Articles

The Law before its law: Franz Kafka on the (Im)possibility of Law's Self-reflection*

By Gunther Teubner[**]

A. The Man from the Country

"Before the Law" – for central questions in legal theory this is one of the most inquieting pieces of literature. Franz Kafka wrote it as a part of the final chapter in his book *The Trial.*

> Before the Law stands a doorkeeper. A man from the countryside comes up to the door and requests admittance to the Law. But the doorkeeper says that he can´t grant him admittance now. The man thinks it over and then asks if he´ll be allowed to enter later. "It´s possible" says the doorkeeper, "but not now." Since the gate to the Law stands open as always, and the doorkeeper steps aside, the man bends down to look through the gate into the interior. When the doorkeeper sees this, he laughs and says: "If you´re so drawn to it, go ahead and try to enter, even though I´ve forbidden it. But bear this in mind: I´m powerful. And I´m only the lowest doorkeeper. From hall to hall, however, stand doorkeepers each more powerful than the one before. The mere sight of the third is more than even I can bear." The man from the country has not anticipated such difficulties; the Law should be accessible to anyone at any time, he thinks, but as he now examines the doorkeeper in his fur coat more closely, his large, sharply pointed nose, his long, thin, blank tartar´s beard, he decides he would prefer to wait until he receives permission to enter. And the doorkeeper gives him a stool and lets him sit down at the side of the door. He sits there for days and years. He asks time and again to be admitted and wearies the doorkeeper with his entreaties. The doorkeeper often conducts brief interrogations, inquiring about his home and many other

* Translated from the German by Alison Lewis. Translator's note: There are two words for "law" in German, "Recht" which refers to law as a process, and law as a profession, and also law in the sense of "that which is legal or illegal", and "Gesetz", which refers more to statutory law in the sense of all laws in force as well as any particular law. In order to make the necessary distinction in the English translation, I have used "Law" with a capital "L" for "Recht" and "law" with a lower case "l" for "Gesetz". But note that the direct quotations from different authors do not follow this rule.

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> matters, but he asks such questions indifferently, as great men do, and in the end he always tells him he still can´t admit him. The man, who has equipped himself well for the journey, uses everything he has, no matter how valuable, to bribe the doorkeeper. And the doorkeeper accepts everything, but as he does so he says: "I´m taking this just so you won´t think you´ve neglected something." Over the many years, the man observes the doorkeeper almost incessantly. He forgets the other doorkeepers and this first one seems to him the only obstacle to his admittance to the Law. He curses his unhappy fate, loudly during the first years, later, as he grows older, merely grumbling to himself. He turns childish, and since he has come to know even the fleas in the doorkeeper´s collar over his years of study, he asks the fleas too to help him change the doorkeeper´s mind. Finally his eyes grow dim and he no longer knows whether it´s really getting darker around him or if his eyes are merely deceiving him. And yet in the darkness he now sees a radiance that streams forth inextinguishably from the door of the Law. He doesn´t have much longer to live now. Before he dies, everything he has experienced over the years coalesces in his mind into a single question he has never asked the doorkeeper. He motions to him, since he can no longer straighten his stiffening body. The doorkeeper hat to bend down to him, for the difference in size between them has altered greatly to the man´s disadvantage. "What do you want to know now," asks the doorkeeper, "you´re insatiable." "Everyone strives to reach the Law," says the man, "how does it happen, then, that in all these years no one but me has requested admittance." The doorkeeper sees that the man in nearing his end, and in order to reach his failing hearing, he roars at him: "No one else could gain admittance here, because this entrance was meant solely for you. I´m going to go and shut it now."

Let us imagine that the man from the country is not the individual who has been delivered up to the force of a higher institution (power, morality, religion etc), as we find in Kafka's numerous interpretations.[1] Let us suppose instead that he is a judge "from the country", who – back there, in the country – has to deal with a legal case based on the law, and who now, in the torment of decision-making, cannot find what is right according to the law. Or to put it another way: let us imagine that it is the legal procedure itself, or more generally the *decision-making practice of the legal process,* in all the confusion of life, that stands before its own law and has no idea what it is doing. In that case it would not be the accused person who has to give an account of himself before the law in criminal proceedings, or the party seeking its rights before the law, but the Law itself, in a desperate search for a law by which it can make its decision. If we now place the protagonists that emerge from this dual role change in confrontation with each other – i.e.

[1] FRANZ KAFKA, THE TRIAL 215 (1998). For critical comments I am grateful to the participants at a seminar given by Christoph Menke in Frankfurt in the summer semester 2011.

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it is not a specific individual that stands "before the law" but legal discourse, and the law for its part is not a generalized and distant authority, but (at a much more trivial level) the valid and positive law – then we have to address the question: What happens within the mysterious relationship between "Law AND law" when that relationship is subjected to the nightmarish logic in Kafka's universe?

This does not mean that the individual perspective ought to be disputed in its own right. In a complementary sense, however, our institutional perspective allows very different things to come to the fore in Kafka's world. I am encouraged in my somewhat far-fetched interpretation by Jacques Derrida's whirlwind of associations concerning Kafka, in which he summons literature "before the law".[2] And Kafka himself, who sends his observers through a wide variety of institutions, through power, the military, the circus and through medicine, always designates them not simply as outsiders, but as part of professional-institutional life: the land surveyor, the country doctor, the researcher, the new lawyer, the bank clerk, the advocate. Last but not least, Kafka's own negative experiences as an insurance clerk dealing with the absurd internal laws of the insurance companies were certainly used by him in his literary output. It seems entirely reasonable, then, that in Kafka's parables not only are flesh-and-blood human beings racked before the gateways to the law, but at the same time the legal institutions of our modern age are subjected to the torment of self-examination.

The legal discourse that seeks to assure itself of its law is tormented by nightmares that are different from those experienced by the person who is subject to the law and who is exposed to the arbitrariness of the judicial system. Kafka's parable renders visible the abysses that are faced by any collective self-reflection of the epistemic community of the Law.[3] If the Law is standing "before" the law, then it is on a desperate search for its origin in time, for justification of its content, and for the social basis of its norms and judgments. And the insoluble question of priority arises: Does Law perhaps take precedence over law? Should the chain of events that constitutes legal procedure precede, in a temporal sense, the law or the norm that is supposed to assist that chain of events in reaching a decision? Should that chain of events be the origin of the law also in a substantive respect? And from a social perspective: should the decision in the individual case have priority, by departing from the general law? And in the triangular relationship that exists between the man, the doorkeeper and the law, the question becomes even more complicated: where does the precedence lie – with the law, or with the spokesman for the law, or with the legal procedure? With which of these three does the origin of the norms lie?

[2] Jacques Derrida*, Before the Law*, *in*: DERRIDA, ACTS OF LITERATURE 186 (1992).

[3] "Abyss" - this is how Jacques Derrida describes the disrupting effects of legal self-reflection, Jacques Derrida, *Force of Law: The Mystical Foundation of Authority*, 11 CARD. L. REV. 919, at 993 (1990).

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"The man from the country" – from an institutional perspective, the meaning of this indication of origin becomes multi-layered, and no longer simply refers to the peasant-like layman who comes to grief when faced with the guiles of legalistic sophistry. The implied contrast between town and country opens up a wealth of different dimensions, which cannot all be entered into here, but only hinted at by means of the following distinctions: 1. law vs. life, more generally: culture vs. nature, 2. statutory norm vs. the process of norm application, more generally: structure vs. process, 3. statutory text vs. legal interpretation, more generally: norm vs. decision, 4. law vs. legal case, more generally: universality vs. singularity. "The man from the country" – this is no longer only a human being as a party in proceedings, but the entire complex process of the Law, a process which is played out before the door, directly on the threshold that separates life from the law.

B. Self-slander

The "Someone" who must have slandered Josef K. in "The Trial" is none other than Josef K. himself. With this bold assertion, Giorgio Agamben makes a plausible case that it is not a separate outside authority that is accusing a person "before the law"; instead, the man from the country is accusing himself.[4] If we follow the role change that has been proposed above, then the self-accusation of a person is transformed into the *self-accusation of the Law*. The Law is bringing itself to trial.[5]

The Law cannot escape its self-accusation. As the man from the country "insatiably" asks the keeper of the law about the general law, it follows the Law's implacable inner urge towards universalization. Then of necessity the Law is no longer asking the question "right or wrong?" solely in respect of the one legal case in the present instance, but also in respect of all human actions. It is asking – for all human actions – the question concerning their legal position (*Rechtslage*). Indeed the Law in the modern age has historically (when it stopped thinking about *actiones* in a way that was fixated on legal procedures and started thinking about legal positions in a way that relates to every event in society) completed this transition towards universalizing its categorizations, and has "juridified" the entire world. Inevitably, then, legal procedure comes up against itself and asks the self-tormenting question: Is applying the difference between right and wrong actually right or wrong? But then the Law becomes caught up in the paradoxes of self-reference. As with

[4] GIORGIO AGAMBEN, *in*: CLEMENS ET AL. (EDS.), THE WORK OF GIORGIO AGAMBEN 13 (2008). identifies the "man from the country" of the parable with Josef K., the protagonist of *The Trial.*.

[5] RUDOLF WIETHÖLTER, IST UNSEREM RECHT DER PROCESS ZU MACHEN? IN: HONNETH ET AL. (ED.), ZWISCHENBETRACHTUNGEN: IM PROCESS DER AUFKLÄRUNG. JÜRGEN HABERMAS ZUM 60. GEBURTSTAG, (OUR LAW IS TO MAKE THE PROCESS? IN: HONNETH ET AL. (ED.), INTERIM CONSIDERATIONS: IN THE PROCESS OF ENLIGHTENMENT. JÜRGEN HABERMAS ON THE 60TH BIRTHDAY) 794 (1989).

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the lying Cretan, whose true statements become false and vice versa, what we are faced with is no longer a simple contradiction, but an infinite oscillation within the paradox: If right, then wrong. If wrong, then right …. This is the fundamental paradox of the Law, which in response to the question as to its foundation does not get a clear yes or a clear no, but an almost mocking interchange between positive and negative value of a viable justification.[6]

The fact of having actually brought the right/wrong distinction into the world in the first place, and thus of constantly producing anew not only right, but also wrong – therein lies the original sin of the Law. The Law is in a position of guilt vis-à-vis the world, because in the very creation of this distinction it does harm to the world, not only when it carries out punishment upon a condemned person, but also when it simply raises the *quaestio juris*, when it cuts through the world's innocence with its "either right or wrong" (no third way) binary code. The Law thus places all people, all events, and even itself under a "Kafkaesque" general suspicion which even the humanistic law of the Enlightenment, with its presumption of innocence, cannot remove. The inexorable compulsion to keep scanning the world according to this criterion produces more and more "wrong". And it is precisely the much-vaunted general nature of the law, which is supposed to do away with arbitrariness in individual cases, that in turn creates new "wrong", because with its violent abstractions it can never do justice to singularity in its infinite manifestations.

Kafka's law compels legal practice to generate life a second time, by generating a "legal reality" which is fictive, yet is very real in its fictivity, almost monstrous. The entire novel "The Trial", in which Josef K. with his imagination transforms the banal reality of his life as a bank clerk into a situation of legal prosecution, bears nightmarish witness to the world of madness into which the modern-day juridification of life leads us.[7] Kafka's Law palace is one of the many "iron cages of the slavery of the future" which Max Weber prophesied for modern society – Kafka's castle would be another example of the same, as would be the penal colony, the circus, and America. The compulsion that is exercised in Law's palace reduces flesh-and-blood human beings to juridical persons acting on compulsion, whose characteristic quality consists exclusively in having rights and duties, whose activities are limited to only being able to commit a right or a wrong, whose sole quality is being either guilty or innocent. The propagating of this second world – that is the evil deed committed by the Law. It is an act of violence against life, in respect of which the Law (if it applies its own categories to itself) accuses itself.

[6] For the paradoxes of self-reference which emerge in legal self-reflection, see NIKLAS LUHMANN, LAW AS A SOCIAL SYSTEM 459-463 (2004).

[7] Concerning the madness of the Law, careful diagnoses are to be found in RAINER MARIA KIESOW, DAS ALPHABET DES RECHTS (The Alphabet of Law) (2004).

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But we shall have to go a step further. Not just self-accusation, but *self-slander* by the Law. This would be the third interpretation of the dispute in the cathedral between Josef K. and the court chaplain, concerning the question as to whether the doorkeeper has deceived the man or whether the doorkeeper himself is the one who is deceived.[8] In its search for the law, legal practice in the modern age becomes a victim of self-deception – in its self-judgment it deceives itself, and does so not out of negligence or by *dolus eventualis*, but by *dolus directus*. For in the clear awareness that it is using false categories for its self-accusation, the Law slanders itself; not only when it judges men, but also when it puts itself on trial, for it cannot do otherwise than expose itself to its binary code, i.e. its own slanderous categories. This is where Kafka's critique of modern Law, with its pride in its autonomy and formality, comes into play for the second time. This critique is now aimed not at the practice of application, but at its self-reflection. By contrast the Law of traditional societies, which was able to classify and assess their law in an all-embracing cosmology in whose moral, religious and political connections it is indissolubly bound up, the highly specialized Law of our functionally differentiated society cannot comprehensively assess its law and decide whether it is true or untrue, good or evil, beneficial or damaging, beautiful or ugly, healthy or sick, just or unjust.

The loss of criteria of positive law, of our legal norms that are established only through decision – that is the disease from which Law in the modern age suffers. Modern Law only has its constricted, inadequate (for the purposes of describing the world), context-free, ultimately meaningless right/wrong binary code – this "cant" of modern legality – at its disposal. And the Law can only reflect on itself with the aid of its own life-falsifying constructs. Its self-assessment is entangled within the limitations of its criteria, its processes, its forums. The original sin of the Law consists not only in the fact of its doing wrong to the legal subjects through the violence of its binary coding, but also in that even in its best moments, in the moments of critical self-reflection, it has done itself this wrong, the wrong of self-slander, and continues to do so over and over again. The way in which modern Law deceives itself – the doorkeeper deceives the man, the man deceives the doorkeeper and the law deceives both – is something that "you don´t have to consider everything true, you just have to consider it necessary",[9] as the court chaplain in the cathedral rightly says, just as Josef K. is right when he says of the total juridification of the world: "Lies are made into a universal system."[10]

[8] KAFKA, *supra* note 1 at 215.

[9] *Id.* at 223.

[10] *Id.*

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C. Excesses of Ambivalence

Yet the *Kalumnia* by which Agamben sees Josef K. as being forever marked is not the whole story, for this attaches a strictly negative value to the Law. Agamben sees only the violence the Law does to human beings. Agamben's history of Law is a story of harm that starts with *homo sacer* and of necessity ends in the *Konzentrationslagern* and refugee camps of the modern age – Kafka's penal colony. But Kafka's parable "Before the law" has a more complex structure: *not pure negativity, but excessive ambivalence.* For the Law always produces both at the same time: it puts some people in the wrong, others in the right. With its condemnations, it causes pain, suffering and torment, but it also simultaneously creates the certainty of expectation and trust, upon which people can construct their life plans. Kafka, in his own life, suffered under the absurdity of insurance law, but he made bold proposals as to how this absurd law could bring about more justice.[11] Because the Law is only able to generate legal fictions, it is permanently producing lies, but it is precisely legal lies that can be really helpful, as the well known Islamic legal parable of the twelfth camel shows. Kafka's Law causes the torments of the permanent awareness of guilt, and it arouses the hope of redeeming acquittal. In the success of modern Law lies its failure, and in its failure lies its success.

It is this simultaneity that makes the torment truly unbearable. For in the purely negative context that Agamben presents to us, the escape to freedom is open: (self) destruction of the Law. The man in the country would not remain sitting in front of the doorkeeper, not knowing what to do. He would – indeed he would have to – protest against the evident wrong, either by fighting it or by simply going away. Voice or Exit. In protest or in flight, "right" would finally free itself from the law. That was the message of the Free Law Movement (*Freirechtsbewegung*): disregard the law when you give a judgment.[12] Kafka's legal world has nothing to do with any such legal pietism. "Before the law", in response to the threatening question of whether it is doing right or wrong when it applies the law, the legal process gets the paradoxical answer: with the application of the law, you are always simultaneously doing right and wrong.

[11] *Reza Banakar,* In Search of Heimat: A Note on Franz Kafka's Concept of Law, 22 LAW & LITERATURE 463, 467 (2010); *Stanley Corngold* ed., Franz Kafka: The Office Writings IX (2009).

[12] The German Free Law Movement was a school of thought at the beginning of the 20th century which had also considerable influence on the American legal realism. It stressed the role of intuitive judgment in court decisions, see FRANZ WIEACKER, A HISTORY OF PRIVATE LAW IN EUROPE (1996), § 29, III 3 c.

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The self-evident certainty of Agamben's pre-judgment in regard to the Law – *Kalumnia* – is transformed by Kafka into an existential uncertainty: *Kalumnia* – or perhaps truth? If one observes the observer "Up in the gallery", the excessive ambivalence of Kafka's universe is made even more clear. "If some frail, consumptive equestrienne *were* to be urged around and around" helplessly by the cruel rituals of the circus operation, "then, *perhaps*, a young visitor to the gallery *might* race down … and yell: Stop!" "But since that *is* not so", he "*weeps* without knowing it".[13] The horror is not simply the reality behind the beautiful appearance, neither do horror and appearance have the same "reality status". The appearance is expressed in the indicative mood for what is really happening, and the horror is expressed in the subjunctive mood for what is merely possible. This remarkably asymmetric ambivalence gives the lie to the negativism of Agamben, who can only see the horror in the law of the modern age. It is infinitely more difficult to deal with excessive ambivalence than with absolute horror.

The paradox makes it inevitable that even the self-accusation of the Law can never stop oscillating between the values of right and wrong. The accusation is never followed by a judgment, neither is it even followed by the judgment of the law by Agamben's higher Law. The judgment over the Law is always deferred. And it is always impossible to decide whether it is in the pure existence of the Law itself that its guilt lies – or, indeed, its merit. And this is what makes for the "Kafkaesque situation par excellence" – not the certainty that the self-accusation is a deliberate slander, as Agamben would have it, so that the intrinsic guilt of the Law is established a priori, but instead the tormenting uncertainty as to whether the self-accusation is the slander of an innocent party or a self-reflection promising truth and justice.

And it is this paradox that first explains the remarkable activism/passivism of the man towards the doorkeeper. The paradox cripples legal practice, and robs it of the courage to decide in favor of resistance to the law, either to flee or stand, voice or exit. But that is only one side. The other side is that the paradox encourages the Law to try the de-paradoxification by means of more and more subsidiary distinctions, such as the legal "man from the country" almost submissively offers to the doorkeeper of the law. While Agamben's negativity calls for the abolition of law, Kafka's paradox is a provocation to "insatiably", in ever renewed attempts, propagate distinctions which are intended to get closer to the law "in thoughtful obedience". But what is the quality of these distinctions?

[13] FRANZ KAFKA, THE SHORTER STORIES 401 (1971). (emphasis by me).

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D. The Judgment

The sheer bafflement of the man from the country in the face of the inaccessibility of the law[14] is not the end of the story. Like flashes of lightning, three sudden and devastating events happen to the man at the moment of his death. Firstly, an inextinguishable shining light breaks forth. Then, the entrance was intended only for him. Then, the entrance is closed. After such a Damascus-like experience, no one can hold out any longer in the suspension that has been triggered by the paradoxes.

"…this entrance was meant solely for you." With these words, a hard judgment is pronounced: he who stands before the law is condemned to decision-making freedom. This judgment sheds a new light on the earlier ambiguous answers given by the doorkeeper – that entrance is forbidden, but may be deferred until later; that the entrance is left open, but with a warning concerning the more powerful doorkeepers. Only the man can – and must – decide. Neither the universality of the law, from which he could get help in his decision-making, nor the support provided by others who are seeking access to the law, will give him any indications as to how he is to decide. This absolute decision-making compulsion means, as far as the individual perspective is concerned, that a radical switch is necessary from the objective law of an external legislator, whose commands have to be obeyed by the subject, to the subjective right of the individual. In terms of the institutional perspective, this "only for you" means that the singular legal trial has no other recourse than itself in its decision-making. Only the singular legal trial itself which is actually proceeding, and no outside authority, not even the general law that is held in such great esteem by all, can be responsible for establishing the norm on which the decision will be based. The law has form only as empty validity without any meaning.

The law as a concrete structure, as a behavioral standard which is defined as binding, has absolutely no existence of its own in relation to the legal event. It exists only insofar as it is invoked by a legal event, and continues to exist only insofar as this legal event invokes the expectation of future legal events. The law has to be continually re-invoked by legal events. If the Law as a chain of events dies, then the door to the law will also be "closed". Law books themselves are not the law, they are at best doorkeepers, or in another form of words, they are only sediments of meaning that are only reawakened to new meaning by invoking the legal event which has to be continually renewed.

But this norm-setting autonomy is "before" the law, i.e. it remains bound by the law. For without the law and its infinite "worlds behind worlds", which provide the space for "normativity", there is no possibility of freedom to set norms, no possibility of continuing to build the Law, no possibility of justice. The freedom to which the law condemns the Law

[14] i.e., from the perspective we have adopted, the paralysis of the self-reflection of the Law that is triggered by the foundational paradox and by the decision-making paradox of the law

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is not simply unstructured chaos, but freedom to set norms, a freedom which already has the structures of the law stamped upon it. As Derrida rightly says: It is only the conditions that make legal cognition possible, which are inherent in the law:

> These possibilities give the text the power to *make the law,* beginning with its own. However, this is on condition that the text itself can appear *before the law* of another, more powerful text protected by more powerful guardians.[15]

The fact that this is circular or tautological does not have to be understood as a criticism. On the contrary. In Kafka's novel "The Trial", the tautology becomes autological, because the text in the "Cathedral" chapter applies the circularity of the normative to itself: The parable "Before the law" stands before the law of the entire "Trial" novel, just as the novel also stands before the law of the parable. Not only do the two works constitute a reciprocal interpretation of each other, but each is a precondition for the other. The specific "guilt normativity" of the two texts does not arise from any outside norm-setting authority which is independent of them, but from the self-referential, indeterminate, self-supporting interrelation between the two texts.

Yet there is a particular contradiction in this duty to establish norms. For the powerful doorkeepers forbid the man any entrance to the law. And at the same time the entrance is intended only for him. In this, he is exposed to the confusions of a "double bind": he is obliged to obey the law, and at the same time he is obliged to break it. Act in such a way that the maxim of your will is to obey the law at all times and simultaneously to break the law at all times. This "double bind" provides him with absolute freedom and at the same time entangles him in permanent guilt: decision-making compulsion and decision-making guilt.

Whichever alternative he chooses, he becomes ensnared in guilt. The individual either becomes guilty of having broken the law or becomes guilty of not rebelling against the law. Was it right to bribe the first doorkeeper, or should the man have found the courage to take up the fight for the law?

The currently prevailing legal theory refuses to contemplate such paradoxical and unreasonable demands. The foundational paradox of the law, the decision-making paradox of the application of the law, the "double bind" of subjective right are banned from legal theory. Some simply deny their existence, others forbid any paradoxical figures of thought on logical grounds, others again pour scorn on them and dismiss them as mere philosophical fancies. Against the background of the nightmarish suggestivity of Kafka's texts, however, all three responses are revealed to be mere helpless gestures. Only a few

[15] DERRIDA, *supra* note 2 at 214.

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present-day legal theoreticians take these paradoxes seriously: Niklas Luhmann, Giorgio Agamben and Jacques Derrida.

E. Context of Delusion

Luhmann builds his legal theory upon the bold thesis that the place of the transcendental subject is now occupied by the paradox.[16] In exactly the same way as Kafka, Luhmann sees the Law, insofar as it has called forth an extreme autonomy in the process of modernization, as being from the outset entangled in the paradoxes of self-reference, so that its self-observations are threatened with paralysis. For Luhmann also, the way out of this paralysis is: *"… this entrance was meant solely for you".* The doorkeeper's astonishing revelation leads us out of the paralysis, the suspension, the twilight. "Draw a distinction" – this is what Luhmann requires of legal practice, so that it can get around the paradoxes. That legal discourse itself, and only legal discourse, must draw a new distinction – that is the strategy by which the paradoxes will be removed, so that we will be saved from falling into their dark depths. Even if the new distinction is in turn necessarily founded on a paradox, nevertheless it has a self-supporting power which is based – if only for a limited time – on its plausibility and its capacity to solve problems.

This is certainly an elegant solution, but it cannot do justice to what happens in the death scene. It does not react to the two other sudden events, indeed it has to disregard them. Luhmann's paradox-resolving solution cannot close the door to the paralyzing law, it must constantly expect the return of law's paradox. And Luhmann's "praise of routine" certainly does not cause any inextinguishable shining light to break forth from the door of the law. It only continues the previous routine of pedantic legalistic distinctions, the permanent recursiveness of legal operations. The new distinction only conceals the paradox in a not very secure place, from which it will soon re-emerge.

Agamben, on the other hand, does actually read two of the events together: *"…this entrance was meant solely for you. I´m going to go and shut it now."* The closing of the door – this, for Agamben, is the key message. He gives us a surprising interpretation. The fact that the door to the law is closed is not a defeat, not a failure for the man, but on the contrary is the result of his patient strategy of waiting, and the intensive, indeed intimate continuing encounter solely with the keeper of the law, rather than the impossible penetration to the law itself. The strategy was aimed at compelling the doorkeeper to lock the entrance to the law. It is precisely then that the man finds his freedom, when the

[16] "Paradoxes are (it can also be formulated thus) the only form in which knowledge is *unconditionally* available. They take the place of the transcendental subject to which Kant and his successors had attributed a direct access to knowledge which is unconditional, a priori valid, and intrinsically self-evident." (translation by Alison Lewis) NIKLAS LUHMANN, DIE RELIGION DER GESELLSCHAFT (The religion of the society) 132 (2000).

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entrance to the law is locked, when the law is cancelled, its empty validity interrupted, the law itself abolished.[17]

However, Agamben cannot come to terms with the shining light. In Agamben's reading, the shining light which the man recognizes in the darkness plays almost no part at all. But this "*radiance that streams forth inextinguishably from the door of the Law*" is the moment of the greatest intensity in the parable, "outshining" the two other events in the death scene. In this light, everything is different. Derrida even speaks of the "most religious moment".[18] And what does the parable say about the origin and intensity of the light? The light comes "from the door of the law", i.e. its origin lies nowhere else than in the law itself, and it "streams forth inextinguishably", i.e. its intensity is linked to the permanent existence of the law. That is the exact opposite of the abolition of the law, as argued by Agamben. It is impossible to have the experience of the light without the law, without its empty claim to validity, without its lying, without its paradoxes, without its obscenity. No law – no light. The absence of law which Agamben hopes for will never be able to generate the light. For the desperation which Kafka evokes does not relate to the grand delusion of the law, which Agamben would like to destroy, because it hinders justice. That is too simple. The law can indeed be set aside, switched off, abolished. This possibility always remains open. On the contrary, the man makes the astonishing discovery that it is precisely the grand delusion of the law that is necessary in order to render the prospect of justice at least momentarily possible. Or to put it another way: justice is dependent upon the obscenities of the law. Justice cannot be had without the law.

It is only on the basis of the *inseparable connection between all three events* that the death scene can be interpreted – inextinguishable light, singular intention, closing of the door. In the shining light that appears, the closing of the door does not signify the abolition of the law, or its cancellation in any future community. Neither can the fact that the light appears simultaneously with the closing of the door be reduced to the opposition between a doom-laden present and the promise of a distant good future, as Agamben would suggest. That would be a spurious hope for the future community which is supposed to emerge from the deepest humiliation.[19] And which makes the salvation of the "coming community" dependent upon the abolition of the law. But in the present event the light and the darkness coincide. In the darkness shortly before the closing of the door, the light appears as *the momentary spark of a chance that in the failure of Law before the law, justice is possible.*

[17] GIORGIO AGAMBEN, HOMO SACER: SOVEREIGN POWER AND BARE LIFE 55 (1998).

[18] DERRIDA, *supra* note 2 at 208.

[19] AGAMBEN, *supra* note 17 at 185.

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In an individual perspective, this would mean that the man, at the end of his torments, experiences the subjective recognition of individual justice. An institutional perspective would go one step further, and could relate (and restrict) this possibility to the single legal procedure. It is only for this singular conflict, and not for other conflicts, that this entrance to the law is determined, and it is only in respect of this singular conflict that a perspective of the justice which is intended solely for it is possible. A justice which is strictly limited to the individual case is possible, but there is no possibility whatsoever of any generalization to other cases. The justice associated with the individual trial has no continuing effect; on the contrary the door of *res judicata* is closed, and must be opened anew in each trial, after which it is always closed.

These are two possible interpretations. We may ask, however, whether the text does not allow of a reading that takes Kafka's critique of modernity's Law to an extreme level. Autonomous legal discourse itself would then be the collective subject before the law, which is able to experience the shining light only in self-transcendence in the face of the law which is intended for it alone. In this self-transcendence there would be neither a future in which the Law is abolished nor any return to the embedded legality of traditional societies. The fact that Kafka is not in any way nostalgic about the Law of the pre-modern age is demonstrated by the experiences of the land surveyor in "The Castle", with the repressive structures of the village community, against which he is constantly rebelling. "Meant solely for you" would then mean the exclusively *juridical justice of modern autonomous Law*, a justice which can only develop such Law itself, from the overcoming of the law, and without having any recourse to any other institutions – not politics, not science, not morality, not religion. In the modern age, a justice that might apply to the whole of society is impossible, there is only a particular justice intended for the Law, a justice which is clearly distinct from other particular justices (those of politics, morality or economics). Self-transcendence of modern Law would then mean that for the Law as a singular institution there is a separate path to justice which only the Law itself and no other institution can follow. It is only in the blindness in which modern decontextualized Law is caught up that it is able to see the shining light of its self-transcendence. It is not the entrance of an individual conscience to transcendence that is intended, but a collective entrance to transcendence, although this entrance does not affect society as a whole, but the self-transcendence of legal discourse itself.[20]

[20] For more detail on this subject *see* Gunther Teubner*, Self-Subversive Justice: Contingency or Transcendence Formula of Law?,* 72 MODERN LAW REVIEW1 (2009).

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F. Bifurcation

If we think of the three events together in this way, then two mutually contradictory interpretations are revealed, by which the behavior of the man is judged.

In one interpretation, it is precisely the mere fact of sitting there, this not particularly laudable "activism/passivism" of the man, that allows him to perceive justice. The man's patient waiting, and also his insatiable questions, have not been in vain. He obtains power of judgment in the final moment of his endeavors. And he does so because he has decided not to penetrate into the infinite emptiness of the law and instead has tried, in one continuing endeavor, to establish a bridge between different worlds. He is not "in" the law, but remains outside, "before" the law, on the threshold, in the permanent confrontation with the doorkeeper, in order – from that position – to mediate between life and the law. Power of judgment is proved not simply in the subsumption of the particular within the general, but in the bridging of two irreconcilable worlds.[21] Kafka radicalizes the opposition that has to be bridged: not merely in the direction of reason versus emotion, but as legal argument versus irrational decision, the order of the law versus the chaos of life, and indeed ultimately immanence versus transcendence.

This interpretation approaches the sophisticated sleight-of-hand by which Jacques Derrida brings his impressive deconstruction of the Law to its conclusion.[22] After an excessive transcendence of the positive law, after the passage through the wilderness, after the delirium of infinite justice, there must come about (as Derrida surprisingly demands) a "compromise", a compromise of infinite justice with the most trivial calculation of legal consequences, with the banal subsumption under a rule of law. According to Derrida, the shattering experience of justice ought not to serve as an alibi for the composure with which a possible future is expected.

> Left to itself, the incalculable and giving *(donatrice)* idea of justice is always very close to the bad, even to the worst for it can always be reappropriated by the most perverse calculation. … And so incalculable justice *requires* us to calculate.[23]

[21] As is well known, Kant located the power of judgment not in the sphere of pure reason, nor in the sphere of practical reason, but defined it as a means of combining the two parts of philosophy to a single whole, IMMANUEL KANT , KRITIK DER URTEILSKRAFT (Critique of Judgment) 84 (1992).

[22] *Jacques Derrida supra note* 3 at. 969m 1044. This triggered great irritation in the deconstructivist camp, *Cornelia Vismann,* Das Gesetz 'DER Dekonstruktion' (The law of 'THE deconstruction'), 11 Rechtshistorisches J. 250-264 (1992).

[23] DERRIDA AGAMBEN*, supra* note 2 at 971.

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To penetrate ever deeper into the paradoxes of the law, and to wish to remain there in post-structuralist quietism – this would then be the culpable error. Instead, the humiliating continuing compromise with the obscene doorkeeper must be demanded of him. The shining light appears only in the re-closing of the door, in the final refusal of entry. That would not simply be fulfillment in failure, but fulfillment only after the labors of the encounter, the compromise with calculation, the humiliation, the bribery, the Sisyphean work of legal discourse. It is not the praise of the mystic power alone, but the praise of the compromise between the mystic experience of justice and the banal calculation of legal consequences – that would be the only interpretation that would justify the man's waiting.

The other interpretation is revealed if the parable is read alongside another text of Kafka. This interpretation does not accept that the toilsome confrontation with the doorkeeper results in justice. On the contrary, the man is forced to realize in the shining light that he could have obtained justice if he had not allowed himself to become involved in the meaningless questioning of the first doorkeeper, and had instead only found the courage to do battle with the other more powerful doorkeepers and penetrate into the law as far as his strength would take him. This obedience that leads the man to remain sitting in front of the door, his fulfillment of duty, is his violation of duty. Instead of only bribing the first keeper, the man should have found the courage to break the entrance ban and to take up the fight for the law. In this reading also, the shining light is an experience that comes over him here and today. For he now "recognizes" justice – but only as another justice, the opportunity represented by which he has failed to grasp.

But the question of how this other justice might be attained is only expressed negatively "before the law", only as the disappointing experience of having missed the big opportunity. That the positive establishment of justice appears possible in Kafka's work, and the way in which this might come about, is more readily seen in "An Imperial Message". Here also, we have the triangular situation between a distant authority, a subject of that authority, and an intermediary, although in this case the direction of movement is reversed. Here also there is a go-between, not a doorkeeper but an imperial messenger who makes superhuman efforts to ensure that the message from the authority reaches the subject. And here too there is the bitter disappointment of discovering that any real mediation between the two worlds is impossible, and the communication via the messenger is a vain hope. Instead: "Noboby could fight his way through here even with a message from the dead man." Then, however, comes the all-deciding sentence: "*But you sit at your window when evening falls and dream it to yourself*."[24]

[24] FRANZ KAFKA, THE COMPLETE STORIES 8 (1972).

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The question of which of the two readings is appropriate – whether justice is to be found in the patient, self-tormenting, humiliating confrontation with the obscene keeper of the law, or conversely in the collective imagination of the legal discourse that takes place before the law and absolutely wants to penetrate through to the law – must remain open. For both readings, however, the same applies: even when the shining light illuminates everything, there is no triumph of justice. Kafka's excessive ambivalence continues, even before the light that shines inextinguishably out of the law. Kafka refuses to answer the question as to "*whether it is really getting darker or if his eyes are deceiving him*." Is this really the shining light of justice? Of transcendence? And if so, is it then a light that comes from outside – from God, from science, from politics, from morality or from natural law? Or does it come from within, as a self-transcending from the "arcanum" of the law itself? Or is it merely some kind of reflected light? A mere shimmering illusion concealing the dark emptiness? A hypocritical self-deception on the part of modern Law, which has become blind in its formal autonomy? It is impossible to escape from this ambivalence, because there is no criterion available to us by which we can distinguish between a collective imagination of justice and a collective self-deception.

G. Law and Literature

All in all, Kafka appears to be a sensitive observer of modern Law, whose insights provide legal sociology and legal philosophy with much food for thought. The accuracy with which Kafka portrays the excessive ambivalence of the Law seems to be at a higher level than that of many social theoreticians who reveal to us the dilemmas of Law in the modern age. Max Weber defined this dilemma in terms of the internal "formal" rationality of the Law being at risk from "material" irrational outside influences emanating from economic and political interests. Kafka's response is that it is precisely the inmost formal rationality of the Law that is most deeply irrational. Hans Kelsen's attempts to preserve the "purity" of Law's normativity against impure empirical influences fail in light of Kafka's observation that it is precisely from its purity that the obscenity of the Law springs. The conversation in the cathedral between Josef K. and the chaplain gives the lie to all attempts at a rational argumentation theory of the Law such as those of Habermas or Alexy. In terms of scholarliness, interpretative skill, equality of opportunities for articulation, honesty and authenticity of the participants in the discussion, this conversation certainly meets the requirements of rational discourse. And yet it does not end in a liberating consensus, but in uncertainty, paralysis, anxiety and a sense of oppression. And Luhmann has to concede to Kafka that his "de-paradoxification" strategies, which under the threat of the paradox quickly invent a new distinction, will never see the inextinguishable shining light breaking forth from the door of the law, because these strategies do not expose themselves to the paradox, but stop "before the law" and its paradoxes, and commence their withdrawal back into the routine as quickly as possible.

But why, then, the literary form? Why does the experienced insurance law practitioner Dr. jur. Franz Kafka not simply write a work of well-organized legal sociology? Is the whole point of Kafka's parable to provide legal theory or indeed legal practice with suggestions as to how they could deal with the paradoxes of the Law? Or does legal literature have an added value, over and above the benefits it provides for legal theory?

The key may be found in certain peculiarities of legal practice "from the country". In the long conversations between the man and the doorkeeper, and between Josef K. and the chaplain, the communication is at a much more complex level than could ever be post-construed by rational academic disciplines. It is true that legal doctrine, jurisprudence and the sociology of law describe in great detail the rational dimensions of the legal system, the ordering of the proceedings, the logic of argumentation, the construction of legal doctrine and the structure of "stare decisis". But they pay no attention to what they term the "non rational" elements of legal practice, and normally exclude these from analysis, indeed they have to do so. The dark urge for justice, the convoluted pathways of the sense of justice, the arbitrary elements in the judge's professional judgment, the decision-making torments of the jury trial, the obscene elements in legal procedure, the foundational and the decision-making paradoxes of the Law – generally speaking, the particular excesses of legal ambivalence – cannot be post-construed by the academic disciplines, or not in any depth. What can logical or theoretical analyses of the legal paradoxes say about the painful experience of the paralysis, and about its ecstatic resolution in the shining light, that are experienced by the man from the country at the moment of his death? In the intricacies of the court trial, in the *arcana* of administrative bureaucracies, and in the practitioners' complicated contractual constructions, legal practice creates for itself a second version of reality, rather as art or religion create their own worlds, which can only be perceived to a limited extent by the rational approach of the academic disciplines that observe them. And even legal doctrine, which in turn represents a peculiar abstraction of legal practice which cannot be regarded as academically legitimate, is not capable of controlling Law's *arcana* by means of its conceptual tools. Social science and legal doctrine can only qualify the deeply hidden areas of legal practice as irrational, and condemn them as such. The same happens when legal sociology investigates the pre-judgments of the judiciary, and when argumentation theory analyses judgments. This second reality is not just the legal trial with its various roles, its norms, concepts and principles, but also an entire propagation of a legal world, a world which looks completely different from the everyday world or the world of academic disciplines.

Yet literary reconstructions can attain an independent insight into the secret worlds of legal practice. Assuredly, they do not have any direct access to the inmost recesses of the law either, but literature's observation produces an added value that goes beyond the most highly advanced sociology of the legal paradox to date, such as is posited by Luhmann, for example. This added value can be indirectly described as the possibility for the paradoxes of the Law to be experienced, an affective re-enactment of the practice of judgment, the "mood content" of injustice. Art, in dealing with the Law, communicates

messages about legal events that cannot be communicated in words (see Michelangelo's Moses). As far as the literature of the Law is concerned, this seems counter-intuitive, for ultimately of course it does communicate about Law in words; in a way that is comparable to legal doctrine, it conveys a peculiar knowledge about the legal world. But its actual literary message is not made up of the content, but of something that is verbally non-communicable but is nevertheless communicated together with the words (see Kleist's "Michael Kohlhaas", Kafka's "The Trial", Borges' "Deutsches Requiem"). "Art functions as communication although--or precisely because--it cannot be adequately rendered through words (let alone through concepts)."[25] Thus the role of legal literature should by no means be reduced to the psychological sense of justice (*Rechtsgefühl*), to the fact of its merely giving rise to affects in the psychological event. On the contrary, the duplication of meaning production in consciousness and in communication has the effect that in legal literature there is genuine communication about what cannot be communicated in words. The added value of Kafka's parable lies in the non communicable aspects of the Law being made communicable by the literary form, and only by the literary form. It is not in legal doctrine, or in legal theory, that we experience some of the secret depths of the Law, but in the story "before the law".

[25] NIKLAS LUHMANN, ART AS A SOCIAL SYSTEM 19 (2000).

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