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The Third Question: The Creative Use of Paradoxes in Law and Legal History

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I

A recent book of Henri Atlan with the suggestive title *A tort et à raison*[1] (wrong *and* right) begins by telling a famous story, allegedly of talmudic origin. A teacher was asked about his judgement on a question disputed by some of his students. The first student explained his point of view. After a long reflection the teacher answered "You are right." Then the second student, who had not been heard so far, protested and gave his reasons. And the teacher answered again, "You are right." Now, other students butted in, objecting that he could not accept both opinions if they contradicted each other. And the teacher, after a long reflection, once more said "You are right." The third question, too, received a friendly answer.

This feeling had been shared, it seems, by Tristram Shandy's father. " 'Tis a pity", he said, "that truth can only be on one side, brother Toby – considering what ingenuity these learned men have all shown in their solution."[2] Hence, in spite of binary coding there seem to be good reasons to give both sides their due and to accept the binary code of truth as well.

In one sense, this is harmless, innocent self-reference. The teacher presents himself as willing to see the best in every cause. In social affairs, this is the easiest way not to get mixed up with the quarrels of others. A therapist probably would react in a similar way. The therapist, too, would start by agreeing and then, remembering her or his professional obligations, would add "but you could see it also in a different way".

But a judge? A judge, of course, cannot be permitted to avoid taking sides. A judge has to decide. The daily problem for a judge is: who is right and who is wrong? And a judge has sufficient knowledge of the books and of life to decide the issue. But remember the third question! On one hand, the judge is not allowed to take the stance of the teacher and accept the right on both sides. But on the other hand, there might be deeper reasons to accept controversies with their right on both sides, and if this is so, what or who justifies the judge in eschewing these reasons as if they were not valid?

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The judge has to pay for it, to be sure. There is nothing for nothing under the sun. The price is acceptance of the paradox of a binary code applied to itself.[3] What, then, about the right or the wrong to decide about right and wrong? How is it that somebody has the right to say that a position or an opinion is wrong? Is there any right to invent the wrong, to create the wrong, or in more recent terms, to "construct" the wrong?

In a famous essay[4] Walter Benjamin made the point that there is no such right above right and wrong, no such superright. There is simply *Gewalt*.[5] The whole Frankfurt School of "critical theory" would join him, because, for them, critique would mean exposure of the contradictions which exist in reality, for instance the contradictions between assumed right and assumed wrong. But then we find ourselves transferred to the same issue in epistemology: how to prove with a noncontradictory logic that the reality is contradictory?

There are paradoxes everywhere, wherever we look for foundations. The founding problem of law, then, is not to find and identify the ultimate ground or reason which justifies its existence. The problem is how to suppress or to attenuate the paradox which an observer with logical inclinations or with a sufficient degree of dissatisfaction could see and articulate at any time. It remains possible to ask the third question: can we accept contradictory opinions as being both right and wrong? Or eventually: how can we rightly or wrongly differentiate the right and the wrong? At least under modern conditions we cannot avoid the issue. But it is also possible to unask the question and to transform the paradox into a less troubling issue. By some sort of *Gestalt* switch there may be ways of transforming the question which make it possible to give an answer. Or there may be answers which make it possible to ask the question.

For this lecture my proposal is to use the invisible hand of the legal paradox as a guideline for an investigation of the history of legal thought. If the assumption holds that there is always a primary necessity to avoid the paradox, there may be different ways to do so. In many ways the forms of deparadoxifying the paradox depend on conditions of social acceptability, and these conditions change with the transformations of the social system of the society. They depend on social structures and are therefore historical conditions.

The background assumption of the paradoxical foundation of the legal system (and, for that matter, of all systems working under a binary code) offers the possibility to connect logical and historical reflection and to see correlations between changes in social structures and changes in legal semantics. We have to remain at a rather detached level – at the level of the third question and at the level of observing observers.[6] But concepts and theories developed for this level have been influential in practical matters, and I shall touch on some of these issue during the course of my lecture.

II

First of all, we have to limit the case. There are many paradoxes in law connected with specific problems. Normally, they pass unobserved. But as soon as legal theory develops an interest in consistent reasoning and decision-

making, paradoxes surface. A recent essay by George Fletcher[7] discusses some of them; for example, the paradoxes connected with paying attention within the law to ignorance of law or to error concerning legal questions, or the paradoxes of the changing interpretation of law which has to, but cannot, refer to itself as some kind of legislation. Other paradoxes are connected with taking into account subjective self-consciousness, reflecting mitigating circumstances in breaking the law. And, again, others have to do with the so-called economic theory of law, calculating the consequences of divergent legal solutions, including the consequences of the decisions themselves for future behaviour, and then using the consequences as a criterion for the decision itself.

Fletcher shows that legal theory copes with such paradoxes by conceptual innovations. He observes two ways of handling such problems: either by abstaining from the legal practice that leads into the contradiction and by limiting the scope of attention for reasons and interests; or by finding or constructing a distinction that dissolves the paradox. Only the second technique is creative and leads to the advances in legal thought. Then, Fletcher proceeds to distinguish the innovative distinctions. There are those which have already been found or constructed and are today incorporated in the established body of legal thought; they are already law, so to speak. And there are others as yet unknown. They have to be found or constructed and remain, for the time being, a matter of further legal thought.

We may share this optimistic outlook and accompany the development of legal theory with our best wishes. But one question remains, and this is, in a different guise, again the third question. Are we sure that we can replace all emerging legal paradoxes by appropriate distinctions? What about the paradoxes implied in using distinctions, the paradoxes of the same that is treated as different? And above all, what about the paradox of defining the law by the distinction of legal and illegal?

This question leads back to my topic. I want to reformulate the third question in the following way: how can a society enforce a binary code? How can one ever be sure that the true is not untrue and the right is not wrong – given experiences which are reported in Greek tragedies or South American novels? And in addition, what happens within the legal system when the society enforces its code?

III

The main body of my lecture will abstain from further theoretical arguments and replace them with a historical survey, comparing different types of society with respect to the ways in which they handle – within given structural and semantical limitations – this problem of binary coding.

Larger societies of the past were organised by two kinds of differences – social strata and centre/periphery. They described themselves as hierarchical order of castes or estates and were at the same time what we would call "urban societies" or "peasant societies", depending on the distinction between urban

centres and rural periphery. Putting the emphasis on one form or the other, they could observe their unity by looking at the top or by looking at the centre. There was no problem of representing the unity of the system within the system. These societies could see their order as natural order and could therefore characterise alternatives as disorder. Ambiguities came up, and particularly so in the Middle Ages, when both forms disintegrated – that is, when the aristocracy was no longer urban aristocracy, and also when the top groups were split according to religious and political functions without clear primacy (or with a semantic primacy of religion and a real primacy of estate-based politics). But even then the system was described as a natural order, and the concept of nature had normative connotations because its antonym was disorder – and not, for example, civilisation.

These societies could easily describe law as natural law. Within old mythical traditions the genesis of order was conceived as emanation. The one (which in Greek arithmetic was not a number) generated the numbers, that is, the difference between odd and even numbers. All multiplicity came out of unity.[8] The unmoving mover created the difference between moving and static entities. In this sense it was easy to conceive the law in the fundamental sense of eternal or divine law creating the distinction of natural and positive law and the distinction of legal and illegal behaviour as well.

By now you may see that this is a way of handling the paradox. The paradox remained invisible and became replaced with a narrative telling the genesis of distinctions. However, this semantic strategy did not succeed completely. Paradoxes have a fatal inclination to reappear. Necessities came up – or at least the urgent necessity to decide at particular occasions against the valid law, the famous *excessum iuris communis propter bonum commune*. For this purpose, new characterisations were invented which provided for new antonyms. The law was characterised as *strict and formal* – and *equity* was invented to justify its neglect in cases where it would be hard to follow the law. This distinction of cruelty and leniency (*crudelitas/clementia*) served to reject the legal code of right and wrong and to re-incorporate the law into the human society. After centuries of decision-making this distinction re-enters the law and we find a casuistry which remembers the cases in which the law itself allows for lenient, attenuating considerations.[9] The distinction which first articulated the paradox of rejectable law is finally transformed into a device for creative social learning within the legal system.

Something similar happened with another distinction, likewise used to present a paradox and to suggest creative ways of solving it. In this case the law was characterised as *normal* – and the institution of *derogation*[10] was invented to justify a violation of the law in view of higher necessities or utilities (and the social order left no doubt about who was and who was not able to do that).[11] The paradox reappeared in long debates about whether derogation is an institution of natural law, permitting the violation of natural law, or whether it can and has to be justified as positive law only in view of postlapsarian conditions. The first opinion could refer to Cicero's dictum *communis utilitas derelicto contra naturam est*.[12] The second requires a

psychological brake. It has to be practised *à regret et en soupirant* as Gabriel Naudé recommends.[13]

However, the paradox not only reappeared, it also revanished. As soon as equity and derogation evolve into a system of definitions and rules – and what else could a jurist do with them – the paradox makes an evasive move, being unprepared to accept regulations. As Wittgenstein asked, "What use is a rule to us here? Could we not (in turn) go wrong in applying it?"[14]

IV

During the seventeenth and eighteenth centuries a remarkable change occurred. The third question looks for new answers. The paradox of law looks for new places to hide away. It appears in new disguises, more appropriate to changing social conditions. The law of nature contracts and becomes the law of reasonable arguments, supposing that reason at least is the nature of human beings. This gives more freedom from theological supervision and more hope for progress by refining and improving the self-control of human affairs. Reason appeals to reason as the last court which is supposed to be able to judge its own affairs. Hence, the paradox is maintained as tautology – as a distinction which is supposed to be none: as reasonable reason. (For affairs not suitable for the jurisdiction of reason, we find at roughly the same time parallel concepts of self-authentification, that is, taste for art and love for intimate relations.[15])

And again, the paradox reappears, being more sophisticated than reason itself. In practical affairs of acquisition and use of property, reason argues with equal voice for equality and inequality. The desire for property and its accumulation is clearly wrong, violating the natural (and the created!) equality of human beings. And the demand for equality is clearly wrong, violating the law of property. How, then, to drive the paradox back into its invisible retreat?

One easy solution consists in using a double concept of nature. Natural reason may demand to surpass nature. Men are born naked, but they are clearly better off in clothes.[16] But then we have to face the question whether nature teaches us that we are better off with an unequal distribution of property.

For more than one century, the question of property becomes the problem in terms of which the foundations of the society are discussed. "Le partage des biens est la première loi de la société, et le tronc, pour ainsi dire, de toutes les autres lois", wrote the Marquis de Mirabeau.[17] Jurists tend to recognise a contract, albeit an implicit contract, because the acquisition and use of property implies the recognition of the property of others.[18] Also, until the second half of the eighteenth century, the society itself is thought to have been based on contract with roughly the same kind of argument.[19] Thus, there is no place for separating state and society; the deparadoxification has to take place within the context of reflections about political society or civil society, and the arguments have to lead back to its *origin*.

In this sense, the authors of the seventeenth and eighteenth centuries used thoughts of Greek and Roman origin to reformulate the paradox. The form was again a quasi-mythical narration. At the beginning there was communal property in the state of nature. But then, the multiplication of people and the invention of arts and sciences made it advisable to separate the goods and to give the chance to augment her or his property to each individual.[20] For a certain time, the selections of Roman materials under the heading of "about acquiring property"[21] played a decisive role in legitimating the law as such. During a long discussion, distinctions became refined. Pufendorf, basing himself on Grotius, introduced the famous distinction of negative and positive community of property – the negative being in a sense property *avant la lettre* (property before the law), the positive being private property with more than one owner.[22] John Locke added the idea that the real reason for the distinction of state of nature and civilisation was the necessity of organising labour, and that the situation became problematic only by the invention of money taking away any limits of acquiring and preserving property.[23]

I cannot go into details here, but have to mention two points. The first is that, in this account, the origin of property has to be a mythical one, not simply a historical state.[24] Hence, the whole structure of deparadoxification became vulnerable to historical and comparative research. This happened in the middle of the eighteenth century, particularly in the writings and lectures of David Hume and Adam Smith. Secondly, if we decipher the structure of the thought looking through its mythical form, we find the idea of natural rights. Natural rights are rights whose recognition does not depend on complementary obligations. They are rights in the sense of Thomas Hobbes or Jeremy Taylor, that is, rights before the law, rights not depending on the recognition of others (for example, the right to preserve and to move one's own body, the old *potestas in se ipsum*) – that is, rights before the distinction of right and wrong.[25] You may recognise it: it is a paradoxical right, a right answering the third question.

But this is a concept of the seventeenth century.[26] The eighteenth century, preoccupied with morality and reason, found what seemed to be good arguments against this concept and insisted that there could not be rights without complementary obligations.[27] Of course not! The paradox has to remain invisible. But then, where does it hide now?

V

In the course of the eighteenth century, the strategy of deparadoxification became reversed. The tradition had started with the idea of an innocent beginning. Once there had been a golden age. Once, in the state of nature, human beings could live according to their needs in a state of communal peace. Then, deterioration set in and mechanisms to compensate needs. Already in the seventeenth century doubts were raised about this version, as in Hobbes, but the countermodel could not really be constructed. There was the dispute of the ancients and the moderns[28] and there was the idea that, on the whole, we

might be better off in modern times. But only in the second half of the eighteenth century do we find the complete reversion. Only then do we find the idea that the beginning was wrong, that the beginning was violence, or that it consisted in the enclosure of property and the co-operation of people stupid enough to believe that this was just.[29] Therefore, it was felt that only the process[30] of civilisation would take us into a better future and justify the past in retrospect. The hidden message of the paradise lost was no longer sin (which presupposes the law) but the violence of God, expelling Adam and Eve from the garden of Eden and preventing their return by his armed troops.

We find this new look with authors who rejected the idea of a contractual foundation of the law – an idea which is evidently tautological (that is, paradoxical) in founding the law on the presupposition of the law. We find this rejection and the corresponding foundation of law on violence in Linguet, one of those writers of the French post-enlightenment who were particularly fond of frivolous paradoxes.[31] And we find it, better known, but also less intriguing, in Kant.

At the beginning was violence. Forget it. Things are much better by now and we can embark on further improvements, for instance by designing a constitution.[32] But then, are we to know the unknown, the future? And do we, in rejecting the past, reject the story of the Tower of Babel as well?

At any rate, the paradox, like the sun, passes underground and reappears in the future. The attempts to domesticate it by reasonable elaboration fail, of course.[33] The Kantian inflation of hopes regarding the foundations of law failed to impress professional men in law, in religion, and in pedagogy as well. The famous names are Gustav Hugo and Anselm Feuerbach,[34] but a whole school of thought developed which criticised the inexact and superficial ways in which Kantianism had been transferred into jurisprudence.[35] At that time, a science of the positive law was in demand, and the options seemed to be whether the positive law should be designed by conceptual constructions, taking the historical experiences of generations of lawyers into account, or whether, on the base of the constitutional state, legislation should be the preferred road into the future.

The paradox now disguises itself as the splendid future of divine mankind, the future of freedom and equality, the future of emancipation and democratic constitutions, or the future of the greatest happiness of the greatest number of people, and finally as the future of the communist society as the new state of nature, the state after the state, after property, after all divisions and distinctions. The paradox prevents observations and descriptions, the future being unobservable by itself anyway. The future becomes the grand excuse for all the misdeeds of the new industrial society, the grand excuse for applying the law which the society itself produces according to a calculus of interest and, increasingly, as a reaction to its own self-created problems.

And again, as always, we find more technical forms of deparadoxification. One of them is the distinction between legislation and administration of justice. Statutes have to be general, court decisions have to apply the law to the concrete case. The production of law has to proceed without paying attention

to particular cases, and it finds its justification, if not its innocence, in its general form. Court decisions have to distribute the symbols "right" and "wrong" to particular circumstances, taking the validity of the law as given. In many senses, this is not the final answer. There remain the well-known problems of self-referring laws and the problem of circular loops between legislation and adjudication.[36] But these are theoretical concerns. In practice, the institutional role differentiation works sufficiently well, and remaining problems can be collected under the heading of "legitimacy", understood as the popularity of governments, exposed to periodic elections. Moreover, it is now easy to solve a very old paradox, that is the paradox of the right to change the law. The legal system may recognise political motives as sufficient for changing the law – but only at the level of legislation and not at the level of adjudication.[37]

This, too, is a way to replace the paradox by a distinction. Moreover, its distinctive feature is avoiding any reference to natural law or morality, having recourse to positive law only. This makes it meaningful to replace the distinction of right and wrong with the distinction of legal and illegal and thereby in addition attenuate the problem. What had been a morally upsetting paradox can now be seen as a simple contradiction between morality and legality – for example, a morally-required disobedience to the law.

The other modern device is the result-oriented practice on both levels, in legislation and in court decisions. What counts is not a principle, nor a logical deduction, nor the elegant conceptual construction, but the difference a decision effectuates either in social reality or in the legal system itself. Are legal effects therefore the criterion of law? This is certainly not a convincing theory[38] but it is the usual practice and the distinguishing mark of the good lawyer. It is something like cutting the future into small chunks that can be handled in the situations of daily life. But again and nevertheless, the future remains unobservable. The legal decisions claim to be right (and not wrong) immediately and remain so, whether their intended results come about or not at a later time.

Logically then, the validity of a programme depends on its own execution. The execution of the programme becomes the condition of the execution of the programme. Hang the man if – and only if – you hang him. This instruction, of course, would make issues undecidable. You really need the future – that is, your present opinions about the future – to discriminate decisions and to deparadoxify a self-conditioned conditional programme. But then you have the question: whose guesses about the future are valid guesses, which is the question: who is in power?

When this form of deparadoxification becomes institutionalised we can expect a need for compensating mechanisms, in particular for self-correcting devices. When the results do not show up, the law has to be changed accordingly. The future remains the future,[39] the problems change their shape, the situations can be handled in one sense or another. The legal system grows by what can be called, using a linguistic term, hypercorrection. The machine ends by being constantly in repair. The promoting paradox remains invisible.

We could make a dream out of this, perhaps a nightmare – the crumbling tower of Babel without the hope for the celestial Jerusalem.[40] We could also decide to risk another look at the paradox or to ask the third question again.

An answer to the third question is a way to put a basement under the building, a basement in which the secrets of the system can be preserved, or, as some would rather suppose, the corpses. We need this basement as the rule without exception, that is, as the exception to the rule that there are no rules without exception. We need it as the paradox.

It may not be obvious that we need a paradoxical foundation at all. To be sure, the language of law permits the construction of sentences which are inconsistent. This is true for all language specialised on cognition, and so much more for normative languages. But why do we not simply avoid these pitfalls, why not steer clear of certain questions and certain constructions and, with this precaution, use the language of law without the embarrassment of looking into the Gorgonian face of the paradox? Even logicians and philosophers try, in constructing formal systems, to design exclusion-devices or to simply put an embargo on what otherwise would seem to be a possible move. We know that this does not work, except *ad hoc*.[41] But what prevents us from doing it nevertheless? It could be sufficient to say that there are rules with exceptions *and* rules without exceptions. Or that there be right claims *and* wrong claims. But then, what is indicated by the "and" and what is excluded by the "and"? Nothing. The "and" serves as the joker replacing within the system the unity of the system. Like the end of the system the "and" of the systems operates as symbol for the unity of the system within the process of reproducing the system – here and now. It is not a sufficient description of the unity of the system. It is again a hiding-place of the paradox.

The unity of the system is not something outside of the system. It is not something inside the system.[42] How and where, then, can we observe the unity? The system is the multiplicity of its operations. It never acts as this multiplicity, it never acts as the network of its operations – for example, as the network of all the legal decisions. It is nothing but the constraints produced by one decision for others of the same system. These constraints exclude other possibilities of the same system. But then, how do we justify these exclusions – for example, of women from certain clubs, of non-owners from property, of prisoners from freedom? The system itself contains these excluded possibilities.[43] If you have clubs, you have members and non-members. If you have prisons you have people inside and outside prison. For every owner of a house there are by now five billion non-owners of this house. How to cope with these atrocities? Technically speaking, exclusion-devices may work sufficiently well. The law can forbid or make it simply invalid to ask the third question. It may prescribe the expulsion from office of a judge who behaves like a wise person. And indeed, we all know that there is a law which forbids the defiance of justice. This makes it possible to ignore the problem. It does not eliminate it.

From a systems point of view we can, following Talcott Parsons,[44] make a distinction between this technical level of the execution of social functions and an institutional level at which a system has to reflect its integration into the encompassing system of the total society. More recent theories make a distinction between "natural" and "artificial"[45] devices for handling the paradoxes of self-reference or between internal and external observation.[46] These differences in conceptual style reflect advances in systems theory which we can leave aside at the moment. My final question is, rather, are there structural reasons in modern society which make it appropriate to enforce this two-level thinking on the legal system and to provide for higher levels of description, be it internal or external, which go beyond merely technical advice? And my proposal will be that in modern society this is not simply a question of legitimation in the sense of taking into account symbolically shared values in communicating the intentions which guide your actions.[47] Indeed, this is too easy to do. The problem is, rather, to improve on the transparency of the internal workings of functionally differentiated systems for themselves and for others. But if paradoxes are the crucial obstacles for observing systems, and if the ways in which systems treat their paradoxes produce transparencies and intransparencies as two sides of the same coin, then this issue has to replace the rather trivial topic of legitimation. And the distinction between the two levels of operative theories and of reflective theories, of technical advice in legal problem solving and of reflection upon the ways in which a system becomes understandable for itself and for others, may become not the solution of the problem and certainly not a new technique of self-legitimation, but at least an adequately differentiated way to produce descriptions.

Now, all this may seem to be a highly theoretical problem without any impact on practical affairs. Lawyers who are programmed for decisions are likely to find this sort of problem uninspiring. My intention has been to show that this is not the case. The historical survey teaches that there is one general technique of avoiding the third question, namely replacing it by a distinction.[48] The code of the legal system, the distinction between right and wrong or, for modern conditions, between legal and illegal acts, is itself a first scheme to articulate the paradox, to found the possibility of self-reference. But then, further distinctions are needed to solve the resulting problems, distinctions like rigid justice and equity, or rules and exceptions, or the distinctions of property, or the differentiation between statutes and court decisions, or between decisions with more or less preferred consequences for legitimate interests. On this level of secondary distinctions the law adapts to social evolution and, in particular, to its own increasing differentiation. These distinctions have a technical side. They are undisputed assumptions in the reasonings of lawyers as persons of practical competence. But they have also an institutional side mediating between the decisions and the unity of the system. "Saving distinction" – this is the recipe for solving the paradox, and "saving" should be taken in the double sense of saving the system in spite of the paradox by using a distinction and saving the distinction itself by the operation that makes use of them.

The prevailing opinion in legal and social science describes the unity of the system as a *value*, representing the social and cultural autonomy of its task. The legal system then has to implement justice. This comes close to being tautological. In my opinion, the unity of a system is realised by its guiding *distinction*.[49] The legal system then has to implement the distinction of legality and illegality. This comes close to being paradoxical, seeing unity as the unity of a difference.

These are clearly competing theories. We will have to choose between beginning and ending with unity or with difference. And there is no other final answer to the third question.

NOTES AND REFERENCES

1 See H. Atlan, *A tort et à raison: Intercritique de la science et du mythe* (1986). Essentially the same theme is central for J.-F. Lyotard, *Le différend* (1983).

2 L. Sterne, *Tristram Shandy* Vol. III, ch. 41, as cited by N. Rescher, *The Strife of Systems: An Essay on the Grounds and Implications of Philosophical Diversity* (1985) p. 236.

3 Of course, a paradox in the logical sense only arises if we see the relation of right and wrong as a logical relation. But even if it is only a matter of rhetorics it matters at the courts and, therefore, in constructing a legal system.

4 See W. Benjamin, "Zur Kritik der Gewalt" in id., *Gesammelte Schriften* 2.1 (1977) pp. 179-203.

5 I leave the term *Gewalt* untranslated. It continues, although inaudible even for most German ears, the traditions of Latin *vis* and *potestas*. It is not simply "violence".

6 Also called second order observation or second order cybernetics. See H. von Foerster, *Observing Systems* (1981) or R. Glanville, "Distinguished and Exact Lies" in *Cybernetics and System Research 2* (1984; ed. R. Trappl) pp. 655-662.

7 G. P. Fletcher, "Paradoxes in Legal Thought" (1985) 25 *Columbia Law Rev.* pp. 1263-92.

8 To give only one citation: within the context "de potestate principum" L. Zechius, *Politicorum sive de principatus administratione libri III* (1607; J. Gymnicum) pp. 62ff, writes: "Omnis multitudo ab uno procedit et per unum mensuratur" and proceeds to elaborate on *increatum/creatum*, *immobile/mobile*, and so on.

9 This development does not necessarily depend upon an organisational differentiation of courts according to whether law or equity guides the decisions. We find it also in continental legal theory. One example is A. Columna Romanus (Egidio Colonna), *De regimine principum libri III* (1607) pp. 513ff. For the Middle Ages see M. Boulet-Sautel, *Equité, justice et droit chez les glossateurs du XIIème siècle* (1951); C. Lefebvre, "Natural Equity and Canonical Law" (1963) 8 *Natural Law Forum* pp. 122-36.

10 A careful, and, as far as I know, unsurpassed analysis of this institution is A. Bonucci, *La derogabilità del diritto naturale nella scholastica* (1906).

11 Seen from this point of view you may find Machiavelli firmly established within an old Catholic tradition, only talking a little bit loudly about its principles and violating the wholesome dread in approaching the paradox. See also R. de Mattei, *Dal Premachiavellismo al Antimachievellismo europeo del Cinquecento* (1969). The flurried disputes about Machiavellian perfidies around 1600 are, then, a symptom that the position of the paradox is changing and that the new political system, called "the state", could offer institutional solutions for former irregularities. The solution comes to be called *ius eminens*.

12 Cicero, *De officiis III, VI, 30* (1966; ed. Hubert Ashton Holden) p. 106.

13 G. Naudé, *Science des Princes, ou Considérations politiques sur les coups d'état* (1712) Vol. 1, p. 341.

14 L. Wittgenstein, *Über Gewissheit – On Certainty* (1969; ed. G. E. M. Anscombe and G. H. von Wright) section 26.

15 Compare A. Baeumler, *Das Irrationalitätsproblem in der Aesthetik und Logik des 18. Jahrhunderts bis zur Kritik der Urteilskraft* (1967; 2nd ed.); R. G. Saisselin, *Taste in Eighteenth Century France: Critical Reflections on the Origin of Aesthetics or an Apology for Amateurs* (1965); N. Luhmann, *Love as Passion: The Codification of Intimacy* (1986).

16 See Colonna, op. cit., n. 9, p. 540 for clothes but also for servitude.

17 V. de Riqueti, Marquis de Mirabeau, *L'ami des hommes ou Traité de la population* (1756) 1883, p. 3.

18 Pacto quodam", said Grotius, "aut expresso, ut per divisionem, aut tacito, ut per occupationem." See H. Grotius, *De iure belli ac pacis* lib. II, cap. II, section 2.5 (1720) p. 188.

19 In spite of this similarity of the argument the social theories of the civil society and the legal theories of property were presented in different texts. See J. G. A. Pocock, "The Mobility of Property and the Rise of Eighteenth-Century Sociology" in *Theories of Property: Aristotle to the Present* (1979; eds. A. Pare and T. Flanagan) pp. 141-66.

20 For a specific topic of actual relevance, the freedom of the sea, compare H. Grotius, *Mare liberum* (1608; Latin-English ed. 1916); J. Selden, "Mare clausum seu De Dominio Maris libri duo (1635)" in *Works* (1726) Vol. 2, pp. 1179-1436. For the typical generalised version see F. Hutchinson, "A System of Moral Philosophy in Three Books" (1755) in *Collected Works* Vol. V (reprint 1969) pp. 309ff; C. Wolff, *Jus naturae methodo scientifica pertractata* (1742) reprint 1968, part II, chs. I and II.

21 Digesta 41.1, *De rerum divisione*, see also *Institutiones* 2.1, *De rerum divisione et adquirendo earum dominio*.

22 See S. Pufendorf, *De iure naturae et gentium lib. IV* (1744) Vol. I, cap. IV, sections II and V, pp. 512ff, 513, 518. During the eighteenth century this distinction became generally accepted. See J. G. Heineccius, *Elementa iuris naturae et gentium* (1749; 3rd ed.) lib. I, sections CCI ff, pp. 182ff; J. Taylor, *Elements of Civil Law* (1769; 3rd ed.) pp. 460ff; G. Achenwall, *Prolegomena Iuris Naturalis* (1781; 5th ed.) section 116, pp. 97ff.

23 J. Locke, *Two Treatises of Government* (1690) Vol. II, ch. V.

24 Compare also P. Bowles, "The Origin of Property and the Development of Scottish Historical Science" (1985) 46 *J. History of Ideas* pp. 197-209.

25 To this warre of every man against every man", said Hobbes at a famous place (*Leviathan* ch. 13), "this also is consequent; that nothing can be Unjust. The notions of Right and Wrong, Justice and Injustice have there no place."

26 T. Hobbes, *Leviathan* (1651/1953) Vol. I, ch. 14, pp. 66ff; J. Taylor, "Ductor Dubitantium" in *The Whole Works* (1970; 1851/2) Vols. IX and X, especially Vol. IX, pp. 279ff. Compare also N. Luhmann, "Die Theorie der Ordnung und die natürlichen Rechte" (1984) 3 *Rechtshistorisches J.* pp. 133-49.

27 However, we find a similar argument in A. Smith's *Lectures on Jurisprudence* (1978; ed. 1763) p. 13, that natural rights are unproblematic whereas in the case of property the *exclusion* of others needs justification.

28 See the by now classical monograph by R. F. Jones, *Ancients and Moderns: A Study of the Rise of the Scientific Movement in Seventeenth Century England* (1965; 2nd ed.)

29 See the famous beginning of the second part of Rousseau's discourse "Sur l'origine et les fondements de l'inégalité parmi les hommes" in E. Rousseau, *Oeuvres complètes* (1964 ed.) Vol. III, p. 164.

30 Process in a new sense, introduced just in time to give a new sense of natural unity to the history which leads into an unknown but nevertheless draftable future. See K. Röttgers, "Der Ursprung der Prozessidee aus dem Geiste der Chemie" (1983) 27 *Archiv für Begriffsgeschichte* pp. 93-157.

31 See S.-N.-H. Linguet, *Théorie des loix civiles, ou Principes fondamentaux de la société* (1767) Vol. 1, in particular the "Discours Préliminaire" pp. 1-177.

32 For the transformation and radicalisation of the idea of a constitution during the last decades of the eighteenth century see D. Grimm, "Enstehungs- and Wirkungsbedingungen des modernen Konstitutionalismus" in *Akten des 26. Deutschen Rechtshistorikertages* (1987) pp. 46-71.

33 See H.-G. Deggau, *Die Aporien der Rechtslehre Kants* (1983).

34 Compare J. Blühdorn, " 'Kantianer' und Kant: Die Wende von der Rechtsmetaphysik zur Wissenschaft vom positiven Recht" (1973) 64 *Kant-Studien* pp. 363-94.

35 A good example is A. F. J. Thibaut, "Über den Einfluss der Philosophie auf die Auslegung der positiven Gesetze" in id., *Versuche über einzelne Theile der Theorie des Rechts* (1798) Vol. 1, pp. 140-207.

36 Under very different perspectives similar solutions can be traced back to Aristotle's *Rhetoric* Book 1. Faced with the pressure of social networks, of grand families, their relatives, and their clientele, the legislator has the advantage of not being able to predict the future, hence of not being able to observe the impact of his law upon the concrete network of social relations; and the judge, being obliged to apply the law without looking aside, is unable as well to adapt the law to the concrete constellations of social stratification. See Colonna, op. cit., n. 9, pp. 507ff. So, the distinction of legislation and adjudication, being an internal distinction of the legal systems, promotes the differentiation of the legal system by diminishing the impact of social structures.

37 See for instance H. L. A. Hart, "Self-Referring Laws" in id., *Essays in Jurisprudence and Philosophy* (1983) pp. 170-8; T. Eckhoff, "Feedback in Legal Reasoning and Rule Systems" (1978) *Scandinavian Studies in Law* pp. 39-51.

38 See my arguments in N. Luhmann, *Rechtssystem und Rechtsdogmatik* (1974) pp. 31ff. For the typical defensive reactions of jurists protecting what seems to them good arguments, see T. W. Wälde, *Juristische Folgenorientierung* (1979); H. Rottleuthner, "Zur Methode einer folgenorientierten Rechtsanwendung" in "Wissenschaften und Philosophie als Basis der Jurisprudenz" special issue (1980) 13 *Archiv für Rechts- und Sozialphilosophie* (eds. F. Rotter *et al.*) pp. 87-118; G. Lübbe-Wolff, *Rechtsfolgen und Realfolgen* (1981).

39 See N. Luhmann, "The Future Cannot Begin: Temporal Structures in Modern Society" in id., *The Differentiation of Society* (1982) pp. 271-288.

40 See M. Serres, "Dream" in *Disorder and Order: Proceedings of the Stanford International Symposium (Sept. 14-16 1981)* (1984; ed. P. Livingston) pp. 225-239.

41 See the arguments of J. L. MacKie, *Truth, Probability and the Paradox: Studies in Philosophical Logic* (1973) pp. 237ff.

42 See R. Glanville and F. Varela, " 'Your Inside is Out and Your Outside is In' (Beatles 1968)" in *Applied Systems and Cybernetics* (1981; ed. G. E. Lasker) Vol. II, pp. 638-41, for the limiting cases of universal distinctions and elementary distinctions.

43 See Y. Barel, *Le paradoxe et le système: Essai sur le fantastique social* (1979) about "potentialisation".

44 See T. Parsons, "Some Ingredients of a General Theory of Formal Organisation" in id., *Structure and Process in Modern Societies* (1960) pp. 59-96. Parsons distinguished three levels: the technical level, the managerial (or professional) level, and the institutional level, and postulated "control relations" connecting these different levels.

45 See L. Löfgren, "Some Foundational Views on General Systems and the Hempel Paradox" (1978) 4 *International J. of General Systems* pp. 243-53 at p. 244. Compare also id., "Unfoldment of Self-Reference in Logic and Computer Science" in *Proceedings of the 5th Scandinavian Logic Symposium* (1979) pp. 205-29.

46 See N. Luhmann, *Die soziologische Beobachtung des Rechts* (1986).

47 Regarding "legitimation", there is a tendency to replace hope by despair and despair by a resolute determination to try nevertheless (we cannot do without it). But after having observed this game for about a hundred years (Georg Jellinek, Max Weber, Jürgen Habermas, and countless followers in legal and social theory) it may sooner or later occur to us that there may be something wrong with the question.

48 A similar account for the emergence of different and divergent philosophical systems is given by N. Rescher, *op. cit.*, n. 2. Here, distinctions are the technique of coping with antinomies which rise in any attempt to explain the world.

49 See N. Luhmann, " Distinctions directrices': Über Codierung von Semantiken und Systemen" in "Kultur und Gesellschaft" special isue (1986) 27 *Kölner Zeitschrift für Soziologie und Sozialpsychologie* (eds. F. Neidhardt *et al.*) pp. 145-61.