Articles

Proceduralization Of The Category Of Law[+]

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Preliminary Remark: The observations below are to be understood more as a draft than as theses. They refer to and continue a series of earlier considerations, most recently in two papers: *Social Science Models in Economic Law*, *in* CONTRACT AND ORGANISATION, 52-67 (T. Daintith/G. Teubner eds., 1986) and *Materialization and Proceduralization in Modern Law*, *in* DILEMMAS OF LAW IN THE WELFARE STATE 221-248 (G. Teubner ed. 1986); both papers are also to be found (in German) in the following documentation: G. Brüggemeier, *Workshop zu Konzepten des postinterventionistischen Rechts*, MATERIALIEN DES ZENTRUMS FÜR EUROPÄISCHE RECHTSPOLITIK, 2-24, 25-64 (Ch. Joerges eds., Heft 4, 1984).

A. The Paradox of Law

J. Habermas: "It is precisely the lack of alternatives, perhaps indeed the irreversibility, in these still contested compromise structures that faces us today with the dilemma that developed capitalism cannot live without the welfare state any more than it can with its further extension. The more or less helpless reactions to this dilemma show that the political incentive potential of the Utopia of a workers' society is exhausted". J. Habermas is fighting against the colonization of the life-world by system imperatives having legal form; juridification as imperialism, as the destruction of structures worthy of being preserved. He holds that "juridification" (as it were false, bad juridification) leads to colonization of the life-world when law as "medium" (i.e. as law that sits so directly on top of the media that control the economic and politico-administrative systems (money and power), so merges with them, that it is no longer capable of or in need of any social or historical justification) becomes active in areas concerned with law as "institution" (i.e. as law that serves the life-world's demands for cultural traditions, social integration and socialization, having to demonstrate thereby its capacity for and need for justification).

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N. Luhmann: "To be sure, it (viz. the theory of autopoietic systems) is probably too complex and too esoteric for everyday use in social communication. It does not place itself in the vicinity of the world-spirit (which brought Hegel into the difficulty of not being able to say who was really writing his theory). Nor does it place itself in the vicinity of the raw impulse to deprive well-off people of their possessions. But must one assume that such a manoeuvre is necessary in order to bring self-reflection into society's communicative process? Need it then be reason and violence?" What Luhmann is getting at is the modernists' alternative project to autopoiesis, and within that the self-referential (self-reproducing) legal system as a functional system beside other ones, with its functional autonomy (i.e., its reflected and reflective regeneration of self-limitations within the framework of a sociological evolutionary theory) as simultaneously normative closure and cognitive openness. He holds that legalization leads to aberrations when functional systems are overstrained by "legal" demands, to which they cannot react within the scope of their own medium, or when the legal system is overstrained in its limitations by false (political, administrative or economic) applications of law; in brief: overstrains and aberrations from "over-socialization" of law, from "over-legalization" of society.

The paradox of law in our time in a nutshell is: for the substantive demands on law (i.e. for "positive conflict norms"!), which both are indispensable and need to be limited, we have neither criteria nor venues nor procedures, which is what we first of all and most of all need. Critical legal theory (as a social theory) would have to succeed in influencing the jurist, who would then in his work of justifying the lay remain aware of the mediated geneses and validity conditions and manage to include them in his decision-making work as "recontextualizations" (K. Günther). The brilliant leading jurists of our time, instead, when they do their work – of course in more of a systems-theory and neo-institutionalist way than a critical one – and interpret their own function in the process, speak consistently of "legal dogmatics", although they practice "legal theory" (as social theory) and ought at least to speak of "methodology". The fact that they speak differently from how they act is not hypocrisy or ignorance, but concerns a specific quality of jurists: they have methods but do not need to talk about them, far less legitimize them. For both dominant and critical jurists, therefore, the paradox of law appears as formally the same, though of course different in content. As law, law must at the same time "offer" and "investigate" its own situation of social justification (as unity and as difference between law and non-law), i.e. understand and represent their own involvement and the fact that they themselves are affected both as precondition and as participatory decision-making. But the dominant jurisprudence can rely on the fact that in speaking of legal dogmatics, legal sources, logic of application or interpretation (in sum, of legal science), one will, both in practice and in reflection, (also) set up law as a social theory and (also) apply it that way, and that it is only through such self-limiting and self-transcending work of orientation that it becomes and remains "jurisprudence as such", without becoming involved in embarrassments over legitimation. Critical jurisprudence must instead reconstruct the consciousness, approaches and methodological machinery of jurists as a developmental set that has led to crises, and at the same time look forward to find the conditions of the possible overcoming

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of the crises. It is at such a theoretical programme that the *proceduralization* of law is aimed at.

B. The Dilemma of Law

"The splendour of the bourgeois subject was its world-historical universality; its misery is its misunderstood particularity" (B. Willms). What is meant is a claimed but not delivered (not deliverable, historically failed) reconcilability of the two experiences of "sociological natural laws" (namely: law as nature-system-order and law as history-reason-constitution) by the rational subject itself. Key words are the overloaded subject, the free-wheeling subject, the surpassed subject, the internalized subject, the particularized subject, the over-strained subject, the impoverished subject. Along with the modern analysis of the citizen as voter, welfare client, worker or consumer there indubitably go passivizations, heteronomies, and relief programs that allow neither the stylization of the "cared for" as the sovereign of events, nor should allow welfare experts to turn into a regency over our life-world. In the meantime, system theoreticians such as Luhmann have, no doubt rightly, pointed out that legal theory has at no time managed to come to terms with the decisive history of formation of the category of subjective law (namely, from "reciprocity" to "complementarity" of legal relationships as social relationships). Here reciprocity means the following: feudal legal relationships were able to provide mutually stable guaranteed expectations (the creation and exercise of obedience and welfare functions). Complementarity, by contrast, means: in de-feudalized, later "capitalist" society, the orientations for action and the guarantees of expectations relate, because of an extent of need that is in principle unlimited, only to completely diffuse groups of role-bearers, so that individual and social identity can no longer be brought "into order". This theoretical non-performance has – at any rate in Germany – been compensated for in legal practice, specifically following Savigny and Puchta. In "subjective right" the legal positions (more exactly, the legal, as social, positions available to "scientific" jurists, i.e. ones that correctly describe their times in legal ideas, i.e. "jurists as such") were from the outset the true (quasi-)subjects of the attributive and allocatory content of norms. Also important is the historical critical thesis that man in "bourgeois society" could, because this was already his historical and theoretical disposition, become citizen only as subject (more exactly, as free entrepreneur and simultaneously as subject [i.e. with the "State" as guarantor of liberal rights and thereby of the "distribution" of law itself]), and that the Enlightenment as a moral project was unable to become political because it could not have formulated any goals, so that it ultimately turned itself into the disguising of power as principle of power. Such lessons also change our view on the three – to date – historical developmental stages of an endeavour to try out the already mentioned reconcilability of the two sociological natural laws (law as natural order and law as historical construction) by the rational subject itself: *law as form for freedom* was and remains the condition for making possible particular goals of freedom; *freedom as law* had to leave too as undecidable the question whether natural law and moral duties actually are, or will be, social duties; "distribution"

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("allocation") of law/freedom as freedom/law is, then, the uncompleted legal program of the uncompleted project of modernity. Law as formalization was and is, at any rate, freedom of ends combined with control of the means to be applied to bring them about. Its (concealed) materiality was and is the freedom of the "enterprising" (in "money" and/or "power") citizens ("fortune" as particular possession and ability!), whose overall social synthesis is regulated by a relationship between freedoms of existence and activation which, precisely because of its negative controlling regulation (the exclusion on principle of conflicts!) ensures specific limitations to ("private") freedom of acquisition against which ("public") distributive freedom cannot be imposed in compensatory, systematic fashion. Accordingly, materialization of law aims at incorporating the prerequisites and effects of (formal) rights to freedom in the legal category itself, and therefore at a reconversion (in the two-fold view of experience and of reason) of that non-empirical (though actually only apparently) cognitive meta ethics as social theory which had underlain formal law as *fundamentum in re*. Materializations in the meantime compel complex comprehensive purposive programs for which all rights themselves become means. For the adjustment of clashing interests in such purposive programmes (more precisely, for the measurement of "purposes" themselves!) there are admittedly (as yet!?) no criteria, no venues and no procedures as "law". Social substitute measures in this field can be observed under such names as "balancing" and "basic principle of proportionality". Both are admittedly in practice nothing more (but of course also no less) than a general social prior reservation of law, which by way of the recallable "positivity of law" and the appealable "rightness of law" claims to legitimate a kind of *legal appropriateness* of – old and new – measures in (problematic) situations.

The fact that a "sociological natural law" with changing contents appears as the banner of our contemporary legal culture is perhaps only an equation with three unknowns. "Natural law" stands for heritages of expectations of justification to which then efforts of relative ultimate justification are devoted, as entrance upon the inheritance. "Sociological" stands for overall social complementarity attributes (legalization of society – socialization of law). There is no doubt, at any rate, that today in "law" what is afoot is very fundamental (paradigmatic) renewal of its social and historical rank. Here there seems to be a trend for the long-continued debate on so-called "failure of the market" and/or "failure of politics" to approach a consensus today that at bottom it is "failure of law" that is involved. It is precisely in this that law is reflected as dilemma: law as *formal category* (substantively) privileges specific "freedom" (guarantees of existence and grants of access are not equal-opportunity) or (instrumentally), as "money" or "power" (i.e.: monetarization and bureaucratization determine the manifestations of application of law), exercises control; law as *substantive category* invokes (consistently powerlessly and in merely culturally critical fashion) ideas against social reality and development, or plumps for specific particularity (in consistently authoritarian or totalitarian fashion). All contemporary efforts therefore aim at nothing less than the reconstruction of the category of law itself. More precisely, they are concerned, each in their fashion, with finding replacement institutions for the – now seen as permanent – breakdown of "law" as the neutral (impartial) third

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party which, originally as God or nature and later as order, market or freedom, promised a world of fair "allocations" and "distributions", but was unable to keep the promise. Theories of order concentrate here on the institutionalizations of "welfare in return for obedience", market theories on the invisible interlinkages of general utility programs, presupposed information systems and socially necessary institutions (State, law), and freedom theories on the conditions for a possible non-empirical, cognitivistic meta-ethics as social theory. The main fights here are waged over whether we ought not finally to give up our ideas of good and just orders as evolutionarily surpassed dreams (or more exactly, learn to understand our order as realized at any particular time as a possible good one), or whether something like a positive, general Utopia can still be designed. For the present general work of reconstruction of law, three clearly demarcated approaches can be briefly defined.

(1) The camp of "*market theories*", or more precisely, of renewed theories of political economy as social theory. They reconstruct two developmental strands of European political philosophy of law before Kant, namely (a) a strand of conceptions around more of a theory of order, for which the production of social consensus and thus the organization of collective action stood at the center, and which on the whole overestimated the possibilities of organization of consensus and guidance (in contemporary terminology, of "control"); (b) a strand of conceptions around more of an exchange theory, for which the low-cost supply of goods and services and thus the competitive utilization of individual activity was central, and which on the whole underestimated the need for organizing consensus and guidance (i.e. again, for "control").

Kant had first sought to tame and channel both traditional currents; since Savigny jurists have left them to their "natural" course, between "critique" and "construction", and since then complaints of "failure" have gained the upper hand. It looks as if the present trends in "political economy" (especially under the slogan "market *and* organization") are again linking up the advantages of both traditions for the strategy and technology of theory, while avoiding their respective drawbacks, and are thereby above all withdrawing the excessive demand on "citizens" (as voters, as welfare clients, as workers, as consumers) for enlightened, autonomous efforts at identification with a success oriented, relieving, conversion of contributions in return for (ever higher) yields. The personalizable center of such theories is occupied by the "*political entrepreneur*" (or more precisely the "discovery-making entrepreneur", who ensures collective decisions and fair distributions by everywhere mediating the incentives to perform with "rewarding" return benefits. In the form of an ideal model, all "citizens" can be stylized as such (potential) entrepreneurs.

(2) The camp of – pure – "*systems" theories*. They serve not reconstruction like the camps in (1), but the overcoming of traditional conceptions of social "criticism" and "construction". They endeavour to transcend all the existing constrictions, onesidedness and lack of success of "market", "politics" or "law" in a system triad of "function", "performance" and "reflection". Essentially they rebuild functional definitions in such a

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way into structures (i.e. into organization, procedure, competences, personnel recruitment and training), that existing systems acquisitions both remain guaranteed against dangers and equipped to learn in order to change. The personalizable center of such theories is occupied by the "*scientific entrepreneur*" (more exactly, the "cognitivistic" entrepreneur) as the model-builder for solutions to problems. In the form of an ideal model, here too all "citizens" can be stylized as such (potential) entrepreneurs.

(3) The camp of "critical social theories" ("practical philosophy"). They stand in the tradition of "critique", and plump for the possibilities of delivering social and historical development projects, as learning projects. At bottom they wish – while respecting uncircumventable developments – to save universalizable normativity, and are dependent in this on "recognition", on "consensus", on "understanding", on "communication". The personalizable center of such theories is occupied by the "moral" *citizen*, who can in both "systems" and "life-world" stand up to reliefs and loads because he can find backing in this "traditions" and in his "type". Certainly, this is only a normative historical David against systems-theory functionalist and political-economist Goliaths. Does it then have more problems and agonies than opportunities? At any rate, it has limited impossibilities! *Proceduralization* takes the part of the last (third) camp, while respecting the importance of the other camps.

C. "Positive Criticism": Limited Impossibilities

People wriggle out from the overriding presumptions of theories. They are not the way theories would like to have them, and they oppose them with their excessive hopes. These hopes continue as before to aim at something like "justice" ("law" in more of a religious and metaphysical everyday view than as a category of rationality). This perennial phenomenon is accompanied today by two contemporary ones: (1) the so-called idealistic turn in the social sciences; it looks as if it is no longer the functioning (successful) social systems (of whatever structure) that can ensure stable legitimations, but precisely the converse, that only stable legitimations can ensure (relatively!) successful functioning, learning social systems; (2) the call for and the requirements on justifications are increasing on all sides; for precisely this reason, neo-conservative and conservative-revolutionary strategies aim at the isolation of our life-world by "systems"; since this could make the justificatory impositions of the various functional elites limitable to successful (co-)production of loyal willingness to follow, to a gain in generalized confidence in the system (a renewed form of civil religion). My support goes, like that of Habermas, instead to an understanding of society's communicative structure as a problem of justifying "rational" practical actions under "system conditions". No closed, correct, substantive ("rational", "natural") concept is to be imposed against a "false" reality, nor should any reality seek to arrogate an idea of its correctness, but "society" (as being restrictively open and capable of learning) is, on the basis of previous experience, to be exposed to new experience. Here there arises, anyhow, the effort, if not to re-write history, also not simply

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to pass over it and proceed to the order of the day. As for the requirements on law and on jurists (as "positive criticism"), the social and legal transformation phenomena can be summarized in such a way that the following key problems and fields for work appear:

1) Socialization of legal criteria
2) "Decentralized macro-control" (H. Willke)
3) Restructuring of the category of law as an orientation towards prohibition.

Socialization of legal criteria denotes the transformation of law itself: from the political disposition of law (law as order of the state or of power) via the legal disposition of society (law as market and/or freedom) to the social disposition of law (with experiential spaces and horizons of expectations that require definition).

Decentralized macro-controls denote the contemporary efforts to cope with the timeless mediation of social and system integrations (not least that of individual action orientations and social conditions of order, existence and development) better than hitherto. After the failure of the market and of politics (today topicalized particularly as failure of law), it seems that a third way is opening up, in alliance with and under the spell of liberty and equality: solidarity! A historical developmental curse seems here so to affect work, class, and systems divisions that a total social synthesis, a rational identity for modern societies, is hard now to seize. For with growing rationality in ever smaller and more decentralized units, the irrationality of the "whole" is growing increasingly recklessly. In legal terms, "solidarity" would mean looking for the conditions of possible universalizability and impartiality of criteria under which each kind of particularity could secure (its) justice, and to arrive at venues and procedures for the application of the criteria. No one should overestimate the chances here. Our traditional "human rights" universalizations (faith, hope, love; liberty, equality, fraternity; freedom, justice, solidarity) sought to cover everything that wears a human face. But all of them dwell "up there", far from the particularities that determine us. If possibilities of universalizability against radical particularity still exist at all, they are no doubt to be sought in "procedures" in which then the criteria, venues and procedures of that unity of law as "justification" and law as "functionality" can also be attained; this is the only thing that can mediate socialization of legal criteria under decentralized macro-controls with renewable prohibition structures. "Left-wing legal theory" has, in the struggle around law, decided no longer to accuse the law in the name of universal rationality and regulatory impartiality, but instead to plump for radicalized particularity, for the sovereignty (in legal terms too) and autonomy of self-determining groups. It is thereby, as it were, appealing for recognition of "absolute" minority vis-à-vis "relative" majority, and thus at bottom, in classical legal terms, for more of an international-law than a "civil-law" status.

The restructuring of orientations towards prohibitions means again in renewal of the law's formal definition in such a way that social autonomy can be set up and exercised under reliable conditions of ground rules and controls. The goal here would be to guarantee "reciprocity" (as social peacefulness in the sense of general conditions of recognition).

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Proceduralization aims at the construction (all theories live and act through people that take them up) and production (implementation in institutional, organized, procedural struggles for application) of such "reciprocities".

D. Proceduralization

Proceduralization aims at the reconstitutionalizability of "freedom", i.e. at reacquisition of criteria, venues, procedures for justifications (of law) (justification is not affirmativeness, but a category for the unity of "criticism and construction"!). Materialization is in turn, then, less a developmental stage on its own than a problem phenomenon of the disjunction, embodied in legal form from the outset, between universal morals and the idea of impartiality as the specific feature of the law on the one hand, and mediations through money and administration on the other. *Proceduralization* is then, also, less a bogged-down materialization (or return to the problem of bogged-down materiality) than a work of reconstruction (as permanent criticism and as permanent construction, or more exactly, "correct" legal constructions are, as it were, to be "made available" to all social functional areas for try-out and recall!) on the difference (dualism, disjunction) between "law" (as justification, "right law"!) and "law" as ("application": "positive law"!). This work affects *all* areas and cannot, for instance, be brought under a dichotomization of law between systems law and life-world law. Putting it another way. I hold firm to the legal realization of a legal rationality that must look for and find its project in the mediatability of normative universality and real circumstances (or die out as "law"). More generally, what can be understood as proceduralization of law is the transformation of a social context of legal freedom (linked with rule-exception or interest-balancing decision-making patterns) in a system of justifications of ever-new social contexts of "ideas" and "interests". Such a re-establishment – as stable change in permanence – is compelled by the state of socialization. Because of the substantive non-decidability of historical and social developments, competencies for forecasting and responsibilities are set up. Proceduralization thus aims not so much at social performance guarantees (as "right of freedom"), nor at concessions (as "political administration"), but at conditions for the possibility (and then organization, procedure, staff for realization) of such guarantees and concessions of integrable reconciliations of interests through legal conduct arrangements. Proceduralization thus aims at constitutional legal principles in the social area for initiating and developing dogmatics specific to the field and for the interpretation of positive sets of norms. For instance, child welfare, industrial peace, the interest of firms, social parity etc. could provide descriptions for meta-rules to be worked out, which, as justificatory rules for the validity of practical legal principles (and simultaneously as proof of the validity of such justificatory rules) would define the criteria and guidelines of legal policy and dogmatics. I understand proceduralization as a guideline project that "transcends" the particular development (of guarantees of existence, interventions in freedoms to act, calls for change etc.), which reconstructively surpasses the definition provisions in existing programs by defining the genesis of the differentiation processes (and the validity conditions within

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them) in consequence of which these programs have been set up and are practiced; all of this under respect for "analysis of reality" (i.e. of historical and social reality, of its compulsions, of its "right") and for "normative functionality" (i.e. regulatory universalizability and relative impartiality) of practical ideas and postulates in relation to the circumstances to be "judged". Proceduralization is – in one phrase – the renewal of linkage with the history of "bourgeois" political philosophy, with the intention of reproducing its "idealistic" and "materialistic" transitions in different circumstances as social learning projects.

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