Law and Morality

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LECTURE ONE: HOW IS LEGITIMACY POSSIBLE ON THE BASIS OF LEGALITY?

Max Weber regarded the political systems of modern Western societies as forms of "legal domination." Their legitimacy is based upon a belief in the legality of their exercise of political power. Legal domination acquires a rational character in that, among other things, belief in the legality of authorities and enacted regulations has a quality different from that of belief in tradition or charisma. It is the rationality intrinsic to the form of law itself that secures the legitimacy of power exercised in legal forms.[1] This thesis has sparked a lively discussion. With it Weber supported a positivistic concept of law: law is precisely what the political legislator — whether democratic or not — enacts as law in accordance with a legally institutionalized procedure. Under this premise the form of law cannot draw its legitimating force from an alliance between law and morality. Modern law has to be able to legitimate power exercised in a formally legal manner through its own formal properties. These are to be demonstrated as "rational" without any reference to practical reason in the sense of Kant or Aristotle. According to Weber, law possesses its own rationality, independent of morality. In his view, any fusion of law and morality threatens the rationality of law and thus the basis of the legitimacy of legal domination. Weber diagnosed such a fatal moralization of law in contemporary developments, which he described as the "materialization" of bourgeois formal law.

Today there is a debate concerning legal regulation (or juridification: *Verechtlichung,)* which is connected to Weber's diag-

[1]Max Weber, *Wirtschaft und Gesellschaft* (Cologne, 1964), ch. 3, pp. 2, 160ff.

nosis.[2] I would like to develop my own reflections on law and morality in this context. First, I will recall Weber's analysis of the deformalization of law and work out some of his implicit assumptions concerning moral theory; they prove to be incompatible with his declared value-skeptical position. In the second part, I will examine three positions within the recent German debates concerning formal changes in law; my aim there is to marshal reasons for a more appropriate concept of the rationality of law. Finally, I will develop, at least in rough outline, the thesis that legality can derive its legitimacy only from a procedural rationality with a moral impact. The key to this is an interlocking of two types of procedures: processes of moral argumentation get institutionalized by means of legal procedures. My reflections have a normative character. However, as the second lecture should make clear, I am developing them not from the perspective of legal doctrine but, rather, from the perspective of social theory.

I. Max Weber's Concept of Legal Rationality

1

What Weber described as the "materialization" of civil law, is today recognized as the wave of legal regulation associated with the welfare state. It has to do not only with the quantitative growth, with the increasing density and depth, of regulation in the legal provisions of a complex society.[3] Given the interventionist requirements of an avowedly active government that both steers and compensates, the functions and internal structures of the legal system are altered as well. Law as a generalized medium is not only more widely utilized; the form of law also changes according to the imperatives of a *new kind* of requirement.

[2]F. Kubler, ed., *Verrechtlichung von Wirtschaft, Arbeit und sozialer Solidarität* (Baden-Baden, 1984); A. Görlitz and R. Voigt, *Rechtspolitologie* (Hamburg, 1985).

[3]R. Voigt, ed., *Abschied vom Recht?* (Frankfurt, 1983).

Weber already had in view the regulatory law of the welfare state. This law is instrumentalized for the policies of a legislature that wants to meet demands for social justice with compensatory redistribution, stabilizing controls, and transforming interventions: "With the emergence of modern class problems, there have arisen substantive demands upon the law from a part of those whose interests are involved (namely labor), on the one hand, and from the legal ideologists, on the other. They . . . call for a social law on the basis of such emotionally colored ethical postulates as 'justice'or 'human dignity'. But this renders the formalism of law fundamentally questionable."[4] At this point the conceptual pair "formal-substantive" (or "formal-material") comes into play. With these concepts Weber shaped the relevant discussion up to the present day — and, in my opinion, steered it in the wrong direction. In his view, the demands for "substantive" justice invade the medium of law and destroy its "formal rationality." He supports his thesis primarily with examples from private law, which, from the liberal point of view, was once supposed to secure the liberty and property of contracting legal persons through public, abstract, and general laws. In fact, new special domains of private law have developed out of this corpus; tendencies toward deformalization are obvious — for example, in welfare and labor law, and in antitrust and corporate laws.[5]

These tendencies can be described as "materialization" if one starts from the formalistic understanding of law that became dominant in Germany with Pandectist science and conceptual jurisprudence. In general, Max Weber explains the formal properties of law that were rigorously elaborated in this tradition by referring to the doctrinal work of lawyers. Legal experts foster the so-called "formalism of law" above all in three respects. First,

[4]Weber, *Wirtschaft und Gesellschaft,* p. 648.

[5]G. Teubner, "Verrechtlichung — Begriffe, Merkmale, Grenzen, Auswege," in Kübler, *Verrechtlichung von Wirtschaft*, pp, 289ff.; G. Teubner, ed., *Dilemmas of Law in the Welfare State* (Berlin, 1986).

the systematic perfection of a body of clearly analyzed legal provisions brings established norms into a clear and verifiable order. Second, the abstract and general form of the law, neither tailored to particular contexts nor addressed to specific persons, gives the legal system a uniform structure. And third, a judiciary and an administration bound by law guarantee due process and a reliable implementation of laws. Deviations from this liberal model can then be understood as encroachments upon the formal properties of the law. The wave of regulatory law associated with the welfare state does in fact destroy the classical image of the system of civil law, for example, the clear separation of private and public law as well as the hierarchy of basic norms and statutes. The same holds for the presumption of a well-ordered and unified body of law. The unity of a more or less coherent legal corpus is not as such objectified in the legal text. An anticipated unity is open to constructive interpretation from case to case. Further, purposive programs displace rule-oriented forms of law to the extent that the enactment of law becomes dependent upon political intervention into social spheres, where the consequences are less and less predictable. Just as concrete facts and abstract goals find their way into the language of the law, characteristics that previously were external to the law now more and more invade legal provisios.[6] Finally, this "rise of purpose within law" (Jhering) loosens the legal ties of the judiciary and the administration, which formerly appeared to be unproblematic. Judges have to deal with blanket clauses and, at the same time, have to do justice to a greater variety of contexts and a greater interdependence of legal provisions, which are no longer placed in a coherent and clear-cut hierarchy. The same goes for "context-sensitive" administrative action.

The formal properties of law were, then, characterized by a systematization of the legal corpus, by the form of abstract and general rules, and by strict procedures limiting the discretion of

[6]Teubner, "Verrechtlichung," pp. 300ff.

judges and administrators. That view already involved certain idealizations; but even this liberal ideology broke down in the face of the legal changes in the welfare state. In this respect one might well speak of a "materialization" of law. But Weber could give this expression a critical sense only by establishing two further assumptions: (a) he considered the rationality of law to be grounded in its formal properties; and (b) the materialization of law for him meant its moralization, that is, the penetration of substantive justice into positive law. From this followed his critical thesis that the rationality intrinsic to the medium of law *as such* is destroyed to the degree that an internal connection is established between law and morality.

2

However, this train of thought is valid only if the formal properties of law, as Max Weber derived them from the formalistic understanding of law, can be interpreted in a narrow, morally neutral sense of "rational." Let me recall three aspects of the sense in which Weber used the term "rational" in this context.[7]

Weber *first* proceeds from a broad conception of technique (in the sense of techniques of prayer, painting, education, and the like) in order to make clear that the aspect of regularity in general is important for the *rationality of rule-governed behavior.* Patterned behavior that can be reliably reproduced provides the advantage of predictability. When it becomes a matter of technical rules for controlling nature and material objects, this rule-rationality takes on the more specific meaning of instrumental rationality. This has no application to legal norms. When, however, it is no longer a matter of the efficient employment of means, but of the preferential selection of goals from among pre-given values, Weber speaks, *secondly*, of *purposive rationality.* Under this aspect, an action can be rational to the extent that it is guided

[7]J. Habermas, *Theorie des Kommunikativen Handelns* (Frankfurt, 1981), vol. 1, pp. 239ff.

by explicit value orientations and is not controlled by blind effects or quasi-natural traditions. Weber regards value orientations as substantive preferences incapable of further justification and subject to choice by persons acting in a purposive-rational manner; an example would be the individual interests that private legal subjects pursue in economic exchange. *Finally*, Weber also calls rational the results of the intellectual work of experts who analytically master transmitted symbolic systems such as, for example, religious worldviews or moral and legal conceptions. These doctrinal achievements are guided by *scientific method* in a broad sense. They increase the complexity and the specificity of a type of knowledge embodied in teachings.

At first glance, it is easy to see how the formal properties of law mentioned above can be described as "rational," in a narrow, morally neutral sense, under the three aspects of the rationality of patterned behavior, the rationality of choice, and scientific rationality. The systematic elaboration of the legal corpus depends on the scientific rationality of experts. Public, abstract, and general rules secure spheres of private autonomy for the purposive-rational pursuit of individual interests. Finally, procedures for the strict application and implementation of laws make possible a noncontingent and thus a predictable connection between actions, statutory definitions, and legal consequences — above all in commercial transactions under private law. To this extent, the rationality of bourgeois formal law would be guaranteed precisely by its three formal properties. But is it in fact these aspects of rationality that provide legitimating force to the legality of the exercise of political power?

As a glance at the European workers' movement and the class struggles of the nineteenth century shows, the political systems that have so far come closest to Max Weber's model of legal domination were by no means experienced as legitimate *per se.* At most, this was true for the social classes that benefited most and for their liberal ideologists. If we accept the liberal model for

purposes of an immanent critique, we can show that the legitimacy of bourgeois formal law results not from its declared "rational" characteristics but, at best, from certain moral implications that can be derived from those properties with the help of additional empirical assumptions regarding the structure and function of the underlying economic system.

3

If we run through the above-mentioned specifications of rationality in reverse order, this applies first to the legal protection or certainty of law, which is established on the basis of abstract and general laws through strict judicial and administrative procedures. Let us assume that the empirical conditions for equal protection are universally fulfilled. We have to keep in mind that legal protection — in the sense of the predictability of infringements on liberty and property — is a "value" that sometimes competes with other values — for example, with the equal distribution of opportunities and social rewards. Hobbes already had a maximization of legal protection in view when he required the sovereign to channel his commands through the medium of civil law. But the privileged place this value enjoys in bourgeois formal law is certainly not sufficiently justified by the fact that the predictability of the legal consequences of action is functional for a market society. For example, whether welfare-state policies that can only be realized with the help of blanket clauses and open legal concepts should be bought at the expense of predictable judicial decisions is a question that involves the moral assessment of different principles. Such normative conflicts must then be decided from the moral point of view of which of the competing interests lends itself to universalization.

This already touches, secondly, on the semantic form of legal norms. The classical form of abstract and general laws does not legitimate political power exercised in that form merely because it fulfills certain functional requirements for the privately autono-

mous and purposively rational pursuit of individual interests. It has been shown time and time again, from Marx to MacPherson,[8] that this would hold true only if everyone enjoyed equal access to the opportunity structures of a market society — and even then only under the premise that there is no preferable alternative to forms of life shaped by monetary and bureaucratic mechanisms. It is true, however, that in contrast to goal-oriented legal programs, rule-oriented programs do have the advantage, owing to their semantic generality, of more readily conforming to the principle of equality before the law. As a result of their abstractness, this type of law even corresponds to the further principle of treating equals equally and unequals unequally, at least when the regulated facts are actually general and not affected in their essential content by changing contexts. Thus, in contrast to Max Weber's functionalist argument, it turns out that the semantic form of abstract and general laws can be justified as rational only in the light of morally susbtantive principles. (Of course, this does not entail that *only* a legal order in the form of public, abstract, and general rules is able to satisfy the two principles of equal protection and substantive equality of the law.)

The third formal property, the scientific construction of a systematic body of law, also cannot by itself account for the legitimating effect of legality. Despite all the authority that the sciences have been able to muster in modern societies, legal norms still cannot achieve legitimacy merely by the fact that their language is made precise, their concepts explicated, their consistency tested, and their principles unified. Doctrinal work can contribute to legitimation only if and insofar as it helps to satisfy the specific demand for justification which arises to the degree that law as a whole becomes positive law. That is, from the perspective of legal subjects and lawyers alike, the contingency of positive law — the fact that law can be changed at will — can be reconciled with its

[8]C. B. Macpherson, *Die politische Theorie des Besitzindividualismus* (Frankfurt, 1967).

claim to legitimacy under one tacit presupposition: context-dependent legal changes and developments should be justifiable in the light of acceptable principles. Precisely the doctrinal achievements of legal experts have made us aware of the post-traditional mode of validity of modern law. In positive law all norms have, at least in principle, lost their sheer customary validity. Therefore, individual legal provisions must be justified as elements of a legal system which, as a whole, is viewed as reasonable in the light of principles. These principles can come into conflict with one another and be exposed to discursive testing. However, the rationality that is brought to bear at this level of normative discussion is more closely related to Kant's practical reason than to pure scientific reason. In any case, it is not morally neutral.

In sum, we can conclude that the formal properties of law studied by Weber could have granted the legitimacy of legality only under specific social conditions and only insofar as they were "rational" in a moral-practical sense. Weber did not recognize this moral core of civil law because he qualified moral insights as subjective value orientations. Values counted as contents incapable of further justification and seemingly incompatible with the formal character of law. He did not distinguish the preference for values which, within the limits of specific cultural life forms and traditions, *commend* themselves, so to speak, as superior to other values, on the one hand, from the moral oughtness of norms that *obligate* equally all whom they address, on the other. He did not separate the value judgments spread across the whole range of competing value contents from the formal aspect of the binding force or validity of norms, a validity that does not vary with the contents of the norms. In a word, he did not take ethical formalism seriously.

4

This is evident in his interpretation of social contract theories. Weber contrasts modern natural law — *Vernunftrecht* — with

positive formal law. He holds "that there can be no purely formal natural law": "'Nature' and 'reason' are the substantive criteria for what is legitimate from the standpoint of natural law."[9] It must be conceded that social contract theory from Hobbes to Rousseau and Kant still retains certain metaphysical connotations. But with their model of an original contract in which free and equal legal associates, after assessing their interests, lay down the rules for their common life, they already satisfy the requirement for a procedural justification of law. In this modern tradition expressions such as "nature" and "reason" no longer refer to metaphysical ideas. Rather, they serve to explain the presuppositions under which an agreement must be able to come about if it is to have legitimating force. The procedural conditions for rational will formation can be inferred from the contractual model. Once again, Weber does not sufficiently distinguish between structural and substantive — or formal and material — aspects. Only for this reason is he able to mistake "nature" and "reason" for value contents from which formal law was the first to free itself. He falsely identifies the procedural properties of a post-traditional level of justification with substantive values. Therefore, he does not see that the model of the social contract (in a way similar to the categorical imperative) can be understood as proposing a procedure whose rationality is supposed to guarantee the correctness of whatever decisions come about in a procedural manner.

These reminders are meant to explain why law and morality cannot be distinguished from one another by means of the concepts "formal" and "substantive." Our considerations so far lead rather to the conclusion that the legitimacy of legality cannot be explained in terms of some independent rationality which, as it were, inhabits the form of law in a morally neutral manner. It must, rather, be traced back to an internal relationship between law and morality. This is also the case for the model of bourgeois formal law that crystallized around the semantic form of abstract and general

[9]Weber, *Wirtschaft und Gesellschaft*, p. 638.

rules. The formal properties of this legal type would at best offer grounds for legitimation only in view of particular moral principles. Now it is of course correct that the change in the form of law that Max Weber describes by the word "materialization" precisely withdraws the basis for these grounds. But this observation does not prove yet that the materialization of law must destroy every sort of formal property from which, in an analogous way, grounds for legitimation could be derived. This change in the form of law merely requires a radicalization of Weber's question about the kind of rationality inherent in law. Formal and deformalized law are from the very beginning only different variants of positive law. The legal formalism that is common to both of these legal types must lie at a more abstract level. We may not identify particular features of bourgeois formal law — as represented by legal formalism — with the most formal properties of modern law in general.

For the purposes of this wider analysis, the concept must be broadly conceived and not connected from the outset to a specific form of law. H. L. A. Hart and others have shown that modern legal systems include not only legal precepts, permissions, prohibitions, and penal norms but also secondary norms, rules of empowerment and rules of organization that serve to institutionalize processes of legislation, adjudication, and administration.[10] In this way the production of legal norms is itself regulated by legal norms. Legally binding decisions in due time are made possible by procedurally defined but otherwise indeterminate processes. Furthermore, it must be borne in mind that these processes connect decisions with obligations to justify or burdens of proof. What is institutionalized in this manner are legal discourses that operate not only under the external constraints of legal procedure but also under the internal constraints of a logic of argumentation for producing good reasons.[11] The basic rules of argumentation

[10]H. L. A. Hart, *Der Begriff des Rechts* (Frankfurt, 1968).

[11]R. Alexy, *Theorie der juristischen Argumentation* (Frankfurt, 1978).

do not leave the construction and appraisal of reasons to the whims of participants. And they can in turn be altered only through argumentation. Finally, it is worthy of note that legal discourses, however bound to existing law, cannot operate within a closed universe of unambiguously fixed legal rules. This already follows from the stratification of modern law into rules and principles.[12] Many of these principles are both legal and moral, as can easily be made clear in the case of constitutional law. The moral principles of natural law have become positive law in modern constitutional states. From the viewpoint of a logic of argumentation, the modes of justification institutionalized in legal processes and proceedings remain open to moral discourses.

Now, if the formal properties of law — below the level of a differentiation into more or less materialized legal types — are to be found in the dimension of legally institutionalized processes, and if these procedures regulate legal discourses that remain permeable to moral arguments, we can make the following conjecture: legitimacy is possible on the basis of legality insofar as the procedures for the production and application of legal norms are also conducted reasonably, in the moral-practical sense of procedural rationality. The legitimacy of legality is due to the interlocking of two types of procedures, namely, of legal processes with processes of moral argumentation that obey a procedural rationality of their own.

II. The Deformalization of Law: Three Interpretations

1

Max Weber was still oriented toward a formalistic interpretation of law that has in the meantime been called into question by subsequent historical research. The liberal model had little to do with the reality of the law, either in late-nineteenth-century Ger-

[12]R. Dworkin, *Taking Rights Seriously* (Cambridge, Mass., 1977), ch. 2, 3.

many or elsewhere. The judiciary's being strictly bound to the law, for example, has always been a fiction.[13] However, the enduring impact of Weber's diagnosis is no accident. For as a *comparative* statement about a trend in the self-understanding and practice of legal experts, the thesis on the deformalization of law has a certain plausibility. More recent phenomena, unavailable to Weber, confirm his diagnosis.

Reflexive law. Weber had in mind the transformation of formal law into policy-oriented legal programs. As the example of collective bargaining law shows, soon another type of deformalized law emerged. I mean the delegation of negotiating competence to the conflicting parties and the institutionalization of quasi-political bargaining processes.[14] With this type of regulation, the legislator no longer directly seeks to achieve concrete goals. Rather, the procedural norms are supposed to regulate processes of will formation and to enable the participants to settle their affairs themselves. This reflexive, or two-level, mode of deformalization gains the advantage of greater flexibility by making legal parties autonomous. This type of reflexive law has expanded in the wake of corporatist developments.

Marginalization. Research on implementation over the past decades has confirmed the "gaps" that exist between the wording and the social effects of legal programs. In many social areas the law has anything but a strictly binding character. Awareness of marginality is partially due to research, that is, to facts not known before. But there are other phenomena: the increasingly experimental character of a goal-oriented regulation of events that are difficult to predict; the growing sensitivity on the part of legislators to problems of acceptability; and the assimilation of penal law to informal types of social control. Above all, substitution of

[13]R. Ogorek, "Widersprüchlichkeit und Einheit der Justiztheorie im 19. Jh." (1986).

[14]G. Teubner, "Substantive and Reflexive Elements in Modern Law," *Law and Society Rev.* 17 (1983): 239ff.

private agreements for criminal prosecution by the state, negotiable settlements between offender and victim, and the like, accelerate the "erosion of norms" and strengthen the trend toward a questionable "consensus orientation."[15] To a certain degree all these trends rid contemporary law of its classical coercive character.

Functional imperatives. As the concept of "regulatory law" already suggests, we interpret the wave of legal regulation associated with the welfare state as the instrumentalization of law for policies of the legislature. But this description attributes to actors' intentions what they often only do more or less unconsciously — as agents of an increasingly complex state apparatus or under the pressure of systemic imperatives of an economy that, though autonomous, still requires stabilization. We can also see in the administration of justice how normative viewpoints are being subordinated to the imperatives of self-maintaining bureaucracies or to the functional pressures of self-regulating markets. In the conflict between rights on the one hand, and collective goods on the other, functional requirements of subsystems regulated by money and power prevail. These media-regulated subsystems are themselves no longer integrated via norms and values.

Morality versus the Positivity of Law. With the increasing mobilization of law, the question of the conditions of the legitimacy of legality gets intensified. With the growing rate of change, positive law undermines its own basis of validity. With every change of government, new interests gain a majority, interests which, for example, affect laws dealing with housing, family, or taxation. Paradoxically, this gets connected with the countervailing tendency to appeal to "correct" law in the name of a moralized law — for example, in the form of civil disobedience, or in connection with issues of abortion, divorce, protection of the

[15]W. Naucke, *Die Wechselwirkung zwischen Strafziel und Verbrechensbegriff* (Stuttgart, 1985), and *Versuch über den aktuellen Stil des Rechts, Schriften der H. Ehler Akademie* (Kiel, 1986).

environment, and so on. There are also systematic reasons for this. Today moral principles originating in natural law are part of positive law. The interpretation of the constitution is therefore increasingly shaped by legal philosophy; in this regard W. Naucke ironically speaks of a "judicial administration of natural law."[16]

All these tendencies fall under the phrase "deformalization" of law. At the same time, under the rubric of "legal regulation" (or juridification: *Verrechtlichung*), they become the object of legal critique. From this perspective as well, the present debates are linked with Max Weber's analysis. His question concerning the rationality of the form of law aimed at criteria for law that could be accepted as both right and functional. To that extent, this discussion throws light on our question, how legitimacy is possible on the basis of legality. In what follows, I want to describe three positions that have arisen in the context of German discussions; I shall not enter into the corresponding American discussions. These positions share the participant's perspective, in which the legal system is analyzed from within.[17] The German discussion is tacitly shaped by conflicting views on the deformation of law during the Nazi period. One interpretation places a greater trust in the judiciary and the administration, the other in the parliamentary legislature. This polarization has the advantage of stimulating us to consider all three governmental powers rather than looking for the conditions of the legitimacy of legal domination only from within the judiciary.

2

Historical experiences during the Nazi period left especially clear traces in a controversy conducted in the fifties between Ernst Forsthoff and Wolfgang Abendroth concerning liberal versus

[16]Naucke, *Versuch über den aktuellen Stildes Rechts,* p. 21.

[17]I will deal only briefly with systems theory in my second lecture and cannot go into the law-and-economy approach at all.

welfare-state issues.[18] It resumes debates that were carried out between Carl Schmitt and Hermann Heller — among others — during the Weimar Republic and after.[19] What matters in our context is that Forsthoff continues by doctrinal means Max Weber's criticism of the deformalization of law. He believes that tendencies toward deformalization can be arrested if typical welfare-state interventions are channeled into the liberal forms of the classical constitutional state. In this view, the principle of the welfare state as it is laid down in the Basic Law of the Federal Republic *(Grundgesetz)* should not be given equal status with the liberal principles of the constitutional state. The liberal logic of the constitutional state is again spelled out in terms of the form of public, abstract, and general norms. As long as the political legislator pursues only those goals that can be realized in such rule-oriented programs, independent court and administrative decisions remain predictable. An active state, intervening in the social status quo through a planning and service-oriented administration, would distort the liberal state. That the legitimacy of legal domination will stand or fall with the semantic form of legal norms is a premise that Lon Fuller has analyzed in detail as the "internal morality of the law."[20]

The weakness of this position lies in its purely defensive character. Forsthoff knows that there once was "a structural correspondence" between the liberal state and the liberal economic order. Given the structural changes that have taken place in the meantime, he must make the unrealistic assumption that the frame of the liberal state has become independent of its social origins and has independently established itself as a "technical," that is, context-neutral game of constitutional rules. Forsthoff cannot explain how the wave of legal regulation associated with the

[18]E. Forsthoff, ed., *Rechtsstaatlichkeit und Sozialstaatlichkeit* (Darmstadt, 1968).

[19]I. Maus, *Bürgerlicbe Rechtstheorie und Faschismus* (Munich, 1980).

[20]R. L. Sumners, *Lon. L. Fuller* (Stanford, 1984), pp. 33ff.

welfare state could be kept within the limits of a legal type of law that has meanwhile become dated, without renouncing the welfare-state compromise that in substance can no longer be annulled.[21]

The democratic legal positivism of his opponent, Wolfgang Abendroth, seems to fit this reality better. According to the premises of Weber's and Forsthoff's legal formalism, the regulatory law of the welfare state must remain a foreign element. Compromises in formula do not help either.[22] By contrast, Abendroth wants to bring the principle of the welfare state and the liberal guarantees of the constitutional state together under the roof of democratic self-determination. For him the social order is at the disposal of the democratic will formation of the people as a whole. The democratic state is the center of a society that organizes and transforms itself. The legal form serves only to implement reformist policies through binding decisions. Law does not possess a structure of its own which might then be deformed. The legal form is represented, rather, as a malleable shell subject to the various tasks and accomplishments of planning administrations. In a positivistic manner, all internal determinations of rationality are removed from the concept of law. The ethical minimum is transferred from the semantic form of the legal norm to the democratic procedure of legislation. Abendroth trusts the rule of law to the Rousseauean hope that a democratic legislature remaining consistent with itself will not enact any resolutions that would not be capable of general agreement. With this idea of legislative activism, Abendroth still remains, however, blind to the specific phenomena of juridification associated with the welfare state, and blind as well to the systematic pressures arising from the market economy and the bureaucratic state.

[21]C. Offe, *Contradictions of the Welfare State* (London, 1984).

[22]E. R. Huber, "Rechtsstaat und Sozialstaat in der modernen Industriegesellschaft," in Forsthoff, *Rechtsstaatlichkeit*, p. 589.

3

In the meantime, however, a metacritique of the criticism of legal regulation or juridification stemming from Abendroth has emerged. At the center of this critique lies the thought that replacing strictly formal law by weak, deformalized regulations opens the way for the courts and the administration to get around the supremacy of the legislature and thus to steer around parliamentary legislation, which now has only a legitimating function. Ingeborg Maus argues, for instance, that materialized and specific types of reflexive law destroy the classical separation and balance of powers, since the legal tie of the judiciary and the administration to democratic law is dissolved by the promotion of blanket clauses and indeterminate goals, on the one side, and by the delegation of decision-making competence on the other.[23] The judiciary fills in this expanded scope for discretion with its own legal programs and value orientations. The administration operates between the implementation and the shaping of legal programs and pursues policies of its own. The legislative window dressing provides only the thinnest of legitimations for the judiciary's own value judgments and for the administration's corporatist ties and arrangements with the most powerful interests at any given time. The adaptation of the legal system to such "situation-sensitive" administrative action is supported only by a judiciary that weighs values and is oriented to the peculiar features of each individual case.

To be sure, this critique moves in the same direction as the legal formalism of liberals. But the two positions are distinguished from one another by their normative premises. Although Maus shares the liberal concern for well-defined legal propositions that narrowly circumscribe the scope of discretion for courts and administrations, she no longer sees the rationality of the Rule of Law as residing in the semantic form of the abstract and general

[23]I. Maus, "Verrechtlichung, Entrechtlichung und der Funktionswandel von Institutionen," in G. Göhler, ed., *Grundlagen einer Theorie der politischen Institutionen* (Cologne, 1986).

norm. Legitimating force is exclusively attributed to the democratic process of legislation. If it were only the change from conditional to goal-oriented legal programs that allowed the judiciary and the administration to circumvent legislative control, this line of argument would lose its point and ultimately coincide with the liberal one. On the other hand, it is also not sufficient to treat the supremacy of the legislature over the other two governmental functions merely sociologically, as a question of power. Behind Abendroth's approach there was still a trust in class analysis and a hope for a class compromise that could be shifted to the advantage of labor parties within the framework of the democratic welfare state. Today our confidence in the background assumptions of Marxist, as well as other, philosophies of history has largely disappeared. In its place there is the need for a straightforward normative justification of why parliaments deserve primacy. Abendroth's legal positivism is not sufficient for this. If the normative gap left by a positivist concept of democratically enacted laws can no longer be filled with a privileged class-interest, then the conditions of legitimacy for democratic law must be sought in the rationality of the legislative process itself.

Thus, from our discussion there emerges the interesting desideratum of investigating whether the grounds for the legitimacy of legality can be found in the procedural rationality built into the democratic legislative process. In the event that this desideratum can be met, there is, of course, at least one further problem. As soon as abstract and general norms that rule out all indeterminacies no longer serve as the prototypical form of regulation in the welfare state, we are left without a mechanism for transmitting any stipulated rationality of legislative procedures to the procedures of adjudication and administration. Without the automatic operation of a strict legal tie, as is assumed only in the liberal model, it remains an open question how the procedural rationality established for the former could be translated into the procedural rationality of the latter.

4

This question, focused on the rationality of judicial decision making, provides the starting point for a third line of argument. This position is less sharply formulated than the liberal or the democratic criticism of soft, deformalized law. There are at least two sorts of answers to the question of how the judiciary deals with deformalized law — a natural law version and a contextualist version. First, however, we must describe the pertinent phenomena.

The judicial review of the supreme court offers itself as an object of analysis. Of course, family, labor, and social law also confront the courts with material that cannot be treated according to the classical model of civil law procedures for subsuming individual cases under well-defined general laws.[24] But the tendencies toward a type of interpretation and decision making that not only fills gaps in the law but constructively develops it are most obvious in the interpretation of constitutional law.

Here it is especially clear that the liberal model of a contrast between state and society has broken down. The barrier between the governmental sphere of "the common weal" and the social sphere of the "private pursuit of individual interests" has become pervious. The constitution is represented as a dynamic whole wherein conflicts between individual welfare and the common weal must be settled at any given time in an ad hoc manner, in the light of a holistic interpretation of the constitution and guided by overarching principles.[25] The clear hierarchy between basic norms and statutory laws has dissolved, as has the character of basic rights as clear-cut rules.[26] There is scarcely any right that could not be limited by the consideration of principles. For this reason, the Federal Constitutional Court of West Germany estab-

[24]Salgo, "Soll die Zuständigkeit des Familiengerichts erweitert werden?" *Zeitschrift für das gesamte Familienrecht* 31 (1984): 221ff.

[25]E. Denninger, "Verfassungsrechtliche Schlüsselbegriffe," in FS. Für R. Wassermann (Baden-Baden, 1985), pp. 279ff.

[26]R. Alexy, *Theorie der Grundrechte* (Baden-Baden, 1985).

lished a "principle of interdependence": every individual element of the legal system can be interpreted *differently,* according to the context, given an understanding of the constitutional "value system" *(grundgesetzliche Wertordnung)* as a whole. With this anticipation of a reconstructed meaning of the whole, a two-tiered relationship is established between the legal order and the principles of legitimation — not, to be sure, at the level of the literal meaning of the legal text but in terms of the interpretive method. This gives rise to considerable legal indeterminacy. In this context, E. Denninger speaks of the replacement of legal domination — domination on the basis of the legality of laws and measures — by a "domination on the basis of judicially sanctioned legitimacy.[27]

But this makes even more precarious the critical question of whether the judiciary can still claim to use their unavoidably widened scope for discretion rationally — that is, with intersubjectively testable arguments. The affirmative answers characteristic of our third position are generally motivated by a mistrust of a parliamentary legislature that can be demagogically seduced. In this respect it presents a mirror image of the line of argument of the democratic position. Once again, a particular assessment of the totalitarian regime of the National Socialists filters through. From this point of view, a judiciary able to direct itself to supra-positive principles is supposed to constitute a counterweight to "a decisionistic and power-ridden positivism," "to a thoughtless, legally blind, intimidated or violated majority."[28] Since the legitimating power of the democratic sovereign has been undermined by legal positivism, the legislature must be subordinated to the control of a judiciary that is bound by law but also by "the highest laws of substantive justice."[29] Whether this is derived from

[27]Denninger, "Verfassungsrechtliche Schlüsselbegriffe," p. 284.

[28]F. Wieacker, *Privatrechtsgeschichte der Neuzeit* (Göttingen, 1967), p. 560.

[29]Ibid., p. 604.

Christian natural law or from value ethics, or whether one calls, in neo-Aristotelian tones, upon the customary ethos of a place, it is all the same: the appeal to a concrete value order that is beyond disposal and discussion confirms in fact Max Weber's fear, namely, that the deformalization of law would open the gates for the influx of substantive, and thus controversial, value orientations that are at root irrational.[30]

It is characteristic of those who advocate such a value-based administration of justice — whether the basics be determined by natural law or in a contextualist fashion — that they share Weber's premises, but with a change of sign. They place procedures, abstract principles, and concrete values all on the same level. Since moral principles are always already immersed in concrete-historical contexts of action, there can be no justification or assessment of norms according to a universal procedure that ensures impartiality. Neo-Aristotelians are especially inclined to an ethic of institutions that renounces the gulf between norm and reality, or principle and rule, annuls Kant's distinction between questions of justification and questions of application, and reduces moral deliberations to the level of prudential considerations.[31] At the level of a merely pragmatic judgment, normative and purely functional considerations are then indistinguishably intermingled.

In this view, the Federal Constitutional Court, in its assessment of values, has no criteria by which it could distinguish the place of normative principles (such as equal treatment or human dignity) or important methodological principles (such as proportionality or appropriateness) from functional imperatives (such as economic peace, the efficiency of the military, or, in general, the so-called feasibility proviso). When individual rights and collective goods are aggregated as values in which each is as particular as the next, deontological, teleological, and systems-

[30]U. K. Preuss, *Legalität und Pluralismus* (Frankfurt, 1973).

[31]H. Schnädelbach, "Was ist Neoaristotelismus?" in W. Kuhlmann, ed., *Moralität und Sittlichkeit* (Frankfurt, 1986), pp, 38ff.

theoretical considerations indistinguishably flow into one another. And the suspicion is only too justified that in the clash of value preferences incapable of further rationalization, the strongest interest will happen to be the one actually implemented. This explains, moreover, why the outcome of judicial proceedings can be so well predicted in terms of interests and power constellations. This third line of argument is only of relevance insofar as it draws attention to an unresolved problem. The example of the judiciary's dealings with deformalized law shows that the moralization of law now so manifest cannot be denied or annulled; it is internally connected to the wave of legal regulation triggered by the welfare state. However, both natural law — whether in the form of Christian ethics or value ethics — and neo-Aristotelianism remain helpless in the face of this, because they are unsuited to working out the rational core of legal procedures. Ethics oriented to conceptions of the good or to specific value hierarchies single out particular *normative contents.* Their premises are too strong to serve as the foundation for universally binding decisions in a modern society characterized by the pluralism of gods and demons. Only theories of morality and justice developed in the Kantian tradition hold out the promise of an *impartial* procedure for the justification and assessment of principles.

III. The Rationality of Legally Institutionalized Procedures: Preliminary Questions

1

If, in societies of our type, legitimacy is supposed to be possible on the basis of legality, then the belief in legitimacy, deprived of an unquestioned religious or metaphysical backing, must somehow be based on the rational properties of law. But Weber's assumption that an independent, morally neutral rationality intrinsic to law counts for the legitimating force of legality has not stood up. Political power exercised in the form of a positive law

that is in need of justification owes its legitimacy instead — at least in part — to the implicit moral content of the formal properties of law. These formal properties should not be too concretely fixed to specific semantic features. Rather, what has legitimating force are the procedures that distribute burdens of proof, define the requirements of justification, and set the path of argumentative vindication. Further, the source of legitimation should not be looked for on one side only, either in the political legislature or in the administration of justice. Under conditions of welfare-state policies, even the most careful legislator cannot bind the judiciary and the administration solely through the semantic form of a certain legal type; he cannot do without regulatory law. We can find the rational core — in a moral-practical sense — of legal procedures only by analyzing how the idea of impartiality in the justified choice and application of binding rules can establish a constructive connection between the existing body of law, legislation, and adjudication. This idea of impartiality forms the core of practical reason. If we leave aside for now the problem of an impartial application of norms and consider the idea of impartiality under the aspect of justifying norms, it was developed in theories of morality and justice that laid down procedures for how someone could decide practical questions from the moral point of view. The rationality of any such pure procedure, prior to all institutionalization, is measured by whether the moral point of view is adequately explicated in it.

At present I see *three serious candidates* for such a procedural theory of justice. All of them come out of the Kantian tradition, but they differ from one another in the models by which they interpret the procedure of impartial will formation.[32] John Rawls adheres to the model of a contractual agreement and builds into the description of the original position those normatively substantive constraints under which the rational egoism of free and equal

[32] J. Habermas, "Gerechtigkeit und Solidarität," in W. Edelstein, G. Nunner, eds., *Zur Bestimmung der Moral* (Frankfurt, 1986).

parties must lead to the choice of correct principles. The fairness of the result is guaranteed by the procedure through which it comes about.[33] Lawrence Kohlberg, by contrast, makes use of George Herbert Mead's model of a universal reciprocity in perspective taking. Ideal role taking replaces the idealized original position. It requires the morally judging person to put herself in the position of all who would be affected by putting into effect the norm in question.[34] From my point of view both models have the disadvantage of not doing complete justice to the cognitive claim of moral judgments. In the model of the contractual agreement, moral judgments are *assimilated* to rational-choice decisions; in the model of role taking, they are assimilated to empathetic acts of understanding. Karl-Otto Apel and I have therefore proposed that we look at moral argumentation itself as the adequate procedure of rational will formation. The argumentative testing of hypothetical validity claims represents such a procedure because no one who wants to argue seriously can avoid the idealizing presuppositions of this exacting form of communication. Every participant in an argumentative practice must pragmatically presuppose that in principle all those possibly affected could participate, freely and equally, in a cooperative search for truth in which only the force of the better argument appears.[35]

I cannot go into this here. In the present context, it has to suffice to indicate that there *are* serious candidates for a proceduralist theory of justice. Only then does my thesis not just hang suspended in the air — the thesis, namely, that proceduralized law and the moral justification of principles mutually implicate one another. Legality can produce legitimacy only to the extent that the legal order reflexively responds to the need for justification that originates from the positivization of law and responds in

[33]J. Rawls, *Theorie der Gerechtigkeit* (Frankfurt, 1976).

[34]L. Kohlberg, *The Philosophy* of *Moral Development* (San Francisco, 1981).

[35]J. Habermas, *Moralbewusstsein und kommunikatives Handeln* (Frankfurt, 183)!

such a manner that legal discourses are institutionalized in ways made pervious to moral argumentation.

2

On the other hand, the boundaries between law and morality ought not to be blurred. The procedures offered by theories of justice to explain how one can make judgments from a moral point of view share with legal processes only the feature that the rationality of the procedure is supposed to guarantee the "validity" of the procedurally achieved results. But legal procedures approximate the requirements of complete procedural rationality because they obey institutional and, indeed, independent criteria by which it can be determined, from the perspective of a nonparticipant, whether or not a decision has come about according to the rules. The procedure of moral argumentation, which is not yet legally regulated, does not meet this condition. Here procedural rationality remains incomplete. Whether something is judged from a moral point of view cannot be decided apart from a participant's perspective, since at this point there are no external or preceding criteria. None of the procedures proposed within moral theory can do without idealizations, even when — as in the case of the pragmatic presuppositions of argumentation — these idealizations can be shown to be unavoidable, or without any alternative, in the sense of a weak transcendental necessity.

It is, however, precisely the weaknesses of this kind of *incomplete* procedural rationality that makes intelligible why specific matters do require *legal* regulation and cannot be left to moral norms of such a post-traditional type. Whatever the procedure by which we want to test whether a norm could find the uncoerced, that is, rationally motivated, consent of all who may possibly be affected, it guarantees neither the infallibility nor the unambiguity of the outcome, nor a result in due time.

An autonomous morality provides only fallibilistic procedures for the justification of norms and actions. The high degree of

cognitive uncertainty is heightened by the contingencies connected with the context-sensitive application of highly abstract rules to complex situations that are to be described as appropriately and completely, in all relevant aspects, as possible.[36] Furthermore, there is a motivational weakness corresponding to this cognitive one. Every post-traditional morality demands a distantiation from the unproblematical background of established and taken-for-granted forms of life. Moral judgments, decoupled from concrete ethical life *(Sittlichkeit),* no longer immediately carry the motivational power that converts judgments into actions. The more that morality is internalized and made autonomous, the more it retreats into the private sphere.

In all spheres of action where conflicts and pressures for regulation call for unambiguous, timely, and binding decisions, legal norms must absorb the contingencies that would emerge if matters were left to strictly moral guidance. The complementing of morality by coercive law can itself be morally justified. In this connection K. O. Apel speaks of the problem of the warranted expectation of an exacting universalistic morality.[37] That is, even morally well-justified norms may be warrantedly expected only of those who can expect that all others will also behave in the same way. For only under the condition of a general observance of norms do reasons that can be adduced for their justification count. Now, if a practically effective bindingness cannot be generally expected from moral insights, adherence to corresponding norms is reasonable, from the perspective of an ethic of responsibility, only if they are enforced, that is, if they acquire legally binding force.

Important characteristics of positive law become intelligible if we conceive of law from this angle of compensating for the weak-

[36]K. Günther, Anwendüngsdiskürse, Dissertation iur. University of Frankfurt, 1986.

[37]K. O. Apel, "Kann der postkantische Standpunkt der Moralität noch einmal in substantielle Sittlichkeit aufgehoben werden?" in Kuhlmann, *Moralität und Sittlichkeit,* p. 232ff.

nesses of an autonomous morality. Legal norms borrow their binding force from the government's potential for sanctions. They apply to what Kant calls the external aspect of action, not to motives and convictions, which cannot be controlled. Moreover, the professional administration of written, public, and systematically elaborated law relieves *legal* subjects of the effort that is demanded from *moral* persons when they have to resolve their conflicts on their own. And finally, positive law owes its conventional features to the fact that it can be enacted and altered at will by the decisions of a political legislature.

This dependence on politics also explains the instrumental aspect of law. Whereas moral norms are always ends in themselves, legal norms are also means for realizing political goals. That is, they serve not only the impartial settlement of conflicts of action but also the realization of political programs. Collective goal-attainment and the implementation of policies owe their binding force to the form of law. In this respect, law stands between politics and morality. This is why, as Dworkin has shown, in judicial discourse, arguments about the application and interpretation of law are intrinsically connected with policy arguments as well as with moral arguments. That will be our topic in the second lecture.

3

The question about the legitimacy of legality has so far moved the theme of law and morality into the foreground. We have clarified how conventionally externalized law and internalized morality complement one another. We have to keep in mind the differences as we turn to the more interesting question of the interpenetration of law and morality. This interlocking is illuminated by the fact that in constitutional systems the means of positive law are also reflexively utilized in order to distribute burdens of proof and to institutionalize modes of justification open to moral argumentation. Morality no longer lies suspended above the law as a layer of suprapositive norms — as is suggested in

natural-rights theories. Moral argumentation penetrates into the core of positive law, which does not mean that morality completely merges with law. Morality that is not only complementary to but at the same time ingrained in law is of a procedural nature; it has rid itself of all specific normative contents and has been sublimated into a procedure for the justification of possible normative contents. Thus a procedural law and a proceduralized morality can mutually check one another. In legal discourses, the argumentative treatment of moral-practical questions is, so to speak, domesticated by legal constraints. Moral discourse is limited methodically by ties to the law of the land, substantively by the selection of themes and by the distribution of burdens of proof, socially by regulations for participation and role taking, and in the temporal dimension by time constraints imposed on proceedings. But, conversely, moral argumentation is also institutionalized as an open process that obeys a logic of its own and thus controls its own rationality. The legal frame does not intervene in the clockwork of argumentation in such a way that the latter comes to a standstill at the boundary of positive law. Law itself licenses and triggers a dynamic of justification that may transcend the letter of existing law in ways unforeseen by it.

This concept is certainly in need of further differentiation with regard to the varied discourses of legal scholars, judges, or lawyers, as well as in view of the varied subject matter, ranging from morally charged to merely technical issues. If these different points of reference have been clarified, it should also be possible critically to reconstruct the practices of different courts from the viewpoint of how far legal procedures make room for the logic of argumentation, or how far they systematically distort arguments through implicitly introduced external constraints. Of course, such effects are to be found not only in the rules regulating legal proceedings but also in the way in which they are in fact practiced. Sometimes a specific class of arguments offers itself for this sort of consideration. I am thinking, for example, of justifications of

court decisions that exclude normative considerations in favor of presumed functional demands. Precisely in such cases it can be seen that the judiciary and the legal system cannot operate in vacuo but have to react to social demands. Whether they must submit to systemic imperatives — either from the economy or from the state apparatus itself — even when they violate or disturb well-established principles does not depend on the courts themselves nor on the tendencies prevailing in the legal public sphere but — in the last analysis — on the political struggles at the frontier between system and lifeworld.

The legitimating force of the rationality of legal procedures is not to be found only in court proceedings, however, but also — and to a greater degree — in the process of democratic legislation. At first glance, it is not very plausible that parliamentary activities could have a rational core in a moral, practical sense. Here it seems to be a matter of the acquisition of political power and of the power-steered competition between conflicting interests, in such a way that parliamentary proceedings would be amenable to straight empirical analysis but not to critica1 reconstruction according to standards of fair bargaining or even of discursive will formation. At this point I can offer no satisfactory model myself; I can only point to the long series of process-oriented theories of constitutional law that pursue a critical-reconstructive approach.[38] In these, majority rule, parliamentary business procedures, electoral laws, and the like are analyzed from the perspective of how far they can promote types of deliberation and decision making that take equally into consideration all relevant aspects of the issue and all interests involved. I see the weakness of these theories not in their process-oriented approach but, rather, in the fact that they do not develop their normative viewpoints out of a logic of moral argumentation and do not apply them to the communicative presuppositions for an unconstrained dynamic of justification. Fur-

[38]J. Choper, *Judicial Review and National Political Process* (1980); J. Ely, *Democracy and Distrust* (1980).

thermore, intraparliamentary will formation is only a small segment of public life.[39] The rational quality of political legislation does not depend only on how elected majorities and protected minorities work within the parliaments. It depends also on the levels of participation and education, on the degrees of information and articulation of issues in the broader public. The quality of public life is in general shaped by the opportunity structures that the media and the institutions of the public sphere actually open up.

However, all these approaches must face the question of whether their mode of questioning is not hopelessly naive in view of the rapidly increasing complexity of our society. If we consider the critique developed by legal realism and further radicalized today by the Critical Legal Studies Movement, every normative investigation that observes the Rule of Law from an internal perspective and, so to speak, takes it at its word, seems to fall into an impotent idealism. For this reason, in the next lecture, I will alter my perspective and switch over from normative theory to social theory.

LECTURE TWO: ON THE IDEA OF THE RULE OF LAW

In taking up Max Weber's question, how is legitimacy possible on the basis of legality, I have tacitly accepted an approach that describes legal development from the perspective of the rationalization of law. This approach requires an otherwise uncommon combination of descriptive and normative research strategies. In the history of science we see a similar division of labor — for example, between the external, or historical, explanation of a paradigm shift and the internal, or philosophical, reconstruction of those unsolved problems that finally led to the degeneration

[39]R. D. Parker, "The Past of Constitutional Theory — and Its Future," *Ohio State Law Journal* 42 (1981): 223ff.

of a research program. The passage from traditional to modern political systems — to what Weber called legal domination — is a complex phenomenon which, in connection with other processes of modernization, calls first for an empirical explanation. On the other hand, adopting the internal perspective of legal development, Max Weber interpreted the formal qualities of law as the result of a process of rationalization. So far we have followed Weber along this path of an internal reconstruction, though not without reservations. We saw, *first*, that even if we conceive modern law under the premises of legal formalism, the form of modern law cannot be described as "rational" in a morally neutral sense. *Second*, we showed that the change in the form of law occurring with the welfare state need not destroy its formal properties — if we take "formal" in a more general sense. The formal properties can be more abstractly grasped with a view to the complementary relationship between positive law and a procedural theory of justice. But, *third*, this result left us with the problem that the standards for an extremely demanding procedural rationality have migrated into the medium of law. As soon as the implicit question about law's being both right and functional is made explicit in this way — a question that has provided the basis for almost all legal criticism since Max Weber — the realist counterquestion is raised: whether the legal system in an increasingly complex society can at all withstand a heightened tension of this sort between normative demands and functional requirements. The suspicion arises that a law which must function in such an environment wears the idealistic self-understanding of justification through moral principles only as an ornament.

Many regard this question as nothing more than a rhetorical retreat and turn at once to the third-person perspective of the sociology or economics of law, For the social-scientific observer, what is normatively binding for participants is represented as something that participants only hold to be so. From this point of view, belief in legality loses its internal connection to good

reasons. In any case, the structures of rationality deployed for purposes of reconstruction lose all meaning. But with this conventional change of perspective, the normative problematic is merely neutralized by fiat. It can return at any time. For this reason, a functionalist reinterpretation of the normative problematic is more promising. On this approach, the normative is not left out of consideration from the start but, rather, disappears along the way to an explanation.

To begin with I want to take up Luhmann's systems theory of law and draw attention to phenomena that his explanatory strategy has failed to grasp. Starting from the conclusion that the autonomy of the legal system cannot be satisfactorily grasped within the categories of systems theory, I will then investigate the sense in which modern law differentiated itself from the traditional complex of politics, law, and morality by means of social contract theories. Finally, I will take up the question of whether, out of the collapse of rational natural law, an idea of the rule of law can emerge that does not remain an impotent "ought" in a society of high complexity and accelerated structural change but, rather, puts down roots in it.

I. SYSTEMIC AUTONOMY OF LAW? LUHMANN'S SOCIOLOGY OF LAW

1

Luhmann conceives of law as an autopotetic system and on this basis develops an exacting theory that can also be used for legal criticism.[40] What appears from the internal perspective of legal doctrine as a normatively regulated practice of discourse and adjudication, Luhmann explains in a functionalist manner as the result of processes of self-maintenance of a social subsystem. The systems theory of law can be briefly described in terms of three

[40]N. Luhmann, *Rechtssoziologie* (Opladen, 1983) and *Ausdifferenzierung des Rechts* (Frankfurt am Main, 1981).

conceptual decisions. First, the deontological quality of binding rules is redefined so that it is amenable to a purely functional analysis. Then the positivist interpretation of law is translated into the functionalist model of a legal system that has differentiated itself from other social subsystems and become completely autonomous. Finally, the legitimacy of legality is explained as a kind of sophisticated self-deception required by the paradoxical nature of the legal code and achieved by the very means of the legal system itself.

First, Luhmann strips normatively generalized behavioral expectations of their deontological, that is, obligatory, force.[41] The illocutionary meaning of commands, prohibitions, and permissions disappears and with it the specifically binding force of these speech acts. From the perspective of learning theory, Luhmann reinterprets normative expectations of behavior as a variant of purely cognitive expectations based upon predictions rather than in terms of rights and duties. In his version, norms can stabilize expectations, which are maintained even in cases of disappointment, only at the cost of a cognitive deficit. Within this empiricist perspective, normative expectations appear as dogmatically frozen cognitive expectations, held with an unwillingness to learn. But since a refusal to learn and to adapt is risky, normative expectations have to be backed by a special authority. Among other things, they must be guaranteed by political institutionalization and enforced by the threat of sanction, or in other words, they must be transformed into law.

However, the more complex societies become, the more the legal system, too, comes under pressure for change. It must quickly adapt itself to altered environments. In a further step, Luhmann describes positive law as an intelligent combination of the unwillingness to learn — in the general sense of normativity redescribed in empiristic terms — and the capacity to learn. Law acquires this capacity through differentiation to the extent that it severs

[41]Luhmann, *Ausdifferenzierung des Rechts,* pp. 73ff.

itself from moral norms grounded in rational natural law or foreign to law altogether, on the one hand, and simultaneously makes itself independent of politics and thus from the legislature and administration, on the other. That is, it establishes itself *alongside* other social subsystems as a functionally specialized self-referential and self-reproducing subsystem that processes information inputs only according to its own code. The legal system pays for this kind of systemic autonomy with a paradox also inherent in Hart's rule of recognition: the legal code that is viewed externally as a social fact, an emergent property, or a customary practice — in any case, as something that occurs contingently — is yet supposed to be capable of being accepted internally as a convincing criterion of validity. This reflects the paradox built into the mode of validity of positive law: if the function of law consists in stabilizing normatively generalized behavioral expectations, how can this function still be fulfilled by a law that can be arbitrarily changed and whose validity is due solely to the decision of a political legislator? Luhmann, too, must provide an answer to the question, how is legitimacy possible on the basis of legality?

Finally, a differentiated legal system cannot, by appealing to legitimating grounds external to law, break through the circularity that emerges with an autonomous legal code — namely, law is what is correctly enacted as law. If law is supposed to be accepted as valid, despite the fact that as positive law it holds only until further notice, at least the fiction of the law's being "right" must be maintained for the legal addressees obligated to obedience as well as for the experts who noncynically administer the law.

At this point Luhmann gives an interesting interpretation to the idea of legitimation through procedure.[42] With regard to the addressees, institutionalized legal processes serve to check the readiness for conflict of defeated clients in that they absorb disappointments. In the course of a procedure, positions are specified in relation to open outcomes of this sort. Conflict themes are

[42]N. Luhmann, *Legitimation durch Verfahren* (Neuwied, 1967).

stripped of their everyday relevance and are painstakingly reduced to merely subjective claims to such an extent "that the opponent is isolated as an individual and depoliticized." Thus, it is not a matter of producing consensus but, rather, only of promoting the mere appearance of general acceptance, or the likelihood of its being assumed. Viewed from the perspective of social psychology, participation in legal processes has a disarming effect because it promotes the impression that those disappointed at any given time "are not allowed to appeal to institutionalized consensus but, rather, must learn."[43]

Of course, this explanation is adequate only for the uninitiated and not for the judicial experts who administer the law as judges, lawyers, and prosecutors. Lawyers who deal with legal cases and are increasingly oriented to consequences recognize their scope for discretion and know that predictions are uncertain and principles ambiguous. If this official use of law is not to destroy the belief in its legitimacy, the initiated must interpret legal procedures differently from the way clients do — namely, as an institutionalization of obligations to bear the burden of proof and to provide good reasons for any decisions. Arguments exist so that lawyers can indulge in the illusion of not making decisions according to whim: "Every argument diminishes the surprise value of further arguments and finally the surprise value of decisions."[44] Certainly, from a functionalist perspective argumentation may be described in this way; but Luhmann considers this the whole truth, since he attributes no rationally motivating power to reasons at all. In his interpretation, there are no good arguments for why bad arguments are bad; fortunately, however, through argumentation the appearance is created "as if reasons justify the decisions, rather than (the necessity to come to) decisions justifying the reasons."[45]

[43]Luhmann, *Rechtssoziologie,* p. 264.

[44]N. Luhmann, *Die soziologische Beobachtung des Rechts* (Frankfurt am Main, 1986), p. 35.

[45]Ibid., p. 33.

2

Under these three premises, the change in the internal structure of law (diagnosed since Max Weber) can easily be interpreted as the consequence of a successful differentiation of the legal system. The adaptations that an increasingly complex society demands of a legal system forces the transition to a cognitive style, that is, to decision making which is context sensitive, flexible, and prepared to learn. This shifting of weight from the specific tasks of normatively guaranteeing generalized expectations of behavior to the task of system steering[46] may not go to such an extreme that the identity of law itself would be endangered. This limiting case would occur, for example, if a legal system, all too willing to learn, replaced its doctrinal self-understanding from within with a systems analysis undertaken from without. For example, internalizing an objectivist description á la Luhmann would have to have as a consequence the cynical dissolution of any normative consciousness among lawyers and would endanger the independence of the legal code.

The concept of the systemic autonomy of law also has a critical value. Luhmann sees in the tendencies toward deformalization a danger of law's being mediated by politics; in his framework, "overpoliticization" appears as the danger that de-differentiation would take place if the formalism of law were weakened and finally absorbed by calculations of power and utility. The autonomy of the legal system depends upon its capacity to steer itself reflexively and to delimit itself from politics as well as from morality. In this way, Luhmann is led back to Weber's question regarding the rationality of law, which he supposed he had left behind. In order to define the autonomy of the legal system at least analytically, he has to identify the constitutive principle that specifically distinguishes law from, say, power or money. Luhmann needs an equivalent for the rationality intrinsic to the struc-

[46]Luhmann, *Ausdifferenzierung des Rechts,* pp. 388ff.

ture of law. Initially, with Weber and Forsthoff, he regarded the semantic form of abstract and general rules — that is, conditional legal programs — as constitutive for law in general. In the meantime, however, Luhmann can no longer play down susbtantive and reflexive law as mere deviations. Therefore, he now sharply distinguishes between the legal code and legal programs, so that the autonomy of the legal system need only depend upon the maintenance of a differentiated legal code. About this code, however, he has nothing to say but that it permits the binary distinction between justice and injustice. From this tautological formula, no further specifications of the internal structure of law can be gained. It is no accident that Luhmann fills in with a question mark the place where the unity of the code should be explained.[47] I see in this something more than the desideratum of a conceptual explication that is lacking for the moment.

If Luhmann will concede to legal discourse only the value of a self-illusion shielded by doctrinal efforts, he can no longer conceive the formal properties of legal processes as a guarantee for the rationality of law. Instead, it is even a necessary condition for the autonomy of the legal system that legal discourses remain context bound, related to individual cases and particular arguments; they are not to become independent, self-propelling philosophical discussions dealing with the paradoxical validity basis of positive law. Legal arguments remain functional only so long as they suppress this paradox from the awareness of the "official use of law." Foundational reflections may not be stirred up by them. The code may not be analyzed simultaneously from within and from without. It must remain unproblematic. But in fact we observe just the opposite. The debate over juridification shows that the deformalization of law has provoked critical considerations and caused law to be made problematic across its whole spectrum.

[47]N. Luhmann, *Ökologische Kommunikation* (Opladen, 1986), pp. 124ff.

3

In the United States as well, with the Critical Legal Studies Movement, a discussion has broken out in which legal formalism is closely scrutinized and mercilessly dismantled.[48] The criticism is supported by case studies and summed up in a thesis about indeterminacy. This does not mean that the results of judicial proceedings are completely indeterminate. Every experienced practitioner will be able to make predictions with a high probability of accuracy. The outcome of court procedures is indeterminate only in the sense that it cannot be predicted on the basis of legal evidence. It is not the law and the legal circumstances that sufficiently determine the decision. Rather, extralegal considerations and would-be arguments fill in the scope of judicial discretion. By way of unreflected background assumptions and social prejudices condensed into professional ideologies, unacknowledged interests carry the day more often than good reasons.

As can be learned from the harsh reactions to it, CLS-criticism is in fact perceived as an attack upon the normative code of the profession. We must insist, however, against Luhmann's systems analysis and also against the self-understanding of the Critical Legal Studies Movement, that this sort of "dysfunctional" self-reflection of the legal system can be developed from within the practice of lawyers only because legal discourse works with tacit assumptions about rationality which can be taken at their word and critically turned against established practices. Along with the procedural distribution of burdens of proof, a self-critical impulse also becomes institutionalized — one that can pierce through the self-illusion Luhmann falsely raises to the level of a systemic necessity.

[48]R. W. Gorden, "Critical Legal Histories," *Stanford Law Review* (Jan. 1984): 57ff. R. M. Unger, *Critical Legal Studies Movement* (Cambridge, Mass., 1986).

Certainly, the wide literature concerning the indeterminacy of the decisions of the courts [49] contradicts the conventional wisdom, which, for example, M. Kriele brings against Luhmann's functionalistic reading of the role of argumentation in legal proceedings: "Luhmann apparently fails to recognize the decisive reason for the legitimating function of procedures: . . . they increase the chance that all relevant viewpoints will be acknowledged and that the temporal and material ordering of priorities will be talked out as well as can be; and therefore they increase the chance that the decision will be rationally justified. The persisting institutionalization of procedures increases the chance that official decisions were also justified in the past and will be justified in the future."[50] But this wisdom is also conventional in another sense; it expresses tacit assumptions about rationality that are practically effective as counterfactual presuppositions as long as they function as standards to which the criticism and self-criticism of the participants may appeal. These presuppositions of rationality, deeply built into the practice of legal discourse, could lose their operative impact only at the moment of their withdrawal as critical standards. But with that all criticism of law would lose its point and its basis.[51]

It is not only the sheer existence of the type of criticism practiced ever since the emergence of the legal-realist school that speaks against Luhmann's theory. Its substantive results also show that the systemic autonomy of law, which Luhmann assumes, does not go very far. The autonomy of the legal system is not already guaranteed simply because all arguments of extralegal origin are translated into the language of positive law and connected with legal texts. Luhmann is satisfied with just this condition: "The

[49]A. Altman, "Legal Realism, Critical Legal Studies, and Dworkin," *Philos. and Publ. Affairs* 15 (1986): 205ff.

[50]M. Kriele, *Einführung in die Staatslehre* (Opladen, 1981), pp. 38f.

[51]F. F. Michelman, "Justification (and Justifiability) of Law in a Contradictory World."

legal system achieves its operative closedness through the fact that it is codified by the difference between what is just and unjust and [that] no other system works according to this code. The two-valued coding of the legal system generates certainty that one is in the right and not in the wrong when one is in the right."[52] It already follows from the immanent critique of legal positivism, as it has been advanced from Fuller to Dworkin, against Austin, Kelsen, and Hart, that adjudication and the application of rules can less and less get by without declared and explicit recourse to policy arguments and to the assessment of principles. But this means, in Luhmann's terms, that the legal code in fact cannot work independently of the codes of political power and of morality, and that the legal system is to that extent by no means "closed." Moreover, the semantic self-referentiality of the legal system, secured by the legal code, also does not exclude the possible intrusion of latent power structures, be it via the legal programs of the political legislator or via the pretense of would-be arguments through which extralegal interests find their way into the administration of justice.

It is evident that the concept of systemic autonomy, even if it were to have empirical reference, does not conform to the normative intuition we connect with the "autonomy of law." We consider legal proceedings independent only to the extent that, first, the legal programs do not violate the moral core of modern law; and only to the extent that, second, the political and moral considerations unavoidably entering into the administration of justice take effect through their rational substance and not through the mere rationalization of legally irrelevant interests. Max Weber was right: only regard for the intrinsic rationality of law can guarantee the independence of the legal system. But since law is internally related to politics, on the one side, and to morality, on the other, the rationality of law is not only a matter of law.

[52]Luhmann, *Die soziologische Beobachtung*, p. 26.

II. Reason and Positivity: On the Interpenetration of Law, Politics, and Morality

1

If we want to make clear why the differentiation of law never dissolves its internal relation to politics and morality, a glance back at the rise of positive law is in order. In Europe this process extended from the end of the Middle Ages to the great codifications of the eighteenth century. Even in the common-law countries, common law was overlaid by Roman Law under the influence of academically trained jurists. It was thereby accommodated step by step to the conditions of a rising capitalist economy and to the bureaucracy of the emerging territorial states. It is difficult to gain an overview of this entangled and multiform process; I shall consider it here only in view of our philosophical topic. The philosophical significance of the transformation of traditional into positive law is better explained against the background of the tripartite structure of the decaying medieval legal system.

From a certain distance, we can detect in our native traditions correspondences to those three elements that (according to the comparative sociology of law) were typical of the legal cultures of ancient empires in general.[53] The legal system was overarched by a sacred law interpreted and administered by theological and legal exegetes. Bureaucratic law, enacted in accord with sacred traditions by the king or emperor, who was also the supreme judicial authority, constituted its core. Both types of law overlay a customary law that was usually unwritten and, in the final analysis, went back to the preliterate sources of tribal law. In the European Middle Ages, the situation was different; the canon law of the Catholic church continued without interruption the high technical and conceptual level of *classical* Roman Law, while the royal law of imperial decrees and edicts was connected to at least the idea of the Imperium Romanum even before the rediscovery of

[53]R. Unger, *Law and Society* (New York, 1976).

the Corpus Justinianum. Even customary law was indebted to the mixed Roman-Germanic legal culture of the Western provinces; and from the twelfth century onward it was handed down in writing. Nevertheless, in its essential features the structure familiar in all civilizations was repeated — the branching into sacred and secular law, whereby, within the horizon of one of the few great world religions, sacred law was closely tied to the order of the cosmos and to sacred history. This divine, or natural, law was *not at the disposal* of the political ruler; in this sense, it was *indisponible (unverfügbar).* Rather, the canopy of sacred law provided the legitimating context within which the ruler exercised his secular power through the functions of adjudication and bureaucratic legislation. It is in this connection that Weber spoke of the "two-fold realm of traditional domination" *(Doppelreich der traditionalen Herrschaft).*[54]

During the Middle Ages this traditional character of law was maintained. All law derived its validity from its divine origin in Christian natural law. New law could be created only in the name of reforming or restoring the good old law. This tie to the traditional understanding of law inconspicuously reveals an interesting tension that existed between two elements within the royal law. As supreme judicial authority, the sovereign stood *under* sacred law. Only in this manner could the legitimacy of the latter carry over into his worldly power. A legitimation premium for the exercise of political power accrued to the ruler from his pious and reverent protection of a supposedly inviolable legal order. At the same time, however, standing at the head of an administration organized into official positions, the sovereign could also make use of law as a medium that lent his commands — for example, in the form of edicts and decrees — binding force. As a means for the bureaucratic exercise of domination, law could fulfill ordering functions only as long as it retained, in the form of sacred legal traditions, the noninstrumental, indisponible character that the

[54]Also see W. Schluchter, *Okzidentaler Rationalismus* (Tübingen, 1980).

sovereign had to respect in his role as the supreme judge. There existed an unresolved tension between these two moments of the indisponibility of law presupposed in the courts and the instrumentality of law used for political domination. But it could be kept in balance as long as the sacred foundation of law remained unchallenged and the base of customary law, backed by tradition, was firmly anchored in everyday practices.[55]

2

If one starts from the observation that in modern societies precisely these two conditions could less and less be fulfilled, the positivization of law can, from an internal point of view, partly be explained as a reaction to such changes.[56] To the extent that religious worldviews gave way to a pluralism of privatized gods and demons, and common-law traditions were more and more penetrated, via the *usus modernus,* by scholarly law, the tripartite structure of the legal system had to collapse. Law shrank to just one of the three dimensions; it hence occupied only the place that bureaucratic royal law had previously filled. The political power of the ruler was emancipated from its tie to sacred law and became independent. It was, accordingly, burdened with the task of filling the gap that the theologically administered natural law had left behind and of achieving this on its own, through political legislation. In the end all law was supposed to flow from the sovereign will of the political legislator. Making, executing, and applying laws became three moments within a single, politically controlled feedback process. It remained so even after the institutional differentiation into three balanced powers of the state.

In this way, the relationship between the two moments of law's indisponibility and instrumentality changed. Today, with a

[55]H. Schlosser, *Grundzüge der Neueren Privatrechtsgeschichte* (Heidelberg, 1982).

[56]The functionalist interpretation of the shift to positivized law neglects this internal aspect. Cf. Luhmann, *Rechtssoziologie.*

sufficient differentiation of roles, which is the significance of the separation of powers, legal programs are still prior to the administration of justice. But can obligating authority still arise from an arbitrarily changeable political law as it had previously from sacred law? Does positive law in general still retain an obligatory character when it can no longer derive its validity from a prior and superordinate law, as had bureaucratic royal law in the traditional legal system? Legal positivism has always given affirmative answers to these questions.[57] In one variant, law is totally stripped of its normative character, and the only instrumentally defined legal norms are conceived as commands of a sovereign (Austin). In this way, the moment of indisponibility is pushed aside as a metaphysical relic. The other variant of legal positivism still holds to the premise that law can fulfill its core function of regulating conflict only as long as some sort of noninstrumentality is retained in the very code of the legal system. However, this moment is now supposed to be attached only to the form of positive law, no longer to the contents of natural law (Kelsen). From this perspective the legal system, sharply separated from politics and morality, together with the courts as its institutional core, survives as the only place where law can, on its own, preserve its form and thus its autonomy. (We have already become acquainted with this thesis in Luhmann's version.) In both cases the consequence is that the metasocial guarantee of the validity of law on the basis of sacred law can be dropped without any functional equivalent replacing it.

The historical origins of modern as well as traditional law speak against this thesis. As we learn from anthropology, law as such precedes the rise of the state and of political power in the strict sense, whereas politically sanctioned law and legally organized political power arise simultaneously.[58] It seems that the

[57]N. Hörster, *Recht und Moral* (Göttingen, 1972).

[58]U. Wesel, *Frühformen des Rechts* (Frankfurt am Main, 1984).

archaic development of law in tribal societies first made possible the emergence of a political rule in which political power and compulsory law mutually constituted one another. It is not very likely, then, that in modern times law could ever be either completely absorbed by politics or wholly split off from it. There is some evidence that specific structures of moral consciousness have played an important role in the emergence of the symbiosis between compulsory law and political power. Moral consciousness played a similar role in the passage from traditional law to a secular and positive law backed by the power of the state and handed over to the disposition of the political legislator. The moment of indisponibility, which, even in modern law, still constitutes an irrevocable counterweight to the political instrumentalization of law as medium, is indebted to the interpenetration of politics and law with morality.

3

This constellation arises for the first time with the symbiosis between compulsory law and political power. In neolithic tribal societies, three mechanisms are typically in force for dealing with internal conflicts: practices of self-defense (feuds and vendettas), the ritual invocation of magical powers (oracles, duels), and the arbitrator's mediation as a peaceful equivalent of dispute settlement for force and sorcery.[59] Such mediators lack the authority for binding decisions and for enforcing their judgments against the resistance of kinship loyalties. Along with the feature of enforceability, courts of justice and judicial procedures are also lacking. Law is, moreover, so intimately connected with moral and religious notions that genuinely legal phenomena are difficult to distinguish from other phenomena. The concept of justice lying at the basis of all forms of conflict resolution is intermingled with mythical interpretations of the world. Vengeance, retaliation, and retribution work to restore a disturbed order. This order,

[59] Ibid., pp. 329ff.

constructed of symmetries and oppositions, extends equally to individual persons and kin groups as well as to nature and society as a whole. The severity of the crime is measured by the consequences of the act, not by the intentions of the perpetrator. A sanction has the sense of a compensation for resulting damages, not the punishment of someone guilty of violating a norm.

This concretistic representation of justice does not yet permit a clear separation between legal questions and questions of fact. It seems that in those archaic legal processes, normative judgments, the prudent weighing of interests, and statements of fact are intertwined. Concepts such as accountability and guilt are lacking; intention and negligence are not distinguished. What counts is the objectively produced harm. There is no separation between civil and criminal law; all violations of the law are equally offenses that demand retribution. Such distinctions first become possible when a completely new concept emerges and revolutionizes the world of legal notions. I mean the concept of context-independent legal norms, set above the conflicting parties as well as the impartial arbitrator, and thus generally recognized as binding in advance. Around the core of such norms crystallizes what L. Kohlberg calls a "conventional" moral consciousness. Without such a concept of legal norms, the arbitrating judge could only persuade and induce the conflicting parties to reach compromises. His personal reputation, due to his status, his wealth, or his age, might have been influential toward that end, but he was lacking political power; he could not yet appeal to the impersonal, obligating authority of law and to the moral insight of the participants.[60]

Allow me to propose the following thought experiment. Suppose that even before something like political authority arises, conventional legal and moral notions emerge from more elaborated mythical worldviews. Then, for example, a conflict-mediating tribal chief could already rely upon the morally binding force of

[60]L. Pospicil, *Anthropologie des Rechts* (Munich, 1982).

intersubjectively recognized legal norms. But he could not yet join to it the coercive character of a threat of sanction backed by state authority. And yet the role of the chieftain, whose leadership until then rested only on his de facto influence and prestige, must significantly change once the concept of a morally binding norm is applied to arbitration. Three steps are important in this scenario. First, such a chieftain, as the protector of intersubjectively recognized norms, would share in the aura of the law he administers. So the normative authority of the law could be carried over from the authority of the judge to the personal power of the leader generally. The de facto power of an influential person is thereby inconspicuously converted into the normatively authorized power of a commander who can make collectively binding decisions rather than merely exercise influence. Second, as a result, the quality of the judicial decision itself can change. Behind the morally obligating legal norms now no longer stands only the tribe's pressure to conform or the de facto influence of a prominent person but the threat of sanctions from the authority of a legitimate ruler. In this way there arises the ambivalent mode of validity of compulsory law, which fuses recognition and force. Third, with this the political ruler would in turn acquire the medium of political power with which he could create an organization of offices and hence exercise his domination through bureaucracy. As an organizational means, law also takes on an instrumental aspect alongside the aspect of the indisponibility of traditional law. For this scenario, morality functions as a catalyst in the fusion of compulsory law and political power.

Although these considerations also have an empirical component, I am primarily concerned with the clarification of conceptual relationships.[61] Let me repeat: only in increasingly complex worldviews does moral consciousness develop toward a con-

[61]K. Eder, *Die Entstehung staatlich organisierter Gesellschaften* (Frankfurt am Main, 1976); J. Habermas, *Zur Rekonstruktion des Historischen Materialismus* (Frankfurt am Main, 1976).

ventional level; only the concept of traditionally anchored and morally obligating norms changes the administration of justice and makes possible the transformation of actual influence into the normative power of political authority; only control over legitimate power permits the political enforcement of legal norms; only compulsory law can be used for the administrative organization of state authority. If one analyzes in detail this interpenetration of religiously embedded morality, of domination legitimated by law, and of legally organized political administration, it becomes evident that the two positivist concepts of law mentioned above are untenable.

4

The reduction of legal norms to the commands of a political sovereign would mean that law, in the course of modernity, had been dissolved into politics. But the very concept of the political would thereby be undermined. Under this premise political power could no longer be understood as legal authority, since a law which has become completely at the disposal of politics would lose its legitimating force. As soon as legitimation is presented as the exclusive achievement of politics, we have to abandon *our* concepts of law and politics. A similar consequence results from the second interpretation, that positive law can maintain its autonomy on its own through the doctrinal accomplishments of a faithful judiciary, which operates, however, independently of politics and morality. If the normative validity of law were to lose all moral relation to aspects of justice that reach beyond the contingent decisions of the political legislator, the identity of law itself would become diffuse. In this case, legitimating criteria would be lacking under which the legal system could be tied to the preservation of a specific internal structure of law.

Assuming that modern societies are not able totally to renounce law (or to produce a functionally equivalent but completely different kind of practice under the continued pseudonym of "law"), the positivization of law creates a problem — if only

for conceptual reasons. An equivalent must be found for a disenchanted sacred law — and for a hallowed customary law — which could preserve a moment of indisponibility for positive law. At first, such an equivalent was in fact developed in the form of modern natural law theories, which had an immediate impact not only on the philosophy of law but also on legal doctrines and on the great codifications of the eighteenth and nineteenth centuries.[62]

In our context I would like to draw attention to two points: (a) In modern natural law theories, a new, post-traditional level of moral consciousness was articulated, which made modern law dependent on principles and standards of procedural rationality. (b) Depending upon whether the positivization of law as such or the resulting need for justification was pushed to the foreground (as the phenomenon in need of explanation), social contract theories were developed in opposing directions. However, in either variant they were unable to establish a plausible relation between the moments of the indisponibility and the instrumentality of the law.

(a) Modern natural law theories reacted to the disintegration of traditional, religiously and metaphysically grounded, natural law and to the demoralization of politics, which was more and more conceived in naturalistic terms as a mode of sheer self-maintenance. Since the bureaucratic state, in the modern role of the sole and sovereign legislator, secured an exclusive hold on law, law was in danger of becoming assimilated to a mere means of organization, of losing all connection with justice and thus its genuine normative character. With the positivity of law the problem of justification did not disappear, it only shifted to the narrower basis of a post-traditional, secular ethic, decoupled from metaphysical and religious worldviews.

One constitutive element of civil law is the contract. The autonomy to conclude contracts authorizes private legal subjects to create subjective rights. In the idea of the social contract this

[62]Wieacker, *Privatrechtsgeschichte der Neuzeit* (Göttingen, 1969), pp. 249ff.

model is used in an interesting way morally to justify political power exercised in the forms of positive law, that is, legal domination. A contract that each autonomous individual concludes with all other autonomous individuals can contain only what all can rationally will in view of their own interests. In this manner, only those regulations can come about that have the uncoerced agreement of all. This procedural idea reveals that the reason of modern natural law is, in its essence, practical reason — the reason of an autonomous post-traditional morality. This requires that we distinguish between norms, justifying principles, and procedures according to which we test whether norms could count on universal agreement in view of valid principles. Inasmuch as the idea of the social contract is used for the legitimation of legal domination, positive law is internally linked to moral principles. This suggests the hypothesis that in the passage to modernity, the transition to a postconventional moral consciousness again served as the pacemaker for legal development.

(b) Social contract theories have appeared in different versions. Authors like Hobbes are more deeply fascinated by the phenomenon of the sheer positivity of law and its contingencies, authors like Kant by the deficits in its moral base. As is well known, Hobbes develops his theory from premises that do away with all moral connotations for positive law as well as for political power. Law enacted by the sovereign is supposed to be able to make do without a rational equivalent for the disenchanted sacred law. Of course, as his theory offers its addressees just such a rational equivalent, Hobbes becomes entangled in a performative contradiction. The manifest content of the theory, which explains the functioning of a completely positivized and thereby morally neutralized law, comes into conflict with its own pragmatic role, for it is designed to explain to its readers why they, as free and equal citizens, can well have good reasons to choose an unconditional subordination to the commands of an absolutist state. Later, Kant makes explicit the normative assumptions tacitly pre-

supposed by Hobbes and develops his theory of law from the start within the frame of moral theory. He derives the universal principle of right, which objectively lies at the basis of all legislation, from the categorical imperative. From this highest principle of legislation follows the original subjective right of each to obligate every other legal subject to respect his freedom as long as it agrees with the like freedom of all according to universal rules. Whereas for Hobbes positive law is ultimately an organizational means for the exercise of political power, for Kant it retains an essentially moral character. But even in these mature versions, social contract theories have difficulties with the task of clarifying the conditions of the legitimacy of legal domination. Hobbes sacrifices the non-instrumental character of law for its positivity; with Kant, natural, or moral, law, derived a priori from practical reason, achieves the upper hand to such an extent that law threatens to merge with morality — legality is reduced to a deficient mode of morality.

Kant builds the moment of indisponibility into the moral foundation of law in such a way that positive law is almost totally subordinated to rational law. In a legal system prejudiced by rational law, no room remains for the instrumental aspect of a law the legislator can use in the pursuit of his policies. After the canopy of Christian natural law has collapsed, the pillars of a politics disenchanted by naturalism, on the one side, and of a law converted into political decision, on the other, remain standing as ruins, Kant reconstructs the disintegrating edifice by simple substitution: autonomously grounded rational law is supposed to occupy the vacant seat of natural law. What thereby changes, in comparison with the tripartite legal system of traditional societies, is the mediating function of the administration of justice that had carried sacred legitimation over to the sovereign and his bureaucratic rule. Jurisdiction now recedes behind the political legislature and treats legal programs as an input from politics. The institutionally separated governmental powers now all fall into the shadow of a *res publica noumenon,* justified by a reason, that

is supposed to find its truest possible counterimage in the *res publica phenomenon.* Kant conceives the positivization of law as the realization of the basic principles of rational natural law — a process which still stands under the imperatives of practical reason.

To the extent that politics and law are pushed into the subordinate position of organs for realizing the laws of practical reason, politics loses its scope for legislative discretion and law its positivity. Kant must therefore reach back to the metaphysical premises of his two-world doctrine so as to distinguish legality from morality in a way that remains full of contradictions.[63]

III. The Idea of the Rule of Law as a Substitute For Rational Natural Law

It is not only for philosophical reasons that modern natural law theories have since been abandoned. To put it simply — the social reality which rational natural law was supposed to interpret became too much for it. It soon became clear that the dynamics of a society integrated through the market could less and less be captured in terms of legal theories and could even less be brought to a standstill within the framework of a legal system sketched out in an a priori fashion. Every attempt to derive the foundations of private and public law, once and for all, from highest principles must run aground on the complexity of society and the mobility of history. Contract theories — and by no means only the idealistic versions among them — had been designed too abstractly. Their designers had not been aware of the social preconditions for their favored possessive individualism. Nor had they acknowledged that the fundamental institutions of civil law, property and contract, as well as the human rights shielding the individual persons against the bureaucratic state, would promote social justice only under the conditions of a fictitious, small-scale market economy.

[63]W. Kersting, *Wohlgeordnete Freiheit* (Berlin, l984), pp. 16ff.

At the same time, these contract theories — and by no means only those proceeding in an a priori fashion — were designed too concretely. The acceleration of social change was not taken into account and the pressures for adaptation that emanated from capitalistic growth and from modernization in general were underestimated.

In Germany, the moral content of Kant's rational law was split up and continued on the parallel paths of the doctrine of private law and of the idea of the Rule of Law. But in the course of the nineteenth century, it became positivistically dried up along both paths. From the perspective of Pandectist science, law essentially merged with the civil-law code administered by lawyers and legal theorists. The moral content of law was to be secured here, within the system of private law itself, rather than from the side of a democratic legislature.[64] F. C. von Savigny, who construed all of private law as an edifice of subjective rights, held the view, with reference to Kant, that the semantic form of subjective right is in itself moral. Universal subjective rights define private autonomous spheres of control and guarantee individual freedom by way of subjective entitlements. The moral core of civil law consists in the fact that "a domain is assigned to the individual will in which it reigns independently of every foreign will."[65] However, it quickly became clear from the actual development of law that subjective rights are something secondary in comparison with objective law and thus could by no means offer the conceptual foundation for the system of civil law as a whole. Consequently, the concept of subjective right has been reinterpreted in a positivistic fashion and purified of all moral connotations. In B. Windscheid's definition, subjective rights merely convert the commands of the objective legal order into the entitlements of individual legal subjects.

[64]H. Coing, "Das Verhältnis der positiven Rechtswissenschaft zur Ethik im 19. Jh.," in J. Blühdorn, J. Ritter, eds., *Recht und Ethik* (Frankfurt am Main, 1970), pp. 11ff.

[65]F. C. von Savigny, *System des heutigen Römischen Rechts I* (1840), p. 333.

A parallel development can be traced in the idea of the rule of law, which Kant had, in any case, introduced only with hypothetical restrictions. The German theoreticians of the nineteenth century were primarily interested in the constitutional domestication of the administrative power of the monarch. In the period prior to the 1848 Revolution, Mohl and Welcker still relied on general and abstract norms that would prove to be a suitable medium for an equal promotion of all citizens "in the most comprehensive and reasonable development of all their spiritual and physical powers."[66] After the establishment of the Reich, Gerber and Laband already put forward the doctrine that legal norms represent the commands of a sovereign legislature set free from any substantive restrictions. It is this positivistic concept of law that was finally claimed for the parliamentary legislature by progressive constitutional law theorists of the Weimar period, such as Hermann Heller: "Within the *Rechtsstaat,* laws are only those, and all those, legal norms enacted by the legislative body of the people."[67]

I recall here the — certainly atypical — German development only because it is there that the erosion of the moral impact of the Kantian conception of law can be studied from both perspectives — that of the doctrinalist of private law, on the one side, and that of an increasingly parliamentarized legislature, on the other. In the Anglo-Saxon countries, where from the beginning the idea of the Rule of Law unfolded in unison with democratic developments, "fair trial" and "due process" were presented as a coherent model for legislation and jurisdiction at once. In Germany the positivistic destruction of rational law was carried out along different lines. Certainly, Kant's construction, according to which politics and law are subordinated to the moral imperatives

[66]Quoted from I. Maus, "Entwicklung und Funktionswandel des bürgerlichen Rechtsstaates," in M. Tohidipur, ed., *Der bürgerliche Rechtsstaat I* (Frankfurt am Main, pp. 13ff.

[67]H. Heller, *Ges. Schriften II* (Leiden, 1971), p. 226.

of rational law, is denied by both the Pandectist science and the theory of the *Rechtsstaat* — however, in one case, from the perspective of the judiciary, and in the other, from the perspective of the political legislature. This is why for those who, after the collapse of all kinds of natural law theories, were even less convinced by the alternative of sheer legal positivism the *same* problem presented itself on both sides, in respectively different forms.

The problem can be stated as follows: On the one hand, the moral foundations of positive law can no longer be provided by a superordinate rational law with a moral impact. On the other hand, it also cannot be dissolved without any equivalent — otherwise law would lose all of its noninstrumental aspects. In view of this dilemma, it must be shown how the moral point of view of impartial judgment can be stabilized from within positive law itself. This requirement is not yet satisfied by the fact that specific moral principles of rational natural law have been incorporated into positive constitutional law, for the contingency of *any* part of positive law is precisely the problem to be coped with. Rather, the morality implanted into the heart of positive law must retain the transcending force of a self-regulating procedure that checks its own rationality. Under the pressure of this problem, some of Savigny's successors, who did not want to rest content with the positivistic reinterpretation of subjective rights, expanded the so-called scientific law of legal experts into a source of legitimation, In his doctrine of the sources of law *(Lehre von den Rechtsquellen)* Savigny had still assigned to the judiciary and the law schools the modest and only derivative function of "making conscious and representing in scientific ways" the positive law which arises both from custom and legislation.[68] Toward the end of the century, G. F. Puchta gave this view an interesting shift: the production of law should not be left to the political legislature alone, since otherwise the state could not be grounded in law and

[68]F. C. von Savigny, *Allgemeine Natur der Rechtsquellen* (1840), quoted from W. Maihofer, ed., *Begriff und Wesen des Rechts* (Darmstadt, 1973), p. 44.

justice, that is, could not act essentially as a "Rechtsstaat." Rather, in addition to the application of the law of the land, the judiciary should assume the productive task of a constructive interpretation, development, and completion of existing law in the light of principles.[69] This "law of the judges" *(Richterrecht)* was supposed to derive an independent authority from the scientific method of justification, that is, from the arguments of a scientifically proceeding jurisprudence. With this proposal, Puchta already offered the starting point for a theory that, from the perspective of the administration of justice, traces the legitimating force of legality back to the procedural rationality built into legal discourses.

Quite a parallel interpretation is suggested from the perspective of legislation, even though parliamentary debates differ in style and purpose from judicial discourses — they are designed for negotiating compromises and not for the doctrinal justification of judgments. From this side as well, those who could not reconcile themselves to positivism raised the question as to the grounds upon which parliamentary majority decisions might claim legitimacy. Following upon Rousseau's concept of autonomy, Kant had already taken a first step toward working out the moral viewpoint of impartiality in terms of the very procedure of democratic legislation. As a touchstone for the lawfulness of legal norms, he offered the criterion of universality — whether a law could have arisen from the united will of an entire people.[70] Unfortunately, Kant himself contributed to the confusion that soon overtook two completely different meanings of the "universality" of law: the *semantic* universality of abstract and general laws appeared in the place of the *procedural* universality characteristic of democratically generated laws as the expression of the "united will of the people."

[69]G. F. Puchta, *Vom Recht* (1841), quoted from Maihofer, *Begriff und Wesen des Rechts,* pp. 52ff.

[70]I. Kant, *Grundlegung der Metaphysik der Sitten,* sec. 46.

In Germany, where the discussion of democratic theory was first revived again only in the 1920s, this confusion had misleading consequences. One could maintain illusions about the very nature of a procedural theory of democracy and about the tedious burdens of proof to be discharged. First, it has to be shown by a theory of argumentation how in parliamentary deliberations policy arguments intermesh with legal and moral arguments. Second, it must be made clear how an argumentatively achieved agreement can be distinguished from compromise and how the moral point of view is also implemented in those fairness conditions that bargaining processes have to meet. But third, and above all, we have to reconstruct the way in which the impartiality of legislative decision making is supposed to be institutionalized by legal procedures, starting with majority rule, through parliamentary business procedures to election laws and the structures of public opinion — that is, the selection and distribution of issues and contributions within the public sphere. This analysis should be guided by a model that analytically represents the whole complex of the necessary pragmatic presuppositions of discursive will formation and fair bargaining. Only against such a foil could the normative meaning and the actual practice of such procedures be critically analyzed.[71]

Further, however, that confusion of procedural universality with the semantic generality of democratically enacted statutes had the consequence that one could ignore the independent problematic of the application of law. Even if the demands for a procedural rationality of law making were somehow satisfied, legal norms never had, and never will have, a semantic form or a well-defined content that would leave to the judge only an algorithmic application. This is so whether we are dealing with the regulatory law of the welfare state or not. As philosophical hermeneutics

[71]U. Neumann, *Juristische Argumentation* (Darmstadt, 1986), pp. 70ff.; A. Kaufmann, "Über die Wissenschaftlichkeit der Rechtswissenschaft," *Archiv für Rechts — und Sozialphilosophie* 72 (1986) : 425ff.

shows,[72] the application of existing law is always indissolubly interwoven with constructive interpretation in Dworkin's sense. Therefore, the problem of procedural rationality is posed for judges and legal scholars in new and differing ways.

In legislative procedures, a morality that has migrated into positive law manifests itself to the extent that policy-oriented discourses operate under the constraints of the principle of the universalization of all interests involved — and thus of the moral viewpoint we must observe in the process of *justifying* norms. By contrast, in the context-sensitive *application* of norms, the conditions for impartial judgment are not satisfied by asking ourselves what all could will but by whether we have appropriately taken into consideration all relevant aspects of a given situation. Before we can decide what norms apply in a given case — norms that may well clash with one another and must then be rank ordered — it must be made clear whether the description of the situation is appropriate and complete with respect to all concerned interests. As Klaus Günther has shown,[73] contexts of justifying norms, practical reason comes into play through testing the *universalizability* of interests, in contexts of applying norms, through an *adequate* and sufficiently *complete* comprehension of relevant contexts in the light of competing rules. The legal procedures through which the impartiality of the administration of justice is supposed to be institutionalized must accord with this regulative idea.

With these considerations, I have sketched in rough outline the idea of a state with a separation of powers and ruled by law which draws its legitimacy from a rationality of legislative and judicial procedures guaranteeing impartiality. By this nothing more is gained than a critical standard for analyzing how the con-

[72]J. Esser, *Vorverständnis und Methodenwahl in der Rechtsprechung* (Frankfurt am Main, 1972).

[73]K. Günther, Anwendüngsdiskürse, Dissertation iur. University of Frankfurt, 1986.

stitution in fact works. That idea does not simply confront abstractly — with an impotent "ought" — a reality to which it so little corresponds. Rather, procedural rationality, which has already partially penetrated positive law, designates the only remaining dimension — after the collapse of natural law — in which a moment of indisponibility and a structure removed from the grips of contingency can be secured for positive law.

The irritating ambivalence of the validity claims with which positive law appears can be explained through the interlocking of legal procedures with the logic of argumentations that check their own rationality in the light of the principles of universalization and appropriateness. In the first place, legal validity, guaranteed by the authority of legislative bodies, must be distinguished from the social validity of actually accepted or implemented law. But within the complex meaning of legal validity itself, there is an ambivalence due to modern law's own twofold validity basis — it rests both on the principle of enactment and on the principle of justification.[74] In the validity claim of moral norms, which — according to Rawl's constructivism — are at the same time constructed as well as *discovered*, the truthlike meaning of moral *judgments* prevails. In the validity claim of positive law, the contingency of enactment adds to this rightness claim the facticity of the threat of force.[75] However, the positivity of procedurally produced and compulsory legal norms remains accompanied and overlaid by a claim to legitimacy. The legal mode of validity refers both to the political expectation that citizens are willing to comply with enforceable commands and to the moral expectation of a rationally motivated recognition of a normative validity claim that can be vindicated only through argumentation. The limiting cases of legitimate resistance and civil disobedience show that such argumentations can also burst open the very legal form in which they themselves are institutionalized.

[74]Habermas, *Theorie des Kommunikativen Handelns,* vol. 1, pp. 346ff.

[75]R. Dreier, *Rechtsbegriff und Rechtsidee* (Frankfurt am Main, 1986).

That the demanding idea of the Rule of Law which I have reformulated is not excessive but, rather, springs from the soil of legal reality is indicated by the fact that what we call the autonomy of the legal system can be measured only against this idea. I am referring to the dimension in which the legally institutionalized mode of justification remains pervious to moral argumentation. If this dimension were closed off, we would no longer know what autonomy of the law could even mean. A legal system does not acquire autonomy on its own. It is autonomous only to the extent that the legal procedures institutionalized for legislation and for the administration of justice guarantee impartial judgment and provide the channels through which practical reason gains entrance into law and politics. There can be no autonomous law without the realization of democracy.