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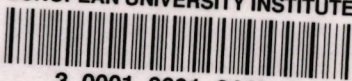
**Social Risks, Welfare Rights and the
Paradigm of Proceduralisation**

**The combining of the institutions of the
liberal constitutional state and the social state**

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BADIA FIESOLANA, SAN DOMENICO (FI)

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Social Risks, Welfare Rights and the Paradigm of Proceduralisation

The combining of the institutions of the liberal constitutional state and the social state

1. The legal philosophy and constitutional theory discussion about welfare rights

The most recent philosophical and constitutional theory discussions about welfare rights have been dominated, on the one hand, by an antithetical fixation on the mere "formal" negative right to liberty¹ and, on the other hand, by an ethic which subjects the evaluation of social conditions and processes to a materialising standard of correctness or which seeks to outdo the universality of rules through the universalizability of the **foundation** of rules². A discourse

¹Cf. for the moral foundation of welfare rights R.E. Goodin, *Stabilizing Expectations: The Role of Earnings-Related Benefits in Social Welfare Policy*, *Ethics* 1990, 530; M. Freedén, *Human Rights and Welfare: A Communitarian View*, *Ethics*, 1990, 489; E. Mack, *Libertarianism Untamed*, *J. of Social Phil.* 1991, 64; D. Copp, *The Right to an Adequate Standard of Living: Justice, Autonomy and Basic Needs*, *Soc. Phil. and Pol.* 1992, 231; the conceptions are based on a supposed priority of public argumentation, cf. especially J. Rawls, *A Theory of Justice*, Cambridge/Mass., 1971 and more differentiated id., *Political Liberalism*, New York 1993. For a critique of the theoretical foundations of the basic conception of "public" justice cf. J. Harsanyi, *Quality, Responsibility and Justice as seen from the Utilitarian Perspective*, *Theory and Decision* 1991, 141; for a philosophical critique cf. B.W. Brower, *The Limits of Public Reason*, *J. of Phil.* 1994, 5; for political conceptions of "social rights" cf. U.K. Preuß, *Verfassungstheoretische Überlegungen zur normativen Begründung des Wohlfahrtsstaates*, in: Ch. Sachsse et al. (eds.), *Sicherheit und Freiheit*, Frankfurt/M. 1990, p. 125; J. Habermas, *Faktizität und Geltung*, Frankfurt/M. 1992, p. 503 ss.; I.M. Young, *Justice and the Politics of Difference*, Princeton 1990, p. 25; P. Flora (ed.), *Growth to Limits: The Western European Welfare States since World War II*, 2 vols., Berlin/New York 1986; A. Sen, *Rights and Agency*, *Phil. and Public Affairs* 1981, 3; id., *Inequality Re-examined*, Oxford 1992, esp. p. 109, 151; cf. also the overview of D.E. Ashford, *Bringing the Welfare State Back*, in: *Comparative Politics* 1991, 351.

²Cf. only D. P. Currie, *Positive and negative Constitutional Rights*, Chicago L.R. 1986, 964; for a neo-institutionalist position cf. P.H. Aronson, *Procedural and Substantive Constitutional Protection of Economic Liberties*, *Cato Journal* 1987, 345; for a doctrinal conception of "protective duties" of the state cf. generally F.O. Kopp, *Grundrechtliche Schutz- und Förderpflichten der öffentlichen Hand*, *Neue Juristische Wochenschrift* 1994, 1733.

- ethical version self-referentially amounts to conceding from the beginning a higher position to a certain argumentation corresponding to certain test procedures. In Habermas, this is derived from the universalizability of language, which is calculated for self-enlightenment³. The politically employed variant of this construction gives priority to the public constitution of civil society in the medium of **explicit** agreement about rules above the priority it gives to the institutions of private society, to personality-formation, the allocation of responsibility and family, work, enterprises etc⁴. From the constitutional theory point of view, this understanding has been carried by some proponents of discourse ethics to the point that it would result in a claim to an equal stake in the goods acquired in society emerging from the **same** right to participation in the institutions of self-understanding in the medium of publicity⁵. The traditional, liberal theory of basic law could only ever ease provisionally the relationship of conflict between public and private rights by means of historical institutions and the conventions generated thereby; on the other hand, from operating with incompatibilities, it again and again received new stimuli to remodelling, for instance, the supplementing of individual rights to freedom with **group** autonomy, or of individual rights to equality with **group** parity⁶. It hardly seems plausible that these historical forms of the co-ordination of the

³Cf. J. Habermas, *Theorie des kommunikativen Handelns*, vol. 1, Frankfurt/M. 1981, p. 28, 339; id., *Der philosophische Diskurs der Moderne*, Frankfurt/M. 1985, p. 376; for a "post-modern" critique cf. N. Bolz, *Am Ende der Gutenberg-Galaxis*, München 1993, p. 66 ss.

⁴For a theoretical differentiation of the relationship between "public" and "private" cf. J.F. Spitz, *La face cachée de la philosophie politique moderne*, *Critique* 1993, 307 ss.; G. Klosko, "Political" Philosophy and American Culture, *APSR* 1993, 348, 355.

⁵Cf. U. Rödel/H. Dubiel/G. Frankenberg, *Die demokratische Frage*, Frankfurt/M. 1989, p. 187 ss.

⁶Cf. generally P. Häberle, *Verfassung als öffentlicher Prozeß*, Bad Homburg 1972, p. 407, 410.

public and the private could be removed by the priority of one side, of a public sphere increased in a procedural variant of communicative-argumentative rationality. The arguments employed for this may be reduced to the ever-repeated, but never elaborated, recourse to the universalising compulsions attributed to language. Moreover, the conception seeks to gain in credibility rather through a negative de-limiting of a conception of freedom which is allegedly merely formal and which isolates the individual from its social context⁷; this argument is, however, not further refined except by reference to the - scarcely derivable but for the purposes of argument not exactly productive - embedding of the individual in a network of relationships, purposes, aims, moral concepts etc.

In the end, this is also the common reference point of those conceptions which derive welfare rights in different variants of a "**materialising**" of rights to the necessity of the satisfaction of **needs**⁸ from the positive guaranteeing of **potentials for action**⁹ (rather than mere possibilities for action) or from civil **status**¹⁰, which is to enable a direct right to participation in social welfare. Thus, in these variants, civil rights are not primarily determined by the share in public discussion¹¹. At this point, details of the theoretical grounds for welfare rights in the various versions of a "materialising or of a discourse-ethically

⁷Cf. for a critique St. Holmes, *The Anatomy of Anti-Liberalism*, Cambridge/London 1993.

⁸Cf. for doctrinal constructions H.F. Zacher, *Verrechtlichung im Bereich des Sozialen*, in: F. Kübler (ed.), *Verrechtlichung von Wirtschaft, Arbeit und sozialer Solidarität*, Frankfurt/M. 1984, p. 14; cf. for a theoretical differentiation Aronson, *ibid.*; H.A. Simon, *Rationality as Process and as Product of Thought*, *Am.Ec.Rev.* 1978, 1; *id.*, *Organizations and Markets*, *J. of Ec. Perspectives* 1991, 25.

⁹Cf. Sen, *ibid.*

¹⁰Cf. Rödel et. al., *ibid.*, p. 187 ss.; Preuß, *ibid.*

¹¹There is no clear separation between the different conceptions, for a combination of "action"- and "needs"-related positions cf. Freeden, *ibid.*, 499.

understood "proceduralisation" of basic rights shall not be dealt with. Rather, it will be demonstrated that a one-sided understanding of the formal, liberal theory of fundamental rights is at the basis of both conceptions and this understanding misses the pre-suppositions of the liberal concept of freedom, especially its support through other social institutions and, above all, its cognitive orientation-achievement. It is precisely this latter which may have exhausted itself completely or partially, but the search for functional equivalents which are focused on the mastering of higher complexity can only succeed if the paradigm of classical liberal law (and its limitations) is more exactly reconstructed. This is the more valid as it is precisely the lack of practical orientation of the newer variants of a materialisation of civil rights and that discourse-ethical proceduralisation, which is conspicuous and the problem of the co-ordination with existing arguments from the individual, differentiated sub-systems through the claim for their subordination is made difficult, if not even impossible. "The practice-related coercion of the individual through society is, in any case, not the object of discourse ethics which has, rather, its eye on a kind of self-obligation in commerce with other members of society¹²." The theories outlined claim a priority for an ethical-moral argumentation whose basis exhausts itself in a circular self-affirmation of moral forms of argumentation which refers all practical arguments normatively to the examination through the procedure of argumentative self-enlightenment of language-mediated inter-subjectivity.

It is precisely this last claim of the most recent discourse ethics which - as will be shown later - fulfils, paradoxically enough, an eminently practical function: it demonstrates the claim to restoration of a substantive rule-based subjectivity in a procedural unity of inter-subjective mediation.

An ethic which is self-establishing through the formal procedure of

¹²For a general critique of the separation of genesis and validity in moral theory cf. H. Krämer, *Integrative Ethik*, Frankfurt/M. 1991.

arguing and which, thereby, simultaneously postulates the centrality of the political-public institutions of deliberation, or a materialising moral guaranteeing the "result justice"¹³ of the exercise of freedom obstruct, however, through their monism access to the changed conditions of social **co-operation** under conditions of complexity.

It will be shown that ethical and moral argumentation can, at best, take over a limited critical function, if at all, and that, conversely, its popularity more readily corresponds to the rise of a class of weakly professionalised "discourse workers" (teachers, journalists, social workers, social education workers etc.)¹⁴ whose intellectual demands are in inverse proportion to their potential for action. Those obligations which can no longer be attributed to or solved by old patterns and which accompany the increased self-modification capability of society, they assign to a meta level (that of morality and ethics) which is not at all suitable for this purpose. This, for its part, finds its adequate expressions in a diffuse "culture of complaint"¹⁵: in times of a self-weakening rule-universalism, decisions about the attribution of actions and consequences can, apparently, be "democratically" made on the basis of self-examining discourses.

Already these few remarks have shown that a theory of the foundation of welfare rights can have wide practical consequences because it - just like the classical, liberal rights of personal liberty - produces certain, paradigmatic order-

¹³Cf. A. Wildavsky, *The Three Cultures: Explaining Anomalies in the American Welfare State*, The Public Interest 1982, 45.

¹⁴Cf. J.L. Golden, *Rhétorique et production du savoir: Les grands courants de la théorie rhétorique américaine*, in: A. Lempereur (ed.), *L'argumentation*, Colloque de Cerisy, Liège 1991, p. 53.

¹⁵Cf. generally, R. Hughes, *Culture of Complaint*, New York 1993; P. Bruckner, *La tentation de l'innocence*, Paris 1995.

achievements which enable expectation-formation¹⁶ and which have to be attuned to the different "levels" of the law¹⁷. It will be seen that it is precisely discourse ethics and the highly abstract discourse of materialising which not only do not take into consideration the cognitive functions of the law but which actively block them. In the following, therefore, the question will first be considered which orientation-achievement the classical, liberal model of freedom has produced. The answer to this question is a pre-requisite for the further question on the limits of the liberal legal paradigm and the pre-requisites and consequences of the appearance of new (social) legal forms and the conditions of the possibility of the co-ordination of the cognitive achievements of the old and the new paradigms.

2. The construction of liberal rights of liberty

It is a long-fostered but, nonetheless, unfounded idea that liberal rights to liberty are nothing other than rights of defence in relation to the state and, therefore, require supplementation through "material", substantial rights to participation in collective co-existence and its real bases (basic income etc.)¹⁸. (Conversely, the opposite of the theory here represented has not, however, yet ensued, namely, that the liberal legal paradigm is in no need of any change; it depends here much more on the historically and socially appropriate classification of the problems of the evolution of law.) The establishing of the

¹⁶Cf. generally N. Luhmann, *Das Recht der Gesellschaft*, Frankfurt/M. 1993, p. 310 ss.; R.A. Heiner, *The Origins of Predictable Behavior*, *Am.Ec.Rev.* 1983, 560; id., *Imperfect Decisions and the Law: On the Evolution of Legal Precedent and Rules*, *J. of Legal Studies* 1986, 227.

¹⁷Cf. J.S. Coleman, *The Role of Rights in the Theory of Social Action*, *JITE* 1993, 213, 223.

¹⁸Cf. Holmes, *ibid.*; A. Seligman, *The Idea of Civil Society*, New York 1992.

liberal right to liberty on a formal "negative" defence against intrusion did have historical and political functions which, correspondingly, also permitted the emergence of differing legal traditions in the various European countries. The individualism of liberal law aimed, above all, at the neutralising of certain handed down ideologies and demands of older, collective institutions (churches, trade organisations, the nobility etc.)¹⁹. The exclusively negative fixation on the traditional stock of norms and conventionalised relationships must not be separated from its context and hypostatised from its a-historical supposition as though the idea were typical of liberal law that society consists of monads which, free of context, under a law equal for all enter into and then dissolve selective (contractual) relationships²⁰. This would be to misunderstand the mere "indirect" character of liberal law, whose self-evident background is based on the idea that it is precisely the merely **normative** (not socio-ontological) idea of free and equal subjects which sets in motion the formation of a network of lasting, longer-term co-operation which enables expectation-formation and, thereby, creates trust as the basis for the testing of new possibilities²¹. The legitimisation for property does not lie primarily in the reward of individual competence but precisely in the fact that it likewise benefits the non-owner if a break in traditional relationships ensues through the institutionalising of property²². Even if this emphasis has not been reflected in legal history, it is, nevertheless, possible to see retrospectively the legitimisation of rights to personal

¹⁹Cf. Holmes, *ibid.*

²⁰Cf. also F. Dubet, *The System, the Actor and the Social Subject*, Thesis Eleven no. 38 (1994), 16.

²¹For the paradoxical relationship between trust and civil liberties cf. A.B. Seligman, *Trust and the Meaning of Civil Society*, *Int. J. of Politics, Culture and Society* 1992, 5.

²²Cf. D. Schmidtz, *When is Original Appropriation Required?*, *The Monist* 1990, 504; E. Mack, *Self-Ownership and the Right of Property*, *The Monist* 1990, 519.

liberty precisely in that everyone, thereby, has been given the possibility of using in his or her decisions that network of artificial (not tradition-bound) relationships - built through repeated co-operation - and the knowledge dispersed over it²³.

The general law should not be seen merely as a mutual fetter on individual egoism but, much rather, the constraint of law has to be considered in a narrow, positive context with the right to individual liberty: to the extent that each abides by the law, each thus offers the **others** the possibility of multifarious activities and, in particular, the possibility of discovering new possibilities. In this lie the roots of the interest in creating institutions which are independent of the immediate motives of those involved and which, for their part, secure the complex relationship-networks between individuals and the development of conventions. It is precisely the development of such institutions not dependent on the motives of those involved which is one of the cultural achievements of western civilisation, to which classical, liberal law has also contributed greatly: positive law has only superficially the function of setting a "limit" to the monad "individual", its primary task is to stabilise expectations²⁴ and to facilitate "positively" longer-term co-operation which, in individual cases, can be largely detached from the motives.

The reverse side of this impersonal institutionalising of relationships of co-operation through individual laws is mistrust towards the "immediate" public interest which prevails against private interests²⁵. With the freedom of the

²³Vgl. allgemein F.A. v. Hayek, *Recht, Gesetzgebung und Freiheit*, vol. 1, Second edition, Landsberg 1986.

²⁴Cf. Luhmann, *ibid.*, p. 310 ff. For the necessity of decisions and rules under conditions of uncertainty cf. Heiner, *ibid.*

²⁵Cf. Holmes, *ibid.*

individual and her or his constraint by the law²⁶, comes the idea that trust must be generalised and cannot be dependent only on traditional, personal relationships²⁷. On this is based the readiness to adopt in strategies for action those constraints which come with the network of a (in particular, economic) practice and not to burden these with direct "personal" considerations regarding purpose and value. Co-ordination takes place in advance because the acceptance of constraints - put in place by "practice" - makes possible trust in generalised, person-independent form.

One may criticise these achievements here briefly outlined, but criticism which ignores the cognitive, knowledge-producing components of liberal law and confuses normative scepticism in relation to centrally given aims with ignorance of the contextual dependency of the collective effects of the rights to personal liberty is not very convincing. Only through a historically informed reflection on the achievements and limitations of the liberal model of law, is a description of the new demands possible, to which the classical paradigm²⁸ can no longer be attuned without problem and which, therefore, demand new evolutionary steps. On the other hand, a mere "materialising"²⁹, the installation of laws of compensation to correct undesired "results" or even a discourse-ethical proceduralisation which outdoes the universality of rules through a super-moral³⁰, has to take into account an orientation-deficit because it ignores the

²⁶For a theoretical construction cf. R.C. Christensen, *Was heißt Gesetzesbindung?*, Berlin 1989.

²⁷Cf. Seligman, *ibid.* (Civil society...).

²⁸Cf. Spitz, *ibid.*

²⁹For a doctrinal construction of the relationship between social rights and liberties cf. Zacher, *ibid.*

³⁰For an approach adapting discourse theory to conditions of uncertainty cf. H. Dubiel, *Ungewißheit und Politik*, Frankfurt/M. 1994.

scepticism of classical liberalism with regard to good intentions and good reasons.

Classical liberalism - as has been shown - has in no respect had an asocial character; it has not neglected the problem of justice, to which its critics always point, but has considered its solution impossible or, at least, difficult³¹. The answer to the classical liberal paradigm can then, however, not consist in self-enlightenment and the enlightenment of others about just this problem, but only in the naming of the **means** with which it is to be solved³². A more precise analysis of the liberal conception of democracy would belong to this which - even if in historically and nationally differing variants - has pre-supposed the deliberation on a rational, that is, also lasting, order separate from the individual persons and individual decisions. This political component of democracy has its necessary counterpart in a relatively lasting allocation of individual responsibility, which must be kept separate from the public and the general interest³³. This also finds expression in that within constitutional law a distinction must be made between the centre and the periphery³⁴: in particular, if one does not differentiate between freedom and equality from this standpoint, thus, considers, for instance, equality as having the same importance as freedom, one creates a relationship of tension that can only be overcome through a strengthening of the state which, there again, impedes the development of security of expectation within the social forms of practice and relationship networks. Nor is this, of course, a possibility which is to be rejected out of hand but

³¹Cf. generally G. Schmidtz, *The Limits of Government*, Boulder/San Francisco 1991.

³²Cf. Wildavsky, *ibid.*

³³The interpenetration of "public" and "private" tends to undermine conditions of possibility of deliberation in the classical liberal sense, cf. Seligman, *ibid.*, (Civil Society...).

³⁴Cf. Coleman, *ibid.*

criticism must, however, confront itself with the possible consequences of an over-burdening of the medium of publicity; not everything can be referred to the possibility of agreement and the limits of its complexity be ignored. Conversely, a perspective on the cognitive order-achievements of the liberal, democratic model of law offers the advantage of enabling also an estimate of changes to which the evolution of civil society, as also that of the state, has been exposed and which have transformed the conditions of their self-description. It turns out that the generating of a new knowledge basis and new types of science, such as statistics, has been made possible precisely through the development of social, inter-organisational networks of relationships, supported and stabilised through the rise of organisations³⁵: therewith, the conditions have been created for responsibility to be attributed no longer only, according to general laws, to private, individual action, but to be described as collective risks and, accordingly, attributed collectively³⁶. Above all, with the appearance of large organisations, the self-modification of society has been expedited, the complexity and the wealth of alternatives in (organisational) action have increased and, simultaneously stable attributions of responsibility to the individual have weakened³⁷.

This development has led not only to the construction of public insurance but also to the recognition of the possibility of a collective disposal over work in the form of collective agreements, and to long-term corporate arrangements

³⁵Cf. generally C. Ménard, *Les organisations en économie de marché*, Rev. d'Econ. Pol. 1989, 771; K.-H. Ladeur, *Das Umweltrecht der Wissensgesellschaft*, Berlin 1995.

³⁶For the political use of the concept of "probability" cf. F. Ewald, *L'Etat - providence*, Paris 1986; I. Hacking, *The Taming of Chance*, Cambridge 1990.

³⁷For the risks of rigidification of pluralist societies cf. M. Olson, *Logica delle istituzioni*, Milano 1994.

and other new collective strategies for action³⁸. The details of this development need not concern us here. In the perspective adopted here on the cognitive function of liberal law it must, however, be noticed that with the disruption of the stable separation of general law (general regularity) and the action of individuals - a separation which has always presupposed within a certain range of fluctuation a balance around a quiet self-stabilising point of order-formation - there also goes a change in the self-description of the political institutions of liberalism, in particular, a crisis of representation and of the general law³⁹. The roots of this lie particularly in the fact that groups - parties, trades unions, associations, large concerns - take over an independent, cognitive, knowledge-generating function and, for their part, pluralise the institutionalisation of social knowledge⁴⁰.

³⁸For the crisis of collective bargaining systems in labour law cf. P. Rosanvallon, *La nouvelle crise de l'Etat-Providence*, Cahiers de la Fondation Saint-Simon 1993 (September), 1; for the possible evolution of more flexible forms of poly-corporatism cf. G. Teubner, *The "State" of Private Networks: The Emerging Legal Regime of Poly-Corporatism in Germany*, Brigham Young University Law Rev. 1993, 553.

³⁹Cf. D. Grimm, *Die Zukunft der Verfassung*, Staatswissenschaften und Staatspraxis 1989, 5; K.-H. Ladeur, *Postmoderne Verfassungstheorie*, in: U.K. Preuß (ed.), *Der Begriff der Verfassung*, Frankfurt/M. 1994 p. 304 ss.

⁴⁰Cf. O. Favereau, *Valeur d'option et flexibilité. De la rationalité substantielle à la rationalité procédurale*, in: P. Cohendet/P. Llerena (eds.), *Flexibilité, information et décision*, Paris 1989, p. 121; cf. generally A. Orléan (ed.), *Analyse économique des conventions*, Paris 1994.

3. From individual action-attribution to collective risk-attribution

a) The change of social reality and its portrayal in the society of organisations

The contrary developments of, on the one hand, the accelerated self-transformation of society, which disrupts the stable regularity and the maintenance of the formation of equilibrium and, on the other hand, a generating of a new stock of knowledge which are at the disposal of longer-term operating organisations which strategically change relationship-networks⁴¹, has resulted in the individual attribution of success or failure in action coming into competition with a description as collective risk. For the connection discussed here, it is important to emphasise that this development is not primarily indebted to a different **evaluation** of formal, individual freedom but that the relationship of general knowledge, regularity and lawfulness⁴², on the one hand, and individual attribution, on the other hand, is superseded by the appearance of organisations and the accompanying new formation of patterns of knowledge-production and, thereby, social self-description becomes considerably more complex. These new kinds of knowledge and stocks of knowledge are characterised primarily by no longer being continually produced through spontaneous variations of a general knowledge distributed through the entire network of relationships and able to be systematised in general regularities, but their frames of reference, their scope of possibility, change strategically and, therewith, metaphorically expressed, order will only be possible far from equilibrium.

This development first found expression within the state itself, especially

⁴¹Cf. I. Nonaka, Creating Organizational Order out of Chaos, Cal.Man.Rev. 1988 (Spring), 57.

⁴²Cf. Dubet, *ibid.*

in the setting up of groups and organisations but also in the transition to the social state⁴³. Groups and organisations produce their own interpretations of reality and create thereby connexion-compulsions for their own action and that of other persons and groups⁴⁴. They thus become a part of the social "memory" through which knowledge is produced, stored and distributed. These new, plural, (inter-)organisational constructions of possibility⁴⁵, combine, in a way which is hard to describe, with the old stock of knowledge which is dispersed through the social network of relationships. The modern group and social state has produced a new organisation-culture and led to the emergence of new stocks of knowledge which are orientated on the standardising-achievements of big business and are probabilistic and stochastic, as well as to new collective attributions⁴⁶: coincidences and dangers which were formerly individually attributed are now construed as collective risks⁴⁷; the formation of expectation in the economy - rule-dependent but subject to individual fluctuations - is more and more changed over to global (inter-)organisational, quasi-contractualising⁴⁸. Collective risks are attributed to insurances, the state or large business ("deep

⁴³Cf. Grimm, *ibid.*

⁴⁴Cf. N. Brunsson, *The Irrational Organization*, Chichester, 1985; *id.*, *The Organization of Hypocrisy*, Chichester 1989.

⁴⁵Cf. Favereau, *ibid.*

⁴⁶Cf. J. Rasmussen, *Event Analysis and the Problem of Causality*, in: D. Brehmer/J. Leplat/*id.* (eds.), *Distributed Decision-making: Cognitive Models of Cooperative Work*, Chichester 1991, p. 248.

⁴⁷Vgl. nur Th. Meder, *Schuld, Zufall, Risiko*, Frankfurt/M. 1993; *id.*, *Risiko als Kriterium der Schadenszuteilung*, *Juristenzeitung* 1993, 539.

⁴⁸For the evolution of "hybrid" forms of interpenetration between market and organization cf. K. Imai/H. Itami, *Interpenetration of Organization and Market*, *J. of Ind. Org.* 1984, 285; M. Hutter/G. Teubner, *The Parasitic Role of Hybrids*, *JITE* 1993, 706.

pockets")⁴⁹, competition, as a process of searching, is, at least partially, removed through collective, strategic, organised search-processes⁵⁰ - embracing complete action-networks - of combined firms, through arrangements between employees' organisations and employers' organisations or other organisations (parties, associations etc.)⁵¹. This system, which has also found expression in the legal system through the formation of a completely new legal class of collective, social and political institutions (collective agreements, public-law insurances, parties etc.) has, simultaneously, developed a kind of collision-order to attune these new institutions to the legal forms of classical liberalism, within which the new forms can be described as a remodelling of the older: group autonomies supplement individual freedom, group parity and equality of opportunity supplement individual, formal equality⁵². This co-ordination of new classes of law allows a mutual support. The collective-legal elements are limited to being able to make use of **certain** collective risks and achievements; equality of opportunity compensates for **certain** effects of the accumulation and self-strengthening of social power. They also safeguard the conditions of operation of individual, classical liberal law in as far as they, in many cases, create for the first time the possibility of new, longer-term action-orientation and value-orientation: the value of the acquisition of specialist professional qualifications

⁴⁹Cf. generally M. Douglas, Risk as Forensic Resource, *Daedalus* 1990 (no. 1), 1; ead./A. Wildavsky, *Risk and Culture*, Berkeley 1982.

⁵⁰Cf. Hayek, *ibid.*; V. Vanberg, Spontaneous Market Order and Social Rules, *Economics and Philosophy* 1986, 75; M. De Vlieghere, A Reappraisal of F. A. Hayek's Cultural Evolutionism, *Economics and Philosophy* 1994, 285; J.M. Buchanan, The Market as a Creative Process, *Economics and Philosophy* 1991, 167.

⁵¹Cf. P. Häberle, *ibid.*; cf. also V. Neumann, *Freiheitsgefährdung im kooperativen Sozialstaat. Rechtsgrundlagen und Rechtsformen der Finanzierung der freien Wohlfahrtspflege*, Köln 1992, esp. p. 437.

⁵²For the evolution of different "layers" of collective rights in judicial decision-making cf. Teubner, *ibid.*

seems for many workers⁵³ and their children more calculable, the safeguarding against job risks relieves families of the necessity of coping with the blows of misfortune or the consequences of individual wrong decisions and, thus, simultaneously facilitates the stabilisation of family relationships, particularly those of the working class. Conversely, the traditional legal class of the liberal rights of personal liberty and their institutionalising produces important achievements for the support of collective re-modellings through limitations and avoidance of risks: the attribution of individual responsibility⁵⁴, supported by individualistic ideologies and the work ethic, means that insurance benefits or the newly won security in employment relations (through collective contracts) cannot be overtaxed through individual misuse ("moral hazard").

b) Collective attribution of risks - social state remodelling of "the second order" and the problems of the self-description of complexity

The bringing within the scope of law of the former welfare grants⁵⁵, which were legitimised religiously or paternalistically, is also to be interpreted against the background described. The possibility of a **right** to financial help to satisfy minimum demands presupposes the functioning of primary and secondary institutions of the social market economy⁵⁶. This is also a variant of collective

⁵³Cf. Goodin, *ibid.*, 548.

⁵⁴For the role of discipline as a counterpart to legal institutions cf. Ph.S. Gorski, *The Protestant Ethic Revisited: Disciplinary Revolution and the State Formation in Holland and Prussia*, *Am.J.Soc.* 1993, 265.

⁵⁵Cf. for the jurisdiction in Germany only the decision of the Federal Court of Administration, *BVerwGE* 1, 159.

⁵⁶Cf. generally Zacher, *ibid.*; N. Dimmel, *Sozialrecht an den Grenzen sozialstaatlicher Rationalität*, *Öst. Z. f. Politikwissenschaft*, 1993, 57; for an economic perspective on the function of the State as an "insurance" organization against social risks cf. H.W. Sinn, *A Theory of the Welfare State*, NBER Working Paper Series, 4856, Cambridge 1994; see also

risk-management, it cannot just be reduced to its distributive function. It must be related to the differentiated layer of individualistic and collectivistic institutions. Taking this into account it is characterised as an insurance benefit independent from a premium it has to remain an exception and has, therefore, primarily the function of compensating for the temporary cessation of employment income supplementing the public insurances in a strict sense; in particular, to facilitate the search for a new job or to cushion a, at most, small group of people from the diffuse risks of foundering amidst social complexity (failure of socialisation or the acquisition of basic disciplines, the interconnection of unfortunate and blamelessly-acquired burdens etc.).

One may criticise this supportive relationship between labour market and social security⁵⁷, but it is precisely in this co-ordination that a cognitive orientation-achievement is contained which criticism cannot simply ignore⁵⁸ and for which functional equivalents must also be sought if alternative systems are developed. One cannot introduce new rights into the network of social institutions without considering the effect on its equilibrium. Observation of the consequences and prerequisites of the re-modelling of liberal-constitutional law through the institutions of the social state shows that the collective attribution of risks (in comparison to earlier, individual attribution) brings with it considerable changes, both cognitively and normatively. This reveals itself especially after a certain period of time when insurance against risk has become a matter of course and is no longer seen as the collective assumption of

the innovative approach of P. Rosanvallon, *La nouvelle question sociale. Repenser l'Etat-providence*, Paris 1995.

⁵⁷Cf. Zacher, *ibid.*, p. 24.

⁵⁸Cf. St. Leibfried, *Towards the European Welfare State? On Integrating Poverty Regimes into the European Community*, in: S. Ferge/J.E. Kolberg (eds.), *Social Policy in a Changing Europe*, Frankfurt/Boulder 1992, p. 245, 252.

primarily individually attributed risks. Furthermore, the extension of horizons of decision and of the entering into of longer-term individual and collective relationships - made possible through the new institutions - has its opposite side in that through collectivisation undesired side effects are produced to a greater extent and, because of this, their observation becomes more difficult since collective attribution of "group risks" can no longer be described by recourse to simple rules and regularities but, for its part, can only be described in terms of probabilistic-stochastic models, which have to reckon with numerous operational factors and, therefore, with uncertainty. Above all, the institutions of the social state produce a virtually constitutive self-referential risk of risk-regulation⁵⁹: the traditional liberal "model of the first order", which is based on the simple mechanisms of the individual attribution of responsibility, allowed distinctions between rule and exception, between right and wrong; distinctions which could and should be adopted into individual orientation. Collective risks whose constructions cannot be linked to simple attributions admit, however, of room for differing strategic interpretations of attributions and attribution-possibilities. Thus, the increase in the collective taking over of risk through organised institutions is normatively easy to introduce and establish, whilst observation of the consequences of institutional change is much harder⁶⁰. The readiness and ability of institutions to adapt may be asserted even without sufficient experience or even in the face of bad experiences, because "purposeful" organisations can apparently deal with bad experiences through a normative change of purpose or

⁵⁹Cf. generally A. Lindbeck, *The Welfare State*, Cheltenham 1993; A. Schüller, "Meine Tasche, Deine Tasche", *Frankfurter Allgemeine Zeitung*, 3/12/94, No. 281, p. 17.

⁶⁰Cf. Ch. Twight, *Channeling Ideological Change - The Political Economy of Dependence on Government*, *Kyklos* 1993, 497; S. Paugam, *Les statuts de la pauvreté assistée*, *Rev. Fr. de Soc.* 1991, 75; N. Herpin, *L'urban underclass chez les sociologues américains: exclusion sociale et pauvreté*, *Rev. Fr. de Soc.* 1993, 421; D. Reynaud, *Le chômage de longue durée: La théorie et l'action*, *Rev. Fr. de Soc.* 1993, 271.

in a normative redistribution of responsibility to others or by simply concentrating on their normative self-description; one can escape their difficulty the more easily as the longer-term nature of the decision-horizons of institutions has its reverse side in the deferment of consequences, and in the possibilities - also in this respect again increased - of continually remaining artificially-construed attribution⁶¹. Consistently enough, this is carried to extremes in Communist organisations which connect their self-definition with the criterion of success and, as a consequence, explain a failed Communist organisation as being a (state-)capitalist one, therewith asserting “after the fact” the realisation of a risk, against which, however, no kind of institutional precautions had been taken.

c) The necessity of a meta-convention on the co-ordination of institutions with one another

For their part, there are no simple rules and connexion-patterns for the attribution of the consequences of collective decisions which are to overcome the limits of individual attributability, because institutionalised attributions - unlike the universal regularity of liberalism - always bundle together a diffuse “group causality” which does not follow any general law and cannot assume any naturally layered, structure-formation-facilitating levels of complexity⁶². Attributions, for their part, are always in competition to others; political organisations especially can declare even the greatest catastrophe to be a success since, in the end, one had the best intentions and had prevented the catastrophe - which was, naturally, the responsibility of others - from being even greater!

⁶¹Cf. Brunsson, *ibid.*

⁶²Cf. generally L. Krüger, *Kausalität und Freiheit*, Neue Hefte f. Philosophie 1992, p. 1; Rasmussen, *ibid.*, p. 247 ss.

One of the secondary consequences of collective risk-attribution consists in the fact that there can no longer be a general rule for the institutionalising of responsibility in “special” organisations. According to the liberal legal paradigm of the universality of rules, an unemployed person has to expose herself or himself to the forces of price competition but unemployment, as a collective phenomenon, in no way excludes a strategy of wage increase, since, in order to deal with this problem, the re-distribution of the risk to others involved (employers, “better earners”) or the state can also be called into the arena⁶³. The state, above all, has in this constellation the task of making a risk invisible through dispersal⁶⁴. This is the social policy counterpart of the policy of the “high chimney” cultivated earlier in environmental law: one mixes attributable dangers with others into a risk which is no longer attributable, in the hope that this will go well. In environmental law, the risks of this form of risk management have long since been recognised but it is, however, still barely accepted that this form of risk management has an internal social counterpart, namely, the emergence of complex risks with chains of causality⁶⁵ which are difficult to structure.

A kind of meta-convention is, therefore, needed which attunes the achievements of collective institutions to one another⁶⁶; for this, the

⁶³For the causes of growing unemployment cf. D.J. Snower, *Why People don't Find Work*, CEPR, Discussion Paper Series no. 883, Dec. 1993; P. Krugmann, *Inequality and the Political Economy of Eurosclerosis*, CEPR, Discussion Paper Series no. 867, Nov. 1993; cf. also H. Siebert, *Geht den Deutschen die Arbeit aus?*, München 1994.

⁶⁴Cf. Aronson, *ibid.*, and generally M. E. Streit, *Cognition, Competition, and Catallaxy*. In Memory of F.A. v. Hayek, *Constitutional Political Economy* 1993, 223.

⁶⁵Cf. for a model coping with unemployment Krugmann, *ibid.*

⁶⁶For the role of conventions and rules in decision-making under conditions of uncertainty and complexity cf. Orléan (ed.), *ibid.*; Heiner, *ibid.*; D.C. North, *Institutions and Credible Commitment*, *JITE* 1993, 11; *id.*, *Economic performance through time*, *Am.Ec.Rev.* 1994, 359, 363; Ch. Engel, *Legal Responses to Bounded Rationality in German Administration*,

remodelling of the liberal constitutional state through the group-pluralistic state had developed an approach which functioned with varying degrees of success in the countries of the European Union but which requires renewal under the now more complex conditions. What, with justice, is known as Eurosclerosis⁶⁷ is a consequence of complexity which is no longer manageable⁶⁸. The formation, however, of such a meta-convention for the co-ordination of the institutions of the "society of organisations" with still-existing institutions of the liberal "society of individuals", which serves the limitation and management of collective risks through the formulating of collision and transfer rules, meets with considerable resistance. It is precisely the functioning of the co-ordination of institutions up to now which has created conditions for its overloading⁶⁹ and made it simultaneously invisible because of the diffuse effects and the long term nature of the developments⁷⁰. Especially recently, organisations and institutions have been confronted with expectations which amount to a hybrid combination of elements of the paradigm of individual right and that of the social state: they are considered as large individuals who, unlike "small" individuals, are released from the constraints of the universality of rules and whom one can, therefore, burden with all possible claims and projections without reflecting more precisely on the pre-requisites and consequences of organisational problem-

JITE 1994, 145; J. Bendor/D. Mookherjee, *Institutional Structures and the Logic of Ongoing Collective Action*, APSR 1982, 129; E. McClennen, *Justice and the Problem of Stability*, Phil. and Public Affairs 1989, 3.

⁶⁷Cf. Krugmann, *ibid.*

⁶⁸For an ethics of complexity cf. E. Morin, "E. Morin: philosophe de l'incertain", in: *Magazine Littéraire* 312 (1993), 18.

⁶⁹Cf. Olson, *ibid.*

⁷⁰Cf. Lindbeck, *ibid.*

management⁷¹. Thus, especially for social (non-economic) organisations, the typical conditions for “superstitious learning” are created: organisations interact - other than individuals who have to behaviour more in accordance with existing social conventions - with other organisations with the help of their own self-created, cognitive constructions and projections and produce, thereby, a problematical self-referentiality⁷² which always demands merely “more of the same”, a phenomenon which in no way excludes this being simultaneously clearly recognised and criticised by other organisations. This is, above all, a problem with which “social” institutions and organisations are confronted and that is assimilated in an erratic fluctuation between over-charge and depression on the part of the personnel⁷³. A tendency to hybrid linking of collective and individualistic institutionalising of risk attribution also finds expression in victimisation, which is especially widespread in the USA and Germany⁷⁴: certain groups of people (whose number tends to be increasing) are generally declared as “victims” who have a right to collective insurance and pension benefits or at least to special care, whilst, conversely, the collective risk, which has realised itself in the victims, is simultaneously personally attributed to certain (similarly said to be increasing in number) people or groups of people on the basis of a personal characteristic or a partial contribution to diffuse chains of effect, according to traditional, individual criteria (“the culprits are in Bonn!”). This hybridising of personal and collective responsibility for risks correspondingly reflects a tendency to ascribe to oneself as moral responsibility

⁷¹Cf. Brunsson, *ibid.*

⁷²Cf. Brunsson, *ibid.*

⁷³Cf. Brunsson, *ibid.*

⁷⁴Cf. Hughes, *ibid.*

the "setting signs of solidarity" through gestures of good will⁷⁵.

This "hybrid" linking of collective and individual responsibility missing the complexity of institutional inter-dependencies is especially characteristic for a "déformation professionnelle" of the social workers. On the other hand, the relatively paltry individual tax contribution of the "normal citizen" permits a diffusion of responsibility, to which, for its part, no complex side-effects are attributed, whilst the "social provision" of clients can thus become an object of individual positive rights which are located on the same level as their "negative" counterparts. This construction seems, however, inappropriate from both sides: neither under the conditions of the change of "social epistemology", the appearance of undesired side-effects in the thinking and behaviour of the "normal citizen" can be neglected, because the gradualistic dispersion of rising taxes largely presupposes a behaviour of contributors as "rational ignorant" citizens who, while not openly opposing, take revenge surreptitiously, i.e. by tax evasion or by trying to get compensation by claiming "social assistance" themselves. Nor does the construction of individual rights to social benefits do justice to the, in general, weakened connexion of many social welfare recipients to the possibilities, as to the constraints, which are generated through the multiplicity of the social relationship-networks. Only a change in state intervention can do justice to both sides of this problem. The "result-orientated" compensation for negative rights to personal liberty through positive benefit laws ignores the relationship between centre and periphery within the legal system and does not do justice to the new conditions of social complexity and diffuse causality.

⁷⁵For a critique of sentimental "solidarity" cf. P. Bruckner, *L'arbitraire du coeur*, Esprit 1994 (No. 3/4), 141; A. de Swaan, *Der sorgende Staat*, Frankfurt/M.-New York 1993, p. 248 ss., 278.

d) Intermediate summary

In this intermediary remark, a reversion shall again be made to the criticism of the dominance of moral-ethical arguments in the discussion about welfare rights. Its claim not only stands in inverse proportion to its practical significance - in practice the moral obligation to solidarity with the weak is nowhere seriously disputed, at least, not without serious consideration regarding the practical **means** of its realisation. The over-estimation of the moral argument is, rather, an expression of the insufficient readiness and capacity to accept that highly complex problems of self-observation and self-description of society and of the process of its self-modification accompanying the collective attribution of risks. A look back at the orientation-achievements of the liberal legal structure shows especially that neither through the "materialisation" of the formal position of the citizen nor through the institutionalising of an ethical super-discourse of understanding about conditions of the justice of social order can anything be contributed to the management of the self-created complexity of a post-modern society, but, much rather, access is obstructed to a functional equivalent of the orientation-achievements of the liberal-constitutional state model for the emerging "society of self-organising relationship-networks". Therewith, hybrid combinations of collective and individual attributions are furthered, conversely, however, the necessity of the development of an ethic of institutions which does justice to complexity, is also missed. Taking up the problem outlined of the self-description of society, I shall deal in the following first with the question in how far the orientation-achievement of the paradigm of individual rights offers connexion-constraints and connexion-possibilities in the development of new, cognitive orientation-models of complex societies. In this, it will be assumed that the organisations of social pluralism hitherto have also and especially fulfilled the function of a distributed social "memory" and

have, thereby, taken up the institutional achievements of the classical, liberal constitutional state model. The problem may be put more precisely to the effect that signs of a weakening of the remodelling of liberalism, already described, through the formation of corporatistic institutions - also with regard to the cognitive orientation-achievements thereby facilitated - demand new descriptions.

4. A new cognitive model for the self-description of the social state of the "second order"

a) The phenomenon of the complexity of regulation problems

The liberal legal model operates, as shown, with differences and attributions which facilitate co-operation and, with regard to the effectiveness hoped for through self-limitation⁷⁶, does not ignore but does indeed neglect certain undesired consequences. In this, it is assumed that, by this means, trust can be generated⁷⁷ and learning capacity guaranteed⁷⁸. The social state has remodelled, but not simply replaced, the cognitive achievements of this system by creating new, collective risk-attributions and new institutions for the generating, storage and dissemination of knowledge of a stochastic-probabilistic type.

The characteristic feature of an emerging, new evolutionary step in the development of the legal model of the industrialised states consist - though this may be asserted only at the cost of some simplification - in the fact that more and more phenomena of complexity arise which can no longer be described and

⁷⁶Cf. D. Schmidt, *Rationality within Reason*, J. of Phil. 1992, 445; id., *The Limits of Government*, Boulder/San Francisco 1991; North, *ibid.*; McClennen, *ibid.*

⁷⁷Cf. Seligman, *ibid.*, (Trust ...)

⁷⁸For the necessity of the institutionalization of learning capability in society cf. H.A. Simon, *Large Organizations in Modern Society*, Il Politico 1989, 587.

managed in the re-modelled institutions of the social state. In the field to be analysed here, this is true, above all, of the change of forms of organisation and work within and between firms⁷⁹, of the development of professional qualifications⁸⁰ which can no longer be precisely distinguished, and the change in the forms and contents of orientation-knowledge, to name simply a few manifestations. Relatively permanent standardisation forms which accompany mass society are increasingly transferred to a flexible functional combination aimed at continual change⁸¹. Demands on the labour force are increasing and becoming more varied, on the other hand, technology becomes more flexible⁸² and the change between the forms of contract and organised co-operation is made easier⁸³. From this, there also emerge new problems for the representation of group interests in the institutions of the social state⁸⁴; their cognitive functions are called into question, in particular the unification and standardisation of interests in collective forms of co-ordination; this is true especially of trade unions, but also of parties⁸⁵. The traditional forms of social

⁷⁹Cf. M. Crozier, *L'entreprise à l'écoute*, Paris 1991; id., *Etat moderne, Etat modeste*, Paris 1991; id., *Le changement dans les organisations*, Rev. Fr. d'Admin. Publ. 1991, 349.

⁸⁰Cf. M.J. Piore/Ch. F. Sabel, *The Second Industrial Divide: Possibilities for Prosperity*, New York 1984.

⁸¹For a theoretical Reconstruction of the enterprise cf. J.L. Le Moigne, *Systémographie de l'entreprise*, Rev. Int. de Systémique, 1987, 499; G. Sapelli, *Forme d'impresa e sviluppo dei mercati*, in: G. Origgi(ed.), *Il divenire dell'impresa*, Milano 1993, p. 21; Nonaka, *ibid*.

⁸²Cf. G. Dosi, *Sources, Procedures and Macro-Economic Effects of Innovation*, J. of Ec. Lit. 1988, 1120.

⁸³For the analysis of complex long-term contracts cf. Ch. Joerges (ed.), *Franchising and the Law*, Baden-Baden 1991; G. K. Hadfield, *Problematic Relations: Franchising and the Law of Incomplete Contracts*, Stanford L.R. 1990, 927.

⁸⁴Cf. for the role of trade unions Rosanvallon, *ibid*.

⁸⁵For the effects of this process on the evolution of the administration, cf. K.-H. Ladeur, *Von der Verwaltungshierarchie zum administrativen Netzwerk*, Die Verwaltung 1993, 137.

representation can no longer be unproblematically attuned to the new variants of the heterogeneity and flexibility of functional organisation and co-operation.

One of the new phenomena is also the appearance of long-term unemployment⁸⁶ which decreases very little, if at all, even in times of more favourable economic development, and whose description makes visible the limits of the cognitive possibilities of the institutions of social-state. The explanation of long-term unemployment is the object of a controversy symptomatic of the problems of the self-description of complex societies indicated above. Various organisations and groups each attempt to present their respective points of view in public and to push the responsibility onto another organisation. There are substantial counter-arguments against all explanatory models. Against the background of the developments to increase social complexity, described above, the assumption seems the most plausible - without this assertion here being made more precise - that we are concerned with a phenomenon of diffuse causality to which a multiplicity of factors have contributed whose causes cannot easily be traced back⁸⁷. Interestingly enough, at a time when, in ecological discussions, the phenomenon of complexity and obligation to decide under conditions of uncertainty gains more and more recognition, in discussions concerning social causality, the search continues for a uniform, problem-solving strategy. This is the more peculiar as the phenomenon of increased social complexity as such is not denied; nevertheless, the institutionalised discussion of simple alternatives prevails: one tendency wants to change the co-ordination of individual paradigm and its remodelisation by the social-state in favour of the first component (neo-liberalism) and to make possible more individual responsibility, the other tendency seeks to mobilise the

⁸⁶Cf. Snower, *ibid.*; Krugman *ibid.*

⁸⁷Cf. Krugman, *ibid.*; Siebert, *ibid.*

responsibility of the state to compensate for the observed functional weakness of the market economy by re-distribution and state intervention. One may also observe here the phenomenon of "superstitious learning": although in all Western European countries, the state itself, its organisation and its achievement, have been weakened to a much greater extent by the processes outlined than has the private economy⁸⁸, and though its capacity to solve problems in many areas approaches that of the destroyed socialist state, the normative claim of the state - to be potentially responsible for everything - is simply taken to be literally true: although its present tasks already threaten to overtax the state, it should also "create jobs", without it ever being seriously questioned which cognitive efficiency the state can develop for this.

b) The new "social epistemology"

The central problem, however, according to the above, seems to consist first in the fact that - to take up the example once more - neither the causes of long-term unemployment will be easy to explain nor, as a consequence, will it be easy to determine which strategy with relatively great probability will at least not lead to a worsening of the problem or to its being pushed into another field of activity. Here also, environmental policy supplies some painful learning processes⁸⁹: it is not seldom that good intentions have proved to be bad advisers.

It would depend, therefore, first also on acceptance of the assumption that, with the increasing complexity of society, new forms of the collective, no longer

⁸⁸Cf. M. Crozier, *ibid.*, (Etat ...); H. Mentzen, *Schlanksheitskur für den Staat*, Frankfurt/M.-New York 1994; D. Grimm (ed.), *Staatsaufgaben*, Baden-Baden 1994.

⁸⁹Cf. generally J. Leca, *Sur le rôle de la connaissance dans la modernisation de l'Etat*, *Rev. Fr. d'Admin. Publ.* 1991, 185, 194.

rule-orientated, but flexible, functional combination of development-possibilities, (“scenarios”), overtax the risk management of the stably organised pluralism of the social state, including its cognitive-constructive forms of self-description. Cognitive forms attuned to rapid self-transformation, for their part, may only be understood as integrated into a dynamic process⁹⁰: the new model of a “social epistemology” should above all be adapted to the fact that activity is much more closely combined with cognition and, thus, the idea of a permanently formulatable explicit rule-observance which separates the general and the particular must be abandoned⁹¹. This is a consequence of the accelerated self-transformation of society.

The constructive moment of self-observation and external observation⁹² gains in significance when the stable distinctions and attributions are superseded by variable, functional distinctions. By this, the search for new, permanent, stable rules is made impossible, its place must be taken by strategic **model formation** under conditions of uncertainty⁹³: as a standard of correctness, only the “viable”, self-confirming practice can be valid, which has to be explicitly attuned to learning, in a provisional rationality of experimenting with relationing-possibilities. In such a context characterised by complexity, modelling distinguishes itself from the norm, as from the prognosis, in that it integrates through a multi-factor prospective method specialist knowledge and action, thus, does not presuppose the separation of knowledge (norm) and

⁹⁰For political and constitutional consequences cf. Grimm, *ibid.*, (Die Zukunft...); for the evolution of social conflicts cf. Rosanvallon, *ibid.*

⁹¹Cf. Leca, *ibid.*

⁹²Cf. generally N. Luhmann, *Beobachtungen der Modernen*, Opladen 1992.

⁹³Cf. generally G. Kampis, *On the Modelling Relation, Cybernetics and Systems* 1988, 131; G.F. Lanzara, *Capacità negativa*, Milano 1993, esp. p. 24; T. Winograd/F. Flores, *Understanding Computers and Cognition*, Norwood 1986, p. 116.

practical application⁹⁴.

This will not be dealt with in detail here. What must be emphasised for the purposes of this analysis, however, is that for the problems of increased complexity there can be no simple solutions, but only an experimental rationality of the drafting, testing and observation of construction-models which are aimed at the observation and "scanning" of diffuse, social causality and side-effects on the possibility of the generating of new, practical knowledge and productive forms of operating with and under conditions of uncertainty⁹⁵. Thus, on the one hand, the collective attribution of risks cannot simply be reversed, above all because the social assumptions of classical liberalism no longer exist. On the other hand, the durability of the collective processing of risks is dependent on many pre-requisites, and it also always implies the development of strategies of risk-avoidance and risk-limitation. Thus the assumptions of social work in society can also be destroyed, not least by those who are always demanding new benefits for their clients without even ever seriously taking into account in their model-assumptions the risk of undesired side-effects.

c) The problem of the co-ordination of institutions

Strategies for the collectivisation of risks must integrate forms of an active management of risks supplemented by the development also of individual avoidance-strategies, which maintain the flexibility of coping with risks. In general, the solidarity, which in the form of a contribution to the safeguarding against the new risks of accelerated self-modification of society can certainly be demanded, can only find its counterpart in a strategy of the maintenance and

⁹⁴Cf. J. Lesourne, *Le futur et ses scénarios*, Magazine Littéraire 312 (1993), 29; H.A. Simon, *Prediction and Prescription in Systems Modeling*, Operations Research 1990, 7.

⁹⁵Cf. Favereau, *ibid.*; Lesourne, *ibid.*

improvement of individual and organisational adaptability⁹⁶ to changing demands with which the state could link to the earlier cognitive achievements of the liberal model of law in a new and more complex variant of the reduction of, and the operating with, uncertainty. Thus, normatively new tasks⁹⁷ must not be simply demanded from the state, much rather, it should be asked what its efficiency (and its limit!) was in the classical-liberal model of law and to what extent there have been maintained in this specific connexion-possibilities for the reconstruction of state problem-management under conditions of complexity.

The decisive change which the "second order" remodelling of the complex orientation-functions of the classical legal paradigm would have to display would consist, above all, in the recognition of a transition which does justice to the heterarchic-horizontal patterns of generation and combination of new possibilities and is aimed at the processing of stochastic-probabilistic forms of order-formation. In the following, an attempt will be made to sketch the outlines of a concept of **proceduralisation**⁹⁸ which - in contrast to a substantial rationality orientated to rule-observance - has to **model**⁹⁹ not only the spectrum of the possible options but also the domain of options, which can no longer be pre-supposed as anchored in law. In this, it must be accepted that ill-structured problems permit no permanent "deductive" rationality but can only be managed in experimental, interactive forms connecting knowledge and action.

⁹⁶For the fundamental role of adaptability in complex societies cf. Simon, *ibid.*, (Organizations ...); for cultural impediments of its generation cf. D. Bell, *Zur Aufklärung der Widersprüche von Modernität und Modernismus, Das Beispiel Amerikas*, in: H. Meier (ed.), *Zur Diagnose der Moderne*, München/Zürich 1991, p. 21, 48.

⁹⁷Cf. H.A. Simon, *Rationality in Psychology and Economics*, in: R.M. Hogarth/M.W. Reder (eds.), *Rational Choice: The Contrast between Economics and Psychology*, Chichester 1986, p. 25.

⁹⁸Cf. Simon, *ibid.* (Rationality as Process...).

⁹⁹Cf. Favereau, *ibid.*

The reconstruction of the institutional infrastructure of society and its adaptation to uncertainty is confronted with problems which it is difficult to describe and which the monism of a moral-ethical discourse cannot do justice to. The institutionalised legal framework determines, above all, the production and acquisition of knowledge, which is necessary for the maintenance of individuals' relational ability in the face of rapidly changing demands¹⁰⁰. This cognitive emphasis is the more important as it is especially the society of organisations which not only, like every society, generates productive and unproductive knowledge, but, to a far greater extent than the liberal society of individuals, is exposed to the risk of following destructive paths. Productive, knowledge-generating and knowledge-disseminating institutions produce beyond their field of validity self-reinforcing connexion-possibilities which are decisive for the longer-term stabilisation of society. The observation of to the traditional, liberal legal model is productive in so far as in the retrospective the assumption may be ventured that it is aimed systematically at the search for and the testing of alternatives and "uses" the individual for the construction of a network of informal conventions and co-operation-possibilities about which also, beyond explicit rules, an implicit knowledge, bound to the relationship-network, is made possible. This knowledge, which is dispersed throughout a complex network of interrelationships¹⁰¹ and cannot be systematised in explicit rules, is generated by the "discovery process" of competition¹⁰² as an emergent unintended side-effect of individual decisions. D. C. North¹⁰³ has with justice pointed out that

¹⁰⁰Cf. Dubet, *ibid.*

¹⁰¹Cf. M. Polanyi, *The Tacit Dimension*, Garden City 1966; R. Mayntz, *Modernization and the Logic of Inter-organizational Networks, Knowledge and Policy* 1993, 3.

¹⁰²Cf. Hayek, *ibid.*; cf. generally H. Bouillon, *Ordnung, Evolution und Erkenntnis*. Hayeks Sozialphilosophie und ihre erkenntnistheoretische Grundlage, Tübingen 1991.

¹⁰³Cf. North, *ibid.*

we still have difficulty understanding the development of adaptive, self-sustaining, productively self-re-inforcing, social sub-systems and the contributions to be made, by institutions. It is, however, precisely the revelation of these difficulties which is one of the enduring achievements of liberal law. It opens simultaneously connexion-possibilities for more complex descriptions which are focused on the management of new forms of uncertainty.

The cognitive problem outlined is determined in the area to be investigated here, above all, by the fact that a large part of the problems of those people who are, in the wide sense, dependent on social services, is only accessible through descriptions by the organisations or institutions¹⁰⁴ who certainly have a vested interest, for example, in the maintenance of cost-intensive programmes of care which at least secure the jobs of carers, whereas the responsibility for the maintenance of dependency can be otherwise attributed.

The non-liberal critique of liberal institutions, which from the outset focus on the management of uncertainty and, for this purpose, rely on a stock of plural mechanisms for searching and testing the new, was, and is, characterised by a lack of institutional thinking, which would enable a comparison of the advantages and disadvantages of competing models. This is even more valid for the strategy of "materialisation" and the discourse-ethical version of proceduralisation of civil rights as both variants more readily reduce the economic system to a system for the distribution of goods and ignore the autonomy of the problem of separation between and attribution of individual and collective **responsibility** or make it one subject of discourse-ethical public reflexion amongst others, without even making an attempt at an appropriate description of the economic system.

¹⁰⁴Cf. E. Katznelson, *The Welfare State as a Contested Institutional Idea*, Politics and Society 1988, 517, de Swaan, *ibid.*, p. 249 ss.; F. Perroux, *Au delà du Welfare State*, *Economie Appliquée* 1984, 99, 114.

First of all from looking back at the management of uncertainty through liberal institutions and, in particular, the necessity of the maintenance of the self-organisation of the sub-systems of society as a form of its processing, it follows that the direct "material" take-over of the responsibility for consequences by the state is itself a risky strategy because the state especially, as an organisation, has numerous possibilities for their dispersal which make difficult the observation of the question of attribution.

d) "Hybridisation" of the culture - the reverse side of the weakening of traditions

The weakening of traditions - reproduced through **implicit** practices, routines and values - which take place under pressure of the accelerated self-modification of society, increases the significance of **explicit** cultural mediation and, simultaneously, makes more difficult its adjustment to, in particular, the system of production. Under conditions of complexity, a learning of the second order is necessary, that is, the generating and maintenance of a procedural capacity to learn; learning of the first order (internalisation of relatively stable, substantial values) is no longer sufficient. The paradoxical combination thus required, of long-term relational ability and short-term, flexible adaptability seems to overtax, at least in part, families and schools especially; at least, up to now hardly any orientation formulae have been found which are practicable and which can be put into operation. The consequence of this development is a hybridisation of culture: on the one hand, its achievements for the "mobile" society become more and more important, on the other hand, under conditions of complexity, its contributions to the development of forms of mutual adjustment between social sub-systems, including culture itself, weaken. Thus develops a problematic variant of autonomy of culture which combines diffuse

aims (self-determination and self-realisation, “ecology”, peace, equality, harmony etc.) with a claim to immediacy and which remains institutionally underdeveloped. Whilst earlier, differing variants of discipline opened access for differing social classes to the constraints and possibilities of a presupposed reality for today’s culture a diffuse heterogeneity of variants of self-realisation is characteristic, a heterogeneity characterised by unmanaged complexity and which, in the end, paradoxically reinforces inequality because it overtaxes the “sorting” and orientation achievement of the family. Its weakening releases more and more variants of a negative individualisation which is characterised by a lack of connexion-ability and adaptability to socially imposed obligations or by a lack of the ability to operate productively with the possibilities thereby created. Investments in longer-term developments are thus - contrary to the oft-expressed claims - impeded, because there is a lack of institutionalisation. Connected with this, is the risk of a process of de-civilisation: the reproduction of flexibility and adaptability, of orientation-knowledge which makes actions possible and of social values which make possible behavioural adjustment, is blocked by the increased possibilities of following negative, individualistic paths (drugs, violence, lack of willingness to learn, self-isolating subcultures etc.). Since these phenomena apparently arise precisely in those youthful years when learning ability is at its peak, problems with long-term repercussions are created as a matter of course, problems which later can only with difficulty be compensated for in many cases, even with lavish social integration aid¹⁰⁵ (cf. also below).

¹⁰⁵Cf. Simon, *ibid.* (Organizations...).

5. Coupling social policy and industrial relations

a) "Workfare" or the subsidising of low wages?

Longer-term unemployment is always accompanied by the risk of the loss of qualifications and of work discipline. The "payment of work instead of unemployment" is, however, contrary to appearances, in no sense a simple strategy¹⁰⁶ because the creation by the state of new jobs is inevitably linked to the risk of endangering other jobs or the opening up of unproductive paths of development. This is especially true of the creation of jobs in the state sector itself: the division of labour can have thoroughly negative repercussions for work motivation if the feeling of being really needed is thereby lost. The same is also true of so-called "workfare"¹⁰⁷, if, and to the extent that, the "employment" aim becomes an aim in itself and the control of part-time workers with few hours in public administration additionally leads to the dilemma that the alternative of non-work would itself be, from the perspective of the social administration, an undesirable effect.

The incentive to **create** new jobs requiring low-level qualifications in the private sector is something which should be considered very seriously as a

¹⁰⁶Cf. J.L. Laville, *Etat et société au déficit de la solidarité*, Esprit 1994 (no 8/9) 69; B. Eme/id., *Cohésion sociale et emploi*, Paris 1994; generally Siebert, *ibid*.

¹⁰⁷Cf. L. Mead, *Beyond Entitlement. The Social Obligations of Citizenship*, New York 1986; *id.*, *The New Politics of Poverty. The Nonworking Poor in America*, New York 1992; for a critique cf. M. Gilbert, *Why the New Workfare Won't Work*, *Commentary* 1994 (May), 47; see also L.A. Jacobs, *Rights and Deprivation*, Oxford 1993, esp. p. 198; Rosanvallon, *ibid*. (*La nouvelle question sociale...*), p. 170 ss.; S. Danziger/D. Veinberg (eds.), *Fighting Poverty: What Works and what Doesn't*, Cambridge/Mass. 1986; for an economic analysis see T. Besley/S. Coate, *Workfare versus Welfare: Incentive Arguments for Work Requirements in Poverty-Alleviation Programs*, *Am.Ec.Rev.* 1992, 249.

candidate for a public experiment aimed at supplying new possibilities¹⁰⁸. The tendency to eliminate such jobs is so often described that it can hardly be called into question. This is connected not least to rigid, collectively agreed regulations, which show simultaneously that, and how, the production of undesired effects can be linked with the process of standardisation characteristic of social state group-pluralism (corporatism). Collective agreement does, indeed, in many cases, aim at an increase in the income for low-level qualification jobs via a "social" component of fixing the wages; simultaneously, however, precisely through this an incentive is created to eliminate such jobs. On the other hand, there actually exists in this area the danger of creating a social underclass of "working poor"¹⁰⁹ who cannot live on their wages alone. In order to deal with this problem the instrument of the (graded) wage subsidy has been suggested¹¹⁰ which is intended to create a wage incentive but, on the other hand, avoid the social danger described, as well as maintain the distance

¹⁰⁸For an explanation of long-term unemployment cf. Snower, *ibid.*; Krugman, *ibid.*; Ch. R.Bean, *European Unemployment: A Survey*, J. of Ec. Lit. 1994, 573; Reynaud, *ibid.*; critical sociologists back the assumption that the solution of the problem of long-term unemployment lies outside the labour market, cf. C. Offe, *Arbeitsgesellschaft*, Frankfurt/M.-New York 1984, p. 104 ss.; G. Vobruba, *Die Entkopplung von Arbeit und Einkommen*, Widerspruch 1989, 79; but leading economists quite plausibly point to the fact that there is no clear relationship between the rise of productivity and the rise of long-term unemployment. For the popular illusion of public re-distribution of work cf. P. Boisard, *Partage du travail: les pièges d'une idée simple*, Esprit 1994 (no. 8/9), 44; the idea of "uncoupling" welfare and labour relations comes close to a kind of "socialism within capitalism" with all the risks that led "real socialism" into failure.

¹⁰⁹Cf. generally Herpin, *ibid.*; G. Lafer, *The Politics of Job Training*, Politics and Society 1994, 349.

¹¹⁰Cf. esp. E.S. Phelps, *Low Wage Employment Subsidies versus the Welfare State*, Am. Ec. Rev. (papers and proceedings) 1994 (no. 2), 54; D.J. Snower, *Converting Unemployment Benefits into Employment Subsidies*, Am. Ec. Rev. (papers and proceedings) 1994 (no. 2), 65; P. Dehez/J.P. Fitoussi, *Revenu minimum, allocations-chômage et subventions à l'emploi*, Observatoire Français des Conjonctures Economiques, Paris, Nov. 1993; Ph. van Parijs (ed.), *Arguing for Basic Income. Ethical Foundations for a Radical Reform*, London 1992; critically Rosanvallon, *ibid.* (*La nouvelle question sociale...*), p. 122 ss.

between the next highest group of “marketable” workers. The possibilities this offers for misuse are clear to see: in economically weak branches, trades unions and employers could come to an agreement about such wages and thus impede an adaptation of the system of collective agreement to the economic framework. Nevertheless, the testing of this model must be considered in face of the danger of the development of an underclass completely cut off from working life and economic life. It could be considered to allow the opening up of this possibility only through collective agreements which, with regard to the possibilities of misuse mentioned above, would have to be judged and evaluated in their execution by independent experts with the co-operation of welfare associations.

This strategy differs from conventional, traditional, public job creation measures in that the market value of the work achievement is more emphasised and, therefore, integration into a (private) enterprise follows more readily¹¹¹. It would be a strategy which is, in no sense, risk-free, but which could partly protect a part of the poorly-qualified workforce from the risks of accelerated self-modification of the economic system without exhausting itself in mere financial compensations. Such a solidarity contribution by better-earning employees would be - and this is a point - easier to justify precisely because the subsidised employees would indeed make a contribution within the framework of their possibilities, which, for example, could also be that the tendency to “rationalise away” services would be curbed. This conception could also be more plausibly linked to the existing network of institutions and the process of its self-transformation.

Those experiments already carried out with wage subsidies show clearly, however, that the mere (re-)distribution of work is no simple solution. To a large

¹¹¹The State can fulfill its function as a kind of basic public “insurance organization” by reducing the risk of employing long-term unemployed people, cf. for a German governmental programme *Frankfurter Allgemeine Zeitung*, 16/9/1994, No. 216, p. 15.

extent, the attempts proceed, for various reasons, very unconvincingly, above all, because - as indicated above - the capacity for longer-term commitments, for integration into and adaptation to the possibilities and obligations of complex, social relationship-networks is under-developed and the readiness for risk-behaviour is over-developed.

b) The necessity of co-ordinating social policy programmes with the totality of institutions

The structures of employment promotion cannot and will not be examined in detail here. Some examples will merely be given to show that, and why - this is also to be asserted in connexion with the recourse to the classical, liberal model of law - the necessity for new, collective conventions and descriptions of risk-attribution and risk-distribution continues to exist. The weakening of the group-pluralistic "meta-convention" has given rise to clienteleism which turns into rent seeking to the disadvantage of third parties. Readiness to set up new conventions including external interests is declared and, simultaneously, made dependent on conditions which are hard to fulfil, and again are addressed to the state or other collective actors. In this way, possessions and status may be successfully defended but in this way a long-term erosion of the capacity for social commitment is produced. Collective bargaining processes had presupposed the cognitive orientation-function of the corporatist order standardisation, and the conventions based upon it. But once this framework is severed because the domain of options itself is no longer given the risk that collective bargaining will lock in as a rent-seeking process is quite high.

The formulation of a new "meta-convention" is only possible on the basis of a stable, inter-organisational compromise which on the other hand is as difficult as it is in unstructured international regimes which also tend to recede

to orientation at short term benefits¹¹². But as the interdependence in national neo-corporatist settings is much more evident a new frame of interorganisational reciprocity should be conceived of.

The commitments to be set up cannot be made in legally binding forms but it would be important to find a new functional equivalent to the diversity of relationship-networks, guaranteed on the first level of the liberal model by security of expectation and trust, after the social state model of **inter-organisational** networks of the communication between pluralistic groups on the basis of the standardising-achievements of mass production (which in the past made possible a thoroughly presentable cognitive order-formation) has at least partly lost its efficiency. The chances of this are, unfortunately, not good in the medium term because in the meantime in the traditional, representative organisations, despite decreasing integration-achievement, there is still little readiness to get involved in new modellings geared to complexity with which new spheres of possibility can be designed and tested. Precisely the comparison with the classical, liberal model shows that a society can generate new possibilities out of the extension of its perception of problems and decisions; possibilities which improve welfare as a whole. The insufficient institutional co-ordination of the descriptions of reality is also reflected in the unclear co-ordination of collective and individual risk-attributions.

Society must increase the complexity of its institutionalised and operationalized self-description, communicative agreement within the framework of linguistically conveyed inter-subjectivity cannot do justice to this requirement.

¹¹²Cf. Olson, *ibid.*; Bendor/Mookherjee, *ibid.*

6. The necessity of the connexion between the institutionalising of social aid and the learning capacity of society

a) The co-ordination of organised, collective action and of social constructions of reality

A new self-observation of the economic and social system which does justice to complexity cannot have its aim in the depiction of invariant, social legitimacy but should, much rather, attempt to model global effects on the basis of incomplete information open to differing interpretations and achieve a strategic inter-organisational co-ordination between state and associations through agreement on aim-means-correlation. It must here been insisted that the concern is not with mere compromise formation, much rather, a new, procedural rationality - as shown - must accept that knowledge and action are far more closely bound to each other than under the validity of the liberal paradigm¹¹³, which presupposed stable regularities. An example of a productive-constructive connexion of the cognitive potentials of state, of associations and of a science offering mediation could consist in a model of a labour policy supported by a comparison of differing national systems, that had as its intention, within the rationality of the provisional and the experimental, the description and the relationing of global social variables and their dynamic as well as seeking to distinguish productive and unproductive correlations. Thus may be distinguished stability-orientated, passive and active social states, as well as those characterised by distribution struggles¹¹⁴; in this way, a frame of reference is

¹¹³Cf. Lesourme, *ibid.*

¹¹⁴Cf. St. Huckemann/U. van Suntum, *Beschäftigungspolitik im internationalen Vergleich, Länder-Ranking 1980-1993*, (Bertelsmann-Stiftung), Gütersloh 1994; the accelerating process of self-modification of society has important consequences for the role of its "knowledge-basis": more and more dynamic-generative components of prospective design linked to action must be modelled, cf. Lanzara, *ibid.*, p. 24, 43, 83.

laid down which admits the relationing of differing variables and allows the formulating of hypotheses about their correlation with, in particular, long-term unemployment. The correctness of such a model cannot be proved; much rather, at most, a plausibility supported by practical testing is to be expected. In the perspective adopted here it would depend on connecting the descriptions with strategies for action which guarantee more flexibility and adaptability through generating new possibilities. In any case, the comparison of differing models reveals so many differences and confirms the supposition that institutions play an important role¹¹⁵ and the point is not to control the legitimacy of the economic system "from outside" through a moral system of the communicative rationality of argumentation. The proceduralisation of the model here outlined could consist in a constraint to a kind of self-evaluation of collective decision making with reference to side-effects and long term consequences.

The example of environmental policy shows that the management of complex problems can no longer be aimed at the winning of certain knowledge and the laying down of regularities **before** the decision, but that recognition and action must be connected with experimental forms of self-construction and self-observation. This signals a basic change in social orientation-knowledge.

In complex societies, the appearance of diffuse, undesired results must be reckoned with no less than in the natural environment. The basic forms of the description of nature **and** society formerly developed parallel, the idea of social

¹¹⁵Cf. generally J. G. March/J. P. Olsen, *Rediscovering Institutions*, New York 1989, who accentuate the necessity of coordination between the institutions of society; cf. also D. Sutter, *The Discovery of knowledge and Constitutional Systems: A New Perspective on the Provision of Public Goods*, JITE 1994, 401. For the cognitive function of liberal economic policy ("Ordnungspolitik") cf. G. Wegner, *Wohlfahrtsaspekte evolutorischen Marktgeschehens: Neo-klassisches Fortschrittsverständnis und Innovationspolitik aus ordnungstheoretischer Sicht*, Tübingen 1991, esp. p. 138 s. For environmental law cf. K.-H. Ladeur, *Coping with Uncertainty: Ecological Risks and the Proceduralization of Environmental Law*, in: G. Teubner/L. Farmer/D. Murphy (eds.), *Environmental Law and Ecological Responsibility: The Concept and Practice of Ecological Self-Organization*, Chichester 1994, p. 299.

legalities corresponded to the natural law and the transfer from the description of **events** (and their legalities) to the formation of a model through the relationing of **variables** in natural science finds its correspondence in the social sciences in a provisional rationality of modelling and of experimentation¹¹⁶. This thinking in global modellings has the advantage that it operates with connexion-patterns which correspond to the new type of stochastic-probabilistic knowledge which the society of organisations has itself produced. The practical conversion of such approaches into negotiation systems could make clear that there are systems of co-ordination which function well and less well, that, in particular, there are more stationary paths of development tending to self-blocking or that there are more dynamic, institutionalising and strategy variants which maintain their flexibility in different countries. It should then be asked how new self-blockings could be avoided and dynamic institution systems strengthened which maintain innovative capacity and generate diversity and flexibility. Differing variants of modelling should be developed which aim to develop new forms of the confrontation of society with self-created productive as well as unproductive compulsions and, thus, to include risk potentials, instead of letting them disappear in the complexity of the network of effects. The concern here is not, however, with new forms of the institutionalising of “expertise” but with the connection of action, recognition and observation through practical modelling consequences. Thus, for example, it should be considered whether the system of collective agreement could not, in this way, be made open to a procedural rationality that would compel both parties to create models about the repercussions of the demands to be negotiated, according to a specific framework of criteria, and with this model, or, more precisely, with the probably two alternative models, to observe the subsequent economic development.

¹¹⁶Cf. Ladeur, *ibid.* (Coping...).

Longer term, a kind of concerted action could emerge from this whose aim could consist not even in the laying down of a certain global model but, much rather, in the maintenance of the **compatibility** of plural models and, thereby, of the comparability of their results. The concern is, above all, to find, through explicit modelling, a functional equivalent to the earlier “social epistemology” of the liberal paradigm, which had been determined by simple pre-suppositions of causality and probability as well as individual attribution. This would be the practical consequence of the attempt made here to link up to the cognitive rationality of the liberal legal paradigm. In environmental policy, the instrumental rationality of simple attributions and interventions is in decline, in social policy, by contrast, the “end-of-the-pipe” strategy of distribution dominates.

In the following, these general reflections will be made more specific with regard to the social services.

b) Clientele-orientation as a symptom of the dissociation of social services and achievements from the system of social institutions

Firstly, it must be emphasised that precisely that clientele-orientation¹¹⁷ which is widespread amongst social workers is extremely problematic: social aid and social services can only be legitimatised as **social** institutions of collective risk-management. This requires that administrative risk-management must be functionally controlled and that individual risk-avoidance and risk-limitation must be promoted. This means, further, that the contribution of the citizen must be honoured by the administration as well as by the recipients, a thesis which, in many cases, is denied by social workers both in theory and in practice

¹¹⁷Cf. Twight, *ibid.*; de Swaan, *ibid.*, p. 249 ss.; J. Becker, *Der erschöpfte Sozialstaat. Neue Wege zur sozialen Gerechtigkeit*, Frankfurt/M. 1994, p. 25.

because it is seen as being synonymous with a degradation of the recipients - quite unjustly because the forms of dealing with social aid through the administration carry much less weight also for the recipient than the perception by the public: if the granting of social aid through the public - because of widespread abuses or decreasing legitimisation of social aid in general - is no longer accepted and is seen as a compulsion, which may already be the case to a large extent, this has grave consequences for the status of the recipient which cannot be compensated for by the ideology of the social workers. Conversely, the decline in inhibitions about claiming social aid, but also the capriciousness of the benefit limits, leads to financial circumstances being, to a large extent, concealed, this state of affairs being encouraged by the banker's duty of secrecy¹¹⁸. Many social workers regard it as a law of "solidarity" when the new, in part striking injustices produced by the social state itself¹¹⁹, which are produced precisely within that group of people with a low or no income, are simply suppressed. It should also be mentioned that in Germany it cannot be recommended for an old person to have savings because, should this person need nursing care, the difference between pension and the now horrendously expensive costs for care are paid by the social security office, the savings only delaying the take-over of responsibility by the state. The representatives of nursing homes are already advising their clients semi-officially how they can rescue their savings. This is merely one indication that in this area a sense of injustice is, to an increasing extent, on the wane and this is completely understandable since an elderly person has to say to herself or himself that the social security office cannot actually be "better-off" because she or he has saved

¹¹⁸Cf. from the perspective of a German Mayor, Becker, *ibid.*, p. 141 ss., 155; De Swaan, *ibid.*, p. 255.

¹¹⁹The institutional weakness of moral theories of "social" rights does not allow for any sensibility concerning unintended side-effects of good intentions.

money instead of spending it at once, as perhaps the person lying in the next bed has done.

The sum total of the losses arising through “social deception” may be small in relation to crimes connected with subsidies - an argument regularly put forward by the defenders of the social state system - but the politico-moral damage is, nevertheless, the greater because one cannot, without danger, dissociate social aid and social services from a duty to solidarity: the citizen, whose solidarity has become a bothersome compulsion, carries out her or his own form of revenge by cheating the state, especially in regard to the payment of taxes, a practice which is rapidly increasing, also in Germany where, formerly, honesty in tax matters tended to be at a high level. Especially in countries like Sweden and Denmark (but, to a certain extent, also in Germany), social benefits (outside the sphere of social aid!) are claimed to a great degree and especially from the relatively high-earning middle classes¹²⁰. This is partly justified by the allegedly protective effect of a form of the granting of benefits which is non-discriminatory also towards the socially vulnerable. That schooling and higher education should, in general, be free of charge is, however, hard to justify.

The social sector (including those employed in the social services) has become so severely stretched in many social states that state payments can, therefore, no longer be perceived as compensatory because the system of redistributions and refunds has become fully incomprehensible¹²¹ and, because of its capriciousness with points of justice, it is hard to legitimatise it. How shall one, for example, regard the fact that an employee with a good income has to pay a socially graduated - that is, for him, a high - contribution towards the

¹²⁰Cf. Lindbeck, *ibid.*; de Swaan, *ibid.*, p. 255; Becker, *ibid.*, p. 81; Ch. Howard, *The Hidden Side of the American Welfare State*, *Pol. Sci. Q.* 1993, 403.

¹²¹Cf. de Swaan, *ibid.*, p. 155.

nursery school fees of his 5 years old child whilst the school education of his 7 years old child is not only free of charge but the state also pays for drawing paper and crayons ("school equipment")! Why should a member of the middle classes who has to pay a lot of money for the studies of his children who are studying away from home find it just that he also, through his taxes, has to pay for the studies of the ungifted and "unmotivated" children of his neighbour? He then "takes it into account" in his tax declaration.

The fact that many people do not see the ineffectiveness of the social state is because they themselves profit from it in one form or another and behave as "rational ignorants" with reference to the intransparent rules of the whole system.

c) A comparison: liberal rights and the institutionalising of trust

The classical liberal paradigm of law was characterised precisely by the fact that through its distribution of veto positions it made possible the erection of a self-supporting network of relationships, through which network a great variety of new options were generated. Conversely, the knowledge implied in this network can be acquired by individuals in numerous ways and processed in decisions which, for their part, bring new possibilities to the system¹²². The paradigm guarantees normatively a high degree of adaptability and flexibility which is supported by the system of individual attributions. Principles which are difficult to manage or other "meta problems" which cannot be put into practice

¹²²Cf. generally Hayek, *ibid.*; concerning the importance of trust for the evolution of the legal system cf. Seligman, *ibid.* (trust...).

or which would block the dynamics of the production of new possibilities are neutralised through the separation of private and public. The central significance of the maintenance of a productive, diverse knowledge-generating of network relationship recedes within the liberal model behind the right of defence aspect only because this effect can only be guaranteed **indirectly** through the system of institutions but not directly through aim-orientated measures¹²³. The system itself rests on many assumptions, it is in no sense the product of spontaneous interindividual exchange processes but depends on the functioning of highly complex institutions, and not only legal ones¹²⁴. In its self-description, however, it emphasises the functionability of the **means** (whilst non-liberal critique stresses the necessity of setting up a substantive rationality of purposes).

It is precisely the fact that this system of institutions rests on so many presuppositions which makes it thoroughly accessible to changes and extensions, especially those which react to new risk-potentials. It is decisive, however, that also in the institutionalisation of new forms of risk-management, the paradigm of "mediation" is observed, that is, that also under conditions of complexity only the increase of the reactivity and flexibility of the social relationship-network as a whole through adapted ("viable") institutions can be striven for but not the direct "material" problem solution. This is, of course, merely a general rule, which admits of exceptions, which, however, there again - this also compels the necessary distinction between centre and periphery within a system of institutions - must be observed to see whether they influence the reactivity of the a-centric self-organising network of interrelationships through undesired side effects.

¹²³Cf. generally A. Seligman, *The Idea of Civil Society*, New York 1992.

¹²⁴For the cognitive role of institutions cf. Heiner, *ibid*.

For the new institutions of the collective attribution of social risks and their management (unemployment insurance, job creation, social aid etc.), the connexion to the general system of institutions is, therefore, necessary, a condition which can be considered as being completely fulfilled for the first remodelling through social state group pluralism (macro-corporatism), whilst for the second level of complexity of the social state this has become increasingly questionable.

The collective assumption of risk is based on a different type of knowledge, namely, probabilistic-stochastic knowledge which, consistently enough, also has to find a counterpart in a complex type of decision, namely, the formation of a model on the basis of experimental self-descriptions and external-descriptions. If social risks are generated through organisations and inter-organisational networks (and no longer spontaneously through the combination of individuals), the way of operating of the institutions of social risk-management must also be **construed** through modelling appropriate to the stochastic-probabilistic forms of knowledge. This process modelling is to be systematically so focused that no more unambiguous causal attributions can be stated. If, within the liberal frame of reference, “negative” right (“vis-à-vis the state”) is disconnected from the indirect contribution to the maintenance of a network of relationships which makes possible trust and innovation, then this can be simultaneously regarded as the reason for the misconstruction of material social rights. They are reduced to the nature of a claim, whilst the question about the side effects, therewith associated, on the general reactability of the relationship-network of society, functioning as a pool of variety, is averted; in an anti-thetical interpretation, to the construction of the “negative right”, the “material” right is relieved of the responsibility for the consequences just as is

the negative¹²⁵. In this, however, it is misjudged that the relieving of the consequences of "negative right" relates only to the individual decision because the consequences cannot be observed in detail but, as a whole, trust is placed in the self-organisation capacity of the relationship-network. This is reflected in the imposition of an abstract legal commitment of the holder of a right: she or he doesn't (within the framework of the law) need to bother about the concrete consequences ensuing from the exercise of a right in the field of freedom of contract because she or he has a general duty only to the legal institutions which are to make possible a generalising of trust. A comparable duty of allegiance, namely, not to overtax the institutions for risk-management, therefore has even more to be combined with social rights. Moreover, the institutions of liberal law and of social aid in the wider sense (just as those of the group-pluralistic social state) must also, however, be linked to those of the liberal model of law. This can only ensue through a modelling of relationing-patterns, using the stochastic-probabilistic stocks of knowledge, which are no longer based on the observation of events but on the relationships between abstract variables. That such a model-building attuned to the institutionalised management of complex risks is not only a necessity, but also a possibility, is shown by analyses which reveal wide differences between the social state models of various West European countries and which cannot be reduced to mere quantitative forms of distribution¹²⁶. This is a kind of knowledge which must be reintroduced into the new institutions managing collective risks because the "natural" observation of

¹²⁵The "bi-polar" construction of formal and substantive rights tends to ignore the positive side effects of the exercise of "negative" rights which generates new possibilities within the social pool of information which can be used by other individuals, cf. K. Arrow, *Methodological Individualism and Tacit Knowledge*, *Am. Ec. Rev.* (papers and proceedings), 1994 (no. 2), 1.

¹²⁶Cf. Huckemann/van Suntum, *ibid.*; for the concept of modelling cf. also Lesourne, *ibid.*; K.B. De Green, *The Challenge to Policy-Making of Large-Scale Systems*, *J. of Theor. Pol.* 1994, 161, 182.

interrelationships between events and, therewith, the accumulation of experience is no longer a reliable mechanism of knowledge generation.

The liberal paradigm of law and its group-pluralistic re-modelling through the social state “of the first order” could still operate with relatively fixed assumptions of continuity and attributions whose basis had been the assumption of “natural” distinct levels of complexity. Causality assumptions can be considered as **permanently** stored decisions which can no longer be basically called into question in those descriptions of reality operating with them¹²⁷. Complex societies, however, have themselves to construe and re-construe the “spheres of possibility”¹²⁸ in which they operate, they can no longer assume a reality accessible to general experience which is prestructured through stable regularities. Therefore, it is also so important that social groups draw up co-ordinated, strategic model-assumptions which integrate knowledge and action. The installation of “expertise” into political advice cannot guarantee this. Points of distributive justice should not distort the awareness that the primary concern is so to conceive **institutions** that they increase the reactivity of society in general. Wrongly construed institutions which do not do justice to innovation, and do not help society to confront itself with the consequences generated by its own reproduction process can set in motion a dangerous downward spiral. Under conditions of complexity, co-operation can no longer be guaranteed through rules of behaviour for individuals; much rather, the organisations, as the central attribution-units, have to accept non-decidability and to construe common spheres of possibility attuned to self-revision. Only through a system of the formation of conventions about “viable” constructions of possibility can the

¹²⁷Cf. F. Heylighen, Causality as a Distinction Conservation, *Cybernetics and Systems* 1989, 361.

¹²⁸Favereau, *ibid.*

fragmenting of knowledge also be limited, whose complexity nowadays overtaxes the traditional institutions for the transmissions of social stocks of knowledge to succeeding generations, in particular, the family and the school.

7. Social administration - administrative rationality - social aid

a) Organisational problems of social administrations - the construction of social problems and their evaluation

If one looks at the function and position of social state and non-governmental social bureaucracies and, in connexion with the above, links them to the other institutions of the organised social state and the liberal constitutional state, the hypothesis may be advanced that the - through moralising arguments - increased weight of the "materialisation" of social rights finds a not unproblematic support in the way these organisations see themselves¹²⁹: the emphasising of "negative" formal rights characterised by the relieving from consequences, finds its counterpart in the fact that pre-requisites and consequences of paying **benefits** are made completely opaque through the bureaucracies¹³⁰. In contrast, it would be important to attach once again the social services (in the wider sense) to the other parts of the system of institutions and, in particular, to take into account the maintenance and reinforcement of the reactivity of the relationship-networks of society as a

¹²⁹For a system theoretical reconstruction cf. D. Baecker, *Soziale Hilfe als Funktionssystem der Gesellschaft*, *Zeitschrift für Soziologie* 1994, 93.

¹³⁰This is one of the symptoms of a lack of coordination between societal institutions.

whole¹³¹. This is only possible when one establishes priorities and emphases at the local and regional level, which are processed in models doing justice to complexity and are observed and evaluated in their "application". In this, "materialisations" - whose abstractionism far exceeds that of the (allegedly) empty formalism of the liberal paradigm of law - have to be replaced by the subtly differentiated search for and description of risk-potentials, which particularly endanger the personal, familiar, local relationship-networks and their reactivity. In this, it would need to be asked where means could be used most effectively and where the concern is, rather, with the guaranteeing of a minimum provision without the prospect of a mobilisation of autonomy. This aim can only be achieved when the narrow clientele-orientation of social work is replaced by a more comprehensive understanding of social welfare.

The social services must first correlate their aims and means more exactly, adjust their organisation to this and develop internal evaluation and control¹³². Only on the basis of well-structured management external evaluations which can assess the degree of aim-achievement are reasonable. Evaluation should not be equivalent to economising (= "saving"), much rather, it would be important, also on the level of the individual social services, - to design conceptions of social risk-management considering more precisely the situation of the recipient, setting priorities, modelling interrelationships, and developing monitoring programmes; on the other hand, however, programmes should also gain the acceptance of the citizens who pay. The rhetoric of "materialisation" and participation actually stands in a striking disparity to the intransparency of the social services with regard to the public, whose claim to democratic participation

¹³¹Many protagonists of the welfare state favour a separation of its institutions from those of the "labour system", cf. Leibfried, *ibid.*; Vobruda, *ibid.*

¹³²Cf. for the role of evaluation in administration, Leca, *ibid.*

in fact is always being emphasised. The “moralising” approach of social work and of the social services in a wider sense corresponds to the - seen from the inter-disciplinary perspective - probably comparatively low standard of the professional competence of the caring professions¹³³.

This is the more problematic as these professions practically monopolise the interpretation of the needs and living standards of their clientele. The group of the “dependents” is itself difficult to organise and, therefore, offers an ideal projection surface for outside interpretations. Also in this regard, the point would be to make clienteleism, which compensates for insufficient innovative capacity by “good intentions”, increasingly permeable for organisation-sociological, communication-scientific and other “external” observations.

The social services probably form the area of the administration which shows the greatest organisational and management deficits, the most failures and the hardest problems of motivation because hybrid demands again and again turn into depression¹³⁴. Simultaneously, it is this administrative area which seems to develop the lowest readiness and ability for an effective organisationally-critical new orientation of the determination of tasks. Whilst in the administration, in fact, flexible management reforms attuned to self-revision and orientated on the contribution to be produced have long been tested, the new organisation of the social services remains, at least in Germany, largely reduced to a narrow clienteleism and has hardly developed any approaches towards the questioning of its self-descriptions - except, perhaps, in a self-mirroring which is, there again, much rather, unproductive and circular, as cultivated by the inexhaustible stream of psycho-literature. The weakening of the integration-

¹³³Cf. Becker, *ibid.*, p. 25.

¹³⁴Cf. Brunsson, *ibid.*

achievement of traditional, representative organisations (industrial trades unions, parties etc.) and the extension of the public sector have, furthermore, the fatal consequence that the influence of the personnel directly interested in the administration (teacher, social worker etc.) has been intensified on the local and regional level¹³⁵. This is true, in particular, of the parties whose basis of recruitment becomes ever narrower; a development which simultaneously gives more room to the influence of small, well-organised groups.

Characteristic of the mentality of the social administration, here certainly exaggerated, is an example from the city of Bremen¹³⁶ which - and this is, at first, to be judged very positively! - had decided on the evaluation of their social services through an external organisation-analysis by independent experts; the completed investigation which - as the information published in fragmentary fashion in the daily newspapers revealed - had found a series of serious shortcomings, was then, however, returned to the external organisation as being "incorrect" and, was therefore, also refused general publication. We are not dealing here with a Conservative administration but with a Green-Liberal-Social Democrat one which impeded public discussion of an investigation it had itself commissioned, despite the great possibility at their disposal of rebuffing criticism. One part of the, incidentally, unspecified "rejection" by the authorities criticises the (extremely expensive) study, interestingly enough, precisely because the criticism is not "sensitive" enough and, therefore, could produce motivation-problems in the personnel!

One must naturally have understanding in individual cases for the problems of the evaluation of complex achievements and also concede to the

¹³⁵Cf. Ladeur, *ibid.* (Von der hierarchischen Verwaltung...).

¹³⁶Cf. *Weser-Kurier* (Bremen), 16/7/1994, p. 14.

administration the possibility of experimentation (and, thereby, naturally also of error), but the hitherto usual opaqueness of the achievements of the social services is not only incompatible with the demands made on a modern administration for constitutionality and democracy, it intensifies the already widespread decrease in the citizens' sense of solidarity as they feel exploited and are denied respect for their achievements. This point of view, however, is beyond the perception of a large number of social workers who - despite all the uncertainty regarding professional standards and achievements - see themselves, rather, as social reformers who ascribe failures, from a perspective of victimisation, "to society"¹³⁷, which is denied any claim to accountability.

Here also is shown an insufficient ability and readiness to describe social risks as management tasks to be put into operation, that is, unavoidably to be limited, a point of view which takes up the problem-construction of liberal institutions. What remains to be emphasised is that the establishing of priorities and the external as well as the internal evaluation are pre-suppositions of a co-ordination of social services with the general, liberal and social state institutions of the first and second order. In this connexion, there is also the question of the efficiency of the **private welfare organisations**¹³⁸, which are largely state-financed. Their method of working, which shows little positive difference from that of the authorities is, likewise, especially as regards financial matters,

¹³⁷Cf. Becker, *ibid.*, p. 25.

¹³⁸Cf. generally Becker, *ibid.*, p. 141 ss., 155; for the necessity of a new "inter-organizational" meta-convention cf. Ph. C. Schmitter, *Five Reflections on the Welfare State, Politics and Society* 1988, p. 503; for the necessity of an institutional ethic cf. W. Schmitz, *Ordnungsethik - Versuch einer Klärung ihres Gegenstandes und der Dimension ihres Eigenlebens*, *Zeitschrift für Wirtschaftspolitik* 1952, p. 213; for the epistemological consequences of the change of the hierarchical structure of society into the flexible network of inter-relationships cf. R. Mayntz, *Modernization and the Logic of Inter-Organizational Networks, Knowledge and Policy* 1993, p. 1.

unclear. The state cannot control the efficiency of the achievements. Here also, forms of evaluation must be found which increase the flexibility and reactivity of these organisations. In this context we have to think of the possibility of a general invitation of tenders for specific services, the testing of the various service strategies of the various organisations responsible, and the making of agreements about quality assurance, evaluation and financial control.

b) Social justice and the vicious circle of its establishment

The widespread tendency in several European countries (in contrast to the USA and its “policy for the poor¹³⁹”) to distribute social benefits according to universal rules, without reference to need, is, indeed, worth discussing. This is, above all, justified by the avoidance of the discriminatory effect of a “policy for the poor”. This advantage is of no great consequence, especially because it is purchased with considerably greater disadvantages. In the working and middle classes this bestowing of benefit without need (e. g. learning materials at school, higher school education) can further a grasping mentality which is, anyway, widespread: one pays too high taxes as it is and so pursues the aim of getting as much back again as possible. Precisely the number of forms and standards of re-distribution and restitution (formal equality stands next to “social differentiation”) by now has little to do with social justice and is suited to promoting a general cynicism.

¹³⁹Cf. Herpin, *ibid.*

Probably it would be more useful to increase precisely those social infrastructure services which can only be used collectively (building improvements in parts of the city, support for associations, self-help groups etc.) instead of promoting “non-discriminatory” granting of benefits and services for all, with senseless widespread effects and problematic repercussions on the relationship of the citizens to public institutions. Also this must not be synonymous with a “policy for the poor” in the nineteenth century sense.

This variant of social intervention may also be better linked to the traditions of liberal law and the orientation on indirect effects producing connexion-constraints which characterise them: it should be considered that the state should “replace”, by the introduction of new possibilities, the maintenance of the diversity of social relationship-networks which has been “used”, in a way which overtaxes the self-organisation-capacity of society, by the accelerated strategic intervention of organisations and thereby created rigidities. This is valid, above all, for (further) education, the maintenance of the structure of local associations, the compensation of greater mobility by the selective strengthening of local, collective communication and care institutions etc.

In the interests of the maintenance of a longer-term commitment of individuals and the reactivity of social relationship-networks, it would also depend on strengthening and supporting the family. Apart from this, it would also be requisite in the perspective here adopted to develop observation and warning systems through the comparative observation of institutions in different countries and regions, which systems are attuned to the longer-term observation of risk factors, and, conversely, to describe productive, social constellations. Also here it would depend on not overestimating the knowledge-generating and administrating function of the groups, above all, those which are “involved”, and

on testing competing perspectives for their ability to be put into operation and on confronting them with one another, especially through the involvement of different sciences.

Social benefits, however, cannot be measured against the fictitious aim of the “equality” of citizens but only against the aim common to **all** citizens of the maintenance of the social relationship-network as a whole which, also in complex risk-situations created through accelerated self-transformation, must make possible longer-term commitment.

The quantitative growth of the social state observable in recent years has, however, produced ever more perverse side effects and has, thus, led to the increase in social conflicts within and between social classes and groups. During a phase of prosperity, this could possibly remain without grave consequences for the stability of society but in times of declining affluence, in which citizens are continually faced with the decline of (non-social) benefits by the administration and a simultaneous increase in the tax burden, such a development can become disastrous for the citizens' awareness. This is one of the risks of risk-regulating which is, more readily, suppressed by the widespread tendency to moralise. Without a sense of solidarity, the social state cannot function in the long run, and a solidarity which gets itself involved pragmatically in the co-operative modelling of alternative trajectories of social development and the experimenting with variable patterns of correlation and which is related to forms of the institutionalisation of flexibility to enable the adaptation to and the management of conditions of uncertainty. Only through institutionalisation can a public space be maintained which is appropriate to the virtuality of collective effects and, therewith, to the **indirectness** of social forms of regulating. The increasing culture of victimisation and of the **direct** “engagement” of good intentions

against indifference or evil is merely a symptom of the weakness of those institutions which exist for the observation and management of social risks. The lack of conventionalised risk-descriptions and risk-attributions which are attuned to one another finds its reverse in a paradoxical, unstructured making public previously private feelings (anxiety, worry, pity etc.) which covers up both the faculty of making distinctions and the decision-obligations of social institutions and, therefore, is thoroughly compatible with a harsh defence of social possessions. In a long term approach, the more vigorous support of voluntary social assistance should be considered because the increasing tendency to substitute paid outside assistance for assistance within the family already overburdens the social state; the increasing future demand for such services will, however, be increased even further owing to the increase in the percentage of old people in the European countries.

c) A “guaranteed minimum income” (“negative income tax”): citizens’ solidarity or increasing re-distribution with sinking assets

The problematic extension of the welfare services of the social state through the disassociation from the other institutions of the liberal constitutional state and its social-state remodelling can also be seen in the example of what basic income (“Bürgergeld” “negative income tax”¹⁴⁰), which should be the entitlement of every citizen and rises or falls, according to a tax law system which balances it against income from employment or assets. Considerable risks

¹⁴⁰Cf. generally Offe, *ibid.*; the contributions in van Parijs (ed.), *ibid.*; Vobruba, *ibid.*; for a critique Siebert, *ibid.*; Rosanvallon, *ibid.* (La nouvelle question sociale ...), p. 122 ss.

would face the few practical (also dubious) advantages of the standardisation of the administration. In reality, the administration would at first simply be moved from the social welfare offices to the tax offices - this is true at any rate of the variant of "negative income tax", in which it is planned that a citizen below a minimum level of income is not only relieved of taxes but that a "negative" tax arises which has to be paid out. Because of the transfers to the financial administration and the simplification of the individual process accompanying the standardisation of cashing up, in longer term the risk is simultaneously produced of an increase even in the amount of administration necessary. The symbolic significance of the term ("negative income **tax**" or "**citizens'** money") should not be underestimated, because in this way the deceitful manipulation would become "positive" tax evasion, whilst the manipulated claim to payment from the social security offices must be perceived unambiguously as fraud. Such an incentive would also be increased quantitatively: today one can, at best, "save" all one's taxes, under the future system one could also save "negative taxes" if one manipulated one's income below the appropriate amount.

The amount of "citizens' money" would, precisely because of its disassociation from the other institutions of the economic and labour system, be exposed to the risk of politicisation, as is, with justice, feared, because it apparently concerns everyone even if it concerns most people merely as a theoretical factor in the calculation. The effect of simplification caused by "citizens' money" is, anyway, rather doubtful if the intention is pursued of satisfying therewith the various part services of social aid (housing benefit, the satisfaction of special needs etc.). It seems hardly possible to judge whether such a standardisation is actually realistic. For marginal groups, a voluntary homelessness or the occupancy of cheap accommodation could even be promoted if, thereby, the income freely disposable increased and the purpose-

bound nature of housing support would be given up. The advantages of administrative simplification would also have to be realised within the existing system of social aid. The same goes for the incentive to work which is to be connected with the new system because the taking into account of (part-) income in relation to "citizens' money" is to be made more flexible. According to the view here represented, the incentive to look for work could better be achieved through wage subsidies in the case of low wages.

It is primarily the symbolic effect and the increased danger of abuses which speak against "citizens' money". It could strengthen the obvious assumption that everyone has a basic "material" right to "citizens' money" and alleviate the necessity of confronting the citizens with the self-created obligations of the labour and economic system and of distinguishing collective as well as individual risk-attributions. The social state tends anyway to reduce the transparency of the attributions: "citizens' money" or "negative income taxes" are euphemisms which seem to confirm the idea, suggested itself by the existence of the social state, of the existence of a horn of plenty from which one may freely serve oneself - this does not, of course, exclude the fact that the social position of the majority of the recipients of social aid has to be improved as a matter of urgency!

It has already been stressed several times that collective systems of risk management which derive the justification for their existence from the accelerated self-modification of society have at least to be linked, for their part, to individual attributions and, therewith, limited. The only basis of this connexion between both institutions¹⁴¹ can be a solidarity which has earned this designation and which has to find its counterpart in collective, as well as

¹⁴¹Cf. Schmitter, *ibid.*, p. 514; Kaltznelson, *ibid.*

individual, forms of risk-limitation. This order of solidarity cannot, under conditions of uncertainty, be built on the justice of individual cases or a direct "constitutionalisation" of the minimum income. However, it has to be linked to the changed forms of the knowledge of risks and of the social management of risks, through which the global constructions of reality, on the basis of differing collective and individual risk-attributions, can be modelled and, through observation and comparison, confirmed or refuted. Thus, it must, by an ideal example, be made apparent to all citizens that the society under conditions of accelerated self-transformation secures its reactivity to social risks through making possible an extended horizon of decision and longer-term, individual commitment and that, for this, financial contributions can be demanded from the better off citizens. This is, however, only possible if it is actually plausible that a society **as a whole** is more adaptable and humaner which secures against certain risks and, thus, also creates a public good. The securing of a subsistence minimum can, however, not be achieved in a way which, through the false appearance of universality ("citizens' money"), increases the heterogeneity of social institutions and, therewith, reduces the crucial potential of self-observation of a complex society which is far from being transparent to itself.

d) Résumé

In the interpretation here presented, the concept of **proceduralisation** aims to explain complex connexions in "viable" forms of model-formation and risk-management, to open up the requisite stochastic-probabilistic knowledge, to describe and organise the mechanisms of its generation, thus, to develop a

should help to broaden the range of possible actions and to raise sensitivity for cognitive rigidities and blocked situations. One could in a sense "use" the European institutions as a focus of observation of social policy on the national level conceived as generators of new knowledge to be introduced into the decentralized process of the social dialogue reinforcing its capability of self-observation¹⁴². Taking into account the corporatist structure of social policy and the risk of establishing narrow views neglecting third-party interests, the role of European institutions could be that of an institutionalized evaluation agency confronting the national level with self-generated constraints following from social concerted action, especially the risk of creating externalities. The purpose of this practical evaluation should primarily consist in the design of models of "complex causality" accentuating long-term development and the experimentation with normative constructions of positive self-reinforcing networks of relationships between mainly organizational inter-actions and the attribution of consequences. One of the major interests should be the search for unintended consequences of inter-organizational negotiations and their reintroduction into social concertation processes. European institutions could make productive use of the actual differences between the national social policy systems in order to produce new knowledge from comparisons, the "pool of variety" of European social policies could thus be regarded as a kind of "social laboratory". On the European level a specific approach should be provisionally adopted as a framework of reference but, on the other hand, a competing one should be taken into account in order to make possible the self-reflection of the valuation process itself which cannot lay claim to produce neutral expertise. Model building under conditions of uncertainty is of course itself prone to

¹⁴²Cf. generally K.-H. Ladeur, *European Community Institutional Reforms. Extra-National Management as an Alternative Model to Federalism*, *Legal Issues of European Integration* 1990, No. 2, p. 1 ss.

functional equivalent to the **cognitive** achievements of the liberal forms of attribution and to increase the citizens' ability to confront self-created or normatively attributable obligations. This is based simultaneously on the assumption that the new social problems connected with the accelerated self-transformation of society can be solved neither through re-distributions nor through state "measures" nor contracts between "social partners" nor through improving the social services. Additionally, too many crisis-phenomena arise which stand in no clear connexion to the distribution of income; this is true, for example, at least of plausible descriptions of an insidious decline in school and university education, which cannot be explained solely by poor future prospects but which is also a symptom of the weakening of institutionalised forms of the transmission of social stocks of knowledge and of the bonds of civilisation. In any case, it seems necessary to take seriously "Eurosclerosis" as the danger of a self-reinforcing process of de-civilisation which extends beyond the area of "social problems" and which demands new forms of the institutionalisation of the management of social risks.

8. Propositions for a New Cognitive Role of European Institutions in Social Policy-making

The European institutions should play an important cognitive role in the distributed reflexive model-building process of social policy outlined above. Considering the constructive character of knowledge stressed in this paper they should have a "catalytic" role of enabling actors to develop a provisional rationality of design and experimentation rather than be actors themselves. They

uncertainty and error. This built-in alternative could be a self-reflective element of the reflexive potential to be institutionalized vis-à-vis the arenas of social policy on the level of the Member States.

To repeat it once more, the purpose of evaluation should not just be one of scientific and neutral description but should be regarded as that of "moderation" in a cognitive dimension, it should be oriented at the set-up of operationalized "descriptors", criteria, methods of "monitoring" on the basis of a technique of scenario building. The potential applicability to and compatibility with strategies of negotiation and policy-making themselves should be a primary concern. European institutions should not endeavour to set up a regime of "expertocracy", the European level should rather be considered as a "consulting agency" which presupposes that the "observed systems" themselves are inter-organizational networks with their own rationality and constraints which cannot be "steered" from some central level of decision-making claiming to possess an over-arching rationality. The role of European institutions should rather be that of a mediator creating incentives to learn on the side of the actors, but it should not lay claim to possess "the" solution of a problem, its main target being then to "convince" the actors of its correctness.

The evaluation itself could be differentiated into two levels of decisions: firstly, the observation of specific measures and strategies of the social dialogue and especially the policy of social integration; secondly, the systemic approach of setting up a model being able to interpret and compare the industrial relations and public social policy of the Member States.

The possibility of the creation of a small independent agency should be considered: its main purpose could be to set up a framework of observation and to function as a stable organizational core for a process of generating new

knowledge which itself should rather be developed on the basis of an invitation for bids open to private consulting agencies and public or private scientific institutes.



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