Articles

Rationality Potentials of Law – Allocative, Distributive, and Communicative Rationality

By Ulrich K. Preuss[*]

It is hardly controversial that the modern law is a pivotal element in the process of societal rationalization. But the concept of rationality (or rationalization) is rather vague and ambiguous; even beginning to clarify it requires elements of a social theory. The law is not a quasi-technical, neutral "instrument" which can be applied in any society for any purpose. Rather, as an element of a society's structure it not only codetermines its specific mode of reproduction but informs us about the standard of civilization a society has attained. Throughout this essay I shall take the position that, for reasons of politics, morality, and what I understand to be ongoing requirements of justification in stable societies, we wish to privilege law in some way. This position is closely connected with the quest for legal rationality.

If we identify the law as a distinct institution we imply that physical domination and economic exploitation are not based on mere factual superiority but have been transformed into entitlements, which are derived from rules about production, distribution and the application of coercion. Transforming the immediacy of factual superiority into the self-mediation of a society can be regarded as the "rationale" of the law. But although it is certainly true that the legalization of power – its transformation into authority – and of economic dependency and exploitation – its transformation into property – are processes of societal rationalization, this assertion is unsatisfactory. It does not tell us what specific

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https://doi.org/10.1017/S2071832200016965 Published online by Cambridge University Press

characteristics of law allow this process of rationalization; moreover, historical research about primitive and archaic societies teaches us that the institutionalization of physical force and economic exploitation is not necessarily brought about by a *legal* order in the modern sense of this term.[1]

A. The Evolutionary Character of Modern Law

What is characteristic of the law in the modern sense of this term is its combination of the institutionalization of force and exploitation with its capacity to release social development. In speaking of "the rationality potentials of the law" we are referring to this evolutionary capacity of the law. Hence it is not astonishing that present-day legal theory predominantly has the structure of a developmental model.[2] Thus, analysis of the rationality potential of the law focuses on its potential for the rationalization of social evolution; in its most sophisticated version – the theory of autopoietic law – it is a theory about the structures of societal self-transformation.[3] This is a rather puzzling concept: why should the self-transformation of a society be more "rational" than its steadiness?

But this question misses the point. The frame of reference for assessing the rationality potentials of the modern law is not normatively integrated and rather static archaic societies, but the modern market and statist society which in Europe originates in the 15th and 16th century and whose obstetricians were learned lawyers. They played a pivotal role in the establishment of the new territorial state by developing legal categories that systematized and standardized the actions of economic intercourse in the emerging market society. When Marx wrote that, in the Middle Ages, religion was the predominant element of social integration and that in modern bourgeois market society it has been replaced by law, he was correctly observing that the dissolution of feudal institutions by the emerging structure of the market and statist society released so many possibilities of action that the only societal alternatives are either the unfettered dynamics of competing individuals whose range of actions is only limited by their physical and intellectual

[1] K. POLANYI, C.M. ARENSBERG, H.W. PEARSON, TRADE AND MARKET IN THE EARLY EMPIRES (1971); K. POLANYI, PRIMITIVE, ARCHAIC AND MODERN ECONOMIES. ESSAYS OF KARL POLANYI (G. Dalton ed., 1968); WESEL U., FRÜHFORMEN DES RECHTS IN VORSTAATLICHEN GESELL-SCHAFTEN, 52 (1985)

[2] P. NONET & P. SELZNICK, LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW (1978); J. HABERMAS, THEORIE DES KOMMUNIKATIVEN HANDELNS. ZUR KRITIK DER FUNKTIONALISTISCHEN VERNUNFT, 525 (1981); R. Wiethölter, *Entwicklung des Rechtsbegriffs*, 8 Jahrbuch für Rechtssoziologie und Rechtstheorie 38 (1982); R. Wiethölter, *Materialization and Proceduralization*, *in Modern Law*, *in* DILEMMAS OF LAW IN THE WELFARE STATE, 221 (G. Teubner ed., 1986); G. TEUBNER (ed.), THE DILEMMAS OF LAW IN THE WELFARE STATE, 13 (1986); G. Teubner, *The Transformation of Law in the Welfare State*, *in* THE DILEMMAS OF LAW IN THE WELFARE STATE (G. Teubner ed., 1986); G. Teubner, *After Legal Instrumentalism? Strategic Models of Post-regulatory Law, in* G. TEUBNER (ed.), THE DILEMMAS OF LAW IN THE WELFARE STATE (1986)

[3] TEUBNER, *id*., 1986

https://doi.org/10.1017/S2071832200016965 Published online by Cambridge University Press

limitations, or the development of a structure which stabilizes these dynamics of "possessive individualism", not by prohibiting it but by giving it direction.

At the origins of the modern law we thus find the alternative: chaos or evolution, an alternative to the genesis of which the modern law itself contributed by elaborating categories which abstracted social actions from their embeddings in concrete social communities. It is not accidental that Hobbes defined the state of nature (in which every man has a natural right to everything) as chaos pure and simple, and no less accidental that the hope for salvation did not materialize in a return to the bonds of common values and reciprocal institutions but in the contractual establishment of a sovereign order. The legal institutionalization of a sovereign authority does not overcome this chaos by simply suppressing the dynamics of uncoordinated individual actions or by instituting substantive values in order to restrict the scope of these actions; it is rather the very essence of the sovereign power that it creates the capacity to select among possible actions by allowing some and prohibiting others; it is the capacity to structure the chaos by the creation not of an order, but of an author with the power to "use the strength and means ... as he shall think expedient for their peace and common defense".[4] Creating the creativity of an author *is* the institutionalization of social change and evolution. It is therefore not surprising that modern legal theory is incidentally a theory of social evolution and that the criterion for our judgment about the rational character of a legal order is its capacity to ban the chaos and to canalize the social dynamics in an orderly process of societal evolution.

If it is true that the structures of modern law are so closely connected with the process of social evolution as I have suggested, we have to ask whether this assertion is compatible with the other contention that the legality of a social order – its self-mediation – transforms factual physical domination and economic exploitation into entitlements, and thus contributes to the rationalization of the social order. We are inclined to regard an entitlement as a claim which is normatively justified. According to this assumption, authority is legitimate power that exercises legitimate coercion, and property is the legitimate exclusion of others from the enjoyment of a scarce resource. True, authority *is* legitimate power and property *is* the legitimate exclusion of others from the enjoyment of a scarce good, but the legitimacy of these institutions is not based on substantial values which are commonly shared by all (or at least most) members of the society; certainly, it is the legal character which confers legitimacy upon the factual character of domination and exploitation, but this does not explain *how* the law can do that.

I do not want to treat the old question if the law owes its authority to the will and command of the sovereign or if, conversely, it is the law that confers authority to the sovereign. This alternative obfuscates the fact that a legal rule in the modern sense of this

[4] T. HOBBES, LEVIATHAN, 143 Part II, Ch.17 (1978)

https://doi.org/10.1017/S2071832200016965 Published online by Cambridge University Press

term describes in an abstract manner possible actions and events and thereby very quickly constructs a model of a social universe so that every single action and social relation is but an application of this rule. That even the actions of the sovereign appear as the application of this rule, and that his will is thus transformed into authority, derives neither from the origins of the rule in the will of the sovereign nor from the rule's substantive quality, but from its character *as* an *abstract* rule. Although Hitler and the National Socialists after 1933 contended that they had brought about a national *revolution* – that is, that they had founded their domination on a self-legitimizing act of political will and power – they were at the same time, before and after 1933, anxious to prove that they had come to power *legally*. The legality of a factual situation all by itself confers, if not legitimacy in the strict sense of normative justification, at least authority; it is authority which makes the mere fact of domination an entitlement derived from an abstract rule. It is this abstraction of the concrete social order which itself is already an act of rationalization, because it conceives of social reality as a systematic and uncontradictory context, excluding the enforcement of interests according to mere expediency or factual superiority, viz. excluding societal immediacy. This implies a notion of rationality having little to do with "justice" in the sense of either mutuality or commonly shared substantive values, but very much with fettering and structuring the dynamics of social change. A subjective right, for instance, is a non-reciprocal entitlement insofar as it is neither balanced by a counter-right nor justified according to criteria of substantial justice, it is structurally "unjust"; its "rationality", or, to be more precise: its rationale is its abstract character which allows a high variety of connections and communications with others and thus contributes to the creation of new and unforeseeable patterns of social action.

B. "Allocative Rationality" Through Formality

It is evident that this evolutionary character of modern law implies a rather restricted notion of rationality, a notion elaborated in the sociology of law of Max Weber. For him the rationality of the modern law consisted in its formal character; the law is not a bundle of moral, political, or utilitarian principles guiding individual or collective actions, but rather a consistent system of abstract rules which generate new legal rules by means of logical deductions. The rationality of the modern law consists in its systematic structure, which makes every legal action a logical operation: every legal decision is the application of an abstract legal rule to concrete facts; the law is an unbroken system of legal rules which allows the subsumption of any concrete fact under one of these rules which, even if not manifestly given, are latently concealed in this system and can be "discovered" by logical operations.[5]

[5] M. WEBER, WIRTSCHAFT UND GESELLSCHAFT, 506 (1964)

https://doi.org/10.1017/S2071832200016965 Published online by Cambridge University Press

For Weber this formal character of the modern law and its logical structure is a genuine element in the process of societal rationalization: it allows the institutionalization of roles and expectations which abstract from concrete, more or less reciprocal social relations and from the embeddings of social actions in the traditions, morals and normative patterns of relatively small and isolated social groups; thus it enhances the quantity and the variability of possible social actions, and it allows strangers not just to become brothers, but to engage in social contact and to overcome local, temporal and social distances. The social, economic and cultural security of the individual does not rest in the mutuality of narrow social communities but in the calculability of a large variety of possible actions. Thus the rationality of law fosters the dissolution of the bonds of the traditional social order for the sake of an overall mobilization of the society's resources.

Hence the rationality of the modern law as Max Weber conceived it is starkly biased in favor of the structure of a market society. Its rationality was the rationality of efficient allocation[6], which sets the standard for the legal structure: demands for the legalization of social justice or ethical principles appear as a dilution, if not as a decay of the rational character of the law.[7]

It is trivial to note that this notion of legal rationality no longer adequately reflects the structure of our present legal order; but it helps us to understand why it is so difficult, if not impossible to develop a concept of substantive rationality of the law.

It has been rightly noted that this formal-rational law has two main deficiencies: it lacks sufficient normative justification, and is badly qualified for the attainment of social purposes. If we accept that every social order needs a minimum of legitimation according to criteria of justice, and that among the regulative media of a modern society – power, money, law – only the law is amenable to normative justification, these deficiencies have far-reaching consequences. It would mean that a "just" or "good" order cannot be defined in terms of legality and that the law is an inappropriate instrument to bring about a "just order". On the contrary, it would be the law that defines the scope and quality of possible social change rather than the people, so that we should have to recognize – to paraphrase a line of Freud's about the individual – that the people are not the masters in their own house.

However, things may be less dramatic than they seem. First of all, we cannot assume that the rationality of the modern law rests in its evolutionary capacity and at the same time

[6] M.J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860, 31 (1977); U.K. Preuss, *The Concept of Rights and the Welfare State*, *in* DILEMMAS OF LAW IN THE WELFARE STATE, 157 (G. Teubner ed., 1986)

[7] Weber, *supra*, note 5, 648

https://doi.org/10.1017/S2071832200016965 Published online by Cambridge University Press

suppose that it is itself excepted from change. Second, we can observe that the structure of the modern law has indeed changed, and the above-mentioned developmental models of the law reflect this legal evolution in different ways. Third, it may be that the justification of legality is not necessarily to be based on substantive values, but on its capacity to allow the simultaneous competition and coexistence of different justifications.

C. "Distributive Rationality" Through the Materialization of Law?

Weber himself had already testified to the process of materialization of the law, which he termed "material rationality" or "principled ethical rationalization"; he referred to the infusion of obligations of loyalty and of ethical principles of justice into the law.[8] In particular the modern welfare state has greatly increased the number of legal norms which contain substantive values – the most predominant in the German legal order is the "dignity of man" in Art. 1 of the Fundamental Law – or which formulate "purposive programs" to be realized by legal means. The law has become protective: it protects the poor against the misery of poverty, the employee against unemployment or at least against its most depriving material consequences, the consumer against the economic power of the producers, the ecological environment against physical exploitation; there are even efforts to protect our descendents against the imposition of burdens by the present generation. This implies a distribution of material and immaterial goods according to principles of distributive justice, *viz.* the structuring of society according to normative principles. It aims at a "just" or "good" social order. Does this entail that the "allocative rationality" of the law has been replaced by its "distributive rationality"? What would be the characteristics of this "distributive rationality"?

We would miss the structural problems of the welfare state and of a "distributive law" appropriate to it if we assumed a substitution of distributive principles for allocative imperatives. A social order exclusively based on normative principles, that is, a normatively integrated order would institutionalize the main societal functions – including those in the process of production – in a hierarchical manner by determining needs, assigning roles and ritualizing social intercourse – in other words, it would be a rigid and static, a premodern order. By no means would it be a legal order in the modern sense of the term. The essence of the modern welfare state and its distributive order consists in its infusion of normative principles into the dynamics of allocational imperatives, its attempt to compatibilize and harmonize the exigencies of an ever (and ever more quickly) changing society with the static character of principles of (distributive) justice. Hence the distributive character of the law is structured by this inherent contradiction.

[8] Weber, *supra*, note 5, 647

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The legal form is the mediator of this contradiction. It manifests itself in the transformation of normative principles into media to fetter the dynamics of the allocational process. This has a threefold meaning: first, normative principles of distributive justice are translated into the abstract language of rights and obligations and function according to its grammar; they are converted into the currency to which the allocational process reacts and which is framed by the law: power and money; second, the legalization of principles of justice interferes with the efficiency of the allocation of resources and of the wielding of power, *i.e.* it mainly exercises a negative influence rather than positively molding social relations; third, the law does not institutionalize "distributive justice" and does not create a normatively integrated order, but "corrects" the market allocation of goods; distributive justice is a "parasite" of the market. The distributive law restricts the scope of possible actions and events, intending to achieve, as a result, a just distribution of goods. But as a *legal* pattern it must redistribute contextless claims and is therefore coupled with (and dependent on) the normatively indifferent allocational process, which determines the tolerable rate of acceptable restrictions. Distributive justice is a cost factor, and this is why distributive legality is often regarded as neither efficient nor just.

To give an example: the labor law is designed to protect the employee against the exigencies of the labor market in that it – as collective labor law – institutes a system of collective bargaining which tends to decouple the determination of the price of the labor force from the cycles of supply and demand; the same applies to many regulations of the individual labor law: laws protecting against unjustified dismissal, assuring sick pay, guaranteeing wages etc. have the purpose of mitigating (or even excluding) the market forces in the area of labor and constituting an order in which the social position of the employees is based on the acknowledgement of his "just needs". To a certain degree this implies a development from contract back to status, but with considerable differences. To be sure, labor law entails a distributive pattern different from that of the market allocations, and it is justified by principles of social justice. But the legal claims of labor law are not "just" in themselves. They are neither incarnations of commonly shared values nor elements of a comprehensive institution in which the individual is embedded and which determines the scope and the normative quality of his actions. They constitute monetary and power relations. The performance of the legal obligation to continue pay (or not to fire) during illness is the normatively indifferent processes of a distribution of power and money; according to principles of justice, it is just *that* the employees have these claims, but the claims themselves are neither just nor unjust.

This distinction has an important consequence for the notion of legal rationality. It is not possible to legalize (distributive) justice, but rather to restructure the distribution of power and money. To put it another way: distributive justice can only be expressed and realized in terms of legal claims to power and money. To this extent there is no difference to the functioning of the "allocative law". But in contrast to the latter, this distribution is not indifferent vis-à-vis principles of justice, instead serving normative goals.

The distributive law rationalizes the normative principles of distributive justice in that it decouples the assignment of goods from individual qualities like age, sex, skills, physical force or moral dignity. The constitution of distributive justice as legal entitlements to power and money combines the abstractions of a de-institutionalized order of strategic actions with normative principles which refer to the steadiness and stability of a "just order". The result is a definition of distributive justice in terms of a just distribution of legal claims, of an abstract and steady design of the society at large (as opposed to its definition in terms of the normative quality of, *e.g.*, a "good life" in an Aristotelian sense). Paradoxically enough, this concept of legalized distributive justice entails a permanent legislation of "just" purposes in order to come up with social change. This contradictory structure of the rationality of the distributive law is certainly not the least important reason for its much discussed "overstrain", and (not accidentally) its crisis is primarily a crisis of implementation of normative goals by normatively neutral and abstract media.

This raises new problems. Since power and money are normatively indifferent media their functioning does not depend on cultural contexts; they are not susceptible to normative claims. If distributive justice is expressed in terms of these media, this entails a specific character of the underlying principles of justice: they do not aim at the constitution of a "just order" in the sense of commonly shared and institutionalized values of reciprocity, but at the justifica-tion of an equal or unequal distribution of goods, *i.e.* of a specific distributional pattern. In the modern welfare state, goods are legal entitlements to money and to power. Hence "distributive justice" is an ambiguous and unstable balance of entitlements. It is ambiguous, because these entitlements are not responsive to social needs or principles of solidarity and can be used for any purpose whatsoever.[9] It is unstable, because use of the entitlements by individuals is not itself bound to normative principles or institutional designs; they rather favor a strategic way of acting according to interest maximization and hence thwart the once attained distributive pattern of justice. (I should mention another reason for the structural instability of the distributive pattern, namely the inherent dynamics of equality as the essential substantive criterion of distributive justice; for reasons of space I am not going to deal with this aspect here.) A normatively justified distribution of money and power therefore calls for everlasting endeavors to maintain and regain this balance of a "just status", which is always threatened by the dynamics of social change.

D. Towards a "Communicative Rationality"?

Much intellectual work has been done to explain why this purpo-sive law and why "legal instrumentalism" failed, producing instead a dilemma or even a "regulatory trilemma" of

[9] Preuss, *supra*, note 6, 158

https://doi.org/10.1017/S2071832200016965 Published online by Cambridge University Press

the modern welfare state.[10] In the following, I want to discuss two concepts which try to examine the failures of "distributive law" from a developmental perspective and which are theoretically valuable because they analyze the same object from different perspectives and develop, the one more implicitly, the other explicitly, the idea of a new post-distributive legal rationality. The first is Habermas' concept of the "colonization of the lifeworld"; the latter is Teubner's theory of "reflexive law".

I. "The Colonization of the Lifeworld"

In order to better understand the contradictory structure of a law which aims at normative purposes but is bound to the abstract media "power" and "money" Habermas has introduced the distinction between law as a medium and law as an institution. Law as a medium serves "as a means for organizing media-controlled subsystems which have, in any case, become autonomous vis-à-vis the normative contexts of actions oriented towards reaching understanding", whereas law as an institution "belongs to the legitimate orders of the lifeworld itself and, together with the informal norms of conduct, form the background of communicative action"; it needs substantive justification (as opposed to the procedural legitimation through the formally correct genesis of the law as a medium).[11] Law as a medium has constitutive power in that it, combined with the other media power and money, formally organizes domains of actions, whereas the law as an institution regulates institutions of the lifeworld which exist prior to the law and are "embedded in a broader political, cultural and social context; they stand in a continuum with moral norms and remold communicatively structured areas of action".[12] Hence the basic substantive norms of the constitution, especially the fundamental rights, and, for instance, norms about criminal offences "close to morality" are typical of the law as an institution, whereas many areas of the economic, commercial, corporation, and administrative law have to be qualified as law as a medium.

Now, Habermas hypothesizes that law as a medium penetrates ever deeper into the institutions of the lifeworld, as a consequence of their subordination to the imperatives of economic growth and of the ensuing commodification of social relations. Referring to the welfare state, he notes the paradox that the problems of communicatively structured institutions of the lifeworld – which arise as after-effects of the dynamics of the formally organized systems – can only be tackled by social welfare law used as a medium but which,

[10] Teubner, *supra*, note 2, 6 (1986)

[11] Habermas, *supra*, note 2, 537; J. Habermas, *Law as Medium and Law as Institution*, *in* DILEMMAS OF THE WELFARE STATE, 212 (G. Teubner ed., 1986)

[12] Habermas, *id*., 213 (1986)

https://doi.org/10.1017/S2071832200016965 Published online by Cambridge University Press

at the same time, "extends to situations embedded in informal lifeworld contexts".[13] He gives the examples of the legal regulations of the family and of the school; the juridification of family relations and the pedagogic process in schools has entailed state interventions into social areas antecedent to the law and structured by communicative norms; but the state can interfere only by legal norms which for their part cannot be translated into the language of these institutions, and which therefore are inappropriate and even destructive. It is plausible to assume that power and money may endanger the integrity of normatively constituted institutions like the family or a pedagogic situation; however, I do not find this argument fully convincing. "Colonization" of the lifeworld evidently refers to the superimposition of a legal structure that can aggregate and organize power and money but not communicative processes at the same time. But Habermas himself rightly states that the legalization of the school is a consequence of the enforcement of the constitutional principles of fundamental rights and the rule of law.[14] Similarly the Federal Constitutional Court of Germany has repudiated the critique of the legalization of the school, asserting that the realization of the fundamental rights of pupils, parents and teachers is the object of the school's legalization.[15] In Habermas' theory, these fundamental rights belong to the law as an institution: it regulates antecedent institutions of the lifeworld, but does not destroy them. How, then, can fundamental rights "colonize" an institution of the lifeworld?

Here Habermas makes a seemingly plausible distinction: he postulates that the "juridification of communicatively structured areas ought not to go beyond the enforcement of principles of the rule of law, beyond the legal institutionalization of its *external* constitution"; the implementation of these principles within this area must be safeguarded by procedures which are "appropriate to the structures of action oriented towards communication – discursive processes of will-formation and consensus-oriented procedures of negotiation and decision-making".[16] This is the postulate for something like a communicative law. It implies the contention that the structures of the law as an institution and those of the institutions of the lifeworld can be compatibilized with each other because they are homologous. According to his theory, the colonization of the lifeworld is due to the fact that the fundamental rights and the rule of law are implemented by the media power and money (which entails bureaucratization and commodification of lifeworld areas), but that such implementation media are not required for the instantiation and enforcement of the rule of law.

[13] Habermas, *supra*, note 11, 214 (1986)

[14] Habermas, *id.*, 215

[15] *Bundesverfassungsgericht*, 1980 BVERFGE 58, 257/271

[16] Habermas, *supra*, note 11, 218 (1986)

https://doi.org/10.1017/S2071832200016965 Published online by Cambridge University Press

In contrast to Habermas I think that the implementation of fundamental rights is necessarily coupled with power and money. I shall give three reasons.

First: At first glance, the assumption that the regulatory media power, money and law are destructive for communicatively structured interactions seems very convincing. But a few moments reflections bring us to a prominent example for the opposite. It is the psychoanalytic relation between the analyst and his or her client. This relationship is based on communication insofar as, in a process of transference and countertransference between two individuals, the unconscious conflicts of the client are, as it were, reproduced in an artificial manner and hence rationalized. A more personal and sensitive communicatively mediated relation is hardly imaginable. It is its fragility which led Freud to insist uncompromisingly on a rigid institutional setting, in which money and law (as media in Habermas' sense) played a pivotal role. The psychoanalytic relation was framed by a legal therapy contract in which the formal obligations of the analyst and of the client are stipulated, especially the obligation to pay even if the client had missed one hour without "sufficient" excuse. Moreover, it was regarded as malpractice for the analyst not to demand his or her fee (mostly cash), although, it is true, Freud himself sometimes violated this rule. The reason for this framework was, first, to confront the client with the reality principle and, second, to integrate the symbolic meaning of money, of legal obligations and of a rigid timetable into the communicative relation (*e.g.* in order to analyze resistance, among other things). Also, Freud's tenet that analyses had to be terminated and hence that time was a limited resource in the analytical relation suggests the importance of external restrictions on a process which in an ideal concept would exclusively be determined by the psychic dynamics of its participants and would have to be left undistorted by external reality. But in Freud's theory this "reality" is not just accepted as inevitable but is consciously utilized – especially money – as a means favoring the progress of analytical communication.

One might well regard the importance of money in psychoanalysis as the manifestation of the bourgeois bias of the whole Freudian theory; but this would not invalidate the argument that the same bourgeois society which produced the practice of a purely communica-tive relation simultaneously made use of money (and of the law) in order to render this relation possible. I myself would, on the contrary, generalize the underlying idea of this technique and contend that every communicatively structured interaction must be embedded in an institutional framework which represents the fact that this communication is always a communication on the level of the society at large, on a level which concerns the society: in short, that every such interaction has externalities. I'll specify this in the arguments that follow.

Second: if we accept the individual's right to treatment as an equal – that is, the right to equal concern and respect in the political process – to be fundamental, this entails the

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equality of individual rights to distinct liberties.[17] Rights to liberties consist in the entitlement to pursue whatever purposes the individual chooses. Within their limits, they do not demand social responsiveness nor a consensus about common values which have to be attained by their exercise. If their enjoyment becomes socially harmful, it is the law which imposes limitations and thus enforces social responsibility.

This abstract character of rights is ambiguous. On the one hand, rights render dispensable the search for a consensus and for a common solution of conflicts. They can be utilized strategically for the enforcement of interests irrespective of normative principles and hence supply bargaining power. In this dimension they rather prevent discursive processes than favor them. This also applies, possibly even more, to communicatively structured areas of the lifeworld, since value conflicts are often far more irreconcilable than interest conflicts in genuine areas of strategic action. On the other hand it is this abstract character of rights which allows the possibility of normative dissent, variety and "exit". This requires, I believe, a more abstract and variable concept of social cooperation than that of a normatively constituted community, namely a concept of civility in which strangers can choose or reject communication with each other.[18] While there might be hardly any dissent that this normative variability is an indispensable element of rights to liberty we certainly would readily disclaim the strategic non-communicative dimension. But both are inseparably connected. Normative variability demands the abstract character of the rights, and it is at the same time their abstract character which makes them susceptible to strategic exercise.

The ambiguous character of rights determines the structure of institutions in which all members have equal liberties. Schools, universities, editorial staffs and the family, too, require the cooperation of individuals, each of whom has the same rights. Rights have to be socialized in order to become effective. True, appropriate institutional structures would need to provide for the resolution of conflicts in a discursive manner. This presupposes the same normative variability of rights which constitutes their non-communicative potential. Whereas rights to liberty outside of institutions are "self-executing", in that they obligate the state not to interfere with the individual sphere, such rights have to be effectuated by an order of cooperation within institutions. Rights for forbearance become rights to equal participation in the realization of the institutional goals; in the process of socialization negative rights are transformed into positive rights without losing their ambiguous character. They are at the same time preconditions of a discursive process of normative integra-tion, *i.e.*, integrated into a social-cultural context, and contextless media of strategic actions, which are enforced by the plainly contextless medium power. In fact, the

[17] R. DWORKIN, TAKING RIGHTS SERIOUSLY, 273 (1978)

[18] R. SENNETT, THE FALL OF PUBLIC MAN, 331 (1977)

https://doi.org/10.1017/S2071832200016965 Published online by Cambridge University Press

situation is paradoxical: only as abstract and contextless media do rights render a normative discourse possible.

Third: It is fallacious to conceive of the constitutional rights of the individual as "constituting" social institutions. Fundamental rights in the original understanding of the bourgeois revolution – the individual liberty to freely choose one's purposes and to obligate the society not to interfere – are not rights *to* common goals – who else could make them binding than an authority? – but rather *against* compulsory "socialization". The family, the school and the core of the welfare system – the social security system – are institutions of compulsory socialization which aim, respectively, at the procreation, formation, and education of the children, that is, at the welfare of the individual. Their formal organization testifies to the fact that the society at large is interested in the realization of these goals; history proves that the different pre-legal institutions of education, health, and welfare – the schools, hospitals, asylums – were "total institutions" and treated the individuals as objects rather than subjects. Hence fundamental rights had a clear-cut polemic thrust against compulsory socialization. The constitutional creation of an individual sphere of non-interference was primarily a barrier against non-voluntary socialization and produced above all the conditions not for discursive procedures and communicatively mediated common understanding of goals and values but rather for the emancipation from common goals. This seems puzzling since due to the above-mentioned twofold character of constitutional rights they do enable the individuals to enter into discursive processes. But again, their character is, due to structural necessity, different from an undistorted communicative discourse.

Hardly anyone would claim that, in narrow and segmented communities, it was "communication" that founded and developed common goals and their realization. Nor does this happen with respect to institutions in which the statist society is interested. It is the state authority which "socializes" individuals and structures their relations by establishing a nexus between the individual and the state authority. At first glance it seems as if power penetrates the integrity of communicative areas. But it is misleading to qualify this process as an "expropriation" or as a destruction of the lifeworld: it is not destructive but rather creative in that it constitutes an "abstract community" among *all* members of the society which renders possible the mobilization of resources for a greater number of societal goals, which would not have been available in autonomous communities. Schools, universities, newspapers and radio stations realize goals of the society at large, otherwise they would not be schools, universities and publishing houses; education, the production and tradition of knowledge and the transmission of information and opinions would happen in a courtly or monastic or otherwise restricted and rather static manner. Schools, universities, the press, radio stations, etc., *are* formally constituted by the abstract media power and law because it is not education, science, publishing etc. which is instituted, but the *society's interest in* education, science, publishing, etc. Without this interest of the society there would be no discursive communication communities, but simply the Middle Ages. There is no "expropriation" of the lifeworld because, there never was any property.

Also, the family – an institution that apparently existed prior to the modern state – has lost its self-sufficient character and has, by legalization, become an institution of the society; this was the reverse of the individuals' emancipation from ecclesiastical and feudal tutelage, and hence the fundament for a more enlightened structure of personal and family relations. Here, as in schools, universities, hospitals, etc., the legalization of the internal relations of the individuals, especially their provision with rights, is constitutive for the develop-ment of a universalistic morality in that it transforms the purposes of these institutions into purposes of the society at large. The first section of the first title about marriage in the 1796 general law of the Prussian land reads as follows: "The main purpose of marriage is the procreation and education of children". This sentence does not simply express a pre-statist wisdom or convention but, on the contrary, has a new and very specific meaning: the state takes interest in the formerly "private" – in reality: ecclesiastical and feudal – affairs of sexual relations. In modern language: the state regulates their externalities by establishing rules about the prerequisites of a valid marriage, about the formalities which have to be observed, about the rights and obligations of the spouses, etc. To conceive of marriage and the relations of the spouses as a "private" affair in which the mutual moral obligations and the conflicts should be solved in a discursive manner among them is – paradoxically enough – only possible because antecedently the marriage has been constituted as a legal relation. Only the establishment of a connection with a great number of other members of the society allows the free choice of social relations and their internal variability, and again it is the abstract and contextless character of the law (and its combination with power) which renders this possible.

It is true that formation, education, health, or individual welfare can be realized only within a social-cultural context, and that is why contextless media like power or legality or money often fail. But this argument overlooks that education, health or welfare institutions do not serve education, health or welfare and the reproduction of social-cultural contexts in which these goals can be realized; rather, they serve the state's interest in formation, education, etc., and hence the transformation of obstinate individuals into state citizens; certainly, the state utilizes the communicative and normative resources within these institutions for its strategic purposes. But if this were not the case, there would be no possibility for discursive communi-cation and conflict resolution at all, because there would be no "abstract community" as the precondition for the variability of normative orientations. In other words: pre-statist and pre-legal institutions were not communicative communities, whereas the potentiality for their emergence has been created by the abstract media power and law.

Actually, the legal institutionalization of areas of the lifeworld is paradoxical: free discourse about norms, values, and common purposes requires the dissolution of segmented, self-sufficient and narrow local communities and the emergence of an abstract polity as a precondition for the development of a universalistic rational morality. It is the abstract, *i.e.* contextless media power, law, and money which found this abstract polity and determine

the structure of all institutions in which the society is interested. They are only created and constitutionalized because and insofar as the society at large is interested in them. The pre- and non-communicative condition of all communicative processes within formally institutionalized areas is the state's power; but in contrast to Habermas' assumption, it does not distort the integrity of a pre-existing discursive community but rather connects communication with the development of the society. The abstract and contextless media power and law (and, in respect to the structures of the modern welfare state, also money) render at the same time discursive communication possible and impossible.

Hence the problem is not the "expropriation" of an antecedent, but the "appropriation" of a still unrealized lifeworld. To put it into a developmental perspective of legal theory: can we recognize elements of a legal development which overcome the structural restraints of the law, in that it allows communicative discourses without the interference of the non-communicative media power, money and law? This would necessitate functional equivalents for the regulation of the externalities of communicative social relations. One direction of development could be the integration of the society's interest into the structure of arguments which are permitted in these discourses; the structure of the discourse would have to be such as to exclude every argument which does not reflect the prerequisites of the society at large. There is good reason to assume that this direction would be self-defeating; it may end in some sort of "value communism" and repression, or it is so demanding that it could hardly become the fundament of social institutions. In the following I shall examine whether the concept of "reflexive law" could be a solution in a quite different direction.

II. Reflexive Law

Although I regard the distinction between the law as an institution and the law as a medium as erroneous it correctly reveals the fact that the internal structure of an area can prove to be incompatible with legal instruments which aim at influencing it. This does not only apply to the relations of the law to lifeworld areas like the school or the family. Teubner has pointed out that "even the »systems« of economy and politics can be partially paralyzed by legalization", *e.g.* by imposing moral imperatives on the economy, which, if realized, could destroy the economy's specific monetarian rationality.[19] In a generalized version, this argument states that the society's different subsystems – the law, the economy, religion, politics, etc. – have different and very specific properties which render access to the others extremely difficult. But at the same time, communication between them is indispensable: the law must be accessible to politics, economics must be accessible to the law, religion must be accessible to economics etc. Each social system has to translate its information into the specific languages of each other system in order to

[19] Teubner, *supra*, note 2, 317 (1986)

https://doi.org/10.1017/S2071832200016965 Published online by Cambridge University Press

influence it. It is evident that this poses special problems for the law, since due to its abstract character it pretends to influence all social systems within a hierarchical structure: according to our traditional understanding, the law is the supreme comprehensive societal institution which establishes a bond among all members of the society and among its specific social systems. If we acknowledge that the different social systems themselves define the conditions under which law will have access to them, then this hierarchical model of regulation fails. A new concept of law and its rationality is required.

Above I had attributed the manifold failures of the distributive law to the structural "overstrain" resulting from the contradictory combination of imperatives of distributive justice with the abstract character of the media power and money. But this is evidently not the whole story. Even if the legislature were able to permanently re-establish a once fixed status of distributive justice in a running match with the ever changing distributive situations, it could not be sure of succeeding in restructuring the regulated area. For instance, it is well known that companies have developed a wide range of strategies to avoid legal regulations which threaten their profit imperatives or that, to refer to Habermas' example, the legal regulation of the school has the side-effect that judges often have to resolve pedagogical problems. Teubner distinguishes three forms of regulatory failure: incongruence of law, politics and society; over-legalization of society; over-socialization of the law. All of them are reduced to different sorts of disarray in the self-producing interactions of the regulated or the regulating system respectively.[20] This hypothesis assumes that not only, as we have seen, the law has its inherent logical structure which rationalizes the main social relations of production, distribution, consumption, reproduction, and domination, but that these areas have gained so much independence from the law that they can successfully resist its regulatory interven-tions. Implementation research has produced so much evidence for regulatory failures that Teubner's contention seems to be a plausible hypothesis. On the other hand: why should the law fail to successfully regulate companies, the family, schools, universities, the technological development etc., if it is, as we have seen, abstract and contextless and hence utilizable in different and heterogeneous contexts?

Actually, the mere fact of regulatory failure does not produce sufficient evidence for the structural incapacity of the law to cope with present-day regulatory purposes. The discussion of the hypothesized "colonization of the lifeworld" demonstrated that the structural incongruence of the law and the regulated area is the necessary condition for establishing of institutions like schools, in that it connects pedagogic processes with the needs of the society at large. For the above-mentioned psychoanalytic relation money and law are deliberately used means of structuring an extremely sensitive and personal communicative relation in order to confront it with the reality principle. This example could provide us with the key for answering the question, whether, to what degree, and

[20] Teubner, *supra*, note 2, 311 (1986)

why the law has lost its regulatory force. If I stated that it is the abstract character of the law (and of power and money) which establishes its almost universal availability for regulatory purposes this implied that the law constituted an "abstract polity" and infuses its needs and purposes into social relations. The law externalizes them, thus making them susceptible to centralized regulations. This is the common rationalizing element of the allocative as well as of the distributive law, notwithstanding their remaining differences.

It is important to note too that the idea of an "abstract polity" implies a homogeneous societal rationality in the sense of a comprehen-sive structural compatibility of all life areas mediated and represented by the law. The "abstract polity" of the modern state and its principal media power, money and law overcame the segmentations of the feudal society and transformed its dissociative segments into a unified body politic. Its integrative force was even vigorous enough to maintain this unity and "abstract homogeneity" against the extremely powerful social tensions of the class society. Representation is the adequate legal-political form to confirm and reproduce the structural uniformity of the body politic and its elements, and even plebiscitarian concepts of popular self-rule assumed this homogeneity. The concept of the generality of the law was, it is true, never fully realized, but it attests to the vigor of the rationality ideal of statist bourgeois society that all social areas are compatible and can be mediated by the law.[21] This implies the notion that each social area contributes its specific per-formances to each other area via the centralized law or can be forced to do so. According to this model the law is, as it were, the universal communicative medium within and between all social areas. But the structure of this communication system does not have the pattern of a network but of a star, that is, all communications pass through a central agency.

Regulatory failures evidently reveal that the connections of the different social areas with the body politic have been disturbed (or it has simply become manifest that the bourgeois legal ideal does not correspond to reality). There is no reason to presume that this is due to our regression to a segmented society; instead, we could hypothesize that the mutual exchange of contributions among the different social areas takes place in a decentralized manner and that these systems simply reject the "service" of the centralized agency. This would mean that the law as a universal medium and as representative not only of the compatibility but of the mediated unity of those areas would have become dispensable. In fact, we can observe elements of such a development in different versions of "concerted actions" which have been theorized as a neo-corporatist societal coordination. Here the traditional territorial-parliamentary representation of the whole body politic is replaced by a functional representation of interests and their organizations.[22] Until now this has taken place in a rather informal, non-legalized manner, and hence tends not to take into account

[21] F.L. Neumann, *The Change in the Function of Law in Modern Society*, *in* THE DEMOCRATIC AND THE AUTHORITARIAN STATE, 22 (1957); F.L. NEUMANN, DIE HERRSCHAFT DES GESETZES, 245 (1980)

[22] U. v. ALEMANN, R.G. HEINZE, VERBÄNDE UND STAAT. VOM PLURALISMUS ZUM KORPORATISMUS (1981)

all externalities. The more functional differentiation of specific social areas and the constitution of specific internal logics for those areas (*i.e.*, the establishment of functional autonomy) proceeds, the more urgent becomes the problem of how to rebind those areas to needs and exigencies of the society at large (*i.e.*, the problem of coping with their externalities). This is a challenge to the rationality potential of the law; it has, as it were, lost the premise of its rationalizing function, namely the structural homogeneity of the different social areas in an "abstract polity". The new problem becomes one of regulating the externalities of the different social systems without destroying their autonomy, where both the regulation of those externalities, and the preservation of the autonomy of the systems that produce them, are necessary for social reproduction.

While many legal theorists focus on the problem of how to compatibilize the specific rationalities of different social systems, I think it is pivotal to preserve legal rationality in its capacity to establish and maintain the connections of social systems to the needs of the society at large and to mediate and represent their unity. While this capacity may have become less important for the securing of the mutual exchange of contributions – although self-reproducing systems like politics may well become self-sufficient and insensitive to the exigencies of other systems – it is all the more important if not for the rational planning of social development, then at least for a minimum of its conscious control.

Whereas the above-discussed concept of the "colonialization of the lifeworld" so to speak despaired of the fact that the presence of the state in communicatively structured interactions is destructive for these interactions (that is, that the law fails to mediate the rationalities of communication and of power), the concept of reflexive law is far more optimistic. Its basic assumption is the self-referentiality of social systems. It abandons the concept of open systems which react to the impulses of their environment and refers to the newly discovered, autopoietic character of biological systems: they are self-producing systems of interaction in that they interact in a manner, according to which the operations of the system circularly reproduce its elements, structures, and processes, as well as its boundaries and its identity.[23] Autopoietic systems reproduce themselves according to their inherent regulative program and hence are closed vis-à-vis their environment; that is the condition of their stability. But this does not mean that they are impermeable. Rather, they accept the information and the requirements of the environment only insofar as the latter are formulated in a language they understand, and satisfy their own criteria of selection.[24]

[23] Teubner, *supra*, note 2, 301, 308 (1986); G. TEUBNER, HYPERZYKLUS IN RECHT UND ORGANISATION: ZUM VERHÄLTNIS VON SELBSTBEOBACHTUNG, SELBSTKONSTITUTION UND AUTOPOIESE, 8 (1986)

[24] Teubner, *supra*, note 2, 309 (1986); Teubner, *supra*, note 23, 31 (1986)

https://doi.org/10.1017/S2071832200016965 Published online by Cambridge University Press

If we interpret the law as an autopoietic system, this would mean that legal change would only be possible if social pressures "appeared on the internal screens of the legal system"[25] and were not, for example, merely manifested as social conflict. The same would apply in the relation between the law (as an autopoietic system) and other (autopoietic) systems which the law tries to regulate. The law has at the same time to secure its own internal self-productive potential (*e.g.* it must not be moralized) and those of the regulated system. From this it follows that "a regulatory action is successful only to the degree that it maintains a self-producing internal interaction of the elements of the regulating systems, law and politics, which is at the same time compatible with the self-producing interactions of the regulated system".[26] Every regulatory legal action has to pass a twofold eye of a needle. But how exactly is this passage to be made? How, that is, can a legal system and a regulated system communicate with each other if on the one hand the legal system must not violate its own self-producing interactions but must, on the other hand, compatibilize them with the self-producing interactions of the regulated system?

The answer is co-evolution: the compatibility of the systems' expecta-tions is not established on the level of the systems themselves but on that of single interactions. Every action belongs at the same time to different systems, that is, the same communication has in different systems a different meaning. To sue a person is an action which has a different meaning in the legal system, in the family of the plaintiff and, say, in the economic system. These systems are coupled in this single action. The legal system is not influenced by the suit as a phenomenon that is important for the family of the plaintiff but rather as a suit, *i.e.*, as a legal action which obeys its structural demands. Conversely, the suit does not influence the family life of the plaintiff by its very character as a legal action, but as a conflict with the sued person or as a puzzling experience with the rather strange world of the courts. This "interference" of different systems with respect to single actions is characteristic of the concept of co-evolution. It postulates that the legal system offers patterns of communication which allow the transfer of information from one system to another, taking into account that the same information has different meanings in the different systems. The contract is an example: the contract is the coincidence of a legal, an economic, and of a lifeworld action. As a legal institution, it couples the autonomy of the legal system with that of the economic system and at the same time respects the obstinacy of the lifeworld. The contract is an "option" of the legal system which, if it is accepted, imposes its very structure on the lifeworld and the economic actions. What is important for legal regulation is that the legislature can mould the structure of the contract, it controls the non-contractual preconditions of the contract.[27] In a generalized version this

[25] Teubner, *supra*, note 23, 35 (1986)

[26] Teubner, *supra*, note 2, 310 (1986)

[27] G. Teubner, Autopoiese im Recht: Zum Verhältnis von Evolution und Steuerung im Rechtssystem, 42, 43 (1986); Teubner, *supra*, note 23, 40, 41 (1986)

https://doi.org/10.1017/S2071832200016965 Published online by Cambridge University Press

concept entails a specific legislative rationality: to successfully regulate social areas, it should provide patterns of inter-system communication (like the afore-mentioned, not yet legalized neo-corporatist bargaining procedures) instead of trying to establish legal obligations in the direct manner of issuing orders and prohibitions. The concept is hetero-regulation by auto-regulation and self-obligation, that is, the creation of structures which guarantee the integrity of the regulated systems and their internal self-producing actions, and at the same time restructure them with the result that the regulatory purposes are achieved indirectly.[28]

This brief sketch of a far more subtle analysis of the perspectives of a "post-instrumentalist law" makes a new legal rationality appear which I term "communicative rationality": it is the task of the law to enable decentralized communications between different social systems as a precondition for a conscious regulation (or at least control) of social evolution. The dissolution of the hierarchical relation of the law to all social systems – the change of all social communications from a star-structure to a network-structure – calls for a new concept of communication in which the weakened function of a central agency for the regulation of social areas and of the society at large are compensated by functional equivalents. Whereas Habermas analyzed the failure of communication as grounded in the structural incom-patibility of the lifeworld with the law as a medium, Teubner's concept of reflexive law surmounts these difficulties with the idea of "interference" of structurally different social systems in single actions; thus he deepens the theoretical premises of the observable tendencies of legal proceduralization.[29] But does the concept of reflexive law really offer the outlook for a communicative rationality which would be more appropriate to the developmental exigencies of our present society? My doubts focus on three problems.

First: The concept of self-referentiality is too narrow. Teubner himself is a bit tentative about the degree, to which the observation of self-producing systems applies to social systems which are constituted by meaning.[30] I have no competence in this border-district of biology, cybernetics, psychology, and social theory, but must rather restrict myself to noting some observations which cannot be fully explained with the concept of self-referentiality. It is true (and reflects our experience) that social systems are autonomous in

[28] Teubner, *supra*, note 27, 48 (1986)

[29] Wiethölter, *supra*, note 2; for constitutional law in Germany: P. Häberle, *Grundrechte im Leistungsstaat*, 30 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER 43 (1972); K. Hesse, *Bestand und Bedeutung der Grundrechte in der Bundesrepublik Deutschland*, 5 EUROPÄISCHE GRUNDRECHTE ZEITSCHRIFT 427 (1978); D. Grimm, *Verfahrensfehler als Grundrechtsverstöße*, 4 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 865 (1985); for the U.S.: J.H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980); J.H. ELY, DEMOCRACY AND DISTRUST. A THEORY OF JUDICIAL REVIEW (1980); R.D. Parker, *The Past of Constitutional Theory – And Its Future*, 42 OHIO STATE LAW JOURNAL 223 (1981).

[30] Teubner, *supra*, note 23, 9 (1986)

https://doi.org/10.1017/S2071832200016965 Published online by Cambridge University Press

that they process information from outside only insofar as it is compatible with their internal operative program. If I want an industrial plant to save energy and to take care of the ecological environment, it is necessary to express that in terms of technical data in order to attain this purpose. If I want to give the people the possibility to require the industrialist to take care of the environment, I must do that by giving them legal rights to sue him: lifeworld interests are expressed in terms of legal action, and legal action is translated into money terms (since every legally defined standard of accepted pollution requires specific technical devices and hence economic investments). But this is not the meaning of self-referentiality. It necessitates that the distinct social systems produce their own operative program, that they not only select and process information according to their program, but that they program their program. Self-referentiality in a strict sense not only implies self-reproduction but self-constitution.[31]

The law is a self-referential system insofar as every legal action or norm can only be defined by reference to another legal norm or action. Hart's secondary norms are an example for a first step to the self-referentiality of the legal system[32]; the level of self-constitution is reached if the legal system in its operation defines the conditions under which law originates, is altered, or expires through legal norms; an example is the incorporation of social or technical norms into the law by legal references: only a legal norm determines that, say, a technical norm has become an element of the legal system.[33]

If an autopoietic system – and here I deal with the legal system and its alleged self-referentiality – creates the program according to which it operates, we of course have to ask: who writes the program for the operative program? Teubner would repudiate this question as prejudiced by a concept of linear causality whereas autopoietic systems are characterized by circularity[34] (I agree, but want to make an important qualification: the circularity of social processes does not only apply to distinct social systems but to their relations to the system of the society at large. To speak less cryptically: I agree that the concept of a pre-legal sovereign which creates (alters, extinguishes) the law does not really grasp the complex character of the law and its relations to society. As Hart has pointed out, the modern legal system is characterized by the complex connection of primary and secondary norms, *i.e.* of rules about obligations and rules about rules. Rules about rules determine the criteria for the validity of rules about obligations – this is an example for the self-referentiality of the modern law; rules about obligations have to be obeyed because they are valid, but their validity does not originate in the will and command of a sovereign,

[31] Teubner, *supra*, note 23, 12 (1986)

[32] H.L.A. HART, THE CONCEPT OF LAW, 91 (10th ed., 1979)

[33] Teubner, *supra*, note 23, 35 (1986)

[34] Teubner, *supra*, note 27, 17 (1986)

https://doi.org/10.1017/S2071832200016965 Published online by Cambridge University Press

but in a rule of recognition.[35] But who issues the rule of recognition? Have we to assume that it is ordered by a sovereign? This would demand that we can identify him *as* sovereign; there must be a rule of recognition which identifies him as the legitimate rule-giver, so that his legal acts too depend on a rule; and if we look for the author of this rule we again have to ask according to which rule this author is identified as a legitimate rule-giver, etc. To solve this problem of infinite regress, Hart introduces the idea of an ultimate rule which contains a supreme criterion about the validity of rules[36]; but this ultimate rule of recognition is not "valid" in the sense in which a rule of recognition determines the validity a rule of obligation; rather it "exists". These two statements – a rule is "valid" and a rule "exists" – represent the distinction between an internal and an external view on the law: an internal view states the validity of a rule which implies that the antecedent rule of recognition has been accepted. The external view is the view of an observer who states that a rule is valid and the underlying rule of recognition is accepted in a society, without necessarily accepting it for himself.[37] The legal system as a complex relation of primary and secondary rules is characterized by the internal view on the rules of behavior and the internal *and* external view on the ultimate rule of recognition: the latter must be "effectively accepted as common public standards of official behavior by its officials"[38], in other words: the rule identifying rules of behavior is an attribute of the legal system – the notion of a legal system implies that there *is* an ultimate rule of recognition, it is inherently given with the notion of legal system, this is the *meaning* of the term "law" and "legal system" – insofar as it is a *public and common standard*. This transcends legal autopoiesis: the ultimate rule of recognition must be accepted by the officials, but in order to be accepted, it must pre-exist not just as a legal rule, but as a social fact which then is molded by the officials according to the prerequisites of the legal system.

This duality of the internal and the external view on the law which is constitutive for the status of the ultimate rule of recognition reflects adequately the fact that the legal system on the one hand programs its operative program, but that this programming program on its part is embedded in a social practice which determines the non-legal preconditions of the legal system. We cannot conceptualize the law as a system without realizing its embeddings in a social practice which connects it in a circular manner with the society at large. Autopoiesis in the strict sense is not characteristic of the law.

Second: in the preceding argument the problem of externalities was already raised implicitly. Here I shall give a more explicit, though brief, critique. The argument is as follows: if the reflexive law secures patterns of communication among different social

[35] HART, *supra*, note 32, 97

[36] *Id.*, 102

[37] *Id.*, 99

[38] *Id.*, 105, 113

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systems, such as the contract or a (not yet realized but much discussed) purely procedural bargaining order for a neo-corporatist societal coordination, this would neglect the external effects of the ensuing new "social contracts". Teubner notes this problem clearly and shows the alternatives: to stipulate substantive duties of social responsibility or to shape the structural pattern of the procedures such as to create something like "virtual representation": the parties to the bargaining procedure can attain their goals only by performing their responsibilities to the society at large.[39] The right of the trade unions to strike only on condition that not only a fixed proportion of their members but also of the whole concerned population has consented would be such a refle-xive manner of internalizing externalities. The first alternative is rejected by Teubner on grounds of the well-known dilemmas of the instrumentalist law and its susceptibility to failure. The latter would be appropriate to the structural exigencies of reflexive law. This strategy would make use of the experience that substantive values can be translated and "liquidated" into procedures.

But we would misinterpret this experience if we overlooked that this transformation of substantive goals into procedures entails a considerable dilution of these goals. If *e.g.* the individual right to life and health is transformed into a right to participate in an administrative procedure in which an administrative agency decides about the permission to build a nuclear plant, the result for life and health has become highly indeterminate. The second argument stems from Teubner himself and is closely connected with the foregoing one about procedural indeterminacy. He rightly states that reflexive regulation, by structuring some internal key-variables – say, of the economic system (or of a corporation) – entails losses of information and motivation.[40]

If reflexive law shall work, that is, if it shall avoid the "trilemma" of incongruence, over legalization and oversocialization; it must be flexible and restrict itself to an "option policy". This means that it has to be highly indeterminate and to put up with the consequence that the legally regulated system defines by its own standards how to internalize externalities. Thus the key problem of the legal structure remains unsolved: the conception of a "synthesis of individual and societal needs".[41] Whereas Teubner recognizes that every "specialized legal communication is always at the same time a general societal communication"[42], *i.e.* that it has externalities, he can conceptualize this only on the level of individual actions and their rationalities but not on the level of societal rationality.

[39] Teubner, *supra*, note 2, 316 (1986)

[40] Teubner, *supra*, note 27, 39 (1986)

[41] Wiethölter, *supra*, note 2, 249 (1986)

[42] Teubner, *supra*, note 27, 36 (1986)

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Third: I come back to the afore-mentioned example of a concei-vable reflexive regulation according to which the trade unions can exercise their right to strike only after prior consent not only of their members but of all who are affected by the strike. The organizational internalization of the externalities of a strike would mean the abolishment of a right for which the labor movement has strived for decades and the establishment of which is a key element of democracy. I do not suggest that Teubner would make this proposal, but rather state that it is an inherent element of reflexive legal rationality. Something is wrong about this, because it is an important achievement of the democratic society that fundamental constitutional rights establish a barrier against state interference, or, in the frame of systems theory, that they constitute social systems which demand autonomy and can be indifferent vis-à-vis externalities. The application of the concept of reflexive law can have the conse-quence that its regulative effect is diluted in areas in which the internalization of externalities is essential, especially in the economic sphere, while it is destructive in areas where externalities are pivotal for the maintenance of constitutional liberties. The reason is the undifferentiated notion of communication. While Habermas conceives of it as a discourse aiming at understanding and normative integration, in Teubner's concept of reflexive law communication is every transfer of information, notwithstanding their relation to different systems. This entails a leveling of communications which neglects the different significance of meaning and normatively structured interactions in different systems. Although I do not agree with Habermas' concept of the "colonization of the lifeworld", I have no doubts about the necessity of distinguishing analytically between social and system integration. Whereas Habermas' concept neglects the important role of the abstract media money, power, and law for the constitution and reproduction of lifeworld areas *as established by the society at large*, Teubner's concept of reflexive law neglects the specific status of lifeworld areas as the objects of legal regulation. Both theories fail to conceptualize the law as a mediator of different social systems and as an institution which represents the unity of the society at large and the quest for the rationality of this unity.

III. A view on "communicative rationality"

It seems appropriate to briefly sum up the results of the foregoing analysis. First, "the law" as a category was identified as intrinsically connected with the process of abstraction of social relations and their released dynamics; it is a pivotal element of structuring (and fettering) social evolution. Its "rationale" consists in the self-mediation of an abstract polity and its dynamics. But it can be structured according to different "rationalities". The formal-rational law as analyzed by Max Weber was assigned to what I call "allocative rationality": it unfetters efficient allocation of scarce resources. The material and purposive character of many regulations of the modern welfare state was assigned to a concept of "distributive rationality" which is characterized by the contradiction that it aims at the realization of a substantively just order of distributive justice by the abstract media power and money. This contradiction was the starting point of the analysis of the concepts of the

"colonization of the lifeworld" and of reflexive law as theoretical solutions of the "dilemmas of law in the welfare state".[43] Both concepts are bottomed on the apparent incompatibility of the structure of the regulating law with that of the regulated area: whereas in Habermas' concept of the colonization of the lifeworld this applies only for the regulation of lifeworld areas through the law as a medium, Teubner generalizes this in the statement of the "regulatory trilemma" of structural incongruence of law, politics and society, of over-legalization of society and of over-socialization of law. For both, communication is a key element for the surmounting of the regulatory crisis of the welfare state. Habermas implicitly pleads for a decoupling of the areas of cultural reproduction from the imperatives of economic growth and the process of commodification both of which are closely connected with juridification. Nevertheless he is not a partisan of "de-legalization", but rather of a concept of law which preserves the integrity of communicative discourses, which aim at understanding and in which individual and social action is susceptible to normative justification.

Teubner agrees with this perspective, but focuses on the capacity of social sub-systems to integrate the consequences of their actions into their operative programs. As regards the legal regulation of social areas this requires the capacity of the law to "understand" the internal self-referential program of the regulated social sub-systems and to structure its interventions such as to be homologous with their internal structure.

In both concepts, "understanding" plays a pivotal role. In Habermas' theory it means susceptibility to normative justification. Teubner refers to the structural incapacity of autopoietic systems to understand messages which are not translated into their language; therefore he looks for elements of a law which is accessible to other autopoietic systems. For him, "understanding" means transferability of information from one social sub-system to another. His is the systems' perspective, whereas Habermas' notion of "understanding" refers to communicative processes within the lifeworld. But, notwithstanding these different perspectives, they are trying to solve the same problem: how can the law regulate social areas without simply being ineffective (Teubner) or without destroying the structure of the regulated system (Habermas)? Finally, the common vision is a decentralized relation between the law and specific social sub-systems. These relations appear to be structurally the same (and they raise the same problems of com-patibility) as, say, the relations between the economic system and the family.

This overlooks the structural singularity of the law as *the* institution of societal self-mediation which embodies its "rationale": not just to compatibilize heterogeneous social subsystems in order to organize their mutual exchange of performances, but to integrate them into a body politic, a commonwealth. This is clearly a normative quest; but the de-moralization of the modern law indicates that it is to be realized by institutional

[43] Teubner, *supra*, note 2, 1986

https://doi.org/10.1017/S2071832200016965 Published online by Cambridge University Press

arrangements and not by some sort of "value communism". Therefore we have to translate this normative meaning of commonwealth into requirements for the structure of the law which, yes, represents the unity of the body politic. Represen-tation does not mean the symbolization of a static unity, but is a *process* of mediating all social areas and integrating them into an order in the normative sense of a "commonwealth". Therefore Habermas rightly insists on the normative justifiability of legal regulations. But the law and its regulatory purposes have to be justified on behalf of *the commonwealth* and not on behalf of decentralized communicative interactions. This has two different kinds of implications: first, the law has not only to gain access to different social subsystems – to the economic system, to the family, to the educational system, to the state apparatus etc. – but, in addition, has to organize the relations among these different subsystems as elements of a unified body politic. This requires a hierarchical relation of the law to those other social areas notwithstanding their structural properties as self-referential systems. Second, the law protects and guarantees self-producing interactions of social subsystems (including the communicative discourses in lifeworld areas) only insofar as they fit into the purposes of the body politic.

This is a traditional view on the law and its integrative function, one which, as we have seen, has entailed its own crisis. The problem is as follows: how can the law preserve its function as the central institution of societal self-mediation without either destroying lifeworld communications or yielding to the self-sufficiency of social subsystems? Whereas Habermas and Teubner offer a solution to the latter require-ments they neglect the former. In fact, this is difficult to perform because the binding force of the two concepts of universal societal rationality (progress as underlying normative goal of allocative rationality and justice as that of the distributive rationality) has been considerably weakened by their failures. More important perhaps is a new experience: the loss of conviction and interest in a concept of rationality of the body politic which we can observe in many tendencies of postmodernism. Whether this originates in the evident self-destructive tendencies of the industrial societies or in the fact that the natural basis of human development has become endangered and that even the biological reproduction of the human species has become a matter of technology cannot be discussed here. What is important for legal theory is that the meaning of the term "the law" implies a concept of societal rationality in the spirit of which the society constitutes itself as a body politic. If we cannot ascertain such an underlying rationality concept in our legal order the term "law" begins to lose its meaning; it then becomes meaningless. It would be futile to establish authoritatively principles of a new rationality, because the corresponding structure of a homogeneous subject of history is missing.

A new concept of societal rationality has to be reconstructed. As I have tried to show in my critique of the concept of the colonization of the lifeworld, discursive processes cannot dispense with an institutional framework which connects them with the body politic. Conversely, self-referential systems can communicate with each other only because and insofar they *know* that they can communicate, that is, they must have a common

understanding of the premises of their communication. They cannot any longer presuppose this common understanding but have to produce and reproduce it in their com-munications. We may name this 'meta-communication' or 'reflexivity' or something else; what is decisive is that they do not simply reproduce their internal logics but the conditions for communication with each other, that is, that they produce and reproduce the body politic. In a legal order which is structured by a self-evident common rationality every single legal act is at the same time an act of reproduction and confirmation of its underlying rationality, and usually there is no necessity to reflect this. It is implied in the general operation of the legal system. Where we cannot presuppose this underlying self-evident rationality but have to re-construct it in our legal practice this meta-communication has to be made explicit. The legal structure itself must allow communication about the conditions of communication. This is not merely procedualization of the law in the sense that it renders patterns of self-regulation available. This requires, to use Hart's above-mentioned distinction between internal and external statements about the law, that the law must give way to external statements about the law: the validity of a rule of behavior is not sufficiently justified by the statement that there is a rule of recognition which is "effectively accepted as (a) common public standard of official behavior by ... officials".[44] This common public standard is not any longer to be seen in a legal practice (of the courts, the legislators, the administrative agencies, the bar etc.) but rather in the conditions which allow the acceptance of this rule of recognition through the members of the body politic. This does not demand a normative, substantive justification of every legal norm; but it does require justification that meets the difficulty that there *is* no pre-existing and self-understood common understanding about a public standard. It must give way for a discourse about the conditions under which a legal obligation is accepted as "law". Civil disobedience is an example, certainly an extreme one.[45] There are other and less dramatic possibilities: a legal rule, say about permission for construction of nuclear plants could widen the scope of possible legal arguments before the administrative courts by allowing "social advocacy"[46], arguments in favor of future generations or tests about the reversibility of an administra-tive decision. Generally speaking, this re-constructive communicative rationality would transform the law into an institutional design "for public learning"[47] in

[44] Hart, *supra*, note 32, 113

[45] U.K. PREUSS, POLITISCHE VERANTWORTUNG UND BÜRGERLOYALITÄT. VON DEN GRENZEN DER VERFASSUNG UND DES GEHORSAMS IN DER DEMOKRATIE (1984)

[46] Nonet & Selznick, *supra*, note 2, 95

[47] S. Holmes, *Precommitment and the paradox of democracy, in* CONSTITUTIONALISM AND DEMOCRACY (I. Elsler, R. Slagstad eds., 1988)

https://doi.org/10.1017/S2071832200016965 Published online by Cambridge University Press

that it would institutionalize communication about the conditions of a legally constituted body politic.[48]

[48] Additional References: K.H. LADEUR, "ABWÄGUNG" – EIN NEUES PARADIGMA DES VERWALTUNGSRECHTS. VON DER EINHEIT DER RECHTSORDNUNG ZUM RECHTSPLURALISMUS (1984); N. Luhmann, *Zur Funktion des 'subjektiven Rechts'*, in 1 JAHRBUCH FÜR RECHTSSOZIOLOGIE UND RECHTSTHEORIE 322 (1970); N. LUHMANN, RECHTSSOZIOLOGIE. REINBEK (1972); U.K. PREUSS, DIE INTERNALISIERUNG DES SUBJEKTS. ZUR KRITIK DER FUNKTIONSWEISE DES SUBJEKTIVEN RECHTS (1979).

https://doi.org/10.1017/S2071832200016965 Published online by Cambridge University Press