

Critical systems theory

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Abstract

Besides their skepticism about universal reason and universal morality, the Frankfurt Schools of Critical Systems Theory and Critical Theory share basic assumptions: (1) the thinking in societal-systemic, institutional concepts, which transcend simple reciprocal relations by dint of their complexity; (2) the assumption that society is based on fundamental paradoxes, antagonisms, antinomies; (3) the strategy to conceptualize justice as a contingent and transcendental formula; (4) the form of immanent (and not morality-based, external) critique as an attitude of transcendence; (5) the aim of societal (and not only political) emancipation in an ‘association of free individuals’ (Marx). The article focuses on those parallels and aims to conceptualize a critical turn-around of autopoietic systems theory.

Keywords

autopoiesis, critical systems, critical systems theory, global law, justice world society

System critique in the sense of Adorno is only possible if you have a concept of social systems. (Brunkhorst, 2003: 17)¹

It is a common assumption that something like a ‘critical systems theory’ does not exist. Systems theory is said to lack a critical-emancipatory impetus; being a merely descriptive form of inquiry, it represented the ‘*Hochform* of technocratic consciousness’, the ‘apology’ of the status quo, meant to preserve the latter. This was at least the view Jürgen Habermas (1974) advanced in his well-known debate with Niklas Luhmann.¹ These characterizations effectively sealed off critical theory from systems theory for a long period of time. However, in the following I will argue that this mutual autopoietic closeness is outdated. Indeed, there exists a ‘critical systems theory’,² which builds on the works of first-generation critical theorists and attempts to reveal the nexus between systemic constraints and subjectivity – described by Theodor Adorno as transsubjective

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reification and, hence, as concomitant disenfranchisement (see the reconstruction in Honneth, 2007b: 44 ff., and Zuidervaart, 2007: 8 ff.).

Fostered especially by Gunther Teubner on the third floor of the Juridicum at Senckenberganlage 31 in close proximity to the Institute of Social Research in Frankfurt am Main, the systems theory of world society is also a critical theory of social systems. It transcends a mere description of structural problems and subjects societal structures to critique, which can productively be taken up by current post-material theories in various ways (see, for instance, Jessop, 2008; Buckel, 2007: 230 ff.; Negri, 2008; Möller, 2008, Brunkhorst, 2007a; see also Blecher, 1991, and Willke, 1975). Critical systems theory focuses on the antinomies of societal structures; it exercises immanent critique with a nonconformist attitude, also encompassing the ‘evil eye’, so characteristic for critical theory.³ With such a stance, the approach attempts to identify and strengthen those social processes that have the potential to overcome reified social orders.

In the following, I would like to outline the links between critical systems theory and critical theory. Besides their skepticism about universal reason and universal morality, both approaches share the following basic assumptions in particular:

1. the thinking in *societal-systemic, institutional concepts*, which transcend simple relations of reciprocity by dint of their complexity;
2. the assumption that society is based on fundamental *paradoxes, antagonisms, antinomies*;
3. the strategy to conceptualize *justice* as a contingent and transcendental formula;
4. the form of immanent (and not morality-based, external) *critique* as an attitude of transcendence;
5. the aim of societal (and not only political) *emancipation* in an ‘association of free individuals’ (Marx).

These similarities, which I will elaborate on in turn, are especially linked to the advancement of systems theory in the *spiritus loci francofurtensis*. While Niklas Luhmann made himself comfortable with a glass of champagne in the air-conditioned VIP lounge of the 27th observation deck at ‘Grand Hotel Abyss’, critical systems theory brings his perspective ‘right-side up’. While Luhmann presumes the nexus of communication with communication, critical systems theory reveals the contingencies and the political controversies about these interconnections, by reading the theory against its grain with deconstructive intent. While Luhmann immunizes systems theory against normative requirements arising from the need for environmental adequacy, critical systems theory is sensitive towards societal controversies about the patterns of just social orders. This allows for a normative turn of systems theory, whose theoretical complexity Luhmann appreciated but whose normative excess found no attention in the cold view of the Bielefeld observer: Luhmann (1985: 2) found the concept of critical systems theory ‘burdened with the intention to create a synthesis of theories of “critical-emancipatory” leaning with notions of “responsive dogmatics” and sociological analyses of the “legal system”’.

Despite this anti-normative claim, critical systems theory leads Niklas Luhmann’s unmanned flying object back to earth after its blind flight above the clouds and the

volcanoes of Marxism.⁴ Like Hegelian dialectics, it takes contradictions as the engine of societal development and draws some analogies from this thought with a left-Hegelian intention

... with real contradictions in the theoretical tradition of Marx. The parallel is the act of putting things right-side up: paradoxes do not exist in the ideal worlds of the spirit, but there exist in a society real paradoxes which further its development. (Teubner, 2005: 210; see also Blecher, 2006)

At this point, the potential of a theory becomes apparent to describe the functional conditions of a differentiated world society, to reveal paradoxes and, hence, to become a vehicle of system-transcending critique. This is why critical systems theory, like Karl Marx,⁵ insists that

... real paradoxes in real society bring the relations into a dance. (Teubner, 2006c: 48; in this context Wiethölter, 1977, is seminal.)

I Transsubjectivity

This highly formal sounding definition predetermined that society is an entity of humans, that it is human, directly in identity with its subjects; as if the specifically social were not the preponderance of relations over individuals, with the latter being the disenfranchised products of the former. (Adorno, 2003a: 9)

The Frankfurt School of critical systems theory shares with the founding generation of critical theory especially the basic assumption about the non-identity of individuals and society. Societal conditions are founded neither monologically *subjective* (as in Kant's Imperative) nor *intersubjective*, but *transsubjective*.

Kant and his followers of the second generation of critical theory tried socially to relink the complex of administrative institutions with democratically legitimized law (cf. Maus, 1990). This position accommodates Adorno's notion of the escape from the 'administrated world', and thereby radical-democratic Kantianism, in the person of Ingeborg Maus, meets societal theory in the tradition of Adorno. From Adorno's perspective, however, such a stance remains reformist, as attempts to humanize institutions that, 'however well meant they were, can cushion and bejewel the current shape of societal antagonisms but not abolish them' (Adorno, 2003b: 453). The focus on a political concept of institutions, that is the accusation, implies that alienation would be a problem of the political system and that it would be feasible to rationalize the irrational. This strategy, however, is precisely a manifestation of the fetishization of collectives and organizations, which has to be overcome (ibid.: 455).

Against this fetishization, critical (systems) theory of the Frankfurt School attempts a detailed analysis of society as a system and looks for strategies of de-reification. Its common starting point is societal differentiation. Here, among the authors of sociological classics, one can think of Emile Durkheim or Talcott Parsons. The former, appreciated by Adorno despite all criticism, was superior to mainstream positivism as he strongly

highlighted phenomena of societal institutionalization and reification (Adorno, 1967: 250). Concerning the latter, Adorno criticizes that Talcott Parsons equated psychology and sociology in his system-theoretical attempt to found a unitary science of human affairs, as such an approach would miss out on the societally set factor of the divergence between individual and society, as well as the two disciplines dedicated to them. In his opinion, Parsons' pedantically organized total schema misjudged that individual and society, although not radically different, have separated historically (Adorno, 1969: 297; for Adorno's criticism of Parsons, see also Adorno, 2003f and 2003i[1968]: 18). This is exactly the point at which modern systems theory, in the sense of Luhmann, differs from Parsons' systems theory, and at which, as Adorno did already, the former introduces a radical difference between the systems of consciousness and autopoietic social systems. Like Adorno, Luhmann describes society as a self-reproducing system, as social reality, which is initially beyond the reach of the practical intentions of its actors. Critical systems theory, which analyses the independent existence of communicative networks as the radical exclusion of individuals from society, refers to this parallel:

Systems theory is here coming close to theorems of social alienation from the traditions of social theory. At this point, there are secret contacts with officially hostile theories: with Foucault's analyses of disciplinary power, Agamben's critique of political exclusion, Lyotard's theory of closed discourses, and Derrida's deconstruction of justice; even if these contacts are officially denied on all sides. (Teubner, 2006a: 333, with reference to Menke, 2004)

Such a theoretical redesign naturally evokes humanist criticism. Anyone who conceptualizes society not as a community of individuals, embarks on thinking the inhumane, acts counter-intuitively, is not interested in human fate. Faced with such criticism, Adorno and Luhmann reacted basically in the same way. While Luhmann (2004: 74, note 47) was irritated that humanists use the word 'human' generally in the singular and, hence, indicate that they take liberties with the individual specimen, Adorno (1997: 504) accounted for non-identity with reference to Marxian materialism, according to which the analysis of 'the' individual is not feasible: 'this would be superficial towards the historical being'.

It is only consistent that Luhmann (2005: 101), in his introduction of the concept of self-reference, avows to preserve the Marxian notion of society as 'self-abstracting, categorizing, thematizing social systems'. Like Marx (1974[1867]: ch. 4), who conceptualized the economic value of capital 'as an independent substance, endowed with a motion of its own, passing through a life-process of its own, in which money and commodities are mere forms', systems theory lends central importance to the concept of self-reference of social systems (Breuer [1987: 103] is instructive). However, in contrast to Marx and critical theory, critical systems theory assumes a multitude of self-referential social processes. Hence, while Adorno follows Marx by taking the concept of system as a monistic one and inquires within a single social system how individuals up to the most intimate regulations are forced to 'subordinate themselves to the societal mechanism . . . and to model themselves accordingly without any reserve' (Adorno, 2003d: 361), system theoretical studies focus on a plurality of internal differentiations within the world

societal system. Not only is the individual the 'ensemble of . . . social relations' (Marx, 1969[1845]: thesis 6), society is also the ensemble of societal subsystems. Ultimately, this makes it impossible to understand society by merely focusing on the individual:

With polycontextuality understood as the emergence of highly fragmented intermediary social structures based on binary distinctions, society can no longer be thought of as directly resulting from individual interactions, and justice can no longer be plausibly based on universalizing the principle of reciprocity between individuals. (Teubner, 2009: 4)

In its observation of world societal differentiation, global functional systems, organizations and regimes, critical systems theory coincides with the neo-institutional theories of 'global culture' articulated by the Stanford School (Meyer *et al.*, 1997), with postmodern concepts of global legal pluralism (Santos, 2002; Hanschmann, 2009), with politico-regulatory assemblages (Sassen, 2006: 224), international political economy (Möller, 2008) and theories of global civil society (Brunkhorst, 2002: 274). Accordingly, the risk for individual and societal spaces of autonomy results from the totalizing drive of world societal organizations and institutions, from 'transnational matrices', from the global economic system, political system, religious system, scientific system, health system, etc. All these societal tin gods do not accept any other gods before them (see Weber's concept of polytheism, 1968: 605, and Teubner's account, 1997); all pursue a relentless program for the maximization of self-rationality. Accordingly, such a polycontextual society does not allow one to identify the individual (in the singular), rather the multitude of *homo* formulas indicates the numerous links between the various systems and the individual: *homo sapiens*, *homo faber*, *homo ecologicus*, *homo militans*, *homo economicus*, *homo politicus*, *homo sociologicus*, *homo religiosus*, *homo psychologicus*, etc. (Fuchs, 2003: 16, 47).

Conditions of exploitation and subalternity in the relations between individuals and society emerge in the context of specific functional systems. Hence, Nancy Fraser (2003: 100) argues that individuals are 'crosscut by multiple intersecting lines of difference and inequality'. In the worst case, this can lead to situations in which not even one's own life is something one could lose (Luhmann, 1995a). It is evident that such precarious situations, as far as they result from the structures of the economic system, can have particularly existential consequences. Inquiries from a Marxist perspective take this fact as their starting point. By stressing the central function of the economic system for the conditions of societal reproduction, 'materialist systems theory' (see for this term Brunkhorst, 2007b: 228) assumes the primacy of the economic system. In such a view, 'capitalism' characterizes not only the functioning of the economic system, but a (historic) system formation, a very distinct situation of interdependence between the systems of politics, economy and law in the world's societal ensemble of institutions. Inherent in the private autonomous (law) system of property ownership (economy), imposed by the state monopoly of force (politics), is the economic system's 'ecologic' primacy over its societal environment (Jessop, 2008; see also Schimank, 2005; for first thoughts in this direction see Luhmann, 1981: 217). 'Capitalism' then does not delineate a scheme of determination in the interplay between base and superstructure, but a specific form of system arrangement in a differentiated world society.

Critical systems theory does not only describe these world societal formations, but by dint of societal maieutics it also stresses the ‘release of societal normative potentials’ (Teubner, 2006c) for the socialization of institutions, and thereby refers to a number of proponents of normative sociology, who have inquired into the conditions for the possibility of social justice of societal organizations, institutions and networks (Fuller, 1969; Selznick, 1969; Ewald, 1986; Friedland and Alford, 1992). Here, the Frankfurt School of critical systems theory is concerned with safeguarding societal spaces of freedom, understood

... as mutual dependence of subautonomies, something that applies not just to the autonomy of social systems but also to that of individuals, collectives, institutions and formal organizations. It is a thoroughly normative conception. (Teubner, 2006c: 62)

2 Dealing with paradoxes

Whoever does not wish to be hoodwinked by the experience of the preponderance of the structure over the matter at hand, will not, unlike most of his opponents, devalue contradictions in advance to methodology, to mere conceptual errors, and attempt to stamp them out through the harmony of scientific systematics. Instead he will trace them back into the structure, which was antagonistic ever since organized society first emerged, and which remains so. ... (Adorno, 2003d: 357)

Like the first generation of critical theory, critical systems theory regards real contradictions as the societal engine. Paradoxes cannot be hoodwinked; they can only be made invisible by hegemonic discourses.⁶ However, this requires

... to keep their latencies latent, repress their inconsistencies, refrain from deconstructing them, set bounds on acuity, waive criticism, set up cover-ups, deceive one’s students. (Teubner, 2006c: 61)

Instead of uncritically reproducing social contradictions by denying them and making them invisible, the revelation of paradoxes aims at demystification and immanent critique. In the Hegelian tradition, dialectics qua method means to think both due to an experienced contradiction in a matter and against it in contradictions. ‘A contradiction in reality’, according to Adorno (1973: 145), ‘is a contradiction against reality.’ It is exactly this contradiction, which also for Adorno cannot be resolved by synthesis (Adorno, 2003e: 16), that critical systems theory refers to when it defines paradoxes in all social systems (and not only those in institutionalized politics) as genuinely ‘political’ (for the combination of deconstruction and systems theory, see Menke’s pointed remarks in 2008: 86):

The ‘political’ thus appears outside the political system, as decision in a context of undecidability; as the resolution of breakdowns of meaning into antagonistic arrangements. (Teubner, 2006c: 53)

This opens especially the view for the fact that

In spite of the state's monopoly, power emerges also outside institutionalized politics. (Teubner, 2009: 18)

The system theoretical insistence on paradox as the big gap in the justification of social institutions, on the mystical foundation, provokes particular criticism (e.g. Günther, 2005; see also Bung, 2008). These attacks are reminiscent of an objection Jürgen Habermas (2005a: 128) expressed earlier: 'Anyone who abides in a paradox on the very spot once occupied by philosophy with its ultimate groundings is not just taking up an uncomfortable position; one can only hold that place if one makes it at least minimally plausible that there is *no way out*.' This phrase, which today is turned in its identical form against systems theory, was originally used against Adorno and Horkheimer in Habermas' *The Philosophical Discourse of Modernity*. In his own argument, Habermas replaces the paradox with the discourse theoretical concept of intersubjectivity, while Horkheimer and Adorno allow themselves no intellectual way out of the uncomfortable position of paradox (Demirović, 1999: 523).

Concerning this focus on paradoxes, critical systems theory returns to the roots of critical theory. Here, there exist points of contact with paradoxological approaches within a reformed critical theory, which once succeeded at the Institute of Social Research (see Honneth, 2002 and Hartmann, 2002) and which focused on inexpiables, paradoxes and social contradictions in the school of Albrecht Wellmer (1993; Seel, 2006; Menke, 2008). Similar to Urs Staehelis' project of 'Updating Luhmann with Foucault', Christoph Menke embarked on a French rereading of systemic relations of self-reproduction. Both have in common that they start with the collapse of meaning and interpret processes of self-reflection in law as political processes, as a struggle about the legal form itself.⁷ Also Antonio Negri (2008: 11) has euphorically welcomed this interest in antagonisms, paradoxes and incommensurabilities in his recent notes on Teubner's legal systems theory: 'It is wonderful that it is lawyers who are seizing the spirit of the new era against cumbersome philosophical traditions.'

The explication of paradoxes remains for law, which is significantly challenged by critical systems theory, not without consequences. While the first generation of critical theorists hardly turned to matters of the judicial discourse, and legal scholars like Kirchheimer, Neumann and Abendroth had hardly any access to the inner circle around Marcuse, Horkheimer and Adorno, current critical theory embraces national and international legal discourse emphatically.⁸ However, in contrast to critical systems theory, which deciphers the political moment of law with reference to its paradox foundations, the second and third generations of critical theory choose a Kantian approach by framing politics as 'applied *Rechtslehre*' [jurisprudence] and by asking how the democratic idea can be updated under the conditions of globalization. In this vein, Jürgen Habermas developed his legal philosophy in *Faktizität und Geltung* (*Between Facts and Norms*, 2001[1992]) and concerned himself intensely with world law in recent studies (Habermas, 2005b; for a valuable application to international politics, see Deitelhoff, 2006). Stressing the Rousseauian heritage, Ingeborg Maus (1992, 2006; also instructive is Eberl, 2008) emphasizes the comprehensive consideration of legal and political processes in a global framework. Also Hauke Brunkhorst (2007a) addresses the interdependent conditions of political and legal processes in world society. Critical theory in law becomes especially

apparent in the works of Klaus Günther (1988; Günther and Randeria, 2001) and Günter Frankenberg (2003a, 2003b); the latter combining the critical legal theory of the Frankfurt School with the studies of critical legal studies (crits) by Duncan Kennedy, David Kennedy, Martti Koskenniemi and Anthony Anghie (for an overview, see Frankenberg, 2009).

All these approaches place law in its societal context and hence transcend a merely dogmatic ‘forgetting’ (Horkheimer and Adorno, 2002: 191). More than the Frankfurt strand of critical legal theory, critics stress the indeterminacy of law by referring to legal realism and by sharpening their critique with reference to Derrida’s scheme of aporias (1992). Despite all differences, these works have in common that they perceive politics and law in close interplay.⁹ Critical legal systems theory is especially concerned with revealing the political in law as the contradictory moment of law. This point was already highlighted by Marx when he wrote: ‘There is here, therefore, an antinomy, right against right, both equally bearing the seal of the law of exchanges’ (Marx, 1974[1867]: ch. 10, sec. 1).

3 Justice as a contingent and transcendent formula

Law is the primal phenomenon of irrational rationality. (Adorno, 1973: 309; Adorno, 2003b: 445)

Adorno has persistently criticized stringency and totality as the bourgeois ideals of necessity and universality (Adorno, 2005: 151). Systemic closeness was attacked by him as rendering matters hermetic by procedure and as systemic self-assertion against the ‘ubiquity of business’. This coincides with the system theoretical description of an order from noise in the co-evolution of system and environment (Luhmann, 1998: 789 ff.). Both Adorno and critical systems theory conceptualize ‘system’ not as a static structural hierarchy. Such a notion, powerfully denounced by Friedrich Nietzsche,¹⁰ is alien to both systemic approaches. Instead, both describe the highly dynamic, evolving, eruptive autonomization of rationalities as the dialectic process of the emergence of self-referring systems. The problematic of autonomization was summed up by Adorno in his philosophy of music; here he accuses solipsist music that its strict texture, which allows it to hold its ground against the ubiquity of operations, has become so hardened that it is unreachable for its transcending, real element, which has once given it the content that makes absolute music truly absolute music (Adorno, 2003h: 27). The crux is, so Adorno argued in his *Aesthetic Theory*, that the societal institution exists only in its relation to what it is not, its other (Adorno, 2003g: 12), but that on the other hand it must be kept open for societal influences: closeness and openness simultaneously. What Adorno highlights in the case of art, systems theory spells out for a number of autopoietic areas of rationality, all of which exist only in their relation to the social environment – drawing distinctions.¹¹ The reified areas of rationality – art, economy, politics, law, etc. – are as social realities no ontological entities but constructs of this very same society; from the perspective of ideological critique: they are fictions, appearances, societal gods. However, Adorno also insisted that fetishized notions are not only appearances: as human beings become really addicted to these opaque objectivities, reifications are not only

false consciousness but at the same time reality. Thus the categories of appearances are also categories of reality, and this is where dialectics becomes manifest (Adorno, 1997: 508).

At this point, the Frankfurt School of critical systems theory strives to integrate into the closed social order a practical obligation for the development of a surplus theory (Teubner, 2001b) with the aim of re-embedding the detached areas of rationality into the real – without which the former could not exist. The test question for further struggles is:

At what loci in society are social utopias designed? (Teubner, 2006c: 54)

This question aims at the thorn of justice. In answering it, critical systems theory demands ‘self-subversive justice as a contingent and transcendent formula’. This leads to a double concept of justice, which first and as an intra-systemic contingent formula has to preserve internal consistency plus responsiveness vis-à-vis the demands of society (Fögen, 2006: 95 ff.). Already the normative implications of this formula, developed from legal self-description, should not be underestimated, as they oblige law as a selection formula to attempt to translate societal structural conflicts into the *quaestio iuris*, to keep spaces of autonomy mutually compatible, to guarantee conditions for the self-constitution of the individual. However, the normative model of justice as a contingent and transcendent formula exceeds this account. A view that confined itself to the contingent formula and tried to universalize it, would only provoke new injustice. This imperialism of legal rationality is exactly what critical systems theory charges universalist theories of justice with, and against which political vigilance is apposite: *summum ius summa iniuria*. This Kohlhaasian consequence of the reified immanence of law is countered with a transcendent moment by critical systems theory. It demands (normatively) the opening-up of a surplus value, the activation of utopian energies under the precondition of truly experienced injustice. This means ‘the demand of transcendence to transform immanence into a meaning alien to it. Justice becomes manifest only by a real passage through injustice’ (Teubner, 2009; see also Teubner, 2001a).

Processes of societal *colère publique* (Fischer-Lescano, 2006) are a form of articulating the experience of injustice, which Adorno has already touched upon by addressing phenomena of societal immediacy and by taking the impulse of solidarity with those, according to Brecht, tormentable bodies as an indication that the undivided exists only in the extreme, in the spontaneous reaction which impatiently cannot tolerate the argument that the horror carries on (Adorno, 1973: 286). Hence, Adorno and critical systems theory are united in their plea against an administrative science of justice. Societal immediacy occurs only in configurations that do not transform justice into justice organizations. At the same time – and this is its dialectical moment – the condition for the possibility of the transcendent formula having an effect is that the established and practised operation of law in an administrated world exists, which evokes the necessity of a ‘quest formula’ in the first place (see also Bonacker, 2000: 273 ff.). It is exactly the mutual interdependence of ‘protection and masquerade’ (Buckel, 2008), of immanence and transcendence,¹² which Adorno spells out in his *Negative Dialectics* with regard to the exchange of goods:¹³

If comparability as a category of measure were simply annulled, the rationality which is inherent in the barter principle – as an ideology of course, but also as a promise – would give way to direct appropriation, to force, and nowadays to the naked privilege of monopolies and cliques. . . . When we criticize the barter principle . . . we want to realize the ideal of free and just barter. To date, this ideal is only pretext. Its realization alone would transcend barter. (Adorno, 1973: 146 f.)

4 Immanent critique as an attitude of transcendence

. . . a certain way of thinking and doing, a certain relation to what exists, to what one knows, to what one does, a relation to society, culture, a relation to the others as well – something one could term the attitude of critique. (Foucault, 1992: 8)

For Horkheimer (1972[1937]) the true social function of philosophy is the critique of the status quo. Taking this stance seriously, critical systems theory is not merely social technology, not sociological extrinsic description, not juridico-theoretical self-description, but the thoroughly philosophical endeavor of societal critique. For such a project of critique, there is no fixed point outside of society, rather critique has to start with the transcendent reference overspill of immanence. Critique arises from the *arcana* of society, critique is attitude, point of view and resistance, which ‘as a faculty to distinguish the recognized and the merely conventional or that which is accepted under the coercion of authority . . . [is] one with critique, which derives from the Greek term *krino*, to decide’ (Adorno, 2003c: 785). As there exists no societal overall subject, there is no position available outside of society from which matters could be clearly described; hence the lever of critique has to be applied to one’s own discrepancies (Adorno, 2003d: 369; for the similarities between Luhmann and Adorno, see Breuer, 1987, 1995: 65 ff.; Brunkhorst, 1988; Wagner, 2005).

The critique of critical systems theory takes especially the law of society as its starting point. In contrast to the hierarchizing totalizing perspective of modern rational law (*Vernunftrecht*, Kant) and also to the immanence critique of the thinking in totalities (Kierkegaard), critical systems theory is not concerned with rethinking ‘law in contrast’ (to reason) or the ‘difference in legal decision-making’, but with the radicalizing intention to decipher the production of form as political and thereby to thematize societal fundamental contradictions. Such an enterprise can prevail – and in this point system theoretical analyses meet with the approach of Christoph Menke – if the struggle about legal forms is observed deconstructively; normativity is not only the backdrop for unfulfilled expectations, but also the justification of law in antagonism itself. The difference between form and the production of form, between form and power, is an aspect of normativity: ‘The power, from whose expansion the form emerges, is at the same time a demand which turns against the emerging form itself. This demand requires that the form corresponds with its other, that it does justice to it’ (Menke, 2008: 105).

The critical legal (systems) theory integrates this normative demand, which in law turns against the law in paradox form and drives it to transcend itself into a permanent becoming of alterity justice. In its quest for justice, it argues with and through law and subjugates itself to systemic constraints of alignment, in order to get rid of them and to

contribute to ‘breaking the spell’. (Adorno, 2003d: 369). In this sense, critical systems theory has explored the chances for a socially adequate and sociologically informed legal science in a number of studies. It has put a legal perspective on networks (Teubner, 2004b; see also Vesting, 2007: 67), regime collisions (Fischer-Lescano and Teubner, 2006), colliding organizational principles of societies (Teubner and Fischer-Lescano, 2008) and transnational matrices (Teubner, 2006a). Two aspects of critique seem to me of significant importance for law: (1) value critique; (2) the critique of statism. (1) Value critique: the legal reformulation of societal conflicts about structure and distribution into sophisticated edifices of values and principles, which can be brought into practical concordance, is the inadequate and judicio-authoritarian attempt to solve the social conflicts of the 21st century by dint of Gracian’s formula of the 12th century. This method renders the societal struggles in law unrecognizable; it has to be replaced, especially by establishing the preconditions for the mutual safeguarding of spaces of autonomy and by way of an experimental ‘conditional freedom’ which enables societal self-regulation (Fischer-Lescano, 2008; see also Ladeur, 2004: 9 ff.). (2) The critique of statism: it is no longer only politics that usurps societal spaces of autonomy. Large social systems – and this is where Habermas’ thesis of the ‘colonization of the lifeworld’ meets critical systems theory – pose specific risks, which have to be counteracted by introducing the obligation to act in a responsive manner with the societal environment (human beings, systems, natural eco-system) (Teubner and Korth, 2009).

The critique of values and statism translates critical systems theory into concrete counter-models with which it intervenes in the struggles about the social adequacy of law. As the whole is the false (Adorno, 2005: 50), anyone who wants to bring ‘chaos into order’ – Teubner¹⁴ with reference to Adorno – has to undermine the system from within – in order to ‘bring a spark to this frowst, which might make it explode’ (Adorno, 1971a: 137).

5 The emancipatory ideal in the ‘association of free individuals’

Let us now picture to ourselves, by way of change, an association of free individuals ...
(Marx, 1974[1867]: ch. 1, sec. 4)

The deconstructive strand of critical systems theory explores the conditions for the possibility of realizing the classical emancipatory ideal¹⁵ and inquires how maturity, as an exit from reified relations – which in Adorno’s view were not natural but the mere remainder of an obsolete historical development (Adorno, 1971b[1962]: 43) – is possible. The starting point for this endeavor is that the social institutions in which we live are still heteronomous, that hence ‘no human being in current society can really exist according to his/her own determination’ (ibid.: 144).

By no means – this is the critical systems theory argument in a nutshell – should one ‘inflate cows in order to get more milk’ (Luhmann, 1999: 215) and surrender world societal questions to the world political system which would then merely have to be ‘world republicanized’. Politics as a system, this fetish of collectivization, is opium for the people, equals the institutionalization of the phantasmagoric and the unfulfilled declaration

of self-responsibility. Instead the utopia is: world civil (law) society without a state: *pax bucovina* instead of *pax americana* (Teubner, 1996); association(s) of free individuals.

This results in a whole number of concrete requirements, the aim of which it is to reveal in a critical-emancipatory perspective the normative kernel of institutions and practices in reality, to intervene in the struggle about the *magnae chartae* vis-à-vis transnational matrices and to develop in each case specific organizational and human rights. In contrast to the model of the co-evolution of human rights and the political rights to participation, critical systems theory is not concerned with a procedural model of justification, which in an abstract manner inquires into the conditions of the universal consentability of norms; it is not interested in the implementation of substantial notions of justice, derived with the help of fictions in an elitist-decisionist fashion (see Maus' criticism of Rawls and Habermas in Maus, 1995), but is concerned with the stabilization of normative resistance *in praxi* (Teubner, 2008: 3). By generalizing and respecifying the function of constitution as an evolutionary achievement, societal processes of constitutionalization are meant to be supported, stabilized and made permanent. Their core concern is to keep societal institutions socially responsive (for the significance of the subjectivation formula of law in this context, see Menke, 2008: 81 ff.), be it through the immediate commitment of private actors to human and fundamental rights (Teubner, 2006a), through the commitment to environmental rights (Teubner and Fischer-Lescano, 2009), to animal rights (Teubner, 2006b) and to institutional rights in the Ridderian sense of the protection of transpersonal spaces of freedom (Fischer-Lescano and Christensen, 2007: 287).

Besides these polydirectional rights to protection, benefits and access, committing public and private authorities to solidarity (for the concept of a solidary economy, see Demirović, 2007: 273), the process of law generation itself has to be socialized; not merely through the paternalist humanization of political institutions which distribute legally non-recoverable acclamation rights to NGOs and reduce their function in call centers and focal points of global governance to resistance reduction via getting around and wearing out, but first of all through the original allocation of legal justifications and rights to action (see Wiethölter, 2005): civil society legislation via scandalization; the structural coupling of discussion and decision in situations of decision-making through the coercive and legally structured establishment of links between the heterarchical and polycentric, the private and public spaces of organizational and spontaneous action; restoring decision-making to processes of societal self-regulation. In short: this is about the opening-up of societal structural decisions about the democratic process through the development of world societal constitutional rights, which set free the potential of global civil society to safeguard autonomy (Teubner, 2004a).

The central concern of critical systems theory is the regeneration of world societal relations of autonomy by breaking open the stratification patterns of societal institutions. The system-theoretical notion of committing social systems to social responsiveness lies parallel to the concept of mimesis in critical theory. However, it becomes radicalized through the demand to establish conditions which ensure that not only the system of art works as a 'body of mimesis' (Adorno 2003h: 169; also Horkheimer and Adorno, 2002: 148 ff.; concerning the latter Gebauer and Wulf, 1992: 389 ff., and Metscher, 2004: 17 ff.). Rather, the world order(s) of social systems have to adopt a mimetic relationship

with system-external reality. 'To let transcendence appear in reality, i.e. the negation of the existing in the mimesis of the existing' (Marcuse, 2000: 138) is then not only the task of art but of all social systems, which have to be oriented in such a way that 'the subject, at different levels of its autonomy, can [position itself] to another, separate but also not separate' (Adorno, 2003h: 86).

The cultivation of the *Aesthetics of Resistance* (Weiss, 1978–81) is thus not a specific characteristic of the art system; rather it concerns safeguarding resistant practices in normations, keeping free spaces of spontaneity and helping notions of democratic organization, societal institutions, organizations and networks to prevail (see already Teubner, 1978). Democratization and the safeguarding of the social responsiveness of societal institutions in economy, law, religion, etc., is the program (Fischer-Lescano and Teubner, 2006: 53) that cannot guarantee a continued existence to any of the established and active institutions. Faced with tendencies of the well-ordered self-continuation of postmodern society, the Frankfurt School of critical systems theory, like the first generation of critical theory, rather makes use of the preference for disorder, revolt, deviation, variation and change. It protests in the name of society, of human beings and of nature – but it does so out of its inner *arcantum*. Subversive justice is the thorn in the flesh. 'Mutiny on the Bounty – this is the message' (Teubner, 2009: 13).

Notes

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1. Hauke Brunkhorst has accurately outlined the parallels between Adorno's and systems theory's conception of society; indeed, Brunkhorst himself represents the possible re-entry of critical systems theory into critical theory.
2. The reason for the meeting was Luhmann's becoming acting professor at Adorno's chair in Frankfurt in 1968/9. For the convergence of both positions and a plea for further integration, see Kjaer (2006).
3. Rudolf Wiethölter created the term 'critical systems theory' and advocates critical theory 'under system conditions'. He introduced the concept in a seminar that he hosted with Gunther Teubner and the author in the summer term of 2007 and that was concerned with 'constitutional pluralism in world society'.
4. For the 'evil eye' and the tradition's concept of critique, see Demirović (1999); also Honneth (2007a: 57 ff.).
5. 'Our flight must take place above the clouds, and we must reckon with a rather thick cloud cover. . . . Occasionally, we may catch glimpses below . . . glimpses of a larger stretch of landscape with the extinct volcanoes of Marxism' (Luhmann, 1995b: 1).
6. ' . . . these petrified relations must be made to dance by singing their own melody to them!' (Marx, 1970[1844]: 134).
7. 'All reification is a forgetting' (Horkheimer and Adorno, 2002: 191); for the process of invisibilization, see Luhmann (2004: 216 ff.).

8. See Menke (2008: 86); the paradox of law becomes apparent, as it both generates and questions the form of 'subjective rights' at the same time, revealing 'the essentially political character of self-reflexive law'. See also Staeheli (2004); Fischer-Lescano and Christensen (2009).
9. For the second generation of critical theory and law, see Niesen and Eberl (2009).
10. For a general survey of the legal thinkers within critical theory see Perels (2001); see also the reconstruction in Buckel (2007: 80 ff.).
11. 'The will to system is a will to lack of integrity' (Nietzsche, 1888: 260, n. 26).
12. 'Draw a distinction: the decisive theoretical resource for a system theoretical inquiry is the distinction between system/environment' (Luhmann, 1998: 60).
13. Based on this difference, Christoph Menke (2008: 107) developed a 'political' concept of subjective rights, which refers to the notion of a right to rights and, hence, to the notion of human rights.
14. For negative dialectics as 'restituting justice', see Honneth (2007a).
15. '*In nuce* – the task of art today is to bring chaos into order.' For this stance, see Teubner (2009) and Wiethölter (1994: 107).
16. 'Nothing seems to me less outdated than the classical emancipatory ideal' (Derrida, 1992: 28).

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