Articles

From Universalistic Law to the Law of Uncertainty: On the Decay of the Legal Order's "Totalizing Teleology" as Treated in the Methodological Discussion and its Critique from the Left[+]

By Karl-Heinz Ladeur[*]

A. From the Project of Universalism to End-Means Rationality

The practical principle of legal certainty, in the sense of a regularity and calculability of legal practice, has a "deep structure", which can be found in Kant's attempt at a new foundation of morality through universalistic formality. In both cases the concern is identical: to break with the dispersed local practices used to integrate norm and facts, and to execute a break which would at last give normativity a systematic independence. The existence and continuity of substantial tradition, of particular customs, should be interrupted by the pre-supposition of a law distinguished by its pure, universalistic form. The unified life-world (Lebenswelt) would thus be split into norm and norm-application, thereby founding a new meaning-giving *deduction* of practice. Action could find normative meaning only through the fracturing of the continuity of life-contexts in the mirror of the generalized other.[1]

In both the moral and the economic models of the Enlightenment, control of the subject over the world of objects outside him is *constructed* in such a way that it was only mediated via internalization of the universal subject (as "man within"). The subject was,

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[1] P. Costa, *Il progetto giuridico*, 1, (1974), 213-236.

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thus, a project which, in a circular fashion, rendered possible both itself and, at the same time, the object separated from it.[2]

The historicity of this project itself, and thus the impossibility of a purely formal, contentless meta-law of the self-enlightenment of individuals with the help of a universalistic "criterion", could remain hidden so long as there remained an assured fund of de facto commonly held convictions about property, contract and family.[3]

The historical progression towards even wider circles of relation (the state instead of local dependency, national instead of local markets etc.) and towards more abstract legal forms (codification instead of common law) – forms which apparently owed their existence neither to some "divine order" nor simply to the "nature of things" (empirically) – gathered momentum right up to the threshold of the twentieth century. (Then, however, its advance seemed to be halted by, on the one hand, the postulate of a new universalism, this time not one of form but of the historical developmental dynamic of material conditions (Marx) and, on the other hand, by the concept of a voluntaristic notion of domination, the "will to power" (Nietzsche), which forced upon the formless flow of becoming moments of duration).

Of course, even in Kant's work the tension between the "given" and enlightening reason did not point towards a future harmony.[4] But it is the model, the idea of an ordered structure of goals, which lost its function as an identify-forming "movens" in the formation of simultaneously nature-bound *and* free and reasonable individuals. In Nietzsche, this difference no longer allows an identitarian "self-relation" of the will; it loses its constructive center and dissolves into a plurality of "forms" (Gestalten) constituted by time.[5]

Even in theories and methods more closely oriented towards the everyday practice of law, more and more recognition was given to conceptions which foreshortened the project of universalism by eliminating the radical moment of breakage with inherited practice ("Aufhebung" – overcoming) and – in German positivism – emphasized the voluntaristic element of the law (by focusing on legislation), while at the same time viewing the basic structures of law quasi as given, an assumption which limited the voluntaristic element of positivism. The universalism of German positivistic "Begriffsjurisprudenz" (concept

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[2] *Id*., 239.

[3] A. MACINTYRE, AFTER VIRTUE. A STUDY IN MORAL THEORY, 48 (1981).

[4] K. KONHARDT, DIE EINHEIT DER VERNUNFT. ZUM VERHÄLTNIS VON THEORETISCHER UND PRAKTISCHER VERNUNFT IN DER PHILOSOPHIE I. KANTS, KÖNIGSTEIN/TAUNUS, 44 (1979); W. Hamacher, *Das Versprechen der Auslegung, in* FESTSCHRIFT TAUBES, 252, (1983).

[5] Hamacher, *supra*, 270.

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jurisprudence) at the turn of the century exhausted itself in the "logical manner of treatment of the law".[6] "The scientific task of the *dogmatics* of a particular positive law lies, however, in the construction of the "Rechtsinstitute", in the tracing back of single legal norms to more general concepts and, on the other hand, in the deprivation of the conclusions following from these concepts."[7] Positivism in no way exhausts itself in the legitimation of power; its systematic character postulates the subsumption of the individual under the unified control of a comprehensive idea.[8] This comprehensive idea gives the system a pyramidal structure, its tenets being integrated through a gradation which rises to a final gathering-point.

The project of "reason as totalizing teleology"[9] increasingly exhausted itself in the pragmatic postulate of the calculability of law. This itself becomes, in the principle of "legal certainty" – similar to money in the economy[10] – a paradoxical symbol for the maintenance of a general context of the legal system which must be actualized in each individual decision. This general context, which grew from the hierarchical deduction of the particular from the general and the conceptual-systematic harmonization of legal provisions with each other, corresponded (on the subjective side), to a reduced conception of the identity of the subject. For here too, an "egology" corresponded to the teleology.[11] Even in this reduced variant of universalism, meaningful action was only mediated through reference to public rules. The "logic of identification" of individuals[12] – which is to be distinguished from penetration into the lived/experienced context of local customs – refers back to the public recognition of individuals by a collective power, namely, state and market. This recognition, however, is conveyed through the very freedom, as a bearer of means of exchange, to communicate with others. In the process of its "realization", rationality is ever more strongly determined on the formal side of the means and no longer of the ends. This shift was given classical expression by Max Weber. Hayek[13] later elaborated on this reduction, in the distinction between goal-free civil law, within which the state does not pursue aims of its own, and the goal-orientated public law, which does pursue aims, and thus is particularly in need of legitimation.

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[6] P. LABAND, DAS STAATSRECHT DES DEUTSCHEN REICHES, Vol. 1, 2 (1888); W. Krawietz, *Begriffsjurisprudenz*, *in* 1 HISTORISCHES WÖRTERBUCH DER PHILOSOPHIE, 809 (J. Ritter ed., 1971); R. ALEXY, THEORIE DER GRUNDRECHTE, 35 (1986).

[7] Laband, *supra.*

[8] C. F. v. GERBER, SYSTEM DES DEUTSCHEN PRIVATRECHTS, (1843); also M.G. Losano*, Der Begriff "System*", *in* GEDÄCHTNISSCHRIFT FÜR I. TAMMELO, 647 *et seq*.,(1983).

[9] B. WALDENFELS, IN DEN NETZEN DER LEBENSWELT, 27 (1985).

[10] A. Orléan, *Certitude et paradoxe*, *in* ECONOMIE APPLIQUÉE, 133, (1985).

[11] Waldenfels*, supra*, 27.

[12] A. Pizzorno, *Sulla razionalità della scelta democratica*, *in* 7 STATO E MERCATO 3, 24 (1983).

[13] F.A. HAYEK, LAW, LEGISLATION AND LIBERTY, VOL. 1: RULES AND ORDER, (1973).

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Even Weber's concept was still based on a secularized form of the Enlightenment, on the presumed coincidence of subjective rationality/expectations and social rationality/valid experience.[14] Subjective identity and certainty of expectation as well as objective coherence of possibilities for action corresponded to each other in a form which built less on the universalism of norms than on the effectiveness of end-means-relations. The codification of the law had constituted the legal relationship as regular, calculable interaction but thereby also unfolded the greater calculability capacity of the organization as a macro-subject, (or better put) as a plurality of subjects.

B. The Dismantling of the Hierarchy Model in the "Laboratory" of Weimar...

In the laboratory of Weimar – although making such an assertion runs the risk of a certain crudeness – the provisional nature of the emphatic project of the Enlightenment is diagnosed.[15] Here, the (literally) original impetus of the suspension (Aufhebung) of the normative claim of tradition turns against the stunted formalism of neo-Kantian analytical origin. The normative pre-supposition proves itself to be formally identical to transgression.[16] with the weakening of universalism through its concessions to the positive will (to power) and the instrumental restriction of the rationality (of means), the project of the Enlightenment exposes itself to different attempts at its own suspension. The multiple, plural subject which can no longer carry the unity of the universalistic project, is also no longer in a position to serve as a reference point for legitimation of the norm.[17] If the norm can no longer be set in a unified project *over* reality but instead is dependent on forces which are themselves undergoing transformation, legitimation is no longer foundation (Begründung) but merely systematic *imitation* (Nachbildung).

In jurisprudence, different conceptions emerge which – following Smend[18] – demand a "geisteswissenschaftliche Methode" (method of the human sciences/humanities) which is to lead out of the dead end without goal or purpose.[19] Despite all their differences of approach, the more recent positions from the "Freie Rechtsschule" to Carl Schmitt's "decisionism" – all have in common the fact that they open the perspective of the legal system to the conditions of possibility of historical *situations* and that they call into question the hierarchical-systematic model of *deduction*.

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[14] L. Sciolla*, Il concetto di identità in sociologia, in* COMPLESSITÀ SOCIALE ET IDENTITÀ 101, 109 (L. Balbo et al., 1983).

[15] J.F. SPITZ, LA MORALE EST-ELLE VRAIMENT MORTE? CRITIQUE 1137 (1985).

[16] R. SCHÜRMANN, LEGISLATION – TRANSGRESSION. STRATEGIES AND COUNTER-STRATEGIES IN THE TRANSCENDENTAL JUSTIFICATION OF NORMS, MAN AND WORLD 17, 361, 382 (1984).

[17] *Id.,* 375.

[18] R. SMEND, STAATSRECHTLICHE ABHANDLUNGEN UND ANDERE AUFSÄTZE, (2nd ed., 1968), 119, 124

[19] *Id.,* 124.

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But the reference-context of norm and subject introduced with the project of the Enlightenment continues in a new form: it is characteristic of this situational perspective that it is determined less by a rule-applying subject than by the growing significance of asymmetrically organized "artificial" actors (big business, groups, associations, etc.) and by the flexible plural "positions" – bundles of situationally-regulated constraints – mediated via these actors to concrete individuals.[20]. In the Weimar methodological debate, the restructuring process taking place within society can only be perceived as a crisis-phenomenon which demands a new unifying formula: its reference point is sought in the state, which is supposed to compensate for the decay of the universalistic rules of individual action and of its personal substrate by providing a higher degree of "spiritual" or "existential" identification with organized processes. This new concept was doomed to fail because it provided no space for the collectively organized actors as such and no system of co-operation based on a willingness to learn, to be internalized organizationally (such a system, which the American New Deal institutionalized in a democratic variant, could only be achieved in Germany, in a violent form, under National Socialism).

The project of Enlightenment, i.e. the overcoming of immaturity through a self-legislation,[21] was meant to achieve a break with the continuity of the tradition of substantial norms integrated in the reality of the actual life-world. The ambivalence of the pre-supposition of norm before practice (and thus of the subject before the object) only appeared when the "incision" of universalism as a historical topological moment became visible in a dynamic which was perpetuated by its own results.[22] Pre-supposition and transcendence are now merely two sides of the same process, of a play of differences and identifications,[23] which is constantly converting its "beginnings" into mere interludes. This holds true not only for the normative side, but also for its personal substrate, the subject, which cannot establish a graded system of reason. But, through the "oscillation between contradiction to the rule and de-regulation or new regulation", a texture is set in motion which again and again aggregates itself in non-intentional, anonymous systems of reference and strikes back at the subject.[24] Rationality and facticity, the legal systems and its "results" are insolubly connected,[25] the multiplying and pluralizing of subjectivity transforms the "logic of identification" (Pizzorno), of the appropriation of subjectivity through individuals as natural persons *and* as position holders in organizationally linked

[20] J.S. COLEMAN, THE ASYMMETRIC SOCIETY, 96 (1981).

[21] E. SEVERINO, LA FILOSOFIA MODERNA, 195 (1984).

[22] Ch. Perelman, *On legal Systems*, JOURNAL OF SOCIAL AND BIOLOGICAL STRUCTURES 341-343 (1984).

[23] Schürmann*, supra*, 362.

[24] Waldenfels, *supra*), 48.

[25] Waldenfels*, supra*, 28.

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networks and connection constraints for actions as well as situational horizons of expectation.

C. ... and the Basic Pattern of Left-Wing Universalism

Even the left-wing critique of law, all variations of which are more or less strongly dominated by Marxist social theories, starts from the project-character of the Enlightenment as the foundation of law. The more fundamental versions attempt to radicalize the universalism of the form of rules of action into a universalism – one *not* alienated by institutionalization – of the satisfaction of substantial life-interests. The more superficial versions seek instead to expand the possibilities of political action for power-critical movements (extensive interpretation of concepts of democracy, the freedom to strike, freedom of opinion, etc.) or to defend institutions which seem to be more susceptible to control by the "people" (e.g. parliament versus the judiciary).

A presentation of individual positions within left-wing critique of law will not be made here. A basic characteristic of all variants, however, is the transition from a universalism of *rules* (dominance of subjects over the world of objects, a form of rationality which ultimately withered into instrumental rationality) to a universal rationality of goals, the determination of which is left to the free association of equal individuals or to the scientific insight of an organization which is conceived as the representative of historical laws. In contradiction to the bourgeois Enlightenment, which had itself become a tradition, something "given", the point of reference for critique is sought "outside": in the individual, who sees himself confronted by an organized domination which can no longer be subsumed under universal rules as "big action", in the working class which, after the first step of freeing the *person* from the general context of the feudal life-world, was also, in a second step, torn out of the world of artisanship and appeared to have become an "appendage" of the machine.

The a priori reference context of the constitution of subject and rationality in the Enlightenment has accomplished the break with "immaturity" in the – to be understood in an emphatic sense – pre-supposition of universal rules before the (legitimate) action. Therein is implied a tension between subject, rule and action which finally, in the production of historical facticity, as a consequence of past rule-application and presupposition (in a non-emphatic sense) ruptures for future action the reference-circle of subject, rule and object, and lets the totality of rationality "disintegrate" into a myriad of developmental lines.[26] Rationality and facticity are, thereby, indissolubly linked. The formation of "artificial" organized actors is the institutionalization form of this context, which stabilizes long action-chains and ramified networks, which inserts connexion-

[26] Waldenfels, *supra*, 27.

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possibilities and connexion-constraints among individual, rule and action. The left critique, therefore, starts primarily from the consequences of the organized empowering of fields of action, and demands the fundamental abolition of the tension between rationality and facticity. With the new dependence on facticity, the old Enlightenment claim of rationality is linked to a higher unity. The incision which universalism has accomplished creates new "data" which can only be brought back to reason through the production of *equality* of real living conditions, and that means primarily through the abolition of organized power, in so far as it is not the immediate expression of the common interests of equal individuals. It thus follows that the left critique of law in its radical form can, firstly, only be criticism of ideology, a critique which, precisely because it comes "from outside", can be made from the viewpoint of the working class or from a utopian anticipation of the free association of equals. In this, it also preserves an enlightening impetus: the discrepancy between the claim of rationality and the facticity of production, between inequality and empowerment, demands a categorically new, *real* incision. It is precisely the destruction of the "totalizing teleology" of rationality which is interpreted (in various readings of the critique of the law, above all, of the Weimar period: Fraenkel and F. Neumann)[27] as a symptom of the decline of bourgeois rationality and drawn upon to found the aspiration of Marxist theory, which claimed to "overcome" ("aufheben" in a Hegelian sense) these contradictions, i.e. to resolve the entanglement of rationality and facticity in a new superior/subordinate relationship. The decisive point is that the critique of law as criticism of ideology introduced, on the one hand, the coming together of norm and theory and, on the other hand, of reality and practice as a central argument[28] and can thus only view attempts to increase the law's receptivity to situations and differential strategies (e.g., to make horizontal, non-hierarchical linking of actions a subject of law and to call into question the deductive relationship of norm and practice) as a road leading to irrationality. On the other hand, however, the tension between nature and reason, which characterizes the education (Bildung) of the individual, is resolved into the rationality of the progressive organization.

D. Paradigms of Left Theories of Constitutional Law in West Germany – Taking as an Example the Writings of U.K. Preuß

I. The Motif of Identity: A Critique of "Two-Tier-Legality"

Since the mid-sixties there has developed in West Germany, after a neo-liberal interlude, a new legal structure which institutionalizes new forms of a "society of organizations", something the Weimar Republic was not capable of stabilizing. In contrast to a – to state it

[27] E. FRAENKEL, DER DOPPELSTAAT, (1974); F. Neumann, *Der Funktionswandel des Gesetzes im Recht der Bürgerlichen Gesellschaft*, in: *Id*., DEMOKRATISCHER UND AUTORITÄRER STAAT, 31 (1967); ID., BEHEMOTH, (1977)

[28] Th. C. Heller, *Structuralism and Critique*, STAN. L. REV., 127, 135 (1984)

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in over-simplified terms – "society of individuals", this new epoch is characterized by the fact that in civil/labor law as well as in public law, increasingly systematic conclusions are drawn from the fact that the primary social actors are no longer "rule-applying" individuals, but rather organizations and groups which act strategically.

The old separation of state and individual is replaced by the formation of a range of fragmented "political arenas"[29] which comprehend political, private and public interests, and in which the state functions as a catalyst in social processes rather than as a decision-making sovereign.

The related legal forms and methods of "harmonization" and "balancing" (Abwägung), above all, the mediation-function of constitutional jurisdiction *between* groups and organizations, the replacement of legal interpretation through flexible, situational, procedural "concretization" and "consensus-formation"[30], social state negotiation-models, and the internalization of "constraints" through organizations etc. shall not be described here in detail. What is important for a discussion of the historical-developmental conditions of the legal system and of possible points of departure for critical reflection about alternatives is the perception that the Welfare state model of the "society of organizations" in the left critique is delineated against the background of the Weimar crisis scenario and perceived by, e.g., U.K. Preuß as a new form of "two-tier-legality"[31]. Beside the classical, formal legality of the mediation of the "territorial and personal unity of society" which is effected via rules and the "regulated application of state force"[32] there appears the "concrete, particular and goal-orientated measure" (74, 75) which, without being mediated by the communication-forms of regulated legality, is intended to maintain the substance of the capitalist social formation (through the distribution of rewards, etc.). The specific historical constellation of the Weimar Republic, the institutional competition of a parliamentary legality with a bureaucratic-juridical legitimacy in which the struggle of two lines of *political* development takes place, is generalized into a process of disintegration of the rationality of the (constitutional) state. Since the *regulated* constitution of unity, in the sense of the Enlightenment model, is always taken as a standard, the legal paradigms of both the Weimar period and the Federal Republic, which originate in the context of the "society of organizations", can only appear as two variations of a process of decay.

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[29] Th. J. Lowi, *Decision Making versus Policy Making, in* PUBLIC ADM. REV 314 *et seq*. (1970).; H. KITSCHELT, KERNENERGIEPOLITIK. ARENA EINES GESELLSCHAFTLICHEN KONFLIKTS (1980); K.-H. Ladeur, *Verrechtlichung der Ökonomie – Ökonomisierung des Rechts?*, 8 JAHRBUCH FÜR RECHTSSOZIOLOGIE UND RECHTSTHEORIE, 74 (1982)

[30] P. HÄBERLE, DIE OFFENE GESELLSCHAFT DER VERFASSUNGSINTERPRETEN, 297 (1975); K. HESSE, GRUNDZÜGE DES VERFASSUNGSRECHTS FÜR DIE BUNDESREPUBLIK DEUTSCHLAND, 17 (16th ed. 1988).; K.-H. Ladeur, *Konsensstrategien statt Verfassungsinterpretation?*, DER STAAT 391 (1982)

[31] U.K. PREUß, LEGALITÄT UND PLURALISMUS, 112 (1973)

[32] PREUß, *supra*, note 31, 71, 106

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In a later work, Preuß sees the intertwining of rationality and facticity institutionalized in the imposition of a "logic of loyalty" (Würdigkeit) as the political-administrative criterion of distribution onto the regulated market logic and of the procedural openness of the process of parliamentary will-formation. This tendency is characterized as the "law of the internalizing of individuals in the cage of abuse"[33]. The new collective logic of action is reduced to the "authoritative evaluation of individuals and their achievements as well as of organized groups".[34] In this view, therefore, the state reacts just as sensitively to any endangering of its "evaluation monopoly" as it did earlier to doubts about its "monopoly of force". Because – and, here again, the conception of the moving power of the ideology, critical unmasking of a non-universal logic of state action becomes apparent – "every thought which is not in agreement with the prevailing value-convictions, already (presents itself) as a direct attack against the concept of the state per se – against the state's evaluation monopoly". [35] Here, a new construction of subjectivity is identified: one which the individual – after having lost his autonomy, his "Eigen-Value" – receives from the state as a surrogate value (e.g. through job creation programs).

Here one can already note a stronger turning away from a Marxist class theory and towards that other reference point for left critiques of law: the individual, who must be protected from the clutches of organized apparatuses: "for, in the system of state-distributed compensatory rewards, the subjective potential for resistance (which the biographical uniqueness[!] of each individual brings to the collective self-production of society) is completely extinguished." The expediency of the distribution criteria contains "no definite, historical conception of the meaning" of existence of individuals in society, and thus the *identity* of the society is finally destroyed.[36]

II. The Motif of Identity II: Conscience as Vanishing Point

An individual-ethical variant of this topos, bearing a stronger normative orientation, appears in a more recent work by Preuß. Here he investigates instances of the reconstruction of identity which were to be won from a policy of "preservation" which would have to orient itself "on the relationship and needs of life-world, indeed, on particular identity".[37] For: "not only does the system of party-competition and of equal opportunity in the acquisition of power ignore the actual life-world interests, but even the

[33] U.K. PREUß, DIE INTERNALISIERUNG DES SUBJEKTS, 329 (1979) .

[34] *ID.*, 278.

[35] PREUß, *supra,* note 33 279.

[36] PREUß, *supra,* note 33, 329

[37] U.K. PREUß, POLITISCHE VERANTWORTUNG UND BÜRGERLOYALITÄT, 115 (1984).

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formal procedures for the solution of a regulated acquisition of power do not work here, because such interests cannot be integrated into them". Civil disobedience, intervention "from outside" are justified by the fact that "the interests directed towards limiting particular developments of some advance receive unequal attention in the political process"[38]. And – here the significance of an individualist ethics as a medium for preserving the dominance of identitarian rationality over the world becomes particularly clear -: "Far from being an accident, it is rather inherent in the nature of these interests that they are "general", that they demand responsibility vis-à-vis future generations or a particular cultural tradition and, therefore, they find no place in the system of organized interests and are incapable of mobilizing the sort of sanctions to which the political process of mass democracy is sensitized".[39] The duty of the state to respect the dignity of resisting individuals is brought into connection with the "integrity of that which cannot be disposed of" (das Unverfügbare), whose "truth" is at odds with the procedural legitimation of the majority. [40]

The theme of identity appears in the works by Preuß quoted above in two variations (and in one transitional form). The first (quoted) work from 1973 is still marked by a Marxist conception of the restoration of the unity of society in a comprehensive social rationality. The transitional form (1979) asserts the loss of unity merely as an observation, the resistance of individuals, while perceived with sympathy, is judged to be a helpless attempt to preserve history from the dissolution into ahistoricity; history as production, as a derivation of meaning, appears only by negative implication.

In the second variant, it is precisely this moment of negation which becomes, in the very apposite image of a "grasp for the emergency break", the crystallization-core of a new rationality of the "preservation" of life-interests which can find no forms of expression in the institutions. The individual conscience becomes the medium of the formulation of ethical "limits" to social action and, therewith, is turned into something normative: the previously apostrophized ahistoricity of the world, from which meaning can no longer be read, provokes the rediscovery of the "book of nature". Ahistoricity no longer produces a textual meaning, and therefore the "particularity" of the individual and of nature must silence the empty chattering of the opportunistic disposal over life. Yet, on the basis of this idea – not exactly in line with the Enlightenment – he attempts once again to revive the concept of "social disposal" over the "consequences of an increasing rationalization of particular social fields, which consequences have gotten out of control and are also completely uncaptured by law". Additionally, he demands the extension of our institutional

[38] PREUß, *supra,* note 37, 116.

[39] PREUß, *supra,* note 37, 116.

[40] PREUß, *supra,* note 37, 104

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design for collective learning processes".[41] Constitutional theory would then be "additionally a theory about the conditions of the process through which society continually revolutionizes its own basic structure." This fruitful idea[42] which, above all, could help us deal with the issue of the conditions of the possibility of historical development of a theory about the processes of social self-transformation – awakens hopes, which (sadly) are dashed immediately. For according to this, the development of "social rationality" presupposes that "constitutional theory *becomes* (!) social theory. At present this is no more than a postulate".[43] That the postulate asserted here is actually so promising must be doubted, for what is demanded here as a future task is something which left constitutional theory has boasted for the last century as its particular achievement. On the whole, the text lets us discern that no new perspective is opened up: instead, the Enlightenment motif merely receives a new paraphrase.

III. The Identity-Motif and the Problem of Social Organization

The presupposition of the norm as instruction and meaning-establishing source of action which is the result of a constitution (that is, of a self-referential grounding of the subject as the "beginning" of its action) is confronted with "direct, operationally organized compulsive force ..., which furnished the model for the general state of emergency and of siege." The postulate of rupture, which the universal norms carry out with the "given" of tradition, is here carried to its extreme. Following Carl Schmitt, Preuß sees that the element of *order* inherent in the legal structure is grounded in a "decision", that is, on the sovereign force of an establishment which precedes all normativity as a non-derivative "direct execution of a social interest in maintenance of order by force".[44]

For Carl Schmitt, this element of decision refers fundamentally to nothing less than the assumption that a legal system cannot claim independence vis-à-vis reality as a "universal expression of reason", because decisions about the validity of the legal system cannot be made on the basis of the system itself. With Preuß the argument takes on a slightly different significance: this element of the facticity of order stands in *opposition* to the normativity of the law. It is a potential object of overcoming via the rational law and forfeits its weight as an autonomous element of existence – in the Nietzschean formulation, the "will to power" – on whose basis the norm system of the law necessarily rests. If one ignores the dramatization of the "decision" (which was determined by the historical period) the argument in Carl Schmitt has a certain stringency whereas, in Preuß,

[41] U.K. PREUß, AKTUELLE PROBLEME EINER LINKEN VERFASSUNGSTHEORIE, PROBLEME DES KLASSENKAMPFS 61, 65 (1985)

[42] K.-H. LADEUR, VORÜBERLEGUNGEN ZU EINER ÖKOLOGISCHEN VERFASSUNGSTHEORIE, 285 (1984)

[43] Preuß, *supra*, note 41, 78

[44] Preuß, *supra*, note 41, 67

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it rather blocks one's perception of the Enlightenment normativism: the "decision" should be overcome precisely in universal law, which makes possible the mediation of the interests of individuals. The basic pattern of the Enlightenment is, in the final analysis, once again repeated in a universal-pragmatic reading. This motif has found its characteristic expression in Sartre's "Critique of Dialectical Reason".45 "Nineteenth-century Marxism is a gigantic undertaking, not only to make history but to master it, practically and theoretically .... The plurality of the meaning of history can only be disclosed and established as such with a view to a future totalizing in regard to the moment in which history will have only one meaning and in which it will tend to dissolve in the concrete human beings who, together, make it". The basic problem of the universal-pragmatic theoretical tradition outlined above is that it lacks a theory of social organization of complexity, one which is no longer translatable46 into the a priori supremacy of subjective consciousness.[47]

E. Conscience as Medium of the "Life-World"?

With the recourse to the individual conscience, Preuß introduces a complement into critical (legal) theory whose status corresponds to Habermas' attempt to introduce the "life-world" into universal-pragmatic communications theory (Preuß also uses the term several times himself): just as the "life-world" as "conservative counterweight" stores the "previously accomplished interpretative work of earlier generations",[48] so conscience is the social authority which defends, in an emphatic sense, the "life-world" against instrumental rationality and moreover points to a "structure of hope", "which should be able to create situations in which those people acting communicatively no longer need to fall back upon consensus antecedents from the "life-world" but can rely on their *own interpretation-achievements*".[49] In this connection, the "Lebenswelt" is made into a pre-verbal pre-structure which, qua context, only precedes the constitution of the "world as text", and which cannot manage the problem of the historical production and constitution of text and context.[50]

The same objection could be made to the political-institutional (theoretically little "enlightened") reading of the complementary relationship between conscience and universal legal mediation. Conscience is too much seen as pre-authority of true rationality

[45] J. P. SARTRE, MARXISMUS UND EXISTENZIALISMUS, 735 (1964)

[46] MacIntyre, *supra*, note 3, 48

[47] A. DAL LAGO, LA PENSÉE COMME OSCILLATION, CRITIQUE 82, 86 (1985)

[48] J. HABERMAS, 1 THEORIE DES KOMMUNIKATIVEN HANDELNS, 107 (1981)

[49] U. Matthiesen, DAS DICKICHT DER LEBENSWELT UND DIE THEORIE DES KOMMUNIKATIVEN HANDELNS, 78 (1983)

[50] Matthiesen, *supra*, note 44, 63; Waldenfels, *supra,* note 9, 107

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which refers to the "test procedures"[51] of an individual *mediation*, i.e. to the constitution of a general comprehensive claim to validity which alone can ground the compulsory character of social norms.[52] To this degree, the pre-decision of conscience stands in opposition to the world of "decisions" which do without this kernel of rationality.

The historical materialization ("realization") of rationality in a variable "order of things" (Foucault) presents itself, (from the perspective of the explicit, institutional mediation of meaningfully acting individuals) as the sheer resistance of speechless non-meaning.

The reduction of the classical-universalist rationality-model (brought about by eliminating the a priori validity claim of the form of law), and the retreat to the mundane equality of participation in the process of mediation is, however, even less convincing in Preuß than in Habermas' philosophically elaborated version. The older reading was still strongly marked by the belief that the new collective subject (the working class) would be able to decipher a historical world-rationality. The institutional and organizational deficit of Marxist state and legal theories has been justly criticized by Preuß in more recent works.[53] The new reading, however, can no longer say anything concrete about the possibility of reason in light of its multiplication into a "network of heterogeneous rationality fields".[54] In my view, this lies in the fact that the "prerogatives of reason", the dominance of the subject over the world of objects, is transferred precisely to the *process* of the legally institutionalized mediation of individual interests. The process becomes, so to speak, itself the subject of legislation. This interpretation is further supported by the fact that in the more recent work quoted, learning capability and self-transformation of the constitution are made the pivot of a new constitutional theory. This can be a thoroughly productive idea, but so long as the historical conditions of learning capability are not also simultaneously made the object of theoretically reflection, the suspicion arises that the work of reason is merely being formulated anew, not conceptually reconstructed.

A merit of left legal theories has always been that they – in contrast to conservative theories – build into theory itself the historical conditions of a theory's origins as self-reflexive components. (In contrast, conservative theories usually remain so "close" to institutional practice that they only perceive isolated and partial changes.) This was however, at the same time, their greatest deficit because, precisely for this reason, they are seduced into assuming that they have found the security of a meta-discourse: left constitutional theory as an event within history expresses at the same time the objective historical reason or the "truth" of an institution.

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[51] Matthiesen, *supra*, note 44, 64

[52] Matthiesen, *supra*, note 44, 95

[53] Preuß, *supra*, note 41.

[54] Waldenfels, *supra*, note 9, 116.

The belief in the collective-subject working class has, of course, disappeared but – in reduced form – the ambition to ground the domination of a subject of history over the world of objects lives on. Yet precisely the conditions for a paradigm shift would merit a fundamental reflection concerning the connexion of theory and practice. In my opinion, the undermining of the old paradigm is to be traced back to the fact that mass production, based on a control through the collective-subject working class, turns out to have been an historically transient economic epoch.[55] The danger exists, however, that the (justified) new interest in individuality and particularity will immediately be generalized again into a meta-discourse, one which will merely continue the old model of the "totalizing teleology" of reason under the formula "learning capability". The newer variant of critical constitutional theory remains here, unlike Habermas' concept referred to above, simply vague.

F. The Necessity for the Legal System to Take into Consideration its own "Application", and the Evolution of the Prevailing Methods

The new methodological conceptions of legal interpretation (cited above merely as examples), show themselves in different directions in one central problem: namely, the necessity of the legal system to take into consideration the consequences of the application of its own programs and, therewith, to compensate for the element of *time* which is absent from the "totalizing teleology" of the Enlightenment. A legal system can have no "beginning", it operates continually with an abundance of connexion-possibilities and connexion-constraints to which every legal action adds new ones. The more recent hermeneutic literature contains an interpretation of this problem, for which the influential work of J. Esser[56] might be named: every transaction within the legal system must not only apply rules but must also have "pre-understood", with a situational horizon, the transactions already made (and the expectations, feedback responses and anticipatory actions thereby inaugurated). This is also the basis for the theoretical and practical interest in the significance of the "precedent system". The law as a formal system could, however, neither communicate with external elements nor thematicize its own consequences. Precisely if it wants to erect a stable, secure order, however, it must, after breaking the connexions with traditional local law, find new possibilities of continuous variation through the opening of feedback-processes to its own "applications". The methodological discussion works through this continuous practical oscillation in which order is constructed from a fluctuation[57] in new non-hierarchical, horizontal forms of the preservation of

[55] M.J. PIORE/CH.F. SABEL, DAS ENDE DER MASSENPRODUKTION (1985).

[56] J. ESSER, VORVERSTÄNDNIS UND METHODENWAHL IN DER RECHTSFINDUNG (1972); also THE HERMENEUTICAL PHILOSOPHY OF H.G. GADAMER, WAHRHEIT UND METHODE (1965).

[57] I. PRIGOGINE, VOM SEIN ZUM WERDEN (1981)

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continuity in change. Norm and norm-application are made reciprocally penetrable, and the products of their own reading are recursively-circularly fed into the legal programs.

"Order from fluctuations" means not only continuous variations in detail, but, much more, that the process of law formation can no longer be regulated from a center, from a *text* and its hierarchical logic. Law formation stabilizes itself in dogmatic figures but it accumulates simultaneously "parallel circuits" which, in time, build up "bifurcations" and explode in new trajectories. Precisely because this process can no longer be regulated intentionally, the fluctuations also determine the substitution and competition of theories and methods. Phases of opening and closing of the system to new experiences, of expanded access for new (constitutional) interpreters,[58] of the widening of admissible arguments ("topoi") and of restrictive emphasis on professional methods and dogmas alternate with one another.[59] In theory this has, e.g., the result that the extension of the area of argumentation in constitutional discussion, which was, above all, induced during the 70's by the working through of the (social-liberal) thrust to modernization, has under recent restrictive pressures again fallen back to more secure dogmatic components. Therewith, an extension of the scope for executive action and political structuring will proceed (which will operate differently in the individual arenas of action). Politically, this has to be seen in connection with the increased driving back of corporate-pluralistic processes of decision-formation through the revitalization of market forces.

Topical-hermeneutic practice construes and reconstrues a norm strategically and, as a compromise in open, plural horizons which depend on the relations between the actors, without a "master strategy"[60] while the new orientation of dogmatic-operative practice makes less recourse to what can be "projected" through procedure and what is held to be compatible with the expectation-horizons of those concerned but, instead to what can (so to speak) be stabilized beyond the conflict with a claim to certainty. This is not a return to old-fashioned systematic positivism, but rather a reductionism which limits expectations in the efficacy of (constitutional) law and, instead of building on the *process* of the internalization and harmonization of the law through groups and organizations – in which state/judicial decisions are only one element next to others – builds more on the specific rationality of the *selective* function of decisions as exclusion/opening of possibilities for action[61] and thus seeks to separate the state more decisively from these group processes.

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[58] Häberle, *supra,* note 30

[59] E.W. Böckenförde, *Die Eigenart des Staatsrechts und der Staatsrechtswissenschaft*, in FESTSCHRIFT SCUPIN, 317 (1983); W. Krawietz, Juristische *Argumentation in rechtstheoretischer, rechtsphilosophischer und rechtssoziologischer Perspektive, in* FESTSCHRIFT SCUPIN, 347; B. Schlink, *Freiheit durch Eingriffsabwehr. Rekonstruktion der klassischen Grundrechtsfunktion*, EuGRZ 457 (1984)

[60] Schürmann, *supra*, note 16, 362

[61] W. KRAWIETZ, RECHTSSYSTEM UND RATIONALITÄT IN DER DOGMATIK, RECHTSTHEORIE, BEIHEFT 2 (1981), 299

Between these two directions (which might be labeled as the topical-hermeneutic and the reductionistic) could be located the argumentation theory which emphasizes "fundamental rights discourse" as an "argumentative procedure" which is concerned, on the openly-discussed basis, to arrive at correct results regarding fundamental rights.[62] The "result-uncertainty of general practical discourse", in which the fundamental rights argumentation also has a share, leads accordingly to the "necessity of authoritative fundamental rights decisions." The procedural element of fundamental rights decisions is here shorn of its group-strategic dimension and applied to open *argumentation*, while the element of decision is explained more as the limit of the logic of argumentation than from the specific-dogmatic rationality of the institutional setting of judicial connexion-constraints for possibilities of action.[63]

A hermeneutic element is, however, common to all these conceptions in that they see the character of language (even argumentative language) not as a scientific construct, as a medium of self-transparency, but as a medium for integration into a given world.[64] This conception of language is oriented on the forms of traditional, time-tested acting. Hermeneutics does not presuppose a norm as a starting point, it recognizes what is new insofar as it can be fitted into the sounding-board of linguistic horizons which structure life-practices.[65]

The merit of the here outlined recent tendencies in (constitutional) law interpretation lies in the treatment of the hermeneutic experience that (legal) judgments and "derivation" of decisions is never simply the result of analyzing a norm, but always at the same time an *action*. By itself, it transforms the context to which it belongs, and into which it incorporates itself again. Interpretation is always production and, therefore, every normative experience is, firstly, a linguistic event which, as a dialogue of "question" and "answer", does not simply decipher and recognize an object but, in the fusion of horizons of present and prior "observers", construes and reconstrues models of world events.[66]

Above all, these conceptions contribute to the processing of historical complexity which was once set in motion through the model of the Enlightenment (also in legal form) and cannot be resolved through the ever-new, ahistorical recourse to the "beginning" of the universal norm. Their merit consists particularly in that they also make the organizational-institutional element of law formation (decision-function, procedure, changing of the

[62] Alexy, *supra,* note 6, 520

[63] Critical thereof J.M. Broekman, *Rechtsfindung als diskursive Strategie*, in FESTSCHRIFT VIEHWEG, 197(1982).

[64] J. GREISCH, L'ÂGE HERMÉNEUTIQUE DE LA RAISON, 34 (1985)

[65] Greisch, *supra*, note 64, 110; G. LAKOFF/M. JOHNSON, METAPHORS WE LIVE BY (1980)

[66] G. VATTIMO, LE AVVENTURE DELLA DIFFERENZA (1980); Gadamer, *supra*, note 50

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horizons of action, etc.) into the object of the theory, and thus are also more complex qua theories than the old kind of positivism.[67] Their problem, however, consists in what, for example, Habermas has called "hermeneutics' dependency on prejudice" which turns against these conceptions insofar as the recognition of institutional-procedural elements of legal action still has to remain bound to the difference between theory and practice.[68] This means that through the integration of norm and action in the fusion of accompanying decision-horizons the history of this dynamic can itself become a mere continuum of an imperceptible variation. The conditions for the competition and substitution of different methods do not themselves become the theme of the hermeneutic methodological discussion. In the hermeneutic conception, historical discontinuity is unthinkable.[69] This is all the more irritating since, Habermas[70] has pointed out, the rise of hermeneutic conceptions in the past as well as in the present reveals an intent to replace a *threatened* continuity, a lost certainty.[71] But apparently this is valid for procedural discursive rationality, too.

On the other hand, one can, from the standpoint of hermeneutic philosophy, object to left constitutional theory (as it has here been represented by Preuß in its most ambitious and elaborate form) that the complete subsumption of action under universal normativity, the filling up of existence with meaning, more readily signifies the end of history than the meaning-deficient condition of present societies.[72] "In an ideal speech situation, in a situation of consummate symmetry and transparence, there exists no sort of communication, an end is put to any process of meaning".[73] And for the same reason the self-reconciliation of the collective subject[74] by "legal mediation" of interests would put an end to politics and – paradoxically – to law as well.

However, one essential element of the Enlightenment which left constitutional theory has always rightly insisted upon, namely, the element of the *negation* of the existing, is, as far as theory is concerned, at least very much diluted in the more recent methodology which

[67] MacIntyre, *supra,* note 3

[68] Vattimo, *supra*, note 61, 38

[69] Vattimo, *supra,* note 61, 37

[70] J. HABERMAS, LOGIK DER SOZIALWISSENSCHAFTEN (1967)

[71] Vattimo, *supra*, note 61, 37

[72] Vattimo, *supra,* note 61, 40

[73] M.M. Olivetti, *Philosophische Fragen an das Werk von E. Levinas, in* VERANTWORTUNG FÜR DEN ANDEREN UND DIE FRAGE NACH GOTT 42 (H.H. Hendrix ed .), 1984)

[74] S. Benhabib, *The Methodological Illusions of Modern Political Theory*, 21 NEUE HEFTE FÜR PHILOSOPHIE 47 (1982)

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has integrated into the literature of plural legal texts the change to situative-strategic law.[75]

G. Fragmenting Subjectivity-Multiplication of "Fields of Meaning" – "Order from Fluctuations"

The element of negation can, however, no longer be referred to a "full" identitarian subjectivity – not even as a project – which would be in the position to ground in a universal form the *one* "meta-discourse" of the "mediation" of interests.[76] The element of structural and organizational connexion-constraints (which are "operationally" or otherwise enmeshed and are created through the "application" of the enlightening-universalistic projects of modern law) cannot be explained merely as the reverse side of rational mediation.

It is wrong to separate the history of the subject from his practice and his implication in language.[77] The idea of subjectivity always contained an element of recognition in the "Other" which was symbolized in the law or a macro-subject (state, God).[78] The project of this symbolic-collective identity precedes the real, concrete, legal "mediation of interests" (Preuß) or the distribution of goods. Also the concept of individual freedom is founded on an idea of collective identity. The problem of the negation of the given by individuals is, however, thereby exacerbated in that this stable identity on the basis of a system of common social symbols no longer exists.[79]

Should the marginalizing of certain groups (youths, students, etc.) or the subsumption under operational control of non-legal "sovereign decision" perhaps ground a particular truth capacity of the conscience? Hardly. If the unity of the project of rationality disintegrates into different fields of meaning, the unity of the subject also loses its self-intelligibility.[80] The disintegration of the great "meta- discourse" has moved the significance of language – that is, the insertion into a relationship-network of speech acts without beginning and without a grasp (mediated by an objective code) on an objective

[75] F. CRESPI, MEDIAZIONE SIMBOLICA E SOCIETÀ (1981); *Id., Assenza di fondamento e progetto sociale, in* IL PENSIERO DEBOLE, 243 (P.A. Rovatti/G. Vattimo eds., 1983)

[76] J.F. LYOTARD, LA CONDITION POSTMODERNE (1979); A. WELLMER, ZUR DIALEKTIK VON MODERNE UND POSTMODERNE 105 (1985)

[77] MacIntyre, *supra*, note 3, 34

[78] R. BODEI, STRATÉGIES D'INDIVIDUATION, CRITIQUE 119 (1985); Pizzorno, *supra*, note 12, 24, 32

[79] Crespi, *supra*, note 70, Mediazione…, 6

[80] Waldenfels, *supra,* note 9, 27

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reality – into the center of interest and has made visible the *narrative* plurality which is reflected (even though with limited effect) in the hermeneutically-inspired present methodology discussions with the help of the recourse to the institutional position of the judiciary of the practice of law.

A more complex form of the integration of this narrative-historical plurality of "intertwined language-games"[81] which neither exhausts itself in a new meta-discourse (and be it in a procedural theory of argumentation,[82] nor in the pragmatic necessity of the formation of decisions and precedents could, proceeding from the *recognition* of the autonomy of historical, self-organizing, plural discourse-formations, be found in a method of operating with uncertainty which is geared to self-transformation and reflexivity.

In my opinion, a new point of departure for a (post-?)modern constitutional theory would have to fundamentally call into question the philosophical tradition which believes it can found the *one* interpretation and normativity of the law on the "sensus communis" or the synthesis of a uniform, human experience.[83] The prevailing methods are certainly too closely bound to the "positive" movement of social institutions ("group consensus", formation of precedents, legal dogmatics, etc.) and operate, therefore, in a short time perspective, but the left interpretation remains solidly fixed on the *one* negative alternative, the utopian reaching out towards the collapse of the movement of differences in the mediations, at the resting point. This would truly be the "end" of the process which had its "beginning" in the Enlightenment: the end of politics and the end of law!

We should, of course, not now fall into the trap in which, again and again, the hope of a new meta-discourse is laid out as bait. Here, rather, a paradoxical model is to be conceived which does not itself elevate its own relativism to a meta-discourse, thereby destroying it. Here the possibility of a "weak discourse" will be tested,[84] one which comprehends the history of the process of reason – with special reference to law – self-referentially as a process of separation into several histories, fields of meaning and fragmented subjects and thus admits the double meaning of history as chain of events *and* "narrative" in the plurality of histories. If "actions produce their own fields and structures of action",[85] the "universal", which is to be won from experience, no longer consists in a "graded system, but in a texture". The fragmenting of subjectivity into heterogeneous, not-intentionally-

[81] Wellmer, *supra*, note 71, 105

[82] R. ALEXY, THEORIE DER JURISTISCHEN ARGUMENTATION (1978)

[83] J.W. MURPHY, UNE RHÉTORIQUE QUI DÉCONSTRUIT LE SENS COMMUN, 128, 125, 139 (1984)

[84] The formulation is modeled on the Italian concept of "pensiero debole", IL PENSIERO DEBOLE (P. A. Rovatti/G. Vattimo eds., 1983).

[85] Waldenfels, *supra,* note 9, 52, 48

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controllable organizational fields of action and meaning[86] cannot be overcome through a Münchhausen-like grasp at full subjectivity nor through a drawn-out proceduralization of such a grasping. The departure from a "principle-controlled synthesis"[87] need not be synonymous with the disintegration and self-destruction of social order.[88]

The physical and psychical sacrifice which traditional and left-wing "macro"-subjects have demanded of individuals should rather facilitate the thinking art of a multiple, open "order from fluctuations" in which, through historical processes of self-organization, reference systems for non-subjectively generated aims aggregate. The individual and the collective institutions should become more permeable for sectoral experiences, for heterogeneous values which would no longer be based on a unified order ("consensus") or on "compromise", i.e., finally, on the *one* reality. It should be accessible to experimental forms of operating with an open combination of a plurality of possibility paths. The model of legal regulation should, more readily, concentrate on the bringing about of self-regulation, on the interruption of self-reinforcement of dominant values, on the buffering of the consequences of the flexibilizing of social relations and relationship-networks. The subject would no longer stand opposed to the world of objects, but the recognition of his self-referential character, of his ability to form models of himself whose reading must constantly refer back again to his own results,[89] would be the constitution of a circular-closed model or models,[90] whose evolution would be kept in permanent motion through the paradoxical inter-twining of normative model and of de facto "application".[91] Such a paradoxical movement, which always only models its own (self-)fulfillment pro-actively, disperses subjectivity into variable points of intersection of a multiplicity of relations, of a "dissipative structure" which can no longer be brought to unity in the pre-supposition of a universal law. In such a view, subjectivity would constantly constitute and de-constitute itself anew.[92] From this follows simultaneously the fact that and why such a conception and a model of the legal-system built upon it is not, either from the side of the individual

[86] Murphy, *supra,* note 79, 139; Waldenfels, *supra,* note 9, 116

[87] Waldenfels, *supra*, note 9, 27

[88] M. DE MEY, THE COGNITIVE PARADIGM, 256 (1982)

[89] H. Atlan, *L'émergence du nouveau et du sens, in* L'auto-ORGANISATION. DE LA PHYSIQUE AU POLITIQUE, 115 (P. Dumouchel/J.P. Dupuy eds., 1983); *Id*., *Complessità, disordine e autocreazione del significato*, *in* LA SFIDA DELLA COMPLESSITÀ, 158 (G. Bocchi/M. Ceruti eds., 1985).

[90] R. FISCHER, LE CERVEAU. MODÈLE DE L'ESPRIT ET CRÉATEUR DE SES PROPRES MODÈLES, 20, 116 (1984); CH. L. SCUDDER, THE MIND: AN EVOLVING SYSTEM OF MODELS, FIELDS WITHIN FIELDS 14, 49 (1985)

[91] Atlan, *supra*, note 89; F.J. Varela, *Der kreative Zirkel, in* DIE ERFUNDENE WIRKLICHKEIT, 294 (P. Watzlawick ed., 1981); *Id*., *Living Ways of Sense-Making – A Middle Path for Neuroscience*, *in* DISORDER AND ORDER, 208 (P. Livingston ed., 1984)

[92] Vattimo, *supra*, note 61, 34; Schürmann, *supra*, note 16, 358

subject, or from the level of a "macro-subject", based on or directed towards a complete and homogeneous regulation.[93]

H. Sketch of an Alternative: A Law Oriented Towards Uncertainty?

Complex systems can now only be "softly" regulated through the regulation of self-organization processes,[94] above all, procedural norms belong to the inventory of such a strategy. Constitutionally-guaranteed freedom can, in a system built on self-organization processes, be neither mere individual self-realization nor action-possibilities "balanced" and allocated by the state. Rather, freedom must provide, in an a-centric legal-system oriented towards uncertainty and the modeling of a plural field of options,[95] a high variability for cultural and political "test-action", for open experimentation with heterogeneous models, values, life-styles etc. A system which itself constantly transcends its own certainties and, thereby, again and again devalues institutionalized knowledge,[96] must, as functional equivalent, develop great conflict-capability and flexibility and open its "memory" through global "parallel-processing" of alternatives.[97] This does not, however, give rise to a structureless openness to everything; rather, "dynamic landscapes" with historically-changing and intertwining topological structures are aggregated.[98] In an a-centric conception of law, the theory of constitutional liberties would be more strongly oriented towards the maintenance of the self-organization capability of relationships in variable networks – and not of individual "spheres of action". The primary concern should not be to compensate for individual action-deficits through state-provision and state protection-duties. The main point is to re-join to the historical dynamic of the de- and re-structuring of multiple fields of meaning, the trivialization of organizational networks through self-reinforcement of dominant values via "interrupters".[99]

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[93] A. TOURAINE, LES DEUX FACES DE L'IDENTITÉ, QUADERNI DI SOCIOLOGIA 407 (1979)

[94] G. Teubner, *Reflexives Recht*, 68 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 13 (1982); *Id. Unternehmensinteresse – das gesellschaftliche Interesse des Unternehmens "an sich", in* ZHR 470 (1985); G.Teubner/H. Willke, *Kontext und Autonomie. Gesellschaftliche Selbsteuerung durch reflexives Recht*, ZEITSCHRIFT FÜR RECHTSSOZIOLOGIE 4 (1984)

[95] G. WERSIG, DIE KOMMUNIKATIVE REVOLUTION, 137 (1985)

[96] M. MASUCH, STEERING SOCIETIES?, 133 (1984)

[97] M. Negrotti, D. Bertasio, *Informatica e processi culturali, in* LA FORMA E IL FUTURO 9, 17 (*Id.* (eds.), 1982); E. Morin, *Le vie della complessità, in* LA SFIDA DELLA COMPLESSITÀ, 49 (G. Bocchi/M. Ceruti eds., 1985)

[98] Varela, *supra*, note 91, Living ways..., 208, 219.

[99] Also on a theory of the enterprise as a network, see P.M. Hejl, *Kybernetik 2. Ordnung, Selbstorganisation und Biologismusverdacht, in* DIE UNTERNEHMUNG, 41 (1983)

In order to prevent misunderstanding, it must be emphasized that the concept outlined here is itself a normative model, one which does not trust that the present economic restructuring processes will "by themselves" generate appropriate legal forms. However, historical conditions of possibility, which go along with the evolution of technological society, are made the point of departure of the theory of a non-identitarian law[100] and, simultaneously, the historical questionability of the relation of model and possibility co-reflected.

The development of the model would have to be carried out on concrete fields of conflicts.[101] But, in order finally to demonstrate the conceptual differences once again using the conflict regarding civil disobedience a subject with which Preuß has been particularly concerned, it should be mentioned that civil disobedience can also be legitimatizable on the basis of the conception developed here. It would not, however, as in Preuß, be therewith validated by the fact that certain life-interests are not sufficiently able to be exhibited and considered in a world of institutions dedicated to the development of production (this would be far too "strong" an assumption). Rather, a society which makes, on a very uncertain basis of knowledge, decisions which possibly have very far-reaching consequences and whose rationality can only attain a precarious stability through *procedures* (and not "substantive" foundation), must, at least *symbolically*, let itself be effectively confronted with an alternative value-option in such a way that the immediacy of the *commitment* of a social movement can be expressed (e.g. blockade) since the institution of parliament can also no longer, in the classical sense, claim to have at its disposal the general, "representative" discourse. (A higher truth-content of the non-institutional social movements is not, however, thereby presumed).

Regarding legal forms, one would have to differentiate between the use of police law and of criminal law: a situationally-related use of police, such as to prevent a blockade, has to be judged in the concept here developed, differently from the punishment of participants. Punishment also always has a socially discriminating effect which is *lasting.* It cannot, however, be appropriate in a model built on uncertainty to inflict through punishment a stigmatizing effect on account of a symbolic, time-limited action against a policy which *can* (but this is not certain) cause a catastrophe. With regard to active, violent resistance, the case is different because, there again, a dynamic is therein contained whose claim to "substantial rightness" – except in extreme cases – would be irreconcilable with the concept here discussed.

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[100] In general U. GUZZONI, IDENTITÄT ODER NICHT (1981)

[101] On environmental law, see K.-H. Ladeur, *Die Akzeptanz von Ungewißheit als Voraussetzung für ein ökologisches Recht, in* RECHT ALS INSTRUMENT DER POLITIK, 60 (R. Voigt ed., 1986)

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Just as there can no longer be the "general" (meta-)discourse, so must the concept of a "point-related" decision be relativized, as far as possible, by keeping open the procedural conflict-dynamic in time.

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