Articles

Social Construction and System in Legal Theory: A Response to Professor Preuss

By Karl E. Klare[*]

A. Introduction

Preuss' paper significantly advances the critical theory of law. As a side benefit, he provides English-speakers with an excellent introduction to the work of two leading West German participants in the debate, Jürgen Habermas and Gunther Teubner. Preuss' paper reveals considerable common ground between critical legal theorists in Germany and the United States, but also important differences of perspective and concern. I suspect that many American legal critics will think that Preuss' criticisms of Habermas and Teubner do not go far enough, that his criticisms raise a fundamental challenge to the current emphasis on structure and system in the German debate. In any event, Preuss' paper suggests the usefulness of a greater German "reception" of the American emphasis on agency and social construction. No doubt American legal criticism would likewise be enriched by entering into a more sustained dialogue with structuralist and systems theory.

B. The Dilemma of Radical Legal Theory

Radical legal theory, by which I mean theory committed to democratization, equality, and self-determination, confronts a recurring dilemma. On the one hand, the instinctive starting point of radical legal theory, particularly theory written by lawyers, is the seemingly never-ending critique of formalism. The critics' basic goal is to show that legal rules are conventional and contingent, not determined or preordained by the order of things. They argue that the accepted repertoire of justificatory arguments ("legal reasoning") is sufficiently porous, ambiguous, and contradictory so that particular legal outcomes are not logically commanded. Accordingly, every instance of rule-formulation or rule-application involves some element, whether overt or obscure, of moral and political choice and responsibility. How can the critic broadly criticize legal outcomes if decision makers face only narrow, technical choices? This is not to say that legal reasoning is

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indistinguishable from general political argument, just that legal reasoning is not nearly so autonomous from political argument as is customarily believed, even by very sophisticated political theorists. At a minimum, the radical critic must establish that legal decision makers routinely make moral and political choices in the course of their work, and that therefore they are active in constructing the institutional substrata of social life. As it turns out, it is remarkably easy to demonstrate this.

On the other hand, radical legal theory has always aspired to take a structural approach, to understand and describe legal orders as systematically reflecting and reinforcing class inequality, patriarchy, and racial domination. Regrettably, it is also depressingly easy to show the pervasive persistence of class, gender, and race hierarchy in the advanced democracies, although explaining the precise role of law in maintaining illicit domination often proves a more difficult task. Still, many legal critics believe that the structural perspective is what gives their work its political bite, what sets it apart from ad hoc reformism.

The radical critics' problem, of course, is that the antiformalist critique constantly collides with and undermines the structuralist perspective. Structural or systemic theories, whether critical or apologetic, seem to require some version of formalism, some claim or assumption that legal orders have an in-built structure (given either by their core philosophical principles or by functional attributes of the social system) that locks in routine legal decision-making. One cannot convincingly attribute observed regularities in legal outcomes to basic systemic principles or functions without at the same time providing some account of the structural constraints on routine legal decision-making. Yet the antiformalist impulse aims precisely to show the pervasiveness of contingency, choice, and personal responsibility in the legal process. It therefore renders problematical all claims of structural constraint.

The critics' dilemma neatly restates a central problem of modern social theory, variously cast as the questions of consciousness and structure, or agency and system. Crudely put, the problem is to explain how human consciousness, choice, and action are "framed", "bounded", or "constrained" by social structures or forces, when it is understood that these structures and forces in turn arise from or are created by human consciousness, choice, and action. I do not mean to suggest that there is a question of choosing between an action/agency perspective or a structuralist theory, so much as a problem of reconciling the approaches.

Perhaps the most significant contribution of the U.S. critical legal studies movement has been to link up the Legal Realists' critique of legal formalism with the contemporary critique of determinism and functionalism in social thought, particularly in reductionist versions of Marxism. In the process, American legal criticism has leaned away from systemic perspectives and toward interpretivist approaches in social thought. The emphasis has been on the social construction of reality at the "micro" level, on showing

that social life is constituted by discrete, humanly created meanings, relationships, and institutions. The current mood of American criticism is skeptical of claims that the forms and patterns of social life are given or determined by a metalogic of history or by the functional needs of a particular type of society (e.g., capitalism). One of the primary expressions of this skepticism is a relentless questioning of all claims that legal orders possess in-built, determinative structures.

From Preuss' paper, it appears that the recent German emphasis has been on structure and system. While he criticizes Habermas's and Teubner's efforts to develop a systems theory of law, Preuss nevertheless searches for an essence of law giving rise to its inherent "rationality potential". This ultimately commits him to the view, shared with his interlocutors, that law possesses a structural logic that is given external to the social practices that comprise legal processes. That is, Preuss clings to a deep logic theory of modernization and to a legal formalism that he rejects in Habermas and Teubner. But Preuss' criticisms of the others destabilize his own project.

C. Preuss' Project

Preuss seeks to discover and describe the rationality potential of law. In developmental perspective, this means a potential to rationalize social evolution, a capacity of law "to ban the chaos and to canalize the social dynamics in an orderly process". The rationality potential is a power of legality simultaneously to tame and dissolve domination and to release creative human energy. In political theory terms, Preuss searches for the feature of law that represents the possibility of self-determination, the potential of law to institutionalize communicative practices that will enable social life to be consciously guided by democratic, collective choices, free of illicit domination.

For Preuss, law is the central "institution of societal self-mediation". Law not only "compatibilize[s] heterogeneous social subsystems", but it "integrate[s] them into a body politic, a commonwealth". "Commonwealth" is a normative concept. It means not just a stable, going social order, but an institutional design to generalize free, communicative action. A commonwealth is an institutional arrangement for "discourse about the conditions under which a legal obligation is accepted as »law«", unfettered by facts of domination and exploitation. It means decentralized processes that are integrated into a body politic committed to self-determination.

If I may translate Preuss into my own idiom, the political aspiration is to protect, foster, and enlarge the democratization of the world, in the private sphere as well as in public life. The theoretical goal is to understand the actual and potential roles of law in the project of democratizing life. Thus far, there is much common ground between German and American legal criticism, despite differences of rhetoric and intellectual style.

But then there is a transatlantic parting of ways. For Preuss, the concept of law implies, or, more accurately, Preuss believes it must imply, "a concept of societal rationality in the spirit of which the society constitutes itself as a body politic". Characteristically, U.S. legal critics decline the search for an *inherent* feature of law that guarantees its rationality or developmental potential. The dominant view resists the notion of an intrinsic meaning of law, preferring instead the view that the meaning of law is given historically.[1]

Be that as it may, Preuss takes to heart the quest for the rationality potential of law. He reviews several earlier conceptions, notably Weber's theory of allocative rationality and theories of the distributive rationality of the welfare state. Preuss finds these theories unacceptable because each ultimately renounces its developmental promise by legitimating hierarchy and other barriers to self-determination. Hence the need for a "postdistributive" or "communicative theory" of the rationality potential of law. At this point, Preuss sympathetically but quite critically reviews two of the most advanced efforts to construct such a theory.

D. Preuss' Critique of Habermas

Habermas's legal theory exemplifies his general thesis of the "colonization of the lifeworld". This thesis rests on his basic distinction between "lifeworld" and "system". For Habermas, "communicative action" is speech or action directed toward discursive will-formation, that is, toward attaining understanding and making decisions through consensual interpretive processes. In communicative action areas, choices and action are susceptible to normative justification and critique. The term "lifeworld" refers to social or cultural contexts characterized by or supportive of discursive practice. However, Habermas sometimes uses the phrase to mean the informally organized areas of social life (e.g., family, school, neighborhood), simply assuming that these are arenas oriented toward communicative action. In Habermas's image, even in modern society the lifeworld areas constitute a prelegal domain; that is, they are structured and coordinated by consensus-seeking communication and not by law.[2]

The concept of "system" derives from the notion that generalized communication and coordination media (power, money, law) emerge in modern societies that circumvent and

[1] American critical legal studies is often criticized for moral relativism. This criticism is mistaken. An historicist orientation in social theory does not imply moral relativism and can be consistent with a commitment to transhistorical values of democracy, equality, and self-determination, at least at some general level. Likewise, the belief of some legal critics that the long run historical significance of the emergence of autonomous legal orders has been to serve democratic values does not require a theory of the inherent or intrinsic meaning of legality.

[2] Jürgen Habermas, *Law as Medium and Law as Institution, in* DILEMMAS OF LAW IN THE WELFARE STATE, (Gunther Teubner ed., 1986).

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displace discursive will-formation and communicative action. The economic and political/administrative subsystems become "uncoupled" from the lifeworld. This process is promoted by "juridification", the legal constitution of action areas. Developmentally, the uncoupling of system released and enormously enhanced creative human energies and potential, but it also set the stage for peculiarly modern forms of domination (e.g., capitalist wage labor). Similarly, the modern expansion and elaboration of law has been freedom-guaranteeing in the sense of undermining absolutism, extending democracy, and dissolving or mitigating some forms of social and economic domination. Yet juridification has also solidified new hierarchies and new limitations on self-determination.

Habermas's ambivalence toward law is captured in his distinction between law as medium and law as institution. As medium, law constitutes and organizes the uncoupled subsystems of economy and politics/administration. These legally coordinated systems ''become autonomous vis-à-vis the normative contexts of action oriented towards reaching understanding".[3] Law as a steering medium is "technicized and de-moralized"[4], and it is "indifferent ... to the questions of substantive justification that arise within its horizons".[5]Law as medium answers above all to functional imperatives. Justification within its discourse is primarily positivistic, procedural, and instrumental. By contrast, law as institution refers to general rules of law that recognize and give binding form to the pre-existing norms of lifeworld areas. Law as institution does not constitute or organize these realms. They are informally organized by discursive practice antecedent to and arising without the assistance of law. The discourse of law as institution admits questions of substantive justification; it is "embedded in a broader political, cultural and social context; [it] stand[s] in a continuum with moral norms".[6]

Habermas believes that we can distinguish the various subject-matter areas of law according to whether they belong to system or lifeworld, (e.g., corporate, commercial, and administrative law in the former category, and constitutional law and some areas of criminal law in the latter). While Habermas sees legal institutions as potentially supportive of the lifeworld, by far his dominant and much bleaker conception is that of law as medium, law that embodies the code of system-functional needs and economic imperatives.

For Habermas, the central social pathologies of advanced capitalist society can be understood as a colonization of the lifeworld by system. By this Habermas means that social reproduction and development are threatened by the progressive monetarization

[3] *Id., 212.*

[4] Habermas, *supra*, 213.

[5] Harbermas, *supra*, 214.

[6] Habermas, *supra*, 213.

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and bureaucratization of communicatively structured domains of social action (cf. Lukács's theory of reification). Habermas writes:

> "[T]he subsystems of economy and state become more and more complex as a consequence of capitalist growth, and penetrate ever more deeply into the symbolic reproduction of the lifeworld... [C]entral areas of cultural reproduction, social integration and socialization become drawn undisguisedly into the wake of economic growth and, therefore, of juridification".[7]

For reasons that Habermas does not fully identify, the negative, harmful effects of contemporary juridification (notably its tendency to deepen peoples' dependency on and control by the bureaucratic state) predominate over any freedom-guaranteeing aspects. Thus, law as medium paves the way for the bureaucratization and monetarization of the remaining but fragile lifeworld domains of discursive practice.[8]

Habermas's concept of lifeworld has great virtues, notably it enables him to break with the traditions in critical social thought that locate a single structure or institutional system (e.g., the "relations of production" or "the state") as the key to social order and social transformation. However, Preuss identifies numerous difficulties with the theory, particularly with the colonization thesis. Preuss begins by undermining the medium/institution dichotomy. He shows that media can constitute consensual, discursive contexts (this is the point of the psychotherapy example). Preuss argues that all aspects of social life are mediated by institutional structures which have the capacity to constrain discourse and solidify domination but which are also capable of establishing and encouraging discursive practices. Preuss therefore rejects the hypothesis of a prelegal realm of social life structured solely by communicative norms and action. He argues that it is impossible to distinguish areas of social life, e.g., family, education, etc., based upon whether they are structured by discursive practice or by contextless media. All action arenas are constituted by both. In particular, all domains of modern social life -– both those Habermas identifies with system and those he identifies with lifeworld – are

[7] Habermas*, supra*, 214-215.

[8] This summary of Habermas's views relies on Baxter, 1987. (Hugh Baxter*, Syem and Life-world in Habermas's Theory of Communicative Action", 16* THEORY AND SOCIETY, 39-86, at 72 (1987)), in addition to Preuss. Baxter's excellent paper criticizes the system/lifeworld distinction in a manner parallel to Preuss' criticisms of the law as medium/law as institution distinction. Baxter's plea for the mutual interdependence of systems and interpretive theory parallels the argument with German legal criticism advanced here.

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legalized, that is, at least partially constituted by law.[9] It follows that no part of legal discourse is so "technicized" as to be indifferent to normative justification. One of the least plausible aspects of Habermas's theory is the claim that the particular subject-matter areas of law can be distinguished as either technically-rational or open to normative conflict and justification.

Preuss rejects Habermas's inclination to view contemporary juridification as developmentally destructive. He argues that juridification "is not destructive but rather creative in that it constitutes an »abstract community« among *all* members of the society which renders possible the mobilization of resources for a greater number of societal goals, which would not have been available in autonomous communities". Legalization "is constitutive for the development of a universalistic morality in that it transforms the purposes of [lifeworld] institutions into the purposes of society at large". Thus, just as Baxter has shown that the "resources of the life-world seem to be essential to the functioning of the supposedly »norm-free«" processes of the system,[10] Preuss argues that the resources of the system may nurture the lifeworld. Assuming that the distinction between the concepts is viable at all, system and lifeworld are deeply interpenetrated, and both are thoroughly legalized.

Though his goal was to escape the reductionism that commonly plagues systems-theoretical approaches, Habermas's somewhat artificial system/lifeworld and medium/institution distinctions prevent him from achieving that end. Preuss' deconstruction of these distinctions seems entirely convincing. Preuss persuasively argues that legal processes can nurture communicative interaction, indeed, they may themselves be arenas of discursive practice; that all interaction is institutionally mediated; and that law at least partially structures all domains of social life in modernized societies.

E. Preuss' Critique of Teubner

I will be briefer here, because Professor Teubner's ideas are discussed elsewhere in this volume. I want simply to indicate how Preuss' criticisms of Teubner parallel his discussion of Habermas. Preuss' point of departure is the pivotal need "to preserve legal rationality in its capacity to establish and maintain the connections of social systems to the needs of the society at large". From the perspective of reflexive law, this requires "the capacity of the law to »understand« the internal self-referential program[s] of the regulated social sub-systems", so as to compatibilize them. Teubner answers this challenge with the theory of

[9] That economic relations are structured by law was a centerpiece of Legal Realist theory. For an extension of the argument to family relationships, see: Frances Olsen, *The Myth of State Intervention in the Family*, 18 UNIVERSITY OF MICHIGAN JOURNAL OF LAW REFORM, 835-64 (1985).

[10] Baxter, *supra,* 72.

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co-evolution, which Preuss attacks. Indeed, he questions Teubner's basic concept of autopoiesis, the self-referentiality of social systems.

Preuss makes three points. First, the program of any social system must be written in some language. But, the "programming program ... is embedded in a social practice"; discourse does not exist independent of the culture as a whole. Wherever this leaves the theory of self-referentiality in general, Preuss argues that "[a]utopoiesis in the strict sense is not characteristic of the law". Second, within the theory of reflexive law the external effects of the patterns of communication established between different subsystems is highly indeterminate, so that "the key problem of the legal structure remains unsolved". Third, Teubner's conception of communication reduces to the mere transfer of information. This neglects "the different significance of meaning and normatively structured interactions in different systems". Teubner's conception of integration is therefore extremely functionalist. It fails to appreciate that sometimes democratic values are served by preserving the autonomy and embracing (however reluctantly) the external effects of certain forms of social action (e.g., strikes).

The parallels here to Preuss' earlier critique of Habermas are: his insistence on viewing legal processes as terrains of discursive practice; his antifunctionalist appreciation of social life as constructed of the countless, interacting contexts of human autonomy and practice; and, his understanding that law cannot and should not be seen as possessing an in-built structure answering to functional imperatives given external to social practice. Preuss' criticisms of Teubner, too, appear to me to be entirely persuasive.

F. Conclusion

Having successfully challenged both Habermas and Teubner, Preuss renews the search for the communicative rationality potential of law. But where have his arguments pointed?

The core of Preuss' case against the other theories is that law has no "essence" or "inherent" social meaning, nor does legal discourse possess an in-built structure or hierarchy of justificatory arguments. Radical legal theorists often seem to want simultaneously to establish that law is inherently a reification *and* that law inherently protects against and mitigates domination. To rebut Habermas and Teubner, Preuss had to argue that law has no inherent essence. In different historical settings law has served either repressive or emancipatory ends, and sometimes, in complicated ways, both. Legal processes have both increased domination and also protected autonomy. Implicitly Preuss suggests that law has no intrinsic quality or essence, that its significance is given historically. This is the meaning of saying that law is a practice, that it is or can be a terrain of communicative action.

Ironically, the very power of Preuss' insights casts doubt on his overall project to discover the "structural singularity" of law, its universal rationality potential. He writes, "[i]f we cannot ascertain such an underlying rationality concept in our legal order the term »law« ... becomes meaningless". In this respect, Preuss still yearns for the key to unlock the idea of legality, to discover its intrinsic principles which are in turn transmitted throughout legal processes by an in-built logic. That is, Preuss still aspires to uncouple law from discursive practice. He searches for some basis on which to conceive of legal practices as "norm-free" and "technical", while at the same time he believes that it is the mission of law to institutionalize our loftiest normative commitments. Preuss' goals are entirely laudable, but his yearning for such a theoretical solution cannot survive his own analysis.

American legal critics will, I think, be inclined to ask why we need to locate some intrinsic concept of legality that guarantees that the normative intentions of law are carried out through "norm-free", technical argumentative practices. Why assume, as Preuss appears ultimately to do, that the notion of legality can displace ethical conflict? Do we need to search for "the" rationality potential of law? Hasn't Preuss already located law's rationality potential simply but precisely in the fact that legal processes are or can be terrains of discursive practice? Legal processes give rise to contexts of discussion and dispute about visions of how social life should be organized. The rationality potential of law is no more but certainly no less than that these discussions and disputes potentially aim toward understanding and consensus. To be sure, like every other established discourse, law is not devoid of illicit hierarchies, privilegings, and silencings. In a particular setting, it may well be that law reinforces domination and that the prevailing legal discourse inhibits political imagination and legitimates an unjust status quo. But whether and how legal practices and discourses repress and/or liberate cannot be decided in the abstract because this depends not on any inherent essence of legality, but entirely on law's content and meaning in social context.

Preuss has a lingering desire to uncover the structural singularity of law, but his specific arguments point in a different direction. They aim away from essentialism and toward interpretive theory, that is, toward a view of law as a practice.[11] This perspective must necessarily recognize law as a terrain of normative conflict. But precisely for this reason the legal realm is potentially a context of communicative action. This is the source of law's potential to assist in democratizing the world.

[11] Legal discourse has been variously conceived by American legal critics as a "field" of action, a "medium in which one pursues a project" (Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology,* 36 JOURNAL OF LEGAL EDUCATION, 518-62 (1986)); an invitation to "good faith conversation" (Joseph Singer, *The Reliance Interest in Property*, 40 STANFORD LAW REVIEW, 611-751 (1988)); or as a "practice" (Karl Klare, *Law-Making As Praxis*, 40 TELOS, 123-35 (Summer, 1979)) Note that Kennedy uses the word "medium" in its ordinary sense (e.g., a sculptor's clay); he is not employing Habermas' distinctive usage.