process,[74] which is how society learns "its" Law ("*verstehen verstehen*"[75]). It learns in which cases the legal system is attentive to social processes and in which it is not. This knowledge permits society to influence Law pro-actively, as it now knows at which points in the legal text it has to direct its impulses in order to enhance the prospects for reaching the desired results.

The Federal Court decision BGE 129 III 335 vividly exemplifies this process. In this case, the Court had to decide whether Art. 333(3) OR, which renders the purchaser and vendor of an enterprise jointly and severally liable for employee claims originating in the period prior to the take over, is also held to apply to cases in which the sale transaction is closed in connection with bankruptcy proceedings. The problem here was that Art. 333 OR was originally designed to strengthen employee protection, but actually resulted in a reduction

[72] Apart from this, a nationalization procedure was provided for in the acts regulating corporations and cooperatives: Art. 715 and 915 aOR.

[73] See BGE 87 I 301 (conversion of a cooperative into an association without prior liquidation); BGE 115 II 415 (merger of foundations); BGE 125 III 18 (conversion of a limited liability company into a corporation without liquidation); See Thomas Weibel, *Art. 1*, *in* ZÜRCHER KOMMENTAR ZUM FUSIONSGESETZ: KOMMENTAR ZUM BUNDESGESETZ ÜBER FUSION SPALTUNG, UMWANDLUNG UND VERMÖGENSÜBERTRAGUNG (FUSIONSGESETZ, FUSG) VOM 3 (Frank Vischer et al. eds., 2004). Also see OKTOBER 2003 SOWIE ZU DEN ERGÄNZENDEN ERLASSEN (IPR, STEUERRECHT), Art. 1 N 11 *et seq* for details on the Commercial Registry practice regarding company conversions.

[74] These *trial and error* processes can be re-modelled using Piaget's equilibration theory (JEAN PIAGET, SIX ÉTUDES DE PSYCHOLOGIE 134 (1964)); this in the sense of MANFRED ASCHKE, KOMMUNIKATION, KOORDINATION UND SOZIALES SYSTEM: THEORETISCHE GRUNDLAGEN FÜR DIE ERKLÄRUNG DER EVOLUTION VON KULTUR UND GESELLSCHAFT 196 (2006), who transformed and made this psychological theory fruitful in the context of systems theory and legal sociology.

[75] HEINZ V. FOERSTER, WISSEN UND GEWISSEN: VERSUCH EINER BRÜCKE, 282 (1993).

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of this protection in situations in which businesses were transferred in insolvency situations: in burdening the purchaser with such liabilities, the success of these kinds of transaction is put in danger, thereby also endangering the maintenance of existing jobs in the enterprise in question. Although the wording of Art. 333 OR does not place any restrictions on insolvent parties, the Federal Court ruled that the joint and several liability imposed on the purchasers of businesses out of bankrupt assets by Art. 333(3) OR should no longer apply, for reasons of securing employment in general. It was only possible to reach this decision because the economy was able to convince the Federal Court in a long series of irritation directed at Law (namely in the form of doctrinal studies, which it had partly commissioned) that a literal application of Art. 333 OR resulted in economic non-sense.[76]

What observers see as a harmless irritation of Law by societal noise is in reality, however, a targeted insinuation of "social values" into legal operations. Society supplies Law with the criteria it needs to judge over conflicts. These social norms[77] first have to be subjected to a legal process of adjustment, and are therefore not adopted *tel qel*, but are primarily translated into the letter of the law, so that a sort of legal morphogenesis[78] takes place. This is due to the fact that Law, as an autopoietic system, does not adopt inputs from its environment directly, but reconstructs them internally first.[79] At this point, it becomes obvious that society ultimately organizes itself (and that Law does not proceed unilaterally, but "feeds" on societal communication). In order to do so, society requires autonomous Law, however – just like God needs an "independent" world in Ibn Arabis' theology of creation in order to see himself. Statute suddenly speaks eloquently, yet the speaker is not the Law, but rather society.[80]

This morphogenic procedure is particularly evident in the Federal Court ruling BGE 120 II 331. The case at hand required decision on the question of whether the Swissair Beteiligungen AG was to be held liable for the creditors' claims of its bankrupt subsidiary, IGR Holding Golf and Country Residences AG, because both IGR's letter paper and its

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[76] See Marc Amstutz, *Interpretatio multiplex: Zur Europäisierung des schweizerischen Privatrechts im Spiegel von BGE 129 III 335*, *in* PRIVATRECHT UND METHODE: FESTSCHRIFT FÜR ERNST A. KRAMER 67, 79 (Heinrich Honsell et al. eds., 2004).

[77] See Rex D. Glensy, *Quasi-Global Social Norms*, 38 CONNECTICUT LAW REVIEW 81, 83 (2005), for more on the definition of *social norms*.

[78] Morphogenesis is the doctrine of form building: See the overview in Annick Lesne/Paul Bourgine, *Introduction*, *in* MORPHOGENÈSE: L'ORIGINE DES FORMES 13 (Annick Lesne/Paul Bourgine eds., 2006).

[79] See, *supra,* note 4, 88.

[80] *Supra*, note 11, 24 seems to suggest exactly this, in a dark formula, which awakes tremendous associations: "[…] la fonction propre du droit comme système social, c'est-à-dire comme système de représentation politique de la société *pour elle-même*".

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advertising brochure title pages contained the Swissair logo in their footers, as well as the statement that "IGR is a Swissair company". The Federal Court held that these statements inspired confidence. The confidence gained in this way is lost in a legally relevant manner, because IGR did not observe Swissair standards in their professional behaviour, which should have caused Swissair to intervene. As Swissair did not intervene, the Federal Court ruled that Swissair was to be held liable as a result of "general principles of liability arising from *culpa in contrahendo*".[81] The key to this decision is not the legal principle of *culpa in contrahendo*. It is only possible to understand the decision by looking at what happened outside the legal system: the emergence of a specific order of expectations in the economy. Over the course of several years, these expectations have been molded so that the independence of a subsidiary from its parent from the point of view of assets has been put into a different perspective. Parent companies are now expected to vouch for their dependent subsidiaries to a greater extent, the greater the subsidiary's advertising affiliation to the group becomes. This is nothing else than a social norm, which does not apply for legal purposes, but rather for sociological purposes (it has been stabilised in the economy counter-factually). It is this social norm that has been absorbed by the Federal Court and transformed into a legal norm through legal morphogenesis.

The above examples of Federal Court precedents clearly show what the fact that Law is designed as text exactly means. That Law is embodied in this medium makes the described interaction between Law and society possible. If the signs of written law had their own semantic identity – a rigid or essentialistic meaning – as prevalent legal reasoning doctrine assumes,[82] the noise made by society would bounce off the Law. However, as has been shown, the boundaries of the semantic identity of signs are functions of an open system of permanent re-differentiation. Each sign is therefore cursed with having an unlimited number of possible interpretations, which makes it possible to change meanings when signs are repeated, and therefore also: the possibility for society to give Law constant measure and to determine the modulating legal language game. One spectacular example of text fluctuations is the *écriture* of the BGB, which was applicable law in an empire, throughout the Weimarer parliamentarianism, in the fascist regime of the Third Reich, in the *Bonner Republik*, and finally also in reunited Germany.[83] Now: which consequences for legal reasoning should be derived from these legal-sociological observations?

It was shown that prevalent legal reasoning doctrine was, above all, understood as the outflow of constitutional principles, namely in support of the ideal that same cases should

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[81] BGE 120 II 331, 335.

[82] See *e.g.* Arthur Meier-Hayoz : *Art. 1 ZGB, in* BERNER KOMMENTAR: KOMMENTAR ZUM SCHWEIZERISCHEN ZIVILRECHT, BD. I: EINLEITUNG UND PERSONENRECHT, TEILBD. 1: EINLEITUNG: ARTIKEL 1-10 ZGB, Art.1 N 136 (Hermann Becker ed., 1962).

[83] See contributions and reports of discussion in UWE DIEDERICHSEN/WOLFGANG SELLERT, DAS BGB IM WANDEL DER EPOCHEN: 10. SYMPOSION DER KOMMISSION "DIE FUNKTION DES GESETZES IN GESCHICHTE UND GEGENWART" (2002).

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be treated alike.[84] This postulate of justice is to be realized through legal reasoning doctrine. To this extent, rules governing legal interpretation are supposed to enable Law to organize itself by its own structures, "without being committed to indicate in advance how many and which operations, such as quoting certain texts, will trigger … the reuse of certain structures"[85]. If we understand legal reasoning in this way, the resulting perspective risks become very one-sided. This can be exemplified nicely by the fact that literature on legal reasoning is generally divided into two categories: thoughts on how to apply law, which fill library shelves, and thoughts on how to collect facts, that are almost absent in scholarly studies.[86] The reason for this imbalance is that the benchmarks for finding justice are thought to be mainly found "within" Law; in other words, in written law. This particularly means that the consequences of legal decisions, which are always tangible in the legal environment first, are not taken into account in applying legal norms.[87] The internal coherence of law is the only objective that counts. Law. Generally speaking, legal consequentialism is therefore foreign to conventional legal reasoning doctrine.[88] This means nothing other than: the interface between Law/society is not a concern to legal reasoning; it is therefore, as Bierling comments, left up to a "more or less blind judicial experimentation".[89]

Precedent from the Federal Court concerning the question of whether the right to terminate at any time according to Art. 404(1) OR has imperative character or not, illustrates how little legal reasoning doctrine is predisposed to consider social discourses. The Federal Court has affirmed a compulsive character of the termination right set forth in Art. 404(1) OR, and therefore also in cases in which this right does not fit. This case law is mainly supported by the argument that distinguishing is not provided for by the "clear wording" of the Act.[90] The consequence is that those contractual agreements for which a

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[84] See *e.g.* ERNST A. KRAMER, JURISTISCHE METHODENLEHRE, 2. AUFLAGE, 338 (2005).

[85] See, *supra*, note 15, 305.

[86] I refer to FRANZ BYDLINKSI, JURISTISCHE METHODENLEHRE UND RECHTSBEGRIFF, 2. AUFLAGE (1991), merely as an (naturally symptomatic) example, who dedicated 10 out of 652 pages (pgs. 417 – 427) of his book on legal reasoning to the issue of facts. A remark on the side: this particular example shows very nicely how little importance is accredited to society in conventional legal reasoning doctrine.

[87] See PIERRE MOOR: POUR UNE THÉORIE MICROPOLITIQUE DU DROIT, (2005), 87 *et seq*: "Ce qui pourtant est le problème essentiel a ainsi été abandonné au bord de la route: celui de la production concrète du droit et de ses méthodes. Autrement dit, et en prenant le terme de méthode au pied de la lettre: si, à partir des faits, le chemin y retourne, en passant (mais *en passant* seulement) par la norme, que signifie ce passage?".

[88] See *e.g.* Neil MacCormick, *Argumentation und Interpretation im Recht: "Rule Consequentialism" und rationale Rekonstruktion*, *in*, ENTSCHEIDUNGSFOLGEN ALS RECHTSGRÜNDE: FOLGENORIENTIERTES ARGUMENTIEREN IN RECHTSVERGLEICHENDER SICHT, 39 (Gunther Teubner ed., 1995).

[89] ERNST RUDOLF BIERLING, JURISTISCHE PRINZIPIENLEHRE, 47 (1961).

[90] BGE 115 II 464, 465.

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right to terminate at any time is plainly unreasonable, are de facto released from the principle of *pacta sunt servanda*. Particularly in the economy, the resulting decrease of legal predictability can lead to unacceptable situations. The blindness to social consequences is the direct result of a strictly platonic understanding of the letter of the law, which is cultivated in precedent. Arguing in favour of the wording of statute, the Federal Court has "frozen" an interpretation of Art. 404(1) OR which is a product of another time. The result is obviously a profound, hermetic closure of Law in relation to certain social needs.

But why should legal praxis revise its understanding of the text? Is it necessary to swap the conventional "picture" of statute as essentialist text, i.e. as a text that has a single and rigid meaning, for a "picture" of statute as a canvas of fluctuating signs? Does this not lead to unnecessary complications? I think that we do not have much of a choice. If Law is to continue to serve as an integrational factor in society, it will be necessary to reconsider that modern society is polycontextual and consists of many fields of action ("contexts"), which each follow a different logic (i.e. the logic of profit for the Economy, the logic of power for Politics, the logic of aesthetics for Art, etc.).[91] Monoaxiological law has fallen into disuse in such societies. These require a flexible *droit*, along the lines of Carbonnier.[92] However, normative flexibility has a high price: where is Law supposed to obtain the benchmarks or values to match the respective social context? It would quickly become cognitively swamped if it would have to develop by itself axiologies appropriate for the respective context from which a certain conflict has arisen.

Derrida's understanding of (legal) text offers a particularly suitable alternative in this regard: if what I am advocating here is true, i.e. that the benchmarks for legal decision-making are not produced exclusively within the law – in other words, socially "blind" –, but according to the scheme of legal morphogenesis described above, we, then, would have a remarkable mechanism of pluralisation of legal practice, through which social norms are transferred from their life context into Law[93]: not only would Law be cognitively relieved, but it would increase its potential of creating legal solutions that are appropriate to adjudication given the social context in which the conflict has arisen. That would mean that the conflict is treated by applying a meaning of legal text that is the product of "valuations" originating from the context in which the conflict has arisen. In this way, the same legal text would have a different meaning in each of the different social contexts: a sense that "fits" the questionable context every time. The issue of polycontextual law is thus primarily one of legal reasoning.

[91] See MARC AMSTUTZ/ANDREAS ABEGG/VAIOS KARAVAS, SOZIALES VERTRAGSRECHT: EINE EVOLUTORISCHE STUDIE, 32 (2006).

[92] JEAN CARBONNIER, FLEXIBLE DROIT: POUR UNE SOCIOLOGIE DU DROIT SANS RIGUEUR (2001) ; also, see PIERRE MOOR, POUR UNE THÉORIE MICROPOLITIQUE DU DROIT, 49 (2001).

[93] See also NIKLAS LUHMANN, AUSDIFFERENZIERUNG DES RECHTS: BEITRÄGE ZUR RECHTSSOZIOLOGIE UND RECHTSTHEORIE, 315 (1981) (every legal system is and remains dependent on a transfer of social values into legal relevancies).

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However: orthodox legal reasoning doctrine is not exactly equipped to deal with a fluid openness of legal text. To this extent, it is unable to siphon off the social added value presented by the openness of text designated here. Although this does not mean that the openness of text does not leave traces in case law, it happens without Law taking notice of it, i.e. in an incidental and uncontrolled manner. For instance, the competition law feeds from industrial organization without in the least reflecting this in its reasoning. The fact remains, however, that industrial organization has a normative effect on rulings, therefore by no means restricting itself to a merely informative role in Law. A judicial argumentation with elements of decision such as industrial organization presupposes that the way in which such elements influence the legal text and how they affect the interplay of its signs is fully understood. A legal reasoning doctrine is thus called for that is able to deal with the creation and displacement of differences in the *écriture* of legal texts.

But what exactly does legal reasoning have to contribute in Derrida's fluid world of signs? This is another difficult questions, which I would like to approach here only on a very preliminary basis: the fact that volumes of social "material" flows into the legal system through statute, means that a high level of variety is produced, which has to be counter-balanced using redundancies.[94] It is in this balancing act in which I see the main task of modern legal reasoning doctrine. A brief sketch of my thoughts on this will have to suffice here:

Legal argumentation is comprised of combining elements that already exist in Law (facts, norms, legal consequences) with each other in a consistent manner (i.e. in a "legally accurate" manner). In doing so, the difficulty lies in the multitude of elements in existence and, as a result, the vast number of possible combinations. In other words, Law contains a considerable amount of variety. In order to come to terms with this problem, the number of possible combinations has to be reduced in order to ensure that the legal addressee in a particular case (e.g. fraud, usury or infringements of patent law) can predict with a measure of certainty, what he can expect in his case. To this end, lawyers use reasons, or "arguments" to check whether the association of elements is "legally viable" or "legally unfounded". The rules of legal reasoning are used to determine whether the reasons given are admissible or not; thus, redundancy is introduced into Law, and the element of surprise in legal rulings is thereby reduced.

An ultimate, rigid determination of how variety and redundancy have to be counter-balanced in Law is not actually possible. The aim of legal reasoning rules is to continuously commensurate variety and redundancy, in order to adapt the ratio to the complexity of polycontextual society (which tends to change over time). Legal reasoning doctrine of this

[94] In more detail, Marc Amstutz, *Hic sunt leones: Von kollektiver Marktbeherrschung und symbolischer Gesetzgebung im Coop/Waro-Entscheid der Wettbewerbskommission, in* 9 SIC! 673, 681 (2003).

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nature can therefore be called evolutionary.[95] Putting it into words remains a challenge for future research.

[95] See *inter alia* Marc Amstutz, *Historizismus im Wirtschaftsrecht: Überlegungen zu einer evolutorischen Rechtsmethodik, in*, FESTSCHRIFT FÜR JEAN NICOLAS DRUEY, 9 (Rainer J. Schweizer et al. eds., 2002), on the concept of evolutionary legal interpretation; See also William N. Eskridge, *Dynamic Statutory Interpretation*, 135 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 1479 (1987), who proposed a model of dynamic statute interpretation for the common law system.

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