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## Legal Argumentation: An Analysis of its Form

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### I

Most theories of legal argumentation are concerned with the justification of legal decisions. That argument is concerned with justification is something which for lawyers (as for almost all who use the term) is determined in the very *concept* of argument and requires no further explanation.<sup>1</sup> This is also the starting point for the considerations which follow here. We will not, however, seek to offer those engaged in argument further assistance in the search for sound, convincing grounds. No doubt there is good sense in justifying decisions and distinguishing between more or less convincing arguments. After all, where decisions are concerned, it cannot really be disputed that any decision could have been made differently. Given this contingent nature of decision, it is no doubt appropriate to adduce reasons for one possibility of deciding rather than the other. What follows is not, then, a revival of that old scepticism which endeavoured (successfully) to disclose the fact that grounds cannot ground. Instead, let us start with a paradox: that grounds are needed which cannot be grounded; that is, grounds which are not grounds. The point will then be to 'develop' this paradox through the observation and description of the conduct of those trained in handling arguments.

We must therefore first clarify the *concept* of argumentation and free it from its tautological version as grounding. This at the same time requires a move to an operational, non-teleological way of conceptualising the questions. In other words, we have to avoid a conceptual form like 'grounding' in which the case of failure is not included.<sup>2</sup> The distinctions which define the concept are:

- (1) operation/observation;
- (2) self-observation/observation of others;
- (3) disputed/undisputed.

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- 1 See Struck, *Zur Theorie juristischer Argumentation* (Berlin: Duncker and Humblot, 1977); Alexy, *A Theory of Legal Argumentation* (Oxford: Clarendon Press, 1989). The same is true of non-legal argumentation theories too: see Toulmin, *The Uses of Argument* (Cambridge: Cambridge University Press, 1958).
- 2 The solution which has become customary in modern times, namely to focus on intention and then distinguish between successful and unsuccessful attempts at grounding, is unsatisfactory, since in 'intention' it points to a 'subjective' situation, with the further intention of using it as an objective criterion. That is why we redirect the focus away from subject-based theory towards systems theory.

Here we opt for one side of these distinctions, understanding by (legal) argumentation an operation of self-observation of the legal system reacting in its communicative context to a difference of opinion as to the allocation of the code values legal/illegal.<sup>3</sup> This is an observation, since the point is to distinguish and to indicate on the basis of grounds or of errors. In the case of the legal system it is the code legal/illegal (just as, in other instances of argumentation, it is codes like true/untrue, good/bad). And the context is that of an autopoietic system, in which the specific features of a communication can be determined only recursively by reference to prior or future communication. Since we are concerned here with argumentation, this involves difference of opinion and its resolution.

In other words, we observe and describe a piece of behaviour — more precisely, argumentative communication — in the legal system. This already restricts our object: we are concerned only with the legal system and not with anything taking place outside that system (in mental systems or in science, philosophy, politics, etc). And we make the further assumption that in communication which uses arguments the point is always only to secure effects within the system itself. Seen this way, legal argumentation is a means for the legal system to convince itself, to refine and continue its own operations in one direction (and not the other). What the people concerned think about this in their heads is quite a different matter. We can only presume that they do not think about it in these terms and that they think something else.<sup>4</sup>

All operations of the legal system (which for us means all communications that assign themselves to that system) have to mark the fact that they belong to it because they refer to the distinction legal/illegal.<sup>5</sup> Merely to mark this belonging requires observation of the distinction. But it does not necessarily require arguments.

Not all operations of the legal system communicate arguments. The system does not consist of argumentation alone. To make this clear, we shall distinguish between decisions as to the legal position and arguments. Decisions as to the legal position change the situation of the law. They use the symbol 'valid law' and, one might say, 'move' it. This may come about through the enactment of statutes or through treaties, through binding court decisions, administrative acts, wills, land registry entries, etc. This level of decision forms the directly effective operational level at which the legal system reproduces itself from occurrence to occurrence; that is, establishes its position by altering it. Such operations assign themselves to the legal system. They thereby distinguish themselves from mere facts that arise somehow or other and can either be legally treated or not (eg a guest smoking in bed causes a hotel fire; a person boards a bus and thereby — as jurists (not in every individual case which occurs, fortunately) have it — concludes a contract). The

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3 For clarification we should add that this applies both to individual cases and to whole groups of cases (for instance, the question whether rescuers act as uncommissioned agents and can make claims on that basis).

4 Merely asking the question means opening a Pandora's box. For the case of science, see Gilbert and Mulkay, *Opening Pandora's Box: A Sociological Analysis of Scientists' Discourse* (Cambridge: Cambridge University Press, 1984). A good insight into problems of establishing the motives behind arguments is also conveyed by Lautmann, *Justiz — die stille Gewalt: Teilnehmende Beobachtung und entscheidungssoziologische Analyse* (Frankfurt: Athenaeum, 1972).

5 In contrast to the much-discussed theses of Hart, *The Concept of Law* (Oxford: Clarendon Press, 2nd ed, 1994), we speak of operational requirements, not of 'rules' of recognition. Much of what Hart has to say, in particular on the institutional nature and non-substantiability of such rules of recognition, can, however, be understood in terms of the recognitional aspect of all legal practice rather than as a particular type of rules.

boundary between facts and decisions cannot be sharply drawn, but this is not our problem at the moment. All we are concerned with here is that the operational level of the autopoietic reproduction of the system does not consist of argumentation alone. Arguments arise and are also operations internal to the system, but they are operations of a different type. They appear when and only when the system arouses itself through differences of opinion as to the attribution of the code values legal or illegal. Only then does the question 'How good are the grounds?' become acute.

Legal argumentation is accordingly distinguished in two ways: it both belongs to the legal system and is distinct from other operations of that system. On the basis of these distinctions, we are interested in what function argumentation fulfils. Only this question allows us to understand why the system is driven at the operational level of self-observation to develop high complexity, refinement and 'legal rationality,' instead of leaving matters to such simple arguments as 'the upper classes are always right,' 'the Party is always right,' 'the military are always right.' (We should stress that each of these simple arguments would fully meet the concept of argumentation.)

## II

Argumentation is a mode of operation of the system, but a mode of a special kind, a mode specialised in self-observation.<sup>6</sup> But this has to be simplified. To the extent that argument takes place, the system observes itself not as a system (in an environment) but as a collection of texts referring to each other. What we have here, therefore, is not reflection in the strict sense, not reconstruction of the system's identity in the system, but distinction and denotation on the basis of texts. These texts may be statutes or legal opinions to be found in the relevant literature or court decisions, or other noteworthy documents from legal practice.<sup>7</sup> For the purposes of argumentation, then, texts represent the system within the system, and indeed jurists already call sets of such texts which refer to each other a 'system.' The main problem of the lawyers' art which must be solved before any argumentation is thus the *finding* of texts — the 'inventio' of the topical tradition.<sup>8</sup> This itself needs legal competence and, to a large extent, this competence suffices to keep lawyers employed.

Where, however, the texts do not supply an unambiguous proposal for what decision should be made, an argumentative distinction has to be drawn. To observe

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6 We must at least mention here the complicated, reflexive conceptuality underlying this distinction between operation and observation. The distinction contains itself in two ways. Observation is itself an operation, which observes operation using distinctions. And the distinction between observation and operation is, of course, itself in turn an observation. Reflexivity in this form can be taken as an indication of the fact that we are operating/observing in the area of basic conceptual questions.

7 Moore, 'Precedent, Induction and Ethical Generalization' in Goldstein (ed), *Precedent in Law* (Oxford: Clarendon Press, 1987) pp 183–213, denies that it is texts which are involved in the case of precedent decisions in common law; and that is so in order to secure free space for ethical generalisations. See also his arguments against moral scepticism in support of this in Moore, 'Moral Reality' (1982) *Wisconsin L Rev* 1061. This can be taken only as a warning example — an example of what would happen in the legal system were it to allow text-free argumentation.

8 The fact that today's discussion of topics works with a poor historical memory because book printing has caused the preoccupation about 'invenire' to decline can be seen from a glance at the literature that has been accumulating since Viehweg, *Topik und Jurisprudenz* (Munich: Beck, 1953, 5th ed, 1974).

this is already to engage in second-order observation,<sup>9</sup> an observation of the observation of texts, an observation of readers. But how is this second-order observation then oriented, this observation of the observation of texts, still bound to texts and dependent on them?

First, we can follow the internal meaning of arguments — what arguments 'think' they are doing. Arguments observe and describe legal events using distinctions of their own. We can see that grounds and errors play a part here. These are forms which, however, must be distinguished and cannot be reduced to a single distinction. As in the case of pleasure (grounds) and displeasure (error) in the mental system, there is here a qualitative duality which cannot be reduced to a symmetrical exchange relationship. The mere negation of a ground is not yet an error, just as the negation of an error does not supply a good ground.

We use the word 'forms' in a sense suggested by George Spencer Brown.<sup>10</sup> According to this, forms are distinctions which serve (only) to allow the designation of one (and not the other) side, including the possibility of crossing the dividing line in a further operation and going over to the other side.<sup>11</sup> Whatever type of system uses forms — whether a living, mental or communicative system — we here call the use of forms 'observation' and, if a text is produced in the process, 'description.' Forms like grounds and errors are, then, instruments of observation. Argumentation is observation using these instruments, is observation schematised through them.

With the concept of ground, we can denote the distinction of good and bad (or less good) grounds. By contrast with what all derivations of the theory of 'ideas' would have us suppose, grounds are not something which can be found lying around somewhere and grounding is not a process of movement along the road towards them.<sup>12</sup> Instead, there is a sort of binary coding of argumentation, compelling the measurement of grounds by their power of conviction, a concentration of their employment on to controversial situations and therefore, in some circumstances (perhaps indeed preferably), argumentation on the basis of the counter-argument. And this is no doubt in line with experience: when one has to argue, grounds present themselves anyway and it is only their positive or negative evaluation which becomes a problem.

In the case of errors, correspondingly, we think of the distinction between erroneous and error-free. The demonstration of an error (where it is logic above all that helps, but also reference to the empirical impossibility of premises) destroys an argument in all cases.<sup>13</sup> Consequently, it is only in the area of error-free

9 MacCormick, 'Why Cases Have Rationes and What These Are' in Goldstein (ed), *Precedent in Law* (Oxford: Clarendon Press, 1987) p 155, at 161, speaks of 'second-order justification.'

10 See *Laws of Form* (London: Allen and Unwin, 1969).

11 Spencer Brown's terminology for these operations is 'distinction,' 'indication,' 'crossing.'

12 On the outdatedness of such a theory of ideas with a unitary orientation and its replacement by a linguistic theory with an approach which highlights differentiation, see the historical presentation in Hacking, *Why Does Language Matter to Philosophy?* (Cambridge: Cambridge University Press, 1975).

13 Since we are leaving out of consideration the internal states of mental systems, we need not go into whether logical errors may not in some circumstances be necessary or even advantageous when the point is to secure or maintain consensus. Consensus may also obviate verification of error. On this, see Edmonds, 'Logical Errors as a Function of Group Consensus: An Experimental Study of the Effect of Erroneous Group Consensus upon Logical Judgements of Graduate Students' (1964) 43 *Social Forces* 33. Also subsumable under this could be the need of many professions to work in circumstances of severe uncertainty. And the function of professional solidarity may then be termed 'surviving mistakes,' leaving it open whether the profession makes it possible to survive the mistakes or whether it itself, despite erroneous practice, has sufficient arguments available to ensure its own survival and that of its practitioners.

argumentation that the search for grounds is worthwhile and only here that lasting controversies may arise, on the basis of differing preferences. The double-sided form of 'error' (to be distinguished from formal mistakes) makes it clear that the polemic against logic and deduction which has become customary in recent jurisprudence is exaggerated.<sup>14</sup> It is right to the extent that error-free argument does not yet supply good grounds, but it cannot be concluded that logic can be dispensed with as a tool for error control.

Grounds and errors also differ in the marking of the form — about which side of the distinction is normally marked and, accordingly, which side is normally unmarked. Markings emphasise which side deserves primary interest, where the problems lie and where consequences for the adducing of further arguments are to be decided.<sup>15</sup> The ground is the marking of the positive side. It gives the form its name. Error is the name for the negative side of the distinction. Normally, this is the one which is marked. This distinction in decisions about marking may create the superficial impression that it is a single dimension or opposition which is involved here. But we have already made it clear that this is not so and that this would be an oversimplification, even at the level of the self-observation of argumentation.

Finally, both grounds and errors presuppose a prior limitation of the context of argument. In the classical structure of thought, this limitation involved two stages — a reliance on generally valid assumptions and a reliance on law itself. These general assumptions have for the most part now been abandoned. Principles indubitable in themselves, against which grounds have to be measured, are no longer the starting point. And as far as freedom from error is concerned, both the logical and the empirical certainties have collapsed. Logically, axioms are now nothing but the components of a calculus that cannot be proved within the calculus itself. Empirically, on the model of quantum physics, there has been general abandonment of the notion of an observer-independent, given, law-governed (or at any rate statistically ordered) nature.<sup>16</sup> If this situation, often globally termed 'foundation crisis,' has to be accepted, what is left to the jurist so as to limit his argumentation except the law itself, and the 'instant case' (or *in abstracto*, the 'issue') involved on each occasion?

The law in force is presupposed in the form of texts. The instant case, or the issue, specifies which texts are to be adduced. Again, then, there is a qualitative duality (presumably in the form of functional complementarity) and not a one-dimensional opposition. Text and instant case are, accordingly, each forms, but not two sides of one form. Accordingly, the set of texts fixed in writing can become (almost arbitrarily) complex only if the instant case, or issue, acts as

14 On this, see MacCormick, *Legal Reasoning and Legal Theory* (Oxford: Clarendon Press, 1978) p 33; but also p 197: 'Deduction comes in only after the interesting part of the argument, settling the ruling in law, has been carried through.'

15 The 'marked/unmarked' distinction (in turn a form of observation!) has been developed in linguistic semantics: see Lyons, *Semantics*, vol 1 (Cambridge: Cambridge University Press, 1977) pp 305–311.

16 This specific change in the form of knowledge has so far scarcely been noticed in the arguments of jurists. See, however, Ladeur, 'Alternativen zum Konzept der "Grenzwerte" im Umweltrecht. Zur Evolution des Verhältnisses von Norm und Wissen im Polizeirecht und im Umweltplanungsrecht' in Winter (ed), *Grenzwerte: Interdisziplinäre Untersuchungen zu einer Rechtsfigur des Umwelt-, Arbeits- und Lebensmittelrechts* (Düsseldorf: Werner, 1986) p 263. Ladeur himself does not get beyond the postulate of a kind of affinity in transition between the evolution of knowledge and the evolution of law, which makes it comprehensible if jurists hesitate to follow him. One would, after all, like to know with adequate certainty how argumentation can be done in this new world of 'epistemological risks' — and particularly, in quite practical terms, in favour of which interests.

selector of relevance. The law can grow and argumentation can still be kept up, if and as long as these assumptions operate.

This dependence of legal argumentation on texts makes the connection between interpretation and argumentation comprehensible. There is scope for argumentation only when and insofar as texts can be interpreted differently (and therefore not, say, where the permitted speed of cars on roads is limited to 100 km/h). To this extent, the 'form' of writing — the distinction between text and interpretation (ie the distinction between verbal meaning and meant, 'meaningful' meaning) — is the precondition for all legal argumentation. But while in interpretation one still has the mental activity of a single reader in mind,<sup>17</sup> argumentation as an operation is never a mental but a communicative action.<sup>18</sup> Correspondingly, texts, cases, issues, but also interpretations carried through in text form, produce the consensual dimension of the argumentation process. They ensure that it is the same thing which is being talked about. They make sure that communication can be connected by making discrimination possible between what is relevant and what is not.

This is part of what is required for the self-observation of argumentative behaviour. 'Argumentation theory' has, today at least, dealt with corresponding self-descriptions — with the preparation of texts which can reflect, begin, guide or control the self-observation of the process of argumentation. It is true that a theory of argumentation then operates 'autologically' at the same level of observation. This means that it is itself supplying grounds (even if they are grounds for the form of grounds). It is itself seeking to avoid errors. It is itself arguing and must therefore — and this is what is meant by 'autologically' — let what it establishes in argument also apply to itself.<sup>19</sup> It is forced into self-referential conclusions. But all this is true autologically just because, and only because, theory is bound by the same instruments of observation as the observer that observes it. And the question then is: does it have to be this way or can other theoretical possibilities be conceived?

### III

The need for an extension of the possibilities of observation for other, structurally richer, descriptions arises, first, simply from the fact that we know today that these grounds cannot achieve their purpose and that freedom from error is always based on assumptions whose freedom from error cannot be guaranteed within the same system. Argumentation can never come to rest. We no longer live in the world of Aristotle. All this is so indisputable that we now have new ways to reassure

17 Even though here, too, today, especially when criteria of tenable, 'objective' interpretation are involved, sideways looks are taken at social, for instance professional, acceptability. This is the case, say, in the role of an 'interpretative community' in Fiss, 'Objectivity and Interpretation' (1982) 34 Stanford L Rev 739, at 746, where this interpretation of interpretation is aimed at warding off the summary description of this 'interpretative community' as 'masked power.' For this there would (on both sides of this controversy) need to be more carefully specified conceptualisation.

18 That those involved have to 'think along' is not meant to be disputed by this. On this complex question, see further Luhmann, *Die Wissenschaft der Gesellschaft* (Frankfurt: Suhrkamp, 1990) p 11ff.

19 Thus, for instance, Rieke and Sillars, *Argumentation and the Decision-Making Process* (Glenview, Ill: Scott, 1984) p 1, introduce their project as follows: 'This book consists of arguments. Taken as a whole, it constitutes a case for a point of view concerning argumentation and decision making. Please keep in mind (the reader is being addressed) that the book is an exercise in the subject under investigation, since in it we will advance arguments and ask you to give adherence to those arguments.'

ourselves: formal concepts like pragmatism, relativism or positivism; names like Gödel or Lyotard; the observation that opposing conceptions cannot get beyond the expression of either one's own dissatisfaction or a flight into Utopia, or, ultimately, beyond complaint at the abandonment of the flight into Utopia. But what follows from this for argument? Is the ultimate consequence that it might just as well be given up, so that one would henceforth do not more than express one's preferences and seek to secure one's interests?

Such reactions are as contemporary as they are premature. They leave out the possibilities generated by an analysis of form, on which we have already made a start. We merely need to ask explicitly with which forms (ie with which distinctions) we want to observe the arguers who, in their turn, observe legal events — with their forms or with other ones. Putting it another way, the point is to utilise the possibilities of second- and third-order observation and, from the epistemological viewpoint, to presume that this sort of second-order cybernetics might show ways out of a situation typified by resolute resignation on questions of ultimate principles, grounds, axioms, *a priori*s, *métarécits*, etc. While the first-order observer merely reads the text and understands it in its immediate verbal meaning, the second-order observer asks how the text is to be read and understood, and to what arguments it puts a stop. The question what function the arguing has and why the arguer seems to be satisfied with the finding of good grounds belongs to the level of third-order observation.

One appropriate form for this is available through the concept of informational redundancy; or, to reformulate this in terms of the theory of form, through using the distinction between redundancy and information.<sup>20</sup> A communication process produces information in so far as it produces surprises. It is redundant in so far as this is not the case and, instead, supports itself in processing information on what is already known. These are two sides of one form because redundancy and information mutually presuppose each other and, at the same time, conceptually exclude each other. Without redundancy, no information would be recognisable, since it would not be distinguishable from other information.<sup>21</sup> But the contrary is also true: redundancy is needed only for the processing of information. The form of informational redundancy accordingly denotes a variable boundary fixing what is new and surprising or what is non-surprising in the process of information processing. This means at the same time that the form separates events and structures, for surprise is always a quality of events (which may, of course, also consist in a system's being confronted for the first time with situations long in existence, like laws in force). Every repetition makes information superfluous,<sup>22</sup> which means, quite simply, redundant. To that extent, communication may also be seen as the ongoing conversion of information into redundancy.<sup>23</sup>

Similarly with argumentation! Admittedly, not every communication is argumentation. In argument the point is after all not simply to make known the

20 This is the distinction Shapiro takes as a basis in 'Toward a Theory of *Stare Decisis*' (1972) 1 JLS 125, at 125f: 'Redundancy is the opposite of information. It is the introduction of repetition or pattern into the message.'

21 This is why one side of the distinction is often also called entropy and the other side, consequently, negentropy. Cf Lazzaro, *Entropia della Legge* (Torino: Giappidulli, 1985). For use of the terms variety/redundancy, to which we shall return, see also Atlan, *Entre le Cristal et la Fumée* (Paris: Seuil, 1979) and 'Noise, Complexity and Meaning' (1989) 3 *Revue Internationale de Systémique* 237.

22 See also the distinction between information and meaning (to the latter of which this does not apply, so that it represents redundancy) in MacKay, *Information, Mechanism and Meaning* (Cambridge, Mass: MIT Press, 1969).

23 As in the essays 'Cybernetic Explanation' and 'Redundancy and Coding' in Bateson, *Steps to an Ecology of Mind* (New York: Ballantine, 1972).

unknown, and in that sense to inform. In arguing one is evidently reacting to specific requirements; and in order to characterise these requirements, we must turn to systems theory and replace the over-general concept of information by the concept of *variety*.

Variety provides a measure of complexity, namely the number and multifariousness of events which set off information processing within the system. These may be external events, as long as there are grounds for giving them legal treatment. But events within the system also reproduce and in certain circumstances increase the variety of the system, such as the enactment of new statutes and ordinances,<sup>24</sup> or the increase in number of binding precedents in common law.<sup>25</sup> Formulated in the terms used above, this involves cases and decisions, the primary operations of the legal system. With the increase in its variety the system increases the number and multifariousness of the (always transient) state it may enter into and thereby increases responsiveness to the environment, though this need not mean adapting itself to notions circulating in the environment or taking over evaluations into the system from its environment.

While the difference between system and environment by itself exposes a system to the temptation of reacting to irritation by its environment and thus increasing the system's own variety, argument serves to work against this and restore adequate redundancy, using redundancies already present. This is the function of grounding. Argument overwhelmingly reactivates known grounds, but in the practice of distinguishing and overruling occasionally also invents new ones, to achieve a position where the system can, on the basis of a little new information, fairly quickly work out what state it is in and what state it is moving into. Using argument, the system reduces its own surprise to a tolerable amount and allows information only as 'differences added in small numbers to the stream of reassurances.'<sup>26</sup>

The starting point for the need is, as already noted, the written form of texts. In endlessly changing situations (which create endless variety) these remain indispensable as a reference, but do not sufficiently determine decisions. That is why one also needs 'rulings' or jurisprudential 'theories,' distinctions of problems or arguments on the basis of legal or actual consequences, in order to be able to practise law as a consistent system of decisional contexts in the face of such great variety. Grounds are accordingly nothing other than redundancy functions — superfluities as far as *additional* information goes, but anything but superfluous *within* the system.

Against a currently widespread terminological confusion, it must be stressed that it is not *praxis* which is involved here but *poiesis*. Instead of a self-satisfying activity like swimming, smoking, chatting or (it can only be said in English) reasoning, it involves producing a work, the production of further reproduction (ie production from products) of the system. This is the 'autopoiesis' of the system.

## IV

An observation of argument using the distinction between information and redundancy can do without referring to grounds and errors. In the description they

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24 That legislation renders the legal system chaotic is the starting point for esp Lazzaro, *op cit* n 21.

25 Shapiro's topic, *op cit* n 20.

26 This formulation is taken from Shapiro, *ibid* p 131.



are not mentioned (just as in higher-order types of calculus, one no longer works with constants but with variables). It is no longer interesting *which* grounds come to bear and *which* errors are made or avoided. The observation confines itself simply to finding that such redundancies are sought and employed, and then seeks, using the distinction between redundancy and variety, statements which characterise the autopoiesis of the system at this level of the observation of observers.

This does not mean the use of just any distinction (like the question whether the justifier is male or female). The point is to observe the grounding as observation, assuming that it in turn uses a distinction — namely, that between good and bad grounds, or between erroneous and error-free.<sup>27</sup> It can then be seen that the need for 'adequate' redundancies occurs behind the search for good or at least adequate (satisficing<sup>28</sup>) grounds as the 'invisible hand'<sup>29</sup> of the system which gives order to the system. The 'art' of second-order observation consists in leaving out something which is admittedly important and indispensable. Here it is the specifying of grounds. And the point of this exclusion is to create free space for the application of a different distinction which not only brings out different things but, building on the forms which are no longer articulated, also makes possible a greater structural richness of observations and descriptions.

We can illustrate this with the example of the grounding of distinctions on the basis of their empirical consequences. Undoubtedly, this kind of grounding plays an important role today. While in Kant's time it was still strictly denied,<sup>30</sup> it has today become widespread. It is relatively unproblematic to determine legal consequences, that is, the legal positions which would obtain if the rule used to justify the decision were to apply.<sup>31</sup> Here, all that is involved is a testing of the recursiveness of the autopoietic operations, something required in any event. By contrast, a problem arises for the system's redundancies where decisions are based

27 Even in a feminist or class-based interpretation, the attempt has at least been made to reach this level of second-order observation, with the assertion that women prefer other grounds than men and that social origin too makes corresponding discriminations. Even were this establishable, it would mean arriving at a level of statements of limited importance. This version would then be important only for personnel policy, and would come into competition with recruitment patterns focusing on the individuality of applicants and on indicators of professional quality.

28 This term of art for 'bounded rationality' was, as we know, introduced by Herbert Simon: see *Models of Man: Social and Rational: Mathematical Essays on Rational Human Behavior in a Social Setting* (London: Wiley, 1957) pp 204f and frequently. This, too, is, by the way, a concept of form based on the distinction between satisficing and maximising.

29 See Shapiro, *op cit* n 20, p 131.

30 'The consequences of action can from experience teach only the *pleasantness* or *unpleasantness* of the same to the feelings, and thereby present *provisions* of *prudence*. But the concept of a *law* and of *bindingness* cannot be intuited from them,' as Buhle says in the *Lehrbuch des Naturrechts* (Göttingen: Rosenbusch, 1798; reprint Brussels, 1969, p 51; emphasis in original). Admittedly, this philosophically inspired dictum is not necessarily an accurate account of older legal practice. There was, after all, always some sort of safety valve, namely in the concept of *aequitas* or Equity, which made it possible, within a framework of broadly understood *jurisdictio* of the sovereign, for decisions according to strict law to be corrected because of unacceptable consequences. See, for example (still at the level of interpretation and not in the form of a query to the sovereign), Domat, *Les Loix Civiles dans leur Ordre Naturel* (Paris: Coignard, 2nd ed, 1697) p 19: 'Les loix naturelles sont mal appliquées, lorsqu'on en tire des conséquences contre l'équité.'

31 On the distinction between legal consequences and real consequences, see especially Lübke-Wolff, *Rechtsfolgen und Realfolgen: Welche Rolle können Folgenerwägungen in der juristischen Regel- und Begriffsbildung spielen?* (Freiburg: Alber, 1981). Particularly worth reading is Rudden, 'Consequences' (1979) 24 *Juridical Rev* 193, using the distinction between behavioural consequences and legal consequences, and the concept of inbuilt consequences as 'the effect of a rule upon itself.' In connection with this, see also McCormick, 'Legal Decisions and Their Consequences: From Dewey to Dworkin' (1983) 58 *New York U L Rev* 239.

on what will presumably be the case in the future. Since the decision has to be taken now, such justifications move in the medium of the merely probable. This leads initially to an immense increase in the system's variety. This in turn leads to the employment of still suitable forms. If, for example, the decision is about the custody of children after the parents' divorce, indicators of the future available at present can be used as rules of decision.<sup>32</sup> Like plants and animals, the legal system develops 'anticipatory reactions' to present occurrences which are quite regularly correlated with future situations<sup>33</sup> (or so it is assumed). But these correlations are, in turn, uncertain precisely where they are supposed to be scientifically guaranteed.<sup>34</sup> A judge will readily draw support from the causal hypotheses and intentions of effect which underlie a law. But what does he do when he thinks they are wrong or far-fetched?<sup>35</sup> In the normal case, the contribution of science must be assessed not as increasing certainty but as increasing uncertainty, by increasing the variety of viewpoints arising in individual cases or rules of decision.

Lawyers often seek to cope with these problems of consequentialism by using formulae of 'balancing' benefits, interests or consequences. To do this, certain case-specific habits have developed in adjudication which do not have implications beyond the instant case, that is, offer little redundancy. Without more specific historical enquiry, those balancing formulae would appear to originate in decisional situations where the point was to break through rules of the type *qui suo iure utitur neminem laedit*<sup>36</sup> and nonetheless compel someone who had acted lawfully to compensate for injury or damage.<sup>37</sup> These are cases in which strict legal/illegal coding fails as a guide so that escape routes must be found, making it possible for someone who has acted lawfully to be treated in special circumstances as if he had acted unlawfully. The balancing of interests is, then, a 'program' for overcoming paradoxes. Today, the legal institution of strict liability gives this type of case considerable, though still limited, scope of application, on the basis, as it were, of Aristotle<sup>38</sup> (that one cannot decide at present how the code is to be applied in the future, whether as true or untrue, or as legal or illegal). Perhaps,

32 Théry, 'The Interest of the Child and the Regulation of the Post-Divorce Family' (1986) *Int J Sociology of Law* 14, pp 341–358, identifies the following criteria from French legal practice: (1) respect for parental agreement; (2) respect for the wishes of the child; (3) the cognition of the status quo. In German law the rule seems to have developed, out of psychological considerations, that the child should remain with the parent to whom it has developed the stronger ties. But what is one to do if psychology does not support such a rule, or does so no longer with the former decisiveness? Cf Limbach, 'Die Suche nach dem Kindeswohl: Ein Lehrstück der soziologischen Jurisprudenz' (1988) 9 *Zeitschrift für Rechtssoziologie* 155.

33 See Rosen, *Anticipatory Systems: Philosophical, Mathematical and Methodological Foundations* (Oxford: Pergamon, 1985).

34 This is true particularly of environmental law. While even recently the building of tall chimneys was being recommended to spare the environment, today we know that it is just this that spreads the pollution further. On this example, see Prittwitz, 'Drei Idealtypen der Umweltpolitik' in Simonis (ed), *Präventive Umweltpolitik* (Frankfurt: Suhrkamp, 1988) pp 49–63, at 52. On the general issue, see also Teubner, 'How the Law Thinks: Toward a Constructivist Epistemology of Law' (1989) 23 *Law and Society Rev* 727.

35 And empirical research would no doubt very largely support him in this: see Höland: 'Vom Machen und Messen von Gesetzen: Erkenntnisse aus der Forschungspraxis zur Reichweite der Gesetzesevaluation' (1989) 10 *Zeitschrift für Rechtssoziologie* 202.

36 'He who relies on his right harms no-one' [ed].

37 On this, cf Merkel, *Die Kollision rechtmäßiger Interessen und Schadensersatzpflicht bei rechtmäßigen Handlungen* (Strasbourg: Trubner, 1895) *passim*, and at 49ff, on the weighing of interests.

38 *Peri Hermeneias (On Interpretation)* (Eng tr, London: Heinemann, 1938) IX [ed].

once again, one might cautiously generalise this type of case with an eye to comparable situations. But this scarcely justifies seeing the balancing of interests as a general legal principle for future-anticipating conflict regulation.

Given this increase in variety which results from the consideration of consequences, it is easy to understand that more recent developments in legal theory have sought support in infeasible, non-renounceable rights.<sup>39</sup> These developments do not oppose nineteenth-century legal positivism, but oppose the thesis that every legal decision must be made in terms of a balancing of benefits (or interests or consequences).<sup>40</sup> It remains to be seen whether the legal system will accept such proposals and do so without regard to consequences. Whether the legal system will give viewpoints which remain outside the balancing of consequences the form of subjective rights or of objective principles (eg torture is never permitted) also remains to be seen. For the moment, we see positions and controversies which lack a clear focus.<sup>41</sup> One might also doubt whether the few human rights claimed as inviolable, ie as functioning 'without regard to consequences,' can entirely escape the generally prevailing utilitarianism. Above all, it must be asked whether rights could suffice as instruments for guaranteeing adequate redundancies, or in reality only serve to justify decisions in spectacular individual cases (say the justification of breaches of statutes). But even if one concluded that in practice consequences are to be taken into account, or foresaw this as the *de facto* tendency of the legal system, the same questions remain open which one encounters in observing the system not from the viewpoint of justification, but from that of redundancy. For however convincing it may sound, that after abandoning all *a priori* established criteria or preference orders it is only the actual consequences of a decision which can be decisive<sup>42</sup> (heaven forbid that we deny that!), there remains, as an open question, the direction towards which a system increasing its variety in this way is moving, unless it has arguments which guarantee corresponding redundancies, or promises a prospect of them. But if the problem of proper justifications is replaced by the problem of informational redundancy, the same factual position can be looked at using a different pattern of distinction, which will then also stimulate other types of inquiry.

In order to justify the use of absolutes in penal proceedings, Hassemer has appealed to an historical but enduring 'legal culture,' which is opposed to a complete dissolution into the balancing of consequences.<sup>43</sup> One could equally well say that the law needs redundancies and produces them itself as 'eigenvalues.'<sup>44</sup> The previously absolute and unconditioned would thus be incorporated into the

39 See in particular Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977).

40 Particularly illuminating on the law of criminal procedure is Hassemer, 'Unverfügbares im Strafprozeß' in Kaufmann (ed), *Festschrift Werner Maihofer* (Frankfurt: Klostermann, 1988) pp 183–204.

41 The information that 'goal reasons' and 'rightness reasons' are *both* admissible — see Summers, 'Two Types of Substantive Reasons: The Core of a Theory of Common Law Justification' (1978) 63 Cornell L Rev 707 — does not of course solve this problem, but only intensifies it by making it into an aspect of the judge's freedom of justification. See also Schroder, 'Rights Against Risk' (1986) 86 Columbia L Rev 495.

42 Among many, see Podlech, 'Wertungen und Werte im Recht' (1970) 95 *Archiv des öffentlichen Rechts* 185, at 198f.

43 *op cit* n 40, p 197ff.

44 'Eigenvalue' refers to the capacity of recursive systems to produce stable values from the continuous application of operations to the result of previous operations. See von Foerster, *Observing Systems* (Seaside, Cal: Intersystems Publications, 2nd ed, 1984) [ed].

recursions of the legal system and its history, and yet be able to resist the use of arbitrary combinations.

## V

When the unconditioned fails and 'ultimate grounds' refuse their services, a vacuum arises which must not remain unoccupied. The *denotation* of the *unconditioned* was, of course, a paradoxical, self-denying figure. We lose little if we give it up. But what could replace it?

Here, too, the concept of the two-sided form can help. In the problem of reference, we distinguish between 'self-reference' and 'other-reference.' Obviously, this distinction is applicable only on the assumption of a system, since otherwise one could not speak of 'self-...' and 'other-...' Looked at more closely, this is a case of the re-entry of a distinction into what is distinguished by it (in Spencer Brown's sense of the word).<sup>45</sup> In Spencer Brown's calculus of form, this figure is used to deliver the calculus itself from the arbitrariness of the initial decision. 'We see now,' the text ends, 'that the first distinction, the mark, and the observer are not only interchangeable, but, in the form, identical.'<sup>46</sup>

For systems theory, the primary distinction is the distinction between system and environment. It is produced by the operation of the system, namely by the allocation of the system's operations to system rather than environment. If the system begins with self-observation and self-description, it cannot denote anything but itself in distinction to the environment. This is precisely what is brought about by the distinction between self-reference and other-reference. The world — the 'unmarked state' which is breached by every distinction — thereby becomes an imaginary space as 're-entry' is brought about and the distinction, re-entered into itself, becomes identified with itself. From that point on, the system can deal with the world only by distinguishing itself from its environment, thus avoiding the confusion of words with things or of maps with territory.<sup>47</sup>

We pass over all the problems arising with the application of this concept to social systems in general and to the system of society in particular. What matters here is how the legal system distinguishes self-reference and other-reference. At the level of those operations which attribute legal validity, this happens through the distinction between normative and cognitive expectations. The system operates under normative closure and cognitive openness. It identifies itself with the function of keeping to normative expectations, if necessary counterfactually, but is, *vis-à-vis* the environment, prepared to learn.<sup>48</sup> It must start from the law in force, in spite of all the freedom of argumentation in new situations. It cannot allow a legal norm to lose its validity just because someone infringes it. By contrast, it can and must act cognitively and, if necessary, revise expectations where fact-finding is concerned.

This difference in form between *normative self-reference* and *cognitive other-reference* seems to correspond, at the level of argumentation, to the distinction between *concepts* and *interests*. Here, these concepts must, of course, be detached

45 See *op cit* n 10, p 56f, 69ff.

46 *ibid* p 76.

47 On this, see, in reference to mental systems or their organisms, Miermont, 'Les conditions formelles de l'état autonome' (1989) 3 *Revue Internationale de Systémique* 295.

48 On this, see Luhmann, 'The Unity of the Legal System' in Teubner (ed), *Autopoietic Law: A New Approach to Law and Society* (Berlin: de Gruyter, 1988) pp 12–35.

from that unfortunate controversy between *Begriffsjurisprudenz* and *Interessenjurisprudenz*<sup>49</sup> which at the start of the century led to the rise of anti-formalism in legal dogmatics. Today, we know (or at least could know) that this was based on several historical misjudgments and that there is no longer much point in such pledges of allegiance to one or other of these schools.

In handling legal concepts, the legal system refers to itself, namely to condensed experiences and established distinctions of its own practice. Through the reference to interests, by contrast, it refers to the environment. The legal system does not ordain what interests one has to have, but in this connection is guided by what the interested parties themselves formulate as their interests.<sup>50</sup>

Legal argumentation, by always proceeding with a sensitivity to both concepts and interests, separates and combines them at its operational level of self-reference and other-reference. In its concepts it preserves successful redundancies, and therefore finds itself faced, in new types of decisional situations, with the necessity of ensuring, in the conceptual sphere, continuity in discontinuity and (where needed) of pointing out new distinctions in a form which can take on conceptual quality. The reference to interests is formally an other-reference — even where the interested parties in the legal system's environment are assumed to have an interest in consistent, predictable, uniform administration of justice.<sup>51</sup> To be sure, in what judicial knowledge of the world diagnoses as 'interest,' it will be possible to find much of the judge's own conceptual baggage. And the need to distinguish between interests which deserve protection and those which do not, combined with the need to 'balance' such interests, leads to considerable prestructuring of what the legal system perceives as interests.<sup>52</sup> But this merely reminds us that other-referential observations are also operations *internal* to the legal system itself, and can enter argumentation only in that way. Accordingly, the system can, at the same time, through the definition of interests in which it refers to facts of the environment, regulate how much variety it can accommodate and process.

As we have seen, there is no metarule for 'balancing interests,' unless one wishes to have recourse to the old definition of moderation, justice as the avoidance of extremes, the search for a golden mean and so on. The principle acts as a medium for the reception of all possible preferences, value shifts and ideologies, which are not controlled by the legal system. If instead one starts by contrasting interests and concepts in terms of the system's other-reference and self-

49 Literally, 'conceptual jurisprudence' and 'interest jurisprudence.' The former, exemplified by the work of Puchte and Windscheid, has some affinity with Anglo-American legal positivism, but is, of course, rooted in a different philosophical tradition. The latter, exemplified by Jhering and Ehrlich, shares corresponding similarities and differences with Anglo-American pragmatism and legal realism [ed].

50 The early modern career of interest semantics, particularly in the sphere of economics and politics, focused precisely on this: while interests are subjective facts, on precisely that account they are calculable as long as attention is paid to how the subject himself defines his interests. Cf. in a slogan deriving apparently from the Duc de Rohan, Gunn, "'Interest Will Not Lie': A Seventeenth-Century Political Maxim' (1968) 29 *Journal of the History of Ideas* 551. See also Gunn, *Politics and the Public Interest in the Seventeenth Century* (London: Routledge, 1969); Luhmann, 'Interesse und Interessenjurisprudenz im Spannungsfeld von Gesetzgebung und Rechtsprechung' (1990) 12 *Zeitschrift für Neuere Rechtsgeschichte* 1.

51 On the 'Interest in maintaining an order that has once come into force,' see Heck, *Gesetzesauslegung und Interessenjurisprudenz* (Tübingen: Mohr, 1914) p 180. See also Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921) p 112.

52 With almost touching openness, Cardozo writes, *ibid* p 113: 'If you ask how he (the judge) is to know when one interest outweighs another, I can only answer that he must get his knowledge just as the legislator gets it, from experience and study and reflection; in brief, from life itself.' Sociologists will be able to make their own presumptions here.

reference, then while no rules for balancing can be derived from this either, it at least becomes clear how strongly what is perceived and balanced as an interest is restricted by considerations of the conceptual mediation of effects of the decisions within the system.

Finally, we can consider the impact of the concept/interest pattern upon the relationship between redundancy and variety. Where much room is allowed for interest balancing, an unbalancing in favour of variety and against redundancy values must bring consistency, reliability and justice with it. From a sociological viewpoint, it may therefore be presumed that a system which argues with an explicit interest-orientation will increase variety and therefore irritability by the environment, with corresponding internal costs. This need not be seen as a restriction on the system's autonomy, still less as a deplorable surrender to the pressure of powerful social interests. Just the opposite may be true in the case of well-meant social legislation and adjudication which tends to disadvantage large organisations, with their economic interests, and to marginalise them legally. The problem which arises is, however, less a 'political' one than one which lies in the question of how the system's autopoiesis will react to such a culture of argument and to the tendency to increase variety at the expense of redundancy.