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Proceduralization and its Use in Post-Modern Legal Theory

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ABSTRACT:

Proceduralization as a form of replacing a substantive decision by a legally established process of consultation, participation, or balancing conflicting interests, is quite frequent as a pragmatic approach. Its value can only be considered adequately if the relationship between law and its cognitive infrastructure is taken into account: the law has increasingly to generate knowledge by its decisions instead of drawing on experience.

I. Introduction

The concept to be outlined here is itself based on the concept of learning in the sense of self-modification - as such it should be self-reflective enough to protect us from indulging in the illusion that there could be a kind of a blueprint of a correct path to follow in legal theory. Proceduralization is a method which takes into account that many practical problems are not accessible to theoretical reconstruction. it could serve as a kind of framework for an open process of observation of society from outside and self-observation of law from within. This brings us immediately to the core of the approach, the link between legal systems and (changing) cognitive assumptions, rules attributing responsibility, and stop-rules for the search for knowledge in decision-making processes. These are not truth-based rules but practical constructions linking cognition and action. That is why self-modification of society has a profound impact on its "social epistemology", its self-descriptions used as a cognitive infrastructure for legal decision-making. Proceduralization tries to

adapt legal methods to alterations in the cognitive basis of society and adjust them to differentiated forms of knowledge.

II. General Remarks on Social Causality and Decision-making in Law and Politics

1. Causality and the State

The rise of the modern concept of state is closely linked to the idea of causality: the traditional legitimation of political power with reference to the past and the continuity to be derived therefrom in modernity, was replaced by a state order based on an abstract conceptuality showing many parallels with the natural scientific representation of causality imposing an abstract order of stable laws subsuming the fluctuation of the multiple single events and allowing for understanding and technical use and manipulation of nature drawing on knowledge of its laws. The modern state, on the other hand, was supposed to set up a human general order separating man from the burden of the specific, irrational, fragmented local order and establishing the equal legal personality as a unit to which specific legal acts and legal positions (property rights) could be attributed. As a countervailing part of this new abstract order, the state has to take up a similar position: as the creator of a new abstract legal order the state is supposed to have legal personality itself - at least in continental legal systems. A society which derives legitimation from the future - and no longer from tradition - would need a flexible knowledge base allowing for operating on partial information. And that is why the functioning of the legal system is linked to a paradigmatic construction of reality.

Causality as a social concept presupposes a specific type of cognitive openness allowing for learning from experience, a concept which combines continuity of a basic paradigmatic framework superimposed on a world which gets its structure and accessibility from a pre-established separation of levels of complexity separating general law-like, experience-based and singular specific relationships. One of the basic assumptions within this domain of causality is the possibility of assigning responsibility for direct effects of actions to an adult individual whereas distant consequences and diffuse effects of far-reaching interrelationships between laws and the accumulation of a plurality of events potentially darkening the clear-cut attribution rules are excluded from consideration. The same is valid for the exercise of 'negative' rights absolving the subject from responsibility for consequences

which could not themselves be conceived as harm imposed on a third person. 'Harm' in this sense is not just a disadvantage imposed on somebody but a deviation from a presupposed normal course of events, reducing the value of a good attributed to a person and protected by subjective right. The concept of harm lays open the close interrelationship between the factual assumptions and legal attribution rules of liberal order.

This model of knowledge which is inherent to the liberal legal system may have simplified social interrelationships; on the other hand, however, it has both constrained and enabled individuals to abide by its main assumptions and develop and adapt their 'mental model' of reality on the basis of its rules. This is particularly important for the role of public and private education and for the functioning of the economy as well.

One of the main problems of present-day law and politics is the lack of a shared model of reality establishing a basic framework of description to be used especially in legal practice and serving as a knowledge base for the management of social conflicts and the adaptation of law to a society which is changing. There has always been a concern for a normative consensus in society but at least the same value should be attributed to the importance of a certain basic cognitive framework which can be used for a common description of society, or can at least help to structure conflicts according to some shared criteria.

Politics and law-making are increasingly confronted with the rise of 'ill-structured' problems for which there is no common understanding even though the value basis of a society may be homogeneous. For example, there is a shared normative assumption that - contrary to classical liberal ideology - mass unemployment is a public concern. However, a productive polemic on modern unemployment proves elusive; possible causal factors proliferate rendering it difficult to establish a shared model of these causes, let alone a solution. The idea of proceduralization of state action should first of all be helpful in reconstructing the problem of modelling society and of designing a common frame of reference for politics, which could serve as a functional equivalent to the liberal cognitive paradigm.

2. The Lack of a Shared 'Mental Model' of Society and the Necessity to Stimulate Cognitive Learning Processes

The mode of decision-making based on a stable pattern of causality and experience could be called 'substantive rationality': in the first place, this means that decision-makers are not confronted with the necessity of constructing the domain of options within which they have to formulate a decision. This domain can be presupposed as given, and general assumptions can be separated from specific ones, the range of alternatives is limited, and choice is prone to subjective values. The sustainability of this mode of substantive rationality is mainly challenged by the difficulty of integrating time and change into its stable frame of reference. Once self-modification of society is more rapid, and complex feedback between variables and events in historical time have to be taken into account learning is a primary concern. And learning is a crucial element of procedural rationality, which leads to institutional flexibility and enables decision-makers to construct their domain of options, which can no longer be presupposed to be structured by the stable separation and differentiation established by the traditional model of social causality. The simple reason for this is that more and more specifically technological and economic decisions include an element of experimentation and strategic design, as they tend to change reality in a much more fundamental way than in the past. Contrary to the 'society of the individuals' in the 'society of organizations' we are confronted with actors possessing a much more sophisticated strategic potential of decision-making. This means that they can coordinate a plurality of different actions within a broader time horizon and are no longer exclusively dependent on general conditions which themselves are excluded from strategic intervention, as was the case within an order based on the individual as the main actor.

The concept of learning which tries to tackle the new problem of private and public decision-making should not be reduced to the collection of more information but includes the necessity of constructing and considering an 'internal environment', within which the decision-making takes place, once the external environment can no longer be presumed to be structured by the general rules of causality. Decision-making can no longer draw on a stable frame of reference, clearly separated levels of complexity nor the legitimacy of linear relationships reproducing a societal equilibrium. The new complexity undermines the stable hierarchy of rules, concrete experience and single events. That is why reference to rules should increasingly be substituted by organizational design which combines external and internal self-observation. The new external complexity has to be managed within organizations by considering

decision-making processes as depending recursively on the generation and the execution of processes of decision-making themselves. The reconstruction of decision-making units has to draw on the necessity to stimulate and orient their learning capability and to broaden their action potential *vis à vis* the turbulence of the external environment and so develop flexibility in order to compensate for lack of transparency and structure in social reality by generating more options and more adaptability because strategic, multiple actions tend to change reality. This means that processes of self-revision and adaptation have to be integrated into private and public organizations.

3. The Main Difference between Substantive and Procedural Rationality

The traditional model of decision-making was dominated by substantive rationality, which could be regarded as being 'instrumentalist': it started from given goals, given conditions and given constraints. The rationality of decision-making was then dependent on the actor whose main task was to search for the one best solution on the basis of pre-structured social causality and legal norms. Procedural rationality, however, presupposes the relevance of the process which generates a situation to be tackled by a learning approach. Information needed in decision-making is not just collected but generated by decision-making processes themselves, and information will always be partial and subject to change. This certainly has important repercussions on decision-making itself: decisions have to be open to self-revision because procedural rationality is a kind of 'bounded rationality' (H.A. Simon).

Substantive rationality starts from a few basic assumptions about social causality and social rules; it treats reality as transparent and does not need sophisticated external observation processes. Procedural rationality, on the other hand, takes into consideration the fact that it can only reduce uncertainty and set up some kind of 'best available' partial knowledge. That is why it has to focus on viable procedures which in their turn have to take into consideration limited attention constraining the decision maker to focus informational activity and to be aware of the fact that the creative element of knowledge-generating process and design is unavoidable. Decision-making is no longer oriented toward some specific final outcome but it is linked to post-decision-making processes of improving data and redesigning models. It has to guarantee flexibility in order to be able to buffer the effects of errors

or to broaden the range of alternatives taking into account the necessity to 'second guess' the decision-making. This approach either excludes decisions altogether or places a burden of argumentation on them, with far-reaching, irreversible consequences and a demand for systematic integration of evaluation. Substantive rationality, however, presupposes a basic set of normative assumptions (legal rules, etc.) and constructions of reality allowing for subsumtion of specific facts of the case under general concepts. It presupposes the 'omniscient decision-maker' who has to emphasize the precision of detailed empirical descriptions of cases and can refer to a universal normative framework attributing responsibilities (mainly) to individuals, and stabilizing expectations.

III. Traditional Problem Structure in Public Decision-making

1. Legislation

Nineteenth-century legislation was characterized by a paradigm set by police law whose main function consisted in preventing people from causing 'danger' to public goods, including health of individuals, through specific police measures. The legislative paradigm was based on a norm structure which followed the model of an 'if/then'- structure: a legal consequence was attributed to a general description of facts. Of course, rules were indeterminate, this is especially valid for police law but the legislature could draw on basic assumptions structuring indeterminacy: for example it presupposed goods, especially rights, as indicators of harm and causal attribution rules which themselves presupposed the possibility to refer to normal states and the possibility of linking specific causes to specific effects which may be separated from a background of an opaque flow of influences.

The legal model of the late nineteenth century is based on stable separation between the rule and its application, a model which is not called into question by the Anglo-Saxon common law because, although this shifted the main task of elaboration and conservation of law to judges, it presupposed a basic stability no less than the Continental legal systems did.

2. Liberal Administration

The same paradigm of police law can also be used in order to describe decision-making processes within the liberal

administration: inherent to police law is the assumption that the police dispose of the average knowledge (experience) which does not exclude that it might be necessary to consult specialists who themselves have had to interpret a common knowledge potentially accessible to everybody. For example, engineers having to judge dangers caused by the use of some steam boiler have to draw on basic textbooks on engineering and to answer the legal question whether it is to be regarded as 'safe' or not. This evaluation of course implies a value component, and especially a decision on the general acceptability of technical risks, because the concept of 'safety' as a criterion of decision-making can not be taken at face value. There are some discussions, especially concerning early railway projects, on how and to whom to attribute risks, especially of fire. But even though judgments are open to discussion, they have to relate to some common representation of a state of normality open to slow social evolution which are not called into question by even serious accidents. The attribution rules themselves are considered to be stable whereas in detail one could quarrel about whether cattle-grazing on the rails is 'normal' or whether thatched roofs catching fire sparks emitted by railway locomotives are harm to be attributed to railway companies or just bad luck to be borne by owners. Nonetheless, the alternatives are rather clear-cut.

Even though administration had the power of discretion, decision-making was considered to be oriented at a state of equilibrium presupposing shared and general public knowledge and values. Experience reinforced and reproduced itself, continuously on a case-to-case basis, and learning had to be only spontaneous and not systematic.

3. Judicial Decision-making

The same problem can also be demonstrated in civil law cases: where someone buys a steam boiler and is hurt when it explodes, the question of compensation under this system is reduced to the problem of liability for negligence. Again, this rule expects average care from the producer, and so refers to experience and knowledge generated by people working in a specific domain of the economy. The producer has access to, and shall consider, professional knowledge, and in that case he will not be liable even if after the fact he comes to learn that the constructions in question were far from perfect. Accidents not falling within the "negligence" category have to be borne by the victim as just 'bad luck'. It presupposes attribution of specific actions which could be controlled by

individuals on the basis of public knowledge. Presupposing technical progress, the public accepts that technical system at a certain stage of evolution but this has to be considered as 'normal', and there is no liability for normal action.

4. Summary

Public decision-making based on the traditional paradigm of social causality and liberal law presupposed general rules with application being separate from them. The reverse side of the separation consists in the assumption that the decision-making process does not modify the rules themselves, even if knowledge changes its evolution is supposed to develop spontaneously and slowly, without alternatives underlying public or private decision-making. Furthermore, it referred to specific facts (being distinguished from a general background of reality) as its privileged cause and not some global risk or events to be considered as just 'hazard' or bad luck. This paradigm establishes a common frame of reference for legislature, administration and the judiciary leading to a certain model of decision-making which corresponds to the rules of private decision-making.

Substantive rationality of the law presupposes clear legal programmes based on 'if/then' relationships and a stable knowledge basis enabling interpretation and adaptation of law to continuous processes of transformation of society. In addition to that, the functioning of the legal system draws on basic attribution rules assigning responsibility to individuals for controllable cause-effect relationships to be distinguished from a background of 'noise' created by processes of self-modification of society. This basic idea of causality establishes stop rules for the inevitable search for new knowledge in liberal society The dominant type of knowledge generation is experience which is itself closely linked to the general structure of a society of individuals and especially to a decentralized structure of technical evolution drawing on practical trial-and-error processes spontaneously generating a kind of average knowledge accessible to everybody. This basic knowledge structure is a crucial presupposition for the functioning of the legal system inasmuch as it allows the construction and application of laws referring to prestructured complexity.

IV. Procedural Rationality and Public Decision-making

1. The Example of Law-making

The new problems the legislator is confronted with can be demonstrated by the decision to introduce co-determination procedures for workers in big firms in Germany. It is not necessary to go into details on how this fits into the structure of company law. In a perspective of constitutional and legal theory this problem in essence refers to the constitutional protection of property. In systems allowing for constitutional control of parliamentary laws especially, we need an idea of a core of property which should be exempt from legal interference. Apparently weighing up of constitutional compatibility of co-determination with this core element of property depends on the effects of co-determination on the decision-making process within enterprises. But how do we know? How can future scenarios be evaluated? Of course, one can arrange parliamentary processes of "hearings" with trade unions, employers, associations, experts on economy, lawyers, etc. One of the crucial problems we are confronted with is obviously that the information we will get is equivocal to say the least. A forecast of the effect of a change in decision-making on the efficiency of co-determined enterprises is highly uncertain. This is not only a problem of lack of 'information', which the law itself tries to turn into a medium of change of hitherto established processes of decision-making, but it develops an approach of 'legal policy' focusing on its own attribution rules. The legal system no longer presupposes a prestructured state of normality but aims at a transformation of reality without being able to fully determine the elements of this process.

This problem of course raises the question of how to manage uncertainty: does constitutional protection of property exclude experimentation with its rules or should Parliament dispose of discretion once detrimental outcomes are not evident? This brings us to the problem of how to manage the process of knowledge generation within political institutions. Is Parliament the adequate organ for the generation and observation of knowledge for complex decision-making processes? Can Parliament compensate for the lack of a common knowledge, especially of a shared domain of experience? Or do we have to impose new constitutional rules on decision-making in complex domains stressing mechanisms of knowledge generation? The answer to this question has crucial consequences for the control of constitutionality by constitutional courts because there is a close link between the role of parliamentary decision-making and the role of constitutional control. We could of course shift the emphasis to the constitutional court as

an institution which should observe and evaluate the role of property under conditions of complexity. This would also be the equivalent of advocating a more active role for the court in the management of highly uncertain issues. And one could argue that courts are not well-prepared for this type of decision-making. One could argue, however, in favour of a strong constitutional barrier against uncertainty excluding modification of law once outcomes are not well-known and hard to forecast. But this could not be an acceptable solution because self-modification of society is a process which is not even primarily created by the law itself; on the contrary, in complex fields of decision-making it is also highly uncertain where the cause of self-transformation of society is to be located. Does the law initiate a process of change or does it rather interfere and structure a spontaneously generated process of self-modification of society leading into uncertainty anyway? On the other hand, self-modification of society as a continuous process is rapid and does not necessarily allow for piecemeal type intervention, since decision-making based on partial knowledge is inevitable and it would only be an illusion to establish a constitutional rule shifting burdens of proof onto those who advocate specific change. Nonetheless we must accept that we cannot fully override our 'duty' to make decisions; and therefore cannot establish a general principle restricting decision-making or parliamentary law-making under conditions of uncertainty.

An alternative could consist in a kind of combination of discretion of Parliament on the one hand and a restructuring of decision-making procedures on the other, which could as well pave the way to a reinterpretation of the role of constitutional courts, since the new method of 'balancing' of pros and cons constitutional courts use in complex cases is not sufficient. So one could imagine new procedural rules taking into account the complexity of knowledge generation, and problems of potential irreversibility of decision-making on partial information and one could think of explicit procedural obligations to observe in a systematic way the consequences of decision-making under conditions of uncertainty, whereas normally self-modification would be left to spontaneous processes of information after the fact. So the only way to manage these ill-structured problems of decision-making consists in re-entering the problem into decision-making procedures. Procedure in this sense is not limited to explicit procedural norms, rather it advocates a shift of emphasis from aims which are highly unstructured to processes of knowledge generation and monitoring of decision-making under conditions of indeterminacy. This

approach tries to find a functional equivalent to a shared common knowledge collected and distributed as experience. And this common basis can consist only of a procedural approach re-entering the problem of unstable frames of reference into the legal process itself, whereas in the past knowledge generation could be considered to be more or less evident and to function spontaneously.

Parliament nowadays is confronted with ill-structured issues where there is no clear-cut aim, no shared description of problems, where contradictory criteria have to be applied, no stable attribution rules can be presupposed and where even observation of consequences to be assigned to a 'reformed statute' is highly controversial. So one of the elements advocated by a procedural approach would consist in a reconsideration of the institutional structure of Parliament with reference to generation of knowledge, its potential management of ill-structured problems, taking into account its institutional conditions of decision-making as opposed especially to private decision-makers, administrators and the judiciary. In particular, the element of self-revision and monitoring of outcomes of statutes should be taken more seriously. Constitutional theory should explicitly take into account that law-making has to set up and differentiate an experimental design, laying open problematic assumptions, alternatives, weaknesses of informational bases and combining discretion left to the majority with sophisticated processes of monitoring based on competing assumptions and open to alternative evaluation after the fact. Above all, this means to take seriously the fact that we do not dispose of a common basis of experience for complex problems of decision-making. (This assumption does not of course exclude that there are still many decisions to be taken on the basis of experience, but this is no longer the typical situation of law-making).

2. Administrative Decision-making in Ill-structured Domains

The new problem of administrative decision-making under conditions of complexity can be demonstrated with issues of nuclear law as opposed to the example of licensing the use of a steam boiler commented above. Nuclear law can no longer presuppose a stable concept of 'safety' but has to take into account risks linked to lack of knowledge, as well, a problem which can no longer be left to spontaneous processes of new experience generated from trial-and-error processes. Administrative decision-makers have to take into account requirements of the 'state of

science and technology' (the wordings in European nuclear laws are different but the substance of the problem is the same). This formulation also raises the problem of the function of the legislature: what about the 'reservation' of legislative competence: how far has the legislature to structure this problem of knowledge generation by the norm itself-is this formulation equivalent to a delegation of competence to administration or experts?

For administration itself, this means that decision-makers can no longer draw on a common experience: design of nuclear power plants is based on highly sophisticated new types of knowledge, statistics, models, and theoretical calculation of probabilities, etc. The administrators need expertise, but this expertise again is no longer easily accessible because it cannot draw on homogeneous public knowledge as could the engineer consulted by administrators deciding on the safety of a steam boiler. Knowledge of nuclear risks is specified (linked to practice without being easily transferrable to a general public), incomplete, heterogeneous and prone to diverging evaluations (it consists of empirical elements, methodological generalizations, technological design, constructing mathematical models, 'safety philosophies' and highly opaque interrelationships between its components). This, *inter alia*, results in the fact that the choice of scientific advisors can predetermine the character of the expertise, which administrators will receive. This is especially due to the fact that the 'state of science and technology' is not just a more sophisticated type of knowledge as compared to experience but it is a different type of knowledge which is referred to: science and technology are much less closely linked to practice and decentralized processes of trial and error open to spontaneous learning than experience. Ecological designs are much more complex and far-reaching than traditional technical constructions, but we should take into account particularly that technology itself generates new knowledge which does not draw primarily on stable experience. For the administrator this means that public decision itself has no settled knowledge basis: risks have to be evaluated according to theoretical knowledge, and assumptions linked to a certain design which is itself based on theoretical model building. This situation has the side-effect that learning from practice is more complicated than it was in the past because processes within power plants are much more difficult to observe than the functioning of traditional mechanical, technical devices. On the other hand, industry has a strong interest in keeping information secret. Administration is confronted with a new version of the link between knowledge and action, but this time the link is much more complex

than their own experience-based knowledge which is better structured and more accessible because the process of its continual enlargement and self-revision is public and distributed over a multiplicity of agents.

Thus,administration is confronted with the same type of complex problems as the legislator, especially because there is no longer a clear relationship between legal concepts and a presupposed body of knowledge. Knowledge is, rather, rapidly evolving, uncertain, heterogeneous, theory-laden, and involved in fragmented strategic decision-making with limited public access . That is why it will not be sufficient to accumulate 'more of the same', that is just more information because information generation in complex processes is potentially infinite. Rather, we need a clear profile of procedures for decision-making laying open the problems related to the ill-structured character of scientific and technological design; to emphasize the necessity of establishing explicit mechanisms allowing for more transparency of, and more sensitivity to, the different heterogeneous components of this type of scientific and technological knowledge; and, to integrate sophisticated processes of monitoring into decision-making reintroducing a substantive problem as a procedural issue.

3. Judicial Decision-making on Complex Issues

New problems raised by liability for defective products have revealed the existing limits of the traditional experience-based reference to 'negligence' as a basis for responsibility of harm. One of the problems related to the growing differentiation of production is demonstrated by accidents which have more and more questioned the rationality of the proof rules to be applied in these cases. For example, when a glass bottle of lemonade exploded and hurts someone, the victim hadHowever, strict application of this rule results in the victim almost always bearing the consequences as 'simple bad luck'. For production methods are not really accessible to the public once defects are not visible and knowledge is too specialized. That is why court practice has experimented with reversal of the burden of proof. Reversal of the burden of proof in many cases leads to more sophisticated documentation of production processes and its rules which then might help producers to prove that it was not in fact negligence which led to the accident. This is a kind of second-order duty imposed on producers to guarantee access to knowledge on production processes where duty to produce safe products is insufficient. Another case of such a

second-order procedural type of duty consists in warnings producers have to publish if potential side-effects come to light only after the product has been placed on the market. To a certain extent, courts try to compensate for the lack of a common set of knowledge by developing new knowledge-related duties, an approach which to a certain extent manages problems related with the lack of a common knowledge base in a satisfactory way. On the other hand, we are increasingly confronted with a certain complexity generated by this approach itself. For example, warnings have to take into account the problem of limited attention. The issuing of too many warnings by producers may be counterproductive: inundated with superfluous information, consumers may simply ignore crucial warnings. We are confronted here with a rather typical problem of producing unintended consequences of decision-making.

The reason why this happens is again related to the dynamics of knowledge generation: knowledge, and practical attitudes and convention, evolve in ways which are not easily foreseen because they do not follow continuous linear paths. Much knowledge remains implicit in practice and so allows actors to withhold it, a situation which was not so pressing in the past because experience as a common knowledge basis was much more open to spontaneous evolution. On the other hand, strengthening liability may again produce unintended side-effects because it could lead firms to shift risky production to undercapitalized small firms, a problem which could then of course be tackled by broadening responsibility. But this approach would again create new uncertainties. Yet we have to take seriously the risk of suffocating innovation if liability is expanded beyond hitherto accepted rules.

We cannot go into details of product liability here, the examples given serve only to demonstrate that the judge as well as the legislator and the administration is more and more confronted with ill-structured problems related to lack of knowledge and lack of stable rules of experience allowing us to forecast behaviour once certain legal rules are changed under conditions of complexity and indeterminacy. That is why the introduction of rights with regard to risks beyond the traditional limits of harm will not be very helpful because they will only create new problems of balancing. A new productive approach to tackle this type of ill-structured problem can only start from reflection on the transformation within the relationship of normative and cognitive components of the legal system, and especially the loss of structure established by the

concept of causality. Diffuse causality leads to 'moving targets' and especially to unintended side-effects. This is related to one of the phenomena judges are confronted with: the hitherto established clear-cut separation between the general norm and public experience; application in a specific case is called into question because the court decision can easily lead to far-reaching transformation of economic processes and consumers' attitudes in a rapidly changing context. This is especially due to the fact that courts can no longer presuppose a stable frame of reference for their description of the caseunder consideration, more and more they are constrained to take into account large groups of actors and their behaviour. For example, in calculating which type of actor can more easily obtain insurance against certain risks or which actor has more strategic resources to structure a certain field, questions arise as to whetherwe should just expect consumers to learn about risks and take into account that an adaptation might be slow and divergent, or whether we should 'use' producers and their resources to advocate adaptation? These reflections show that judges are increasingly constrained to develop a strategic approach in deciding cases in rapidly evolving environments. And again, proceduralization can be helpful in the development of more sophisticated and differentiated approaches stressing the problem of knowledge generation and the inevitability of taking into account repercussions of decisions within larger groups, once not only products and production processes change but also consumers' attitudes and habits. In cases of negligence, one could in the past have presupposed a certain type of product and a certain experience of how to use the product, including of how parents prepared children to adapt to everyday risks. Once self-modification of society affects the whole process of knowledge generation and its transfer between generations, decision-making on assigning responsibility becomes much more difficult and demanding. This evolution leads us to reconsider the relationship between legislation, administration and the judiciary in the light of the knowledge problem. Functions of public institutions have to be redesigned in a cooperative manner redesigning the relationship between law-making, administrative decision-making and judicial control. The different resources of state powers should be re-evaluated with reference to their potential contribution to the management of uncertainty, which is a common task and whose complexity undermines the clear-cut separation of powers.

V. Social State and Social Complexity

1. New Types of Knowledge Used in Welfare Policy

Other examples of difficult problems related to lack of stability of patterns of responsibility or of a shared social model of description of society can be found in the field of social policy. In the past, individuals were not held responsible for distant consequences of actions, but only for harm to bearers of legally protected rights. On the other hand, individuals were held responsible for their well-being and failure to earn a living was just 'bad luck', perhaps a case for charity but not for collective responsibility. As we all know, this has changed. And there are good reasons for this transformation of the legal system especially in the establishment of public insurance, social assistance, etc. However, contrary to wide-spread assumptions, solidarity in complex society is not a solution but a problem. This can be demonstrated by a reflection on the first steps in the development of new public insurance systems: they were only possible on the basis of a new type of knowledge enabling decision-making beyond the traditional model of individual cause-effect-relationships and rules of individual attribution of responsibility, that is: statistics drawing not on individual actors but calculating with group relationships (diseases, unemployment within large populations) which leave aside the individual. This is one of the aspects which show that calculability of risks to be ensured not only introduces a new complex concept into our social modelling but also conflicts between the old individual attribution of responsibility still valid in economy and the new collective form generated. The conflict is due to the fact that the new rule necessarily leads to an attenuation of the rigidity of the old one: this leads to problems of 'moral hazard' creating the risk of overburdening collective responsibility. Exploiting social insurances distributes costs over a large number of people, that is why its effects are diffused and more acceptable to individual beneficiaries. A further aspect is related to the huge public bureaucracies which are necessary to administer systems of collective responsibility (the same is true for social assistance): they tend to have no incentive to attain a certain efficiency because failing programmes or decline of public attention for social policy may easily weaken their own position.However, this sector is dominated by large corporate groups (trade unions, welfare organizations, etc.) which have their own stake in this domain. Their interests tend not to be identical with those of the individuals to be protected (poor people, etc.). Without going into further details here, these few remarks should have made clear that collective responsibility is a problem because of lack of transparency of the field and the difficulty in constructing

shared models of complex realities. This problem has a self-reinforcing character because organized groups get more and more interested in changing public perception of the problem, remoulding the self-image of people and establishing a culture of 'victimization' preventing clear insights into the structure of social policy and its rules. That is why on the other hand the system tends to invite people to abuse the system who otherwise would be opposed to it if they could understand how it works. This helps organizations to concentrate on the creation of 'positive' ideas of a just society - which everybody is sympathetic towards - without telling what the problems of justice under conditions of complexity really are. This is a destructive circle because the evolution of the system does not know any stop-rules allowing for observation and the construction of a rational, transparent administrative order. Once a basic level of social security is transcended, the system necessarily gets into more and more self-contradictions, the reflection of which is at the same time sealed off by ideological formulas.

We have had to become familiar with 'complex causality' in nature - putting into question the calculability of linear cause-effect relationships - but society has become no less complex. For the new social problems there will not be any 'end of the pipe'-technologies, either. I will only mention one example: the explanation for unemployment. The American economist, Paul Krugman, has recently quite plausibly observed that all present approaches provide only partial explanations for this intriguing phenomenon, and that the most realistic assumption will have to accept that this is a case of complex causality, that is, a lot of different concurring and competing partial causes are to be considered. The challenge for economy - and, we have to add, also for legal science - must consist in gaining access to an institutionalized approach to model this new type of complex causality. In legal terms this could mean, for example, that complex systems of collective responsibility, including collective bargaining processes, would have to be constrained to link their policy to certain model construction assumptions about their expectations concerning central data of the underlying processes. Such a model would have to be designed in such a way as to allow for comparison and retrospective observation. This could be a way of confronting society and social actors with self-generated constraints systematically, and of explicitly taking into account problems of ill-structured fields of action which tend to be more and more opaque. The self-modelling and self-designing capacities of society, which in

the past were based on trial-and-error processes within society of the individuals, have to be reconstructed and adapted to the conditions of the society of the organizations with the prospect of an 'experimenting society'. This concept tries to link itself to the liberal principle that a constitution must always be based on a kind of pre-constituted order from which it derives the distinctions with which it organizes decision-making processes and attributes responsibilities. In the past, we could more or less rely on some implicit regenerative power of society. But under the conditions of the new paradigm, the process of generation of new possibilities, the intertwining with unintended consequences, must be taken into account more explicitly. A new functional equivalent to the classical liberal substantive rationality based on general rules, individual responsibility, experience, and decentralized decision-making has to be found.

For the internal rationalization of the state, the above-mentioned approach could mean, for example: administrative tasks which are difficult to structure should only be taken up if a systematic evaluation programme is set up because information has to be generated explicitly once experience spontaneously emerging from trial-and-error can no longer be relied upon. Public tasks in general should be more related to the development and conservation of the informational infrastructure of society in a broad sense which would have to be set up in order to generate more possibilities and widen the "pool of variety" in society. In this way, procedural objective duties of the state could be linked with the rationality of traditional liberal rights rather than being integrated into the continuity of a substantive purpose-oriented logic of the welfare state.

VI. Outlook: Toward the 'Experimenting Society'

1. Critique of Discursive Rationality

Contrary to the 'argumentative rationality' of the post-conventional model of deliberation prompted by the Habermasian school, the model here advocated would rather presuppose bounded rationality and draw on the operation with provisional conventions, the management of self-produced constraints, the search for stop-rules oriented towards "viable" patterns of decisions and attribution of consequences. At present, new distinctions are necessary, which have to be adapted to self-organization of processes in society which are no longer registered by the old 'representative' macro

organizations. A discourse-ethical version of proceduralization of constitutional law would, however, neglect specific functions of the legal system. Priority of a discourse of justice would expect too much collective action potential, it underestimates the inevitability of constraints for the ongoing process of differentiation of society which cannot be overcome by 'deliberation'. There is no *a priori* justice which does not consider problems of implementation of justice in a complex society and that is why the priority of a discourse of justice over competing systemic and instrumental rationalities is far from being plausible. Such a claim to priority is an integral part of the form of discursive rationality but cannot be justified explicitly. It is not astonishing that Habermas derives the self-enlightening potential of political discourse from a rationality inscribed into language itself which has to be liberated from political power relationships and economic instrumental rationality. Judging from real history, it is far from evident that 'disinterested' political discourse has in any way privileged access to a global rationality. The main danger for liberal society in the past has been created by 'altruistic' political movements, which specifically for their altruistic nature, ask for sacrifices lead to a circle of self-destruction of society at large. The main problem in society is not to find rules for political argumentation but to maintain patterns of cooperative action. The problem of how to establish a cooperative order within a fragmented and rapidly evolving society cannot meaningfully be tackled without taking seriously the problem of knowledge, a common frame for self-description of society under conditions of indeterminacy if necessary. Neutralizing interest by deliberation would - even if it were possible - only solve the problem of fairness which is, by far, not the more pressing one.

A post-modern society cannot be integrated through a stable set of common shared beliefs but rather by 'overlapping networks' of practical differentiated political and social interactions generating a kind of implicit knowledge which can be used as the raw material for setting up explicit conventions. The complex society confronted with uncertainty must turn into an 'experimental society', restructuring its institutions in the sense of a reshaping of incentives for learning and adaptation. The fact that the main actors now are organizations and not individuals blocks the way back to a pseudo-liberal deregulated society. However, the liberal traditions exclude as well the alternative of a state replacing spontaneous self-regulatory potentials of the market by substantive goal-oriented regulations. That is why a renewal of a liberal society under conditions of complexity which must lead towards a self-organizing

society, can only be imagined to come about by introducing into organizations periodic "irritations" which create potentially externalized problems which can no longer be left to spontaneous evolution. The procedural character of this conception consists in the assumption that it is more requisite variety which is at stake. The general frame of reference should be focused on methods and procedures of confronting social systems and organizations with self-generated constraints challenging the risk, especially of organizations, of becoming locked into some established track of their development. The emphasis of this concept is laid on a paradoxical external determination of internal self-determination of organizational networks of interrelationships, leading towards a new legal order of a 'self-organizing society' which is distinguished from the primary liberal society of the individuals by the characteristic that its self-modification comprises also its own rules.

The central role of causality and experience as building-blocks allowed the establishment of an integrating framework structuring social reality, and the formulation of individual expectations in social interaction and cooperation. Society cannot be reinvented, nor can the knowledge generated by and implicit in practice be ignored by any political and legal theory. That is why a meaningful solution to the present crisis of state can only consist in the search for a functional equivalent of the classical relationship between the basic legal structure and its institutionalized model of society as well as its method of generating and evaluating new knowledge in a framework of self-observation of its own functioning. The relationship between legal order, and cognitive structure of society established by liberal order, is taken as a starting-point in this approach because it has functioned in an acceptable way. A global, justice-oriented, argumentative procedure cannot play this role because it neglects the constraints implicit in differentiated social practice fields. The model of proceduralization presented here is linked to the specific processes of knowledge generation and their relation to private action and public decision-making, as was the case with the traditional link between abstract legal norms and reference to general experience. It tries to combine normative and cognitive components in a prospect of an experimenting, flexible self-organizing society. It regards procedures explicitly as generating new knowledge, new options and new models as a functional equivalent of the link between abstract general rules, and experience as a public knowledge base of a society of individuals. Both approaches are characterised by the necessity of mobilizing knowledge for decision-making in a society confronted

with indeterminacy emerging with future orientation as opposed to reproduction of tradition.

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