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Ethic of contingency beyond the praxis of reflexive law[1]

Zusammenfassung: Mit der Absicht, einige Anweisungen abzuleiten, die die Idee einer Ethik der Kontingenz plausibilisieren können, werden in diesem Text drei Modelle eines reflexiven Rechts (Kontextsteuerung, Optionenpolitik und *ad-hoc*-Schiedsgerichtsbarkeit) analysiert. Das reflexive Recht ist, gerade weil es die systemische Autonomie als unproblematisch anerkennt und dementsprechend dezentrale Koordinationsformen konzipiert, eine privilegierte Strategie im Umgang mit der Ungewissheit, die aus den ungleichartigen Rationalitäten, unterschiedlichen systemischen Interessen und kollidierenden normativen Erwartungen, die die moderne Gesellschaft charakterisieren, entsteht. Bei dieser Ungewissheitsbewältigung aber zeigt das reflexive Recht – jenseits seinen pragmatischen Leistungen – eine Weltvorstellung, die auf der Kontingenzerfahrung basiert. Einerseits bedeutet dies, dass die operative Autonomie differenzierter Einheiten hochgeschätzt ist, und andererseits, dass unter ihnen eine koordinierte Koexistenz in Form eines *modus vivendi* gefördert wird. Ob dies eine Ethik der Kontingenz genannt werden kann, ist die zentrale Frage dieses Aufsatzes.

One of the main critiques confronted by systems theory is what Habermas calls the exclusion of the internal perspective. This refers to a theoretical disposition that eradicates the possibility of constructing a theory of law beginning from the self-comprehension of the actors themselves (Habermas 1998). From the internal perspective of Luhmann at least, this exclusion seems rather to be an advantage. The development of a concept of society as an emerging order requires that the normative and evaluative standards of the actors are seen as events of communication itself instead of as regulative ideals or components of the concept of communication (Luhmann 1997).

In the 1990s, Habermas faced up this problematic combination of the systemic character of law and the discursive-grounded process of legitimation with the distinction between facticity and validity. The former refers to the systemic character of law and the latter indicates the commitment of rational actors to legitimated and enforced law (Habermas 1998). In Luhmann's terms, the equivalent distinction is that of decision / validity, but in this case validity requires no external legitimacy through the actors' conformity. In contrast, validity is the internal symbolic generalized communication media of the legal system which

is actualized in each legal decision (Luhmann 1995). The only internal perspective in this case is the perspective of the system and not that of the actors.

The aim of this article is to examine the possibility of an actor's internal perspective behind a systemic theoretical framework. With the help of the category of *ethic of contingency*, I will try to combine the systemic description of law with a specific interest in the consequences of the operatively-closed functioning of the legal system for the participants. Without referring back to the rational foundation of legitimate law, I will try to find out within the theoretical field of reflexive law the seeds for that concern. This option cannot be understood as *Aufhebung* of the systemic and normative positions, first of all, due to the systemic character of the premises from which it develops. Secondly, it does not intend to find either an archimedical point of view or the equilibrium between universalistic normative orientations and the operative closure of the system. And finally, an ethic of contingency tries to represent an episodical modus of self-understanding of the participants within legal constellations, which rather than seeking universal validity strive for universal applicability through the universality of contingency.

In order to do this, I begin with the relationship between evolution and the internal perspective of the participants, which considered in systemic terms, can be refered to as the experience of contingence (I). This experience of contingence underlies the idea of reflexive law in the works of Helmut Willke and Gunther Teubner (II), which I try to connect with ethical and not only theoretical concerns derived from a non-instructive model of social coordination (III). In this way, I will try to illustrate how reflexive law is builded upon what I would call the *modus vivendi* of the ethic of contingency – a systemic praxis which regulates the consequences of the operative closure by reinforcing the commitment of the participants with that closure (IV), and whose concrete operation can be seen in the arbitral practices of the *lex mercatoria*, the *lex sportiva*, and the *lex digitalis* (V). Finally, I will end up with some closing remarks (VI).

I.   Evolution and the internal perspective

In systemic terms, the internal perspective of actors is tied up to double contingency which means that all the experiences and actions for both alter and ego – they being psychic or social systems – depend not only on one but on both of them. The meaningful construction of the world is based on the temporal resolution of this problem by developing social structures composed by expectations about expectations (Luhmann 1971a). Images of natural norms and values become in this way problematic and the world itself becomes an icon of uncertainty and risk.

The problem of the formation of social structures of expectations about expectations is then resolved by systemic evolution. Meaningful variations are

selected and stabilized as structures of expectations in different social systems that operate on the basis of symbolic generalized communication media (Luhmann 1997). The contingency of the world remains in the foreground because, on the one hand, each system presents itself as opaque and contingent to the others, and on the other hand, the evolutionary stabilization of expectations develops in the temporal dimension, actualizing new structures and deactivating others. Only the present admits no other possibilities, and the future must be seen as risky and contingent.

Structural evolution is not an individually-guided process. Insofar as variations are selected by social structures they separate from individual control. An ongoing system-building process takes place at the emergent level of communication, including individual selections only as alter-ego reference points of double contingency constellations. Individuals can learn from the stabilized expectations and contribute to reproduce them, but they can also refuse to learn, reject some expectations and act normatively in relation to others who describe themselves as sustaining those expectations. In this case we face a conflict of norms. The problem of conflicting norms – after Luhmann (1998a) – is the function of ethics as a reflexive theory of morality. If morality establishes the conditions of attention/defiance of persons, then the ethics accomplishes the function of applying those criteria to specific social situations. In this sense, both morality and ethics are possible forms of communication in society, and not an all-encompassing standard for the guidance of the whole society. As communication, ethics does not solve problems but reflects upon them. The question of how the problems of conflicting norms can be solved is a central issue in moral philosophy. Multiple answers have been developed on this. For instance, Habermas' (1988) answer is that of the actor's consensus on the basis of rationally oriented communicative acts; Rawls (2002) calls for an overlapping consensus grounded in the natural principles of justice; and Rorty (1996) prefers a solidarity based on the *we-intentions* as common experience. In all three cases the resolution of the problem of conflicting norms includes the internal perspective of the participants.

As we know, Luhmann's answer lies beyond moral philosophy and thus beyond the self-comprehension of actors themselves. The sequence can be summarized in this way: the complexity of the world induces selection, and selection implies contingency in the social and temporal dimension of meaning which is reduced through the emergence of stabilized structures of expectations in the evolution process. Is there a possibility to build – upon systemic premises – the internal perspective of the actors in the operation of emergent procedures that deal with the problem of conflicting norms and colliding rationalities? If this is the case, it can only be based on the universalistic experience that systems theory conceptually accepts: the experience of contingency. In dealing with this issue, I believe that reflexive law will provide us with some helpful indicators to construct the idea of what I have previously called an ethic of contingency.

II. Contingency and reflexive law

The experience of contingency lies at the centre of Helmut Willke's theory of contextual guidance. It tries to find a way to guide structural selection without interfering the autopoiesis of the system. With the help of contextual guidance the structural evolution and the contingency of the system can be coupled with the contingency of alter‹s and ego's perspectives. This process can be summarized as follows: »Contextual guidance means a reflexive and decentralized steering of the contextual conditions of all systems and the self-referential self-steering of each system. A decentralized steering of contextual conditions means that a minimal collective orientation of the ›world-view‹ is inevitable, but this collective context is preestablished neither by a central unity nor by the summit of society« (Willke 1993, 58 – translation AM). The contextual conditions are constructed from the discourse of the autonomous units included in a bargaining process – whether they are organizations or persons. The attention is put on the destabilizing effects of the systemic operative closure for another psychic or social system and the question thus becomes: how can these effects be reduced without deactivating the contingency of the involved systems?

In the context of a functionally differentiated society, a privileged way to develop this kind of observation is reflexive law. It aims to find a correspondence between legal norms and the normative expectations of the participants within constellations of conflicting norms. Instead of defining the option followed by a system in an authoritative way, a reflexive law provides procedures and rules to connect the double contingency of alter and ego and, at the same time, to maintain the contingency the implicated systems by reinforcing its self-regulation. There is no possible normative integration in a functionally differentiated society due to the differentiated normative expectations of a contingent world. Rather, it is possible to construct situational and pragmatic agreements in order to preserve the autopoiesis of the involved systems and, by means of self-regulation, to cope with the normative character of alter‹s and ego‹s expectations (Teubner / Willke 1984; Willke 1987; 1992).

Helmut Willke (1996a) has called this strategy the *invitation to self-regulation*. The contingent character of this strategy can be seen from its inception. As in any invitation, it may or may not be accepted by the system, just like any other communication offer. In this sense, it is important to increase the probabilities for accepting the offer. In so doing, reflexive law should widen its knowledge about the dynamic of the confronted problematic constellation. It must take into account the function of the involved systems, its procedural rules and the normative expectations of the participants (Willke 1996b). The probability of success increases also if the affected units (alter and ego) are able to accept an external guidance and are cognitively open to change the setting of goals without abandoning their normative expectations: »With this, the decisive precondition of a successful intervention is also mentioned: the system itself

must – regularly following an experienced *suffering* [*Leidensdruck*] – wish for a change. The intervening actor – the therapeutist, consultant, development expert, teacher – operates as a mediator of a self-changing process, for only the system itself is able to change its own operation in a sustainable manner without loosing its identity and autonomy« (Willke 1996b, 95 – translation AM). However, nothing guarantees the success of contextual guidance. Contingency remains as the background of the coupled, differentiated and contingent expectations of the participants. There is no external criterion for guiding the intervention; each criterion is internal to the situation within which the (self-) regulation is possible. It can work for a specific situation but its success cannot be necessarily extended to another situation where the involved systems, the normative expectations and the participants are different. In this sense, reflexive law can be considered as a non-instructive strategy of social coordination. It is a pragmatic coordination process of situational and episodic applicability whose treatment of conflicting norms is based on the contingency of the participants' expectations, rather than on the instantiation of a universalistic moral proposition. The outcome is a contingent one and corresponds only with the contingency of the participants.

In turn, Gunther Teubner's (1993) proposal is based on the concept of *interference*. It denotes that a real contact is possible between autopoietic systems. Interference presupposes that the systems share a meaningful horizon and for that reason they can mutually interfere with each other. Their partial communication refers to the same distinction made by two or more differentiated autopoietic cycles. While a legal norm appears in the cycle of law, it appears also in the hypercycle of society. But while in the cycle of law the norm is related to the binary code of validity, in society the validity of the norm is a matter of degrees because for other systems validity is only a secondary codification. When it comes to the code of law, Teubner identifies a lack of motivation in the rest of society. Legal communication can only motivate legal communication. Sanction-led strategies, moral pressure and contracts are mechanisms to deal with this lack of motivation in the environment of law. But, following Teubner, none of them is reflexive enough: sanctions are based on a logic of order and control that is holy inappropriate in autopoietic systems; persuasion and moral pressure are too constrained to the acceptance of alter's and ego's expectations; and contracts bind every case in the same way, leaving no room for contingency. With the combination of observation and interference, Teubner aims to increase the coordination competence of law by developing what he calls an *options policy*: »If is extended beyond contracts and rights, then it is possible to expand the concept of reflexive law further by implementing an ›options policy‹. This in effect would mean diminishing the power of the law in certain domains and making it abandon its claims to comprehensive regulation. Instead, it would merely produce optional regulation, which those concerned could use or not, as they saw fit. What are the consequences of this flexible

legal policy that can be adapted to a variety of situations? The law is used only when it meets social needs, otherwise not« (Teubner 1993, 93-94).

In the same way as in Willke's theory, in Teubner's comprehension of reflexive law, the legal framework becomes binding for the participants if the participants decide to bind themselves to law. This decision is a contingent one. It does not depend on a rationalistic legitimacy in the lifeworld, or on sharing some principles of justice; and at the same time it does not deny the problem of the integration of orthogonally extended normative expectations. The double contingency of the normatively oriented expectations of the participants is situationally and episodically reduced by a pragmatic coordination strategy whose rules are created at the same time as its implementation.

III.   The seeds of an ethic of contingency

How can the seeds of an ethic of contingency be identified in the praxis of reflexive law? In its critique to evolution as a guidance strategy for operatively closed systems, Willke offers some indications to come nearer to this question: »Evolution is a suboptimal strategy. It does not allow satisfactory reactions against long-term risks and dangerous situations. It avoids intervening – as the contrast between a laissez-faire regime and an intervening state makes clear. The problem is that under current conditions neither the laissez-faire nor an intervening state represents optimal solutions« (Willke 1993, 58 – translation AM). From the perspective of Luhmann's theory of evolution, the optimality of the solutions is evaluated in relation to their contribution to the stabilization of structures, i.e., solutions are optimal until they become irrelevant to the existing structures. In this context, risks and dangers – viewed from the participants‹ internal perspective – can only be seen as external costs of the mutual adaptation of systems. From the perspective of systemic evolution, these constellations would not require any kind of intervention or contextual guidance because at this elemental level, it simply happens what happens.

There is no reason to suggest a theory of contextual guidance if the adopted point of view is the process of systemic evolution. Evolution resolves problems at an evolutionary scale; it does not need the helping-hand of a guided intervention. Intervention, in the form of contextual guidance, becomes necessary only if the attention is directed to the consequences of the operatively-closed functioning of autopoietic systems for the individuals. Or, in other words, if it can be presumed that the normative expectations of the participants do not match with the systemic structures already stabilized. It is, finally, a contrafactually generated ethical concern introduced into the analysis of the evolution process with a view to coordinate the contingency of systemic expectations with those of the involved participants without unifying them.

With the help of his distinction between ontogenetic learning and filogenetic development in the operation of law, Teubner seems to share this dissatisfaction with pure evolution as the only steering mechanism in society. If a theory of filogenetic development – in which the mechanisms of variation, selection and stabilization are distinguished – underlies the analysis of law, then individual events seem rather to be accidental (Teubner 1993). In contrast, ontogenetic learning refers to the interactive dimension of law. At this level – specifically on the scenario of a trial – the legal system can learn and incorporate new doctrinal knowledge for future operations. Not only legal communications converge on a trial, they also include a multiplicity of conflicting communications and normative expectations. From this convergence of disparate communications, Teubner derives the necessity of a reflexive law: »When these problems threaten the very existence of the system, they can lead to the conscious introduction of regulatory devices which mediate between systems and give fresh impetus to the process of co-evolution. What we are dealing with here, then, are systems of negotiation which operate between the systems and are aimed at reconciling different world-views and expectations. This brings us to the subject of regulated co-evolution […] when we look at social regulation through reflexive law« (Teubner 1993, 63).

Reflexive law as options policy indicates an identical concern as in Willke‹s theory of contextual guidance; namely, to pay attention to the consequences for the individuals of the operatively-closed functioning of autopoietic systems. This seems to be an ethical concern rather than a purely descriptive interest on structural evolution. Surely, neither Willke nor Teubner has intended to promote an emancipatory turn in systems theory (see Luhmann 1992). In order to do this, it should be clearly established that emancipation is what society needs and from this particular moral position to design interventions with ›liberating goals‹. This would mean to indicate one side of the distinction and to treat all what does not support this selection as anomaly, alienation or cultural *malaise* (see Taylor 1994; Giddens et al. 1996). That is exactly not what an ethic of contingency is looking for. Rather, it aims to enhance the autonomy and double contingency of the participants by coordinating pragmatically their normative expectations, as it is apparent in the operation of contextual guidance and options policy. We can see how: (a) they are activated thanks to a demand or request coming from the involved participants and not from a external entity; (b) they advance a communication offer which can be accepted or rejected by the alter-ego-constellation in terms of its own autonomy; (c) the alter-ego-constellation, and no other third part, decides about the rules, timing and success of the intended regulation; and (d) there is no ultimate criterion to enforce the agreement if it fails.

The contingency of the selection process is increased because it offers procedural alternatives rather than a particular solution. The participants themselves are required to construct a possible solution. But there is neither a *telos* nor a specific regulating principle whose instantiation would push the participants

to reach a point in which the unity would be achieved. Only pragmatic advantages can motivate them to get into negotiations with each other. Ideas of the Good, conceptions of justice or utopian thoughts can be in this way considered as optional commitments among others forms of legitimacy, like expertise, knowledge, efficiency, viability – the so-called *derivatives of legitimacy* (Willke 2007). On the other hand, the increasing fragmentation of law in the context of the world society leads to a relativization of the classical nexus between nationally settled democratic politics and law. This means that not only a political democratic doctrine, but also the rationality of multiple functionally differentiated systems and social sectors, is expressed in several legal arrangements. This is what Fischer-Lescano and Teubner have called a social constitutionalization of law or constitutional pluralism (Fischer-Lescano/Teubner 2004; 2007), namely, the reflexive connection between law and the operating principles of other social systems beyond the limits of the national state. In all of these cases, derivatives of legitimacy – related to the logic and rationality of each sector – can arise contingently, without seeking universal applicability and becoming latent once the problem is solved.

Are all these effects of a differentiated society only comprehensible as relativity of values? Can we find on the grounds of decentralization, heterarchy, fragmentation, operational closure and differentiation the seeds for a new form of dealing with contingent and risky social situations? If persons include and exclude themselves constantly from diverse social constellations with different logics and rationalities, if they get regularly involved in institutional conflicts and systemic problems which require multilateral and complex solutions, if along their lives they can play different roles simultaneously, adapt themselves to different social structures and semantics and learn to live with uncertainty and with the usual disappointment of some normative expectations, can we conclude that the contingency of modernity develops an ethic of contingency upon which participants can reflect and evaluate the social world?

IV.   Ethic of contingency as a *modus vivendi*

Contingency is a universalistic experience. If the world is not a necessary world, then it could have been different and can be different. The world is the sum of actuality and possibility; it is what it is and what is not – but it could be. It is the empirical correlate of the contingency of each being. In Luhmann's words: »The concept of the world no longer indicates the foundation of each being; after the nominalistic turn of thinking it no longer refers to the cosmic sphere of the necessary in which the facticity of change, movement, and of the merely possible becomes a problem. In contrast, it means contingency itself within which the justification of necessities, truths, beauties, validities have become a problem« (1971b, 380 – translation AM). But the fact that the world has become

contingent does not mean that it is – in its own nature – a contingent one. If the radicalism of contingency is accepted, then the contingent possibility of its own suppression must also be acknowledged. Therefore, if the contingency of the world is a stabilized selection, then an ethic of contingency becomes a *modus vivendi* which contributes to its protection by providing a way to the coexistence of multiple rationalities.

In John Gray's conception, a *modus vivendi* »expresses the belief that there are many forms of life in which humans can thrive. Among these are some whose worth cannot be compared. Where such ways of life are rivals, there is no one of them that is best. People who belong to different ways of life need have no disagreement. They may simply be different« (Gray 2000, 5). John Horton has summarized Gray‹s conception of *modus vivendi* as follows: »What we have, therefore, is a plurality of sometimes conflicting and incommensurable, objective, experientially determined, values« (Horton 2006, 158). And inspired in Gray's formulation, Hrvoje Cvijanovic advances a political perspective: »*Modus vivendi* is the solution wishing to restrict the realm of political insecurity in plural societies by means of providing the minimal content of coexistence« (Cvjanovic 2006, 35). Gray's conception is certainly centered on a cultural perspective of human values, but there are strong parallels with the systemic understanding of contextual guidance and options policy: all these conceptions recognize the radical incommensurability between differing rationalities and the conflicting character of these rationalities, but they also aspire to the coexistence of the structural and semantic differentiation.

As a *modus vivendi* the ethic of contingency is compatible with the operative fragmentation of modern society in terms of differentiated systemic rationalities and normative expectations, and it also compatible with the colliding expectations that derive from this fragmentation. It aims to reflect upon such conflicting conditions and their decentralized coordination strategies and to react against the attempts to transform the coexistence into a major unity. In this sense, an ethic of contingency is also a counterfactual experience: in confronting the attempts to reduce it, it responds with an ever-increased production of contingency. It does not learn from the fact that in the present only a few selections will be actualized. For that reason it makes new options constantly available for new selections, actualizes new presents and envisions possible futures. As a *modus vivendi* an ethic of contingency proceeds normatively: it does not accept the factuality of the present and always look for other possibilities. It can be said that an ethic of contingency is a normatively guided search for the non-actualized.

The expectation of what is possible is also present in each individual. For everyone the selectivity becomes conscious in the form of experience or action (Luhmann 1998b). Thus, contingency is also a subjective matter. The potential for selection, negation and reconstruction of other possibilities is a part of the meaningful constitution of subjects, and everyone experiences the other

and the world by applying these potentials. This leads to a duplication of the world as double contingency. Any fundamental certainty, any truth, virtue or validity becomes subsequently a matter of observation; they can be no longer considered as the zero-zone from which what is experienced or enacted can be defined it. The future remains always open, but it is uncontrollably open because double contingency makes one‹s own selections selectively available for others. Consequently, the world transforms itself into a scenario for the unpredictable: »The concept of contingency means that the possibilities of further experiences and actions included in the horizon of current experiences are mere possibilities. Therefore, they can turn out different as expected« (Luhmann 1971a, 32 – translation AM).

An ethic of contingency as a *modus vivendi* rests on the absence of a binding connection between alter and ego, but it assumes that in spite of this fundamental absence, the coexistence is possible as pragmatic coordination. An ethic of contingency admits, on the one hand, that things can change if ego accepts alter‹s communication offer but, on the other hand, it understands that there is no foundations upon which that acceptance could be thus granted, that ego‹s acceptance would flow naturally if the procedure is flawlessly followed. Even if ego accepts the communication offer, the pragmatic result is the emergence of communication and the contingency of experiences and actions, as each psychical and social system integrates cognitively in disparate ways the pragmatic advantages of coordination – and employs it differently. For that reason, the ethic of contingency cannot presuppose the unity of a ›better society‹ in terms of modern principles like justice, equity, fairness, reason or humanity. It can only present itself as a *modus vivendi* by recognizing the *unitas multiplex* of that ›better society‹ – a unity that always remains a difference of multiple expectations that are locally and episodically coordinated after the contingent criteria of the involved participants.

Experiencing and acting in a contingent world of functionally differentiated systems requires that individuals internalize the fact that uncertainties and risks are essential features of modernity. This means a major shift from the idea of controlling the world to the question of how to cope with uncertainty, contingence and risk. Normative expectations are required to face up to a new scenario. They can no longer address a central system – as in the past was the case with politics – hoping that via intervention and authoritative control problems would be solved and disappointed expectations reestablished. If an ethic of contingency would have a role to play in this context, this would be to warn individuals about the discriminating, complex and fundamentally unpredictable ways in which a functionally differentiated society operates, and to show them how to deal with these situations. This do not implies that each normative expectation will be forced to adopt a cognitive modus. Normative expectations remain normative and individuals should learn to whom, and how, are these expectations conveyed if something in return is expected.

As we have seen, in the praxis of both contextual guidance and options poli-
tics there are some indications to accomplish that task. There is no search for
unity behind these efforts, but a claim for coexistence; there is no pressure for
integrating the difference under a supra-systemic principle, but the aim to con-
struct a *modus vivendi*. It is rather a question of how to achieve one‹s own goals
and, at the same time, to preserve contingency through pragmatically founded,
episodically restricted and locally situated middle-range coordinations. For
sure, this neither guarantees the solutions to actual problems nor the fulfill-
ment of the normative expectations, but what it certainly can do is to manage
the problem of conflicting norms by giving them the opportunity to interact
with each other and the knowledge to overcome an immobilizing and general-
ized rejection.

The coordination of complex social orders does not take place by means of reg-
ulative ideals instantiated in individual actions. Since these ideals appeal to the
shaping force of practical reason they do not have access to systemic rational-
ity. Despite the fact that individuals may conduct themselves in relation to reg-
ulative ideals like justice or equity, the emergent character of communication
neutralizes their effects. This was the reason why Durkheim tried to reverse
the causality of the Kantian categorical imperative, which derived society from
individual behavior: »Summarizing […] the Kantian categorical imperative of
moral consciousness takes the following form: be able to fulfill a specific func-
tion in a useful manner« (1985, 52 – translation AM). But the facticity of the
requirement leaves no room for ethical reflections. The contingency would be
drastically limited under this adjustment of the individual action to functional
differentiation – without even mentioning that this would transform differen-
tiation into a *law of history* and would produce an optimal fit between system
and environment. In contrast, the ethic of contingency aspires to a mutual sen-
sibility between systemic structures and actors‹ self-descriptions by promot-
ing a *modus vivendi* of situational forms of social coordination. It seeks neither
the anthropologization of the system nor a regressive de-differentiation with
high costs in terms of the defended conditions of justice or equity. The ethic of
contingency does not deny the fact that such principles would motivate some
individuals to act correspondingly, but it tries to warn about the neutralizing
effect of emergence and double contingency upon the expected consequences
of the selected values.

The key of the ethic of contingency seems then to rest on the reflection of the
communication process: how the other understands the communication offer,
how alter's expectations adjust to ego‹s expectations, how ego's and alter's
contingency are coupled to the systemic structures and what can be done to
improve this structural coupling. Thomas Blanke has formulated this prin-
ciple in relation to reflexive law in the following terms: »Find a form of law
which leaves the autonomy of social discourses undisturbed but which simul-
taneously encourages them reciprocally to take heed of the basic assumptions

upon which each is based« (Blanke cited in Teubner 1993, 97). At a higher level of abstraction, this principle meets a fundamental systemic distinction; namely, the distinction between operative closure and cognitive openness. In generalizing what Blanke suggests, we may conclude: operative closure of systemic communication to preserve contingency, and cognitive openness to make coordination possible without disturbing the autonomy of social discourses. The golden rule of the ethic of contingency could then be: find a way of producing contingent coordinations which confirm the contingency of the coordinated constellation.

V.   Arbitral tribunals and contingent validity

The implementation of this rule in contemporary law could be clearly appreciated in the constitution of neospontaneous legal regimes and its arbitral tribunal. Neospontaneous legal regimes – after the definition advanced by Gunther Teubner (2000) – attempt to coordinate operations and arising conflicts between private or non-public agents which do not act in response to political agendas of their own nation-states, but in accordance to the logic of their own operation field. Neospontaneous legal regimes can be found in market transactions, in the digital sphere or, among others, in the sport system. They are known respectively as *lex mercatoria*, *lex digitalis* and *lex sportiva*. The aim of this section is to connect these regimes and their arbitral tribunals to the idea of ethic of contingency (a) by observing their functioning with some examples taken from the arbitration praxis in these three fields (b).
 (a) If functional differentiation implies the existence of international corporate actors and transnational institutions, then a democratically grounded legal system within the limits of the state has a partial capacity to regulate the operation of these actors and institutions (Willke / Willke 2007). A decentralized way of coordination seems to be necessary in order to manage the conflicting rationalities of diverse supranational constellations. The regulations of multinational enterprises, the standardization of professions, the rules of international business, of the digital communication and of the sport field are examples of a supranational law without a democratically grounded legislation (Teubner 1997). In the lasts decades, multiple arbitral institutions have proliferated in all of these supranational systemic fields. They can be considered as a direct product of the self-regulated character and autonomy of diverse social areas. They are concerned with the coexistence of their own internal expectations, and not particularly with developing an idea of a fair public order – for instance, proceedings and arbitral awards are always private and confidential, unless the parties decide to make this information public (Mereminskaya 2007a, 2007b). In this sense, arbitral tribunals are *ad-hoc* procedures. They are interested in providing the contingent expectations with a device for self-coordination, which

do not transform the difference into a major unity or moral consensus. In their own autonomous functioning, they meet, on the one hand, central aspects of both contextual guidance and options policy – like their activation by request of the participants, the autonomy of the alter-ego communicative constellation and the self-binding character of the decisional process. And they show, on the other hand, how an ethic of contingency can reflect on and contribute to maintain the autonomy of differentiated social systems.

In the arbitration process, the parties are entitled to define the seat of the arbitral procedure, the applicable laws, the admissible evidence, the language of the procedure, and to appoint the arbitrators (Uncitral 1985). In this sense, the principle of party autonomy in this private arena seems to be a functional equivalent to the rule of law in the public order. Arbitral awards have a binding character for the participants and have also effects for future decisions in their own autonomous fields. They function as self-binding law for the parties (Mereminskaya 2006). Derivatives of legitimacy like expertise, opportunity and efficiency are in these cases the operating principles. Arbitrators must be experts. Their appointment must consider their professional qualifications, specialization topic and professional reputation. On the other side, the *ad-hoc* character of the arbitration procedure allows us to reach high levels of efficiency in the dispute resolution process: »In comparing the length [and costs] of the arbitral procedure with a judicial one, the arbitral procedure remains the most efficient alternative. Participants in the international trade may resolve their disputes in an expedite way, which allow them to reassume their commercial activities without having to cope with a long period of legal uncertainty.« (Mereminskaya 2007a, 126) These arbitral procedures operate therefore as law – with the symbol of legal validity as core to their operation. There is no democratic legitimacy behind these arbitral awards, but they operate as a part of a supranational legal system (Mereminskaya / Mascareño 2005).

Classical doctrines may discuss if this can be called law. They may possibly question the *potestas* behind such decisions, the lack of a global state to enforce the arbitral awards; they may criticize the non-democratic conditions of this legal framework and conclude that such decisions do not make any legal sense (see Jackson 1999). They can certainly do that while beyond the national frontiers arbitral tribunals are created, binding decisions are made, communicated and implemented by the parties themselves. Their discourses and expectations are referred to the functional networks in which they operate; these are neither determined by cultural knowledge nor by universalistic ideals. They emerge contingently in relation to the involved systemic logic, to normative expectations of the participants and to the pragmatic conditions of the problematic constellation.

In supranational law the production of norms can be seen as a spontaneous process, and in this sense, as a highly contingent one. It is not the result of a deliberative procedure – the only one that, after Habermas, would guaran-

tee a fair contribution of the participants to the generation of norms (Habermas 1998). A neospontaneous regime emerges in peripheral contact zones between law and other social areas. In Teubner's words: »In global contexts, a real self-deconstruction of law takes place. This effectively overrides the basic legal principles of the nation-state – the deduction of legal norms from a hierarchy of legal sources, the legal legitimacy through a politically set constitution, a law-making process through parliamentary entities, the protection through institutions, procedures and principles derived from the rule of law, and the guarantee of individual freedoms through politically hard-earned fundamental rights« (Teubner 2000, 4 – translation AM). The internal perspective of actors in neospontaneous legal regimes is not incorporated in the classical way of the democratic norm production but, on the other hand, they are the source for a supranational production of norms: from the collision of their incommensurable and contingent expectations emerges a neospontaneous legal framework.

This kind of law is highly contingent not only because it regulates multiple conflicts arising from functional differentiation but also because its conditions of production are unique. They seem to be less grounded in a discursive ethic than in an ethic of contingency which, on the one hand, deals with the fragmentation and incommensurability of each discourse in a decentralized way and, on the other hand, derives its validity not from universal principles but from the self-contained character of each discourse. Coordination is for an ethic of contingency an episodically restricted and locally situated possibility: it happens in the very moment and place when and where it happens. Any unity is absorbed by the radical difference of each discourse. Some evidences of this contingent foundation of neospontaneous legal regimes are revised in the following section.

(b) The case of the neosponteneous legal regime in the field of commercial transactions is called *lex mercatoria*. Relevant here are the formal aspects of the arbitration that can be called a *procedural lex mercatoria* (Nottage 2006). This is grounded in a contract whose validity, if disputed by the parties, is reviewed by arbitrators. Such a resolution mechanism is established by the same contract; it is internal to the law itself. This introduces a highly contingent procedure. First there arises the paradox that the decision about the validity of the contract is resolved in the same contract from which the decision arises. In de-paradoxing this situation, a new paradox is introduced: the arbitrator can decide about its competency on the case, that is, he can decide if he decides to decide or not – the so-called principle of *Kompetenz Kompetenz* (Mereminskaya 2006). If he decides not to decide, then such a decision implies that either a national court assumes the case – under these circumstances the problem abandons the sphere of the *lex mercatoria* – or a new arbitral tribunal is appointed – which replicates the problem and all its related contingencies. If the arbitrator decides to decide, then the paradox remains. In solving this situation the *procedural lex mercatoria* appeals to the autonomy of the arbitration clause in relation to the

validity of the contract – that is, the validity of the decision about the validity of the contract is tied up to the same contract. If the arbitrator estimates that the contract has no validity, then the validity of that decision does not derives from an external source but from the decision of the arbitrator whose legitimacy is established in the arbitration clause. If the arbitrator estimates that the contract has no validity, then the validity of his decision has derived from the same contract that he has not considered. In this case legitimacy emerges from illegitimacy.

A rationalist and discursive way of founding legal constellations cannot accept such formulations. A hierarchical modus of legal argumentation *à la* Kelsen or Hart cannot even do it (Fischer-Lescano / Teubner 2007). The discursive ethic and the hierarchical construction of law seem in this case to be replaced by an ethic of contingency, which looks for the coordination of multiple rationalities in a functionally differentiated society. For an ethic of contingency the discursive autonomy of the participants and its multiple practices are the autonomous scenarios from which the conditions of legitimacy and validity of such discourses arise. Commercial practices are derived the applicable principles employed by arbitral tribunals. There is no democratically elected legislator to pass them as applicable law. The discourse validates itself through a self-contained decision of its own validity.

The case of the *lex sportiva* is similar. The Court for Arbitration of Sports develops its principles from multiple practices of sport federations and their autonomous codes: »It has a formal contractual basis and its legitimacy comes from voluntary agreement or submission to the jurisdiction of sporting federations by athletes and others who come under its jurisdiction« (Foster 2006, 2). The voluntary agreement does not consider a deliberative process. Once in the game, participants have, strictly speaking, pre-accepted the norm. No player takes part on democratic discussions about the production of sport rules; they only follow and reproduce them consequently by playing. And precisely from this fact derives the validity of the norms. To state it clearly: if in the case of the *lex mercatoria* legitimacy may derive from illegitimacy, in the case of the *lex sportiva* validity derives directly from facticity. In this way, each federation gains in autonomy in dealing with national courts, and the Court for Arbitration of Sports becomes an increasingly recurred entity in case of dispute resolutions.

In any case, the Court for Arbitration of Sports cannot be seen as a legislative institution of the sport system – as if from its operation would derive the applicable norms for each federation. Decisional formulas of the Court are constructed from both the sport practices and the norms of participating federations, and they are generally returned to the federations either as a decision of no-innovation in sport matters or as a decision of innovation if there is a conflict between norms. In the first case, it prevails the decentralized principle of non-interference with the decisions of the game referees, even though mistakes can be made (McLaren 2001). In the second case, a principle of norm-

harmonization rules that, for instance, a player cannot be suspended by its own national federation for a longer period than it is stipulated in the international federation of the specific sport (Foster 2006).

Something similar happens, in terms of ruling norms and production of norms, in the field of the *lex digitalis* – the regulating standards of the cyberspace. Michael Hutter (2001) identifies six dimensions where these norms appear: (a) international treaties, (b) national public law, (c) national private law, (d) mutual agreements, (e) informal rules of conduct, and (f) technical standards. One of the first systematic efforts to standardize these norms was Netiquett – a code from the 1980s that involved from courtesy rules in electronic messages until sanctions and quasi-legal norms (Hoffman / Kuhlman 1995). The growth of Internet in the 1990s made not only necessary a new systematization, but also the institutionalization of governing rules to confront the lack of regulatory competence of the nation-state on this matter (Mefford 1997). The institutionalization could only be virtual. In the late 1990s the Cyberspace Law Institute created a procedure based on arbitral law. Virtual courts meet the disputes and establish their decisions according to the *lex digitalis*: »Sanctions could be fairly easily enforced as long as the ›net-courts‹ control the access points to the Net and thus are able to banish violators from the domain« (Hutter 2001, 87). In sustaining and accepting these decisions three forms of derivatives of legitimacy seem to operate: efficiency, viability and expertise (Hutter 2001). Participants produce norms by following their cost evaluations (efficiency), they evolve in a self-regulating fashion (viability) while disputes about conflicting norms are resolved by a panel of experts (expertise).

Derivatives of legitimacy operate also in the case of ICANN, the Internet Corporation for Assigned Names and Numbers. The regulation of the *cybersquatting* (the appropriation of website names for selling them at higher costs than the registration costs) is extremely complex and highly time consuming for national courts. Following a WIPO-Report (the World Intellectual Property Organization) in response to an inquiry formulated by USA about the website registration, ICANN developed in 1999 the so-called Uniform Dispute Resolution (UDRP).

The ICANN procedure is decidedly more efficient than a national lawsuit. ICANN demands to the firms with websites to inscribe the selected names and to adopt the UDRP as a general condition of their commercial administration (Calliess 2004). If a collision of domain names takes place, then the UDRP prescribes the following procedure: an administrative panel of experts in national institutions accredited by ICANN decides to erase or to reassign the domain name to the plaintive firm. If within ten days once received the decision of the panel the name-holder does not take any legal action in a national court, then the name is reassigned to the plaintiff if it is able to demonstrate that: »1) The disputed domain-name is identical to or comes ever nearer to the point of confusion with a trademark owned by the plaintiff, and 2) the defendant has no

legal right or genuine interest in the domain-name; and 3) the domain-name was registered and used in bad faith« (Calliess 2004, 19 – translation AM).

Several elements of the *lex digitalis* are relevant for the present analysis: a) neospontaneous courts with its own regulation procedures emerge autonomously with the aim to coordinate this field; b) they are, on the one hand, losely coupled with the national level but, on the other hand, tightly coupled to the logic of the digital framework; c) derivatives of legitimacy like viability, expertise and efficiency ground the decisional process of the expert panels; and d) participants bind themselves to the ICANN decisions; the tribunal operates as a jurisdictional court. The ICANN's UDRP has been strongly criticized due to the short running procedure applied to the cases, which would make impossible to harmonize the fairness of the democratically grounded procedure and the efficiency-led method established by the UDRP (Donahey 2000). But that is indeed the whole point of neospontaneous legal regimes, and that is also the whole point of the ethic of contingency. ICANN aims to regulate the uniform functioning of the cyberspace and not the democratic conditions of this area. The internal conditions of the problematic field prevail over transdiscursive principles. Needless to say that such principles may also be considered in arbitration, but only if they make sense to the contingency of the self-regulating constellation. It can be paradoxically said that a contingency of ultimate principles prevails – or in other words, a contingency of *inviolate levels*. Only an ethic grounded in the universality of contingency can handle this paradoxical formulation.

VI. Conclusion

The internal perspective of the participants in differentiated social relations can be better recognized and grasped if the concept of contingency underlies the analysis. Contingency is a subjective matter and, at the same time, a universal fact. It cannot be harmonized at a higher level of abstraction by transdiscursive principles, for they are also involved in contingent social constellations. Contingency accepts the radical autonomy of both individuals and systems; it is the milestone of meaning and thus the origins of selectivity and risk in modern society (Luhmann 1984). In this sense, efforts to deal with it in a centralized way – state control, national public policy, or moral pressures – are increasingly ineffective. Disparate rationalities, different systemic interests, multiple and colliding normative expectations produce a centrifugal and unpredictable dynamic which only can be steered via decentralized coordination strategies. This means to accept the fact that contingency cannot be controlled, but only partially, locally and episodically managed. But this is a rather counterintuitive idea if we consider the deep-seated expectations deriving from the history of an all-encompassing control and authoritative regulation of the welfare state and its all pervasive law regimes.

In contrast, an ethic of contingency is based on the uncertainty of the differentiated world and does not try to absorb difference into unity, rather it reflects upon such differentiated conditions and promotes new forms of coordination. It does not try to remove or unify the contingency of the participants. In contrast, as a *modus vivendi*, it fosters the coexistence of multiple rationalities and decentralized mechanisms to cope with uncertainty. The self-binding character of regulation in contextual-guided processes, the contingent acceptance of legal regulation in the options policy, the principle of party autonomy and the ad-hoc arbitration in the neospontaneous legal regimes are practical echoes of this ethical reflection. In other words, the ethic of contingency promotes the reflection on the distinction between the inner and outer sides of a discourse. In this way, self-reference and hetero-reference are activated: the discourse recognizes itself as a discourse in an inaccessible and irreducible world constituted by multiple discourses. That is the first condition to think about coordination strategies which – due to the incommensurability of the discourses – can only be evaluated by its pragmatic performance; namely, by the fact if they whether contribute to the coordination or not.

The practices of reflexive law – contextual guidance, options policy and arbitration tribunals – assume the inaccessibility, irreducibility and incommensurability of the discourses. But they also assume that derivatives of legitimacy may motivate the participants towards a mutual coordination: the parties accept a self-validated arbitral award and the non-democratically grounded rules of the game; they reconstruct an *ad-hoc* idea of fairness to deal with their own particular problems. Paraphrasing Rawls, the ethic of contingency would promote a *reflexive nonequilibrium*, a reflexive instability, or in other words, a way of producing contingent coordinations that confirm the contingency of the coordinated constellation.

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