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The transformation of legal semantics in postmodern society

From the "subsumption" of cases to "balancing" and a semantics of networks

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Abstract: For several years, we have been tackling anew the deep and disruptive transformation of the legal system that is provoked by the emergence of the "society of networks". This is, so to speak, a tertiary remodelling of the liberal legal system – and, again, it has major consequences for its semantics. After individuals and organisations as legal actors, we are now confronted with a new type of quasi-actors – networks that undermine the hitherto taken-for-granted borders between the inside and outside of organisations, between individuals and organisations, and the rules of the game are changed once more. The operation of the law with clear distinctions, well-defined conceptions, is again severed, because more and more highly complex cases and situations that only allow for a design of a legal structure in "real time" come to the fore.

Keywords: Legal semantics. Semantics of networks.

1. Statute law and its language

I would like to start from the assumption that the functioning of the law is, to a great degree, dependent on the necessity of keeping the rules underlying its functioning invisible. This does not mean that law is merely ideology, but it is primarily a field of practices upon which the rules of construction of legal arguments, legal operations and legal judgments are "instituted" (DESCOMBES, 2013, p. 442-449) from below and encoded in an incessant "flow of analogies" (HOFSTADTER; SANDER, 2013, p. 161-173) that continuously observes and distinguishes new

situations with reference to old mental categories that are always too broad to cover a limited number of cases.

They are based upon heterarchical connections between the "concreteness" of bridging concepts between "'families' of action" (*Familienähnlichkeit*, L. Wittgenstein) – and families are never closed, they always reckon with the vanishing of some members and the accession of new members. In this perspective, the law is always included in a reproduction of entangled hierarchies (D. Hofstadter) – this means that, for example, the construction of cases is always already based upon the law – it is not a neutral observation of facts that is afterwards "subsumed" under the general concepts of the law. Unwritten rules of relevance, rules about the conception of causality or probability, constraints about argumentation, the presumption of certain links between facts, conditions and consequences and the like all contribute to the construction of situations and cases (GASKINS, 1995). The concatenations of analogous relationships underlie a continuous flow of variation, of experiments that are only in a second step related to and controlled by the seemingly fixed categories of statutes and the law in general. Within the conceptualisation of systems theory, one may talk about the law's function as stabilising "expectations" – not just "commanding" a certain form of behaviour or imposing limits on human action (LUHMANN, 1990). "Expectations" can remain vague and have to be kept open to experimentation – as long as a certain level of trust, of relatively consistent behaviour in conditions of uncertainty, can be uphold. This is much more important than the willingness to abide by the "literality" of a certain norm. In this respect, one can talk about the entanglement of the constituted norm and the instituted web of relationships, practices that have emerged in the realm of a legal field. Constituted in this sense is – following Descombes (2013) – the explicit "hierarchical" definition of a legal rule, whereas the institution of the "application" process is processing in a heterachical, "analogical" way. This process can only emerge and evolve over time if the "management" of the inter-relationships between cases, practices and situations allows for a continuous overlapping of concepts that keeps the self-organising development of new possibilities open, and, at the same time, operates selectively and excludes certain connections and possibilities, while others are included into the repertory of possibilities (TAYLOR, 2004). One may call this process of managing inter-relationships "mapping" – that is, an operational practice that is always focused on cases and situations, and, at the same time, is aware of the repercussions that the specific case necessarily has on the web of a practice, in that it is involved and asks for a permanent encoding of new patterns (HUTCHINS,

1995). This process of relating cases can only be controlled to a limited extent; this why there is a continuous movement of minor or major transformations within the web of inter-relationships, which can, at times, lead to a disruption of a practice because the old patterns of inter-relationships, of encoding cases, no longer fits. They are challenged by a cumulation of external effects or side-effects within the web of the inter-relationships, which can no longer be stabilised in a promising way. Thus, new constructions for the encoding of situations are put in place and are tried out within the mapping process.

What is at issue here is not the self-observation and control of legal semantics from above – the practice both generates and institutionalises its own knowledge, which can only to a limited extent follow the explicit rules of argumentation or conceptual systematisation; rather, it is a competence for situations that is required (ROMANO, 2004), not the construction of pure legal concepts and the systematisation of a hierarchy of norms. This does not exclude the systematic character of legal argumentation in the liberal society from playing a major role. However, this systematic character of legal rules and practices of "subsuming" reality under separate legal concepts is only a repercussion of the self-organising power of the process of "mapping" inter-relationships between cases, situations and reflexive patterns in practice. The self-standardising potential of fields of practical operations and their spontaneous ordering of analogies is the driving force of the stabilisation and transformation of the law. This does not exclude the constitutive explicit reflexive power of court judgments or doctrinal commentaries from playing an important role in this process. However, the assumption that there can be a deduction of a judgment from the general norm would only be an illusion.

The French legal philosopher Thomas (2011, p. 137) has drawn our attention to the "operational" character of the law and the role of "fictions" within legal practice. This conceptuality is not meant in the traditional sense of a "legal fiction", but one might say that these are rather the simplifications and standardisations which we need for "mapping" a field of inter-relationships by the use of "artefacts" that can only give orientation if they are translated creatively into a situation, the search for a path through the overlapping analogies. *L'écart au fait* characterises the law (THOMAS, 2011): the law knows that one cannot pre-suppose that everybody acts as a rational individual in spite of its fictitious construction of the "legal subject" – but it does try to impose and to support certain practices of self-transformation of individuals who have to abstract themselves from the ties of tradition or their egotistic self-interest that does not take into account all the competing,

but nonetheless standardised, interests of other subjects which have to be respected in order to establish a productive pool of variety, a pool of ideas, upon which anybody can draw. Liberal society undergoes a permanent process of self-transformation as a consequence of the legal operations of "legal subjects". These are the trans-subjective side-effects of the use of subjective rights (OAKESHOTT, 1975, p. 140). The state, as such, does not does not have substantive purposes. It makes forms of operation (contract or the "administrative act") available for both individuals and its own agencies, but not, primarily, in their own interest, but, in a paradoxical way, in the trans-subjective interest of the third, the other, citizens, with a view to the "push" of an emerging impersonal process of self-creation and experimentation (LADEUR, 2011).

Docility, self-control, reliability, co-operation and tenacity are the qualities that the individuals Shulman and Stroumsa (2002), two historians of late antiquity, pointed out that religious communities in late antiquity, both Jewish and Christian, had already experienced the religious need to develop more active mobile practices of religiosity and to contribute to the evolution of a more abstract "cultural matrix", once the communities had started to grow. In the end, this turned out to be a second push towards acknowledging the requirement of rituals that helped interiorise the reflexive and receptive "inner self" and to institute the "flow of personality" (WINTHROP-YOUNG; WUTZ, 1999, p. xi-xx) that corresponds with the flow of the possibilities in society. Adam Smith would later call for the necessity to observe the world in the "mirror of the others" and continuously to construct an "internal spectator", a "man within".

The character of a self-fulfilling prophecy is attributed to normativity. In this sense, the law constructs its own reality – this is not only an ideology but a fiction that tries to contribute to an autonomous normative realm of inter-relationships upon the basis of which co-ordination is made possible. One should again refer to Yan Thomas if one wants to have an answer to the question of why we need such a fictitious order and its complex analogical practices of mapping inter-relationships. Again, I think we will not be disappointed by his explanation: he takes the view that the evolution of Greek and Roman law, and, as a consequence, the law of modernity that follows the path of legalisation of the world that began in Athens and Rome, is due to the rise of the "town" as a form of life beyond tradition (THOMAS, 2011). The town is itself a "medium" of artificial inter-relationships, of creating new forms of behaviour, of the rise of a "common knowledge" that allows for mutual observation, adaptation and transformation, for the fragmentation of forms of life, for learning. And such a fictitious realm of inter-relationships beyond established norms and traditions needs new forms of "fictitious" co-ordination that allow for the emergence of flexible patterns of "repeated" interaction in conditions of continuous transformation (BOHANNAN, 1965, p. 33-34). At this point, a reference to the legal evolution of a country such as Brazil might be appropriate: in a country in which a major part of the population lives in traditional rural areas or even in an indigenous static culture (NEVES, 2013), one might think of the necessity of imposing a self-limitation on the expansion of a modern legal system which – as I have tried to show – pre-supposes certain historical and cultural conditions for its functioning. If these conditions cannot be pre-supposed or cannot evolve, the expansion of the legal system may have disastrous consequences. What I would

like to emphasise – and, in this respect, one may also draw on the traditions of the Jewish legal thinking – the law as an object of "study", as a mode of co-ordination and of self-reflection, as an order for the generation and transformation of a "common knowledge", and a set of productive operations that are attuned to the "artificial" order of towns.

2. The process of undermining the unity of the world and the paradigm of the "application" of norms

The paradigm of "application" of norms has had its legitimate role in the legal system in spite of the priority attributed to the analogical character of the horizontal "contamination" of innovation and variety that transpires through the legal process. It was so-to-speak the "vanishing mediator" between the normativity of the law and the self-organisation of patterns of legal practice that demonstrated a certain tendency to limit the potentially disruptive effects of change, which was reduced, if possible, to piecemeal processes of transformation from case to case. However, in the liberal society, the court decision – within the web of inter-relationships at which I have pointed – worked somewhat in the temporal mode of "future II": that is, upon the basis of a case in the present tense, the law is defined that "will have been" in the future (HARDIN, 2003, p. 33-106) – and it is accepted as such because of its functionality, not because it is true that the legal situation is this or that.

What I have described until now was more or less the paradigm of the structure of the legal process in the age of the "society of individuals" – including the predominant hermeneutic methods; in particular, the interpretation of the legislator's will – which was, in effect, treated as the will to a certain uniformity of the law. However, one has to bear in mind, according to Hofstadter and Sander, that "the strictest form of literality", the fixation on the stability of the wording of law, "does not allow any resemblances to be noticed, and this excludes all thinking" (HOFSTADTER; SANDER, 2013, p. 174).

The problems which I would like to raise now are of interest for both Brazilian and German lawyers: the emergence of the "practices of balancing".[1] I have only recently learnt from a Brazilian doctoral student who works on "balancing" about how often Robert Alexy is referred to in the practice of the Brazilian Supreme Court – for example. I presume that Alexy has never ever been quoted in a judgment of a German Supreme Court or the Federal Constitutional Court, because "balancing" in Germany was long established in practice before Alexy wrote his books on method (ALEXY, 1986; HEINOLD, 2011; KLATT, 2013).[2] The older formula of "balancing of interests" had, in the late 1950s, been replaced by *Güterabwägung*, the balancing of "legal values" (DEUTSCHLAND, 1958). Now, I would like to revitalize and rephrase what I have presented with regard to the methods of the law of the "society of individuals": I take the view that "balancing" is more a practice that reacts to the *problématique* of the increasing tensions, pluralisations and fragmentations that could be observed within the evolving "society of organisations" in the 1920s and 1950s of the last century. In my view, and, as a consequence of what I have said before, one can assume that the change from the "application" of norms to the "concretisation of the law" and towards "balancing" is due to the

[1] For a critique, see Luhmann (1995).

[2] For a critique, see Reimer (2013).

increasing tendency to the multiplication of factual "scripts" and the rise of "special knowledge" (GUÉHENNO, 1999, p. 19; LUHMANN, 1995) (for example, risk knowledge, expertise) as opposed to general experience that is open to more or less everybody and emerges from a continuous distributed process of experimentation and improvement of technologies, etc. The "factualisation" (Boureau) and "historicisation" (Gauchet) of rights that *de-stabilises* individual rights and opens them up for the re-introduction of hitherto excluded possibilities: for example, the question of "real" use of freedom in the field of the freedom of the press. The so-called "optimisation" of "constitutional principles", as Alexy puts it, no longer operates from case to case, but by a "grouping" (*Gruppierung*, Walter Benjamin) of cases, for example, the interest of bank customers, workers (and not just legal subjects), or by emphasising the case of an organised "group" or organisations (big firms, technology pushing organizations, trade unions, etc.). In many respects, more fragmented and pluralised use of knowledge and strategic production of long chains of action and not just individual actions tend to blend legal and factual interest and raise difficulties in the process of analogical thinking that I have described earlier: the process of stabilising expectations becomes much more difficult once organisations are at stake. They behave in a strategic manner both within the organisation and outside. This leads to an evolution that might be characterised as a "loss of substance" and the emergence of a "lecture plastique" (Malabou) of reality with a much more tentative prospective character of both the legal operations of organisations and court judgments. Court decisions try to develop more a kind of a "management of rules", including legal norms, factual rules and conventions (standards) and the formulation of "rules of collision" (LADEUR, 2014, p. 383). These are rather complex phenomena whose nature is more or less played down by what is called *Abwägung* (balancing). I would like to draw your attention to two examples: first, the increasing diversity of technological knowledge types (between experience and different grades or versions of uncertain knowledge), and, second, the fragmentation of professional rules for the thematisation of "subjects" of general interest, on the one hand, and the breakdown of a shared conception of "honour", on the other (LADEUR, 2007). In a sense, one may call this – as I did earlier – the conflict of divergent "scripts" that entangle facts and values in a much more open way than in the past. What we need here is not a broad conceptuality of "principles" and "balancing", but a more narrowly-defined practice of a "management of (different) types of rules". Often, one may regard the role of courts rather as that of a "catalyst" (SCOTT, 2007, p. 565), i.e., courts intervene in a web of "scripts" and either try to irritate the

web towards more openness or try to block certain trajectories (a certain practice of the media, risk management for the development of technologies, the co-ordination of different religious forms of life).

The difference between the legal practices in the "society of individuals" and those of the following "society of organisations" is to be seen in the change towards the rise of a more comprehensive "grouping" or concatenation of operations, as opposed to the distributed mode of single operations upon a case-by-case basis. This evolution requires the introduction of a reflexive element into the design of both legal operations and court practices. What this means can be demonstrated upon the basis of the judgments in the field of the conflicts between personality rights and the freedom of the media: the single judgment no longer indicates a stable rule or pattern of practices that changes incrementally in a continuous way; instead, both the courts and the addressees of their judgments take into consideration the fact that the stabilisation of expectations can only be brought about by the whole "web" of judgments, which both allows for and pre-supposes new "moves" within the fluctuation range that has been established by the hitherto accumulated number and type of decisions.

In this case, what happens can be the object of a process of mutual observation. At the same time, there are other cases in which such continuous observation is less easily carried out. There are principled conflicts that emerge at a certain societal crossroads, which afterwards are not necessarily the object of further corrections or changes by new court decisions. This, in my view, is the case in many questions concerning the law of the welfare state: In this field, we have – to simplify a bit – a conflict between the formal freedom of the individual as a paradigm of the liberal society – as I have described it earlier – and the new trend toward a "materialisation" (WIETHÖLTER, 1985, p. 221) and historical "factualisation" of rights: "real" freedom is to be guaranteed – not just an empty format of freedom that is devoid of any resources. "Balancing" both elements, the formal and the "material", substantial one, misses the crucial point: there is a conflict between two paradigms of social ordering that is at stake here. And it is not easy to observe spontaneously what the effect of such a cumulation of conflictual paradigms might be. The German Federal Constitutional Court (FCC) has formulated a "duty of subsequent correction" (*Nachbesserungspflicht*) for decisions (laws) that have been made in conditions of complexity and uncertainty (DEUTSCHLAND, 1979). This is a very good element of a "proceduralisation" of the law, and reflects its own knowledge base which can no longer be pre-supposed to be a stable frame of reference for the construction of causality, the presumption of cause-effect trajectories and the like. Unfortunately, the formula given by the German Constitutional Court is still an empty shell. It has not been supplemented by more concrete elements. One has to admit that it is difficult both to imagine and to design a meaningful process of evaluation and monitoring of learning practices with regard to the entanglement of conflicting principles and the factual consequences of their implementation. This can lead to the compilation of "reports" of dubious quality. However, it is not only in this regard that the "societal" control projects have to be adapted to the dynamic of social transformation and to the increasing uncertainty of the societal "pool of variety". In one way or the other, *ex post* control – in a broader sense – has to be given

more attention if decisions are increasingly taken in conditions of uncertainty.

A culture of "societal learning" has to be formulated, one which, in several respects, has to be introduced into the legal process because social norms underlie both a continuous and a disruptive process of change. These short reflections should, at least, have made plausible what my criticism of "balancing" means: this approach reflects a transformation of the infrastructure of the web of operations and decisions that processes the incessant flow of "analogies" between the "knots" of legal and factual interrelationships in society. However, "balancing" pre-supposes that the adequate reaction to the evolution that this web has undergone in the last decades consists in a purely legal shift to the more abstract level of "constitutional principles" that integrate the legal system at a more abstract and broader level with the intent of an "optimisation" of principles – as opposed to norms in the narrower sense. It does not pay enough attention to the transformation of the legal infrastructure of the operations and decisions that I have described, and, at the same time, it neglects the transformation of both the social knowledge base and the type of actors that are the very addressees of the law (from individuals to organisations). This evolution paves the way for a factually more open, more reflexive legal order that has to be based upon a kind of "pluralist management of different rules", and not a more comprehensive legal construction rule alone. One might call this new law a kind of "likely law" or "fuzzy law", because of it takes the unstable character of reality in consideration, whereas the older legal system was perhaps also aware of uncertainties, but treated them, in a legal sense, just as "fortuity" for which nobody could be held responsible.

This evolution, by the way, finds its repercussion in the emergence of a new layer of a global, transnational law, including procedures of standard-setting, beyond the state: this development is due to the increasing intensity of economic transborder exchange and its consequences, whereas the traditional state-based resources of international law lag behind this process of transformation (CALLIESS; ZUMBANSEN, 2012). Social norms and public-private inter-relationships that generate hybrid "quasi-legal" norms take the lead over classical forms of formal legal rule-making. In a sense, this is just the transnational global version of the increasing "co-operation" between facts and legal norms, instead of a clear separation, on the one hand, and the deduction of decisions from general rules, on the other. One may summarise this development that finds its parallels in literature and other fields of culture – as Bender and Wellbery (1990)[3] put it – as a process of the emancipation of semantics from rules and stable purposes. The older semantics are increasingly replaced by a tendency towards a "formal openness for different and even conflicting purposes". Cultural semantics, including legal semantics, adapt to the "rootlessness" of culture – this is again a quotation from Bender and Wellbery (1990) – and become more "mobile". They loosen their ties with stable forms and figures such as doctrinal constructions and fixed relationships. It becomes more visible that the single legal norm or text can only produce sense as "part of a much larger, more elusive pattern of remembrance and forgetting" (WILF, 2011, p. 543-546). Society becomes aware of the fact that the construction and development of the law and the practice of

[3] See Assmann (1995).

court judgments underlie a "historical drift" within the population of norms and decisions that are only, to a limited extent, the object of conscious reflection and design (HAMPE, 2014, p. 22-186).

One final remark on the status of the new legal paradigm would seem to be appropriate: the rise of the new model does not completely do away with the classical one. There are still domains where the old model can continue to work, as it has done for centuries, and, at the same time, the new paradigm is not completely different from the elder one. And this is why we need "norms of conflict" that try to co-ordinate the scope and impact of both paradigms.

3. The law of the "society of networks": from the fragmentation of the legal order to a fragmentation of the legal function?

For several years, we have been tackling anew the deep and disruptive transformation of the legal system that is provoked by the emergence of the "society of networks". This is, so to speak, a tertiary remodelling of the liberal legal system – and, again, it has major consequences for its semantics (LADEUR, 2010, p. 143). After individuals and organisations as legal actors, we are now confronted with a new type of quasi-actors – networks that undermine the hitherto taken-for-granted borders between the inside and outside of organisations (POWER, 1999), between individuals and organisations, and the rules of the game are changed once more. The operation of the law with clear distinctions, well-defined conceptions, is again severed, because more and more highly complex cases and situations that only allow for a design of a legal structure in "real time" come to the fore.

Charles Sabel and others (SABEL; SIMON, 2012, p. 1.265) talk about "contextualising regimes" – a term which means, for example, the design of contracts that roll out their structure, in a way that is characterised by an entanglement of specific bargaining, and, at the same time, the "contextual" modelling of a legal frame of reference within the flow of the co-ordinating, loosely-coupled executing action: this can be observed in the domain of new "high knowledge" technologies, such as biotechnology, neuro- and cognitive sciences, nano- and computer technologies. They are transgressing cognitive and organisational borders, and, as a consequence, give rise to a type of normativity that is deeply intertwined with the facticity upon the basis of which only experimental linkages between legal building blocks can be brought about, whose character can, in the end, only be defined and evaluated

"after the fact" – again, the normative *ex post* control comes to the fore, whereas patterns, stable forms and figures no longer function. We will see also that the legal subject as a broad framework that can embrace different versions of actors also undergoes a transformation. The economists Bahrami and Evans (2011) take the view – in an economic point of view – that the "old game" consisted in planning or anticipating certain outcomes, or for the state to set limits or offer legal formats for economic operations. The "new game" demands "surfing fluid reality and adjust to morphing conditions". More and more models of "paralegal and pragmatic governance" are put in place that allow, first of all, the formation of a common perspective on the network of inter-relationships that is being processed. And these networks of inter-relationships do not seem to have a clear beginning or a clear purpose, nor do they have a clearly-defined end.

This evolution finds its repercussion in the development of new institutions of legal mediation and arbitration, instead of legal decisions on conflicts in state courts (JENNEJOHN, 2007). This should not be prematurely judged as just one more phenomenon of increasing private power at the expense of institutions that are legitimised by democratic procedure. I think we definitely need a new type of "cyber law" that is more finely-tuned to the necessities of "surfing fluid reality". For example, for the new conflicts that emerge in the Internet, we should experiment with new mediating information brokers that could act for hybrid forms of "data ownership" of users *vis-à-vis* firms such as Facebook and Google or new network contracts, which bring to bear the network effect between users on the relationship between users and Google and the like. In order to put some more concreteness into what I have said, I would like to give an example of how the law works in conditions of extreme uncertainty – and we will see that it works.

For example, in Silicon Valley, some young computer scientists work in their famous "garages" on their own. They have different projects, some rather trivial, such as the control of the data networks of other firms. And they work on their own projects of a more innovative and intellectually-challenging type. There are some overlaps, they help each other, they take over some work on important and less important components of the projects of the others. As a matter of fact, what is crucial for the development of the different projects is not so clear at all. And then, there is a breakthrough in one garage: Microsoft offers 10 million dollars for the use of an innovative computer application. It is only now that the law steps in: who is the developer of the application? What are the contributions of the other co-operators? Or are they co-operators at all? Didn't they just have a labour contract or was it rather a service contract

or didn't the co-operators tacitly form a company? If one were to bring this type of conflict to a court, it would be extremely difficult to fit this "colloidal", jellylike constellation into stable legal patterns (JENNEJOHN, 2007). What is done in these cases, in fact, is quite ingenious: there are now lawyers with computer knowledge who are asked to formulate a kind of protocol of what has happened in such a constellation. They talk to each participant, and, upon the basis of the protocol that is consented to by the partners, the lawyer makes a proposal on how to act vis-à-vis Microsoft and on how to distribute its payments. This process works quite smoothly because the participants understand themselves to be a form of "network subjects". This means: they know that they are – to quote Bahrami and Evans (2011) again – "surfing fluid reality", and that one has to "adjust to morphing conditions". And this is only possible if one accepts that it is impossible to find a solution that does justice to each participant in a more or less perfect way. The network must go on…

One might perhaps call this new emerging type of law "serial law", in the sense that it is possible only "after the fact", ex post, to generate a satisfactory legal pattern that might put some normativity into a "series" of factual operations that create a network of inter-relationships that can *ex post* give rise to an experimental normative pattern that can also be tried out in other constellations and possibly contribute to new legal regimes. To give another example from high technology, I would just like to draw your attention to the development of other "high knowledge" construction processes, such as nano-technological applications that are so diverse and multi-form that can could not imagine an ex ante procedure for some kind of authorisation. The alternative could consist in a complex procedure of monitoring and learning in "real time" that could probably only be implemented by the participation of another private firm that works in the same field.

The elements of "cyber law" that I have sketched here might be referred to a new overarching frame of reference that might be called "second order proceduralisation": from the specific "cases", one can construct some bridging components that cannot be stabilised, but which still allow for a productive process of "oscillation" between new technical knowledge-generation and a flexible type of legal "encoding" in "real time" or *ex post*. "Contextualising regimes" is not the worst name to be given to such a type of generation of legal "order from chaos" (ATLAN, 1979).

The legal semantics that fit this evolution would rather be fluid, relational, "serial", instead of being substantive or referring to stable organisations or groupings of operations that were characteristic for the "society of organisations".

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