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Post-Modern Constitutional Theory
A Prospect for the Self-Organizing Society

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DEPARTMENT OF LAW



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Post-Modern Constitutional Theory
A Prospect for the Self-Organizing Society

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1. The Future of Liberalism After the End of History

a. The breakdown of Communism - A Pyrrhus' victory?

In 1989 the victory of the liberal system seemed to be complete. The competing Communist system had broken down totally, an event that had often been predicted in the past but which seemed to be quite a surprise when it eventually happened - especially for those sciences focusing on the observation of politics and society.

Five or six years later the feeling of confidence, of being witness to a fresh start, opening an era of cooperation after the end of destructive conflict had faded away. The establishment of new liberal regimes in Middle and Eastern Europe has turned out to be much more complicated than presumed. The instability of contemporary Russia seems to be almost more of a threat than its compact structure as a superpower had been. The end of the clash of systems seems to have released new crisis potentials.

This is valid not only for the external relationships between states but for their internal structure as well - and not least within the victorious liberal system itself.

One of the explanations which have been given for this phenomenon recently draws on the assumption that the East-West conflict itself - or in economic terms: the conflict between Socialism and Capitalism - had had a paradigmatic structuring conflict-binding function which reinserted a potential for adaptability into liberal institutions forcing them to be supplemented by elements of the Welfare State. But this would - according to this approach - only be part of the phenomenon for above all this conflict is said to have had the function of reinforcing the vitality of Liberalism, creating a new commonly shared meaning within a system which is always at risk because of its always self-destructive tendencies eroding public commitments and social bonds.

So should we then join Benjamin Constant who - *vis-à-vis* the political upheavals caused by Napoleon - exclaimed: "Que Dieu nous rende nos Rois faineants". Behind this contemporary disillusionment, of course, an old problem is coming to the fore, that of a lack of legitimacy of Liberalism which cannot be ignored for the only reason that compensatory political efforts in practice have much more intriguing flaws themselves.

b. Liberalism and its dependence on conflicts

This disillusionment is also intermingled with a hidden reproach: the victory of the liberal system is regarded as undeserved because it is silently blamed for having been obtained by trickery, i.e.: by use of force borrowed from a friend-enemy-polarization. However, this reproach itself is the basis of a somewhat hypocritical "peace-initiative" taken by a left movement commending itself for its own, if only unvoluntary contribution to the conservation of Liberalism by way of intensification of conflicts. Of course, this mixture of anger and condescension is not a reliable basis for a detached reasonable judgement. This recent reinterpretation of conflicts prompted by authors of the Frankfurt School is not very convincing, as there are of course different types of conflicts which have to be distinguished, otherwise Yugoslavia would be the most stable political system in Europe and Switzerland would long have faded away. If we try to use the end of Communism as a kind of screen onto which current problems of liberal systems could be projected, rather an opposite idea could occur which could take on a heuristic function: couldn't we rather put it the other way round?" Are there certain similarities between liberal and Socialist systems coming to the fore, especially a kind of Real Socialism within Capitalism? Couldn't this be an approach giving access to an analysis of the problem of the functional State and of its relationship to society and, therewith, to a determination of the function of conflict for society? This does not bring us necessarily to conventional criticism of the Welfare State. Problems seem to be much more complex, we have to dig deeper. Aren't there more and more institutions in the public sphere - not only the State, but also the intermediary corporatist organizations - aren't these institutions taking up more and more tasks which are less and less structured, even indescribable and uncontrollable? Corresponding to this conjecture could be the assumption that there are political and social domains where we do have conflicts but rather the wrong ones? A structural similarity to Real Socialism could consist in the tendency of many public institutions to operate on the basis of purely normative self-descriptions which are neither adapted to control nor to learning.

c. New political risks created by Socialism within Capitalism?

Let's take an example from the educational system - though this might appear rather unfair - because it isn't only in this domain that the aforementioned problems occur. The Land Hamburg - as well as several other German Lander - wants to amend its school law: schools are to be given more autonomy, schools

are to become more democratic. One is quite surprised because this was exactly the aim of education policy in the last decade, wasn't it? Schools apparently are to be even more democratic than they have already been since the late '60s? Nobody is to be excluded, it is not the children who should adapt to school, but - as you can imagine - of course it's the other way round: the school must adapt to the children. The definition of learning capability and the tasks of school shall be worked out in cooperation with the children themselves. The old traditional school system took orientation from means presupposing a fixed set of basic qualifications on the side of the child - the new system focuses on aims - without really telling how and by which means to attain them.

At this point, we meet an old acquaintance from Real Socialism - the revolutionary comparative form which is to tackle problems by way of a purely normative claim of outdoing the already attained progress on the highest level of the universally developed Socialist system.

From our preliminary observations which should bring us nearer to the focus of this paper one could come to the consideration that, of course, the tasks of schools are much more complex nowadays than they used to be in the past. But this is more and more regarded as a chance by people - having a professional or political interest at stake - to prompt purely normative attribution of tasks to schools and to block any kind of empirical evaluation. Instead eventual problems remain unstructured and are shifted openly to the political system. This, of course, would really make a difference to Real Socialism: Socialism kept problems as far as possible invisible until they took up such a complexity as to block any possible self-observation of the whole system.

A common characteristic of contemporary liberal systems and Socialism seems to consist in the tendency to shift problems to the State when the solution within decentral differentiated subsystems seems to be painful. I would like to conclude these introductory speculations by some generalizing remarks. To my mind, one of the central problems of the liberal political system seems to consist in the growing complexity of tasks which call into question traditional concepts of law as a constraint, as a limit, and that, at the same time, political institutions don't develop a suitable, adequately flexible self-stabilizing rule-structure which would have to integrate a capacity of self-observation and self-revision - including a set of necessary stop-rules allowing for specification of tasks and for a coordination with other institutions. The dissolution of stable instrumental means-oriented tasks - for example of schools - is regarded as equivalent to a freedom to normative self-description which remains protected from control and from the necessity to learn. This is in my view one of the main reasons why

Socialism failed - a system whose normative design was principally mirrored in its own self-description.

2. The Challenge of Complexity

a. From substantive to procedural rationality of law

In the following considerations I intend to focus, above all, on the necessary transformation of constitutional and legal systems produced by the rise of complexity: complexity has to be distinguished from complicatedness. The former notion is characterized by the limits imposed on the description of problems, especially because of a kind of uncertainty generated by a growing number of feed-backs within networks of interrelationships of a domain leading to unintended side-effects. To give an example: once we no longer have a clear model of cause-effect relationships into which a law intervenes it becomes possible that the application of a law changes its own factual basis and the expectations it presupposed.

One of my theses is that this growing problem of the dissolution of stable expectations, the severance of a clearly structured and differentiated hierarchy of presupposed "natural levels of complexity" which allowed for description and attribution of linear cause-effect relationships, forces the legal system to reintroduce more flexibility, more capacity of self-description and more learning capability into the range of its operations. This is equivalent to a transformation from substantive rationality with clear description of problems and a limited array of options allowing for continuous structured accumulation of experience to a procedural type of rationality. The latter would be characterized less by the growing importance of legal procedure as such than by the necessity of knowledge generation and the design of experimental models on the basis of partial, fragmentary knowledge. This is not primarily a matter of having more knowledge but of finding a functional equivalent to the connection between decision-making and experience. When I herewith stress the cognitive rationality of law I don't of course ignore the fact that the law has to make possible normative decisions but rather, that the knowledge basis of decision-making can no longer be presupposed as being stable.

b. The diminishing value of the distinction of the public and private spheres

Some years ago, Dieter Grimm, a judge at the German constitutional court and a law professor, in a lucid article on "The Future of the Constitution" drew attention to the fact that the rise of public responsibility for social developments and the phenomenon of a "materialization of the problem of justice" finds its repercussions in a tendential split between legal attribution of tasks and their rather fictitious fulfilment. This is related to the fact that the separation of State and society which had also to be presupposed by the pluralistic constitutional order is being superseded by the introduction of institutionalized hybrid collective mediating forms establishing themselves between the spheres of the public and the private. But there is a dynamic inherent in these processes tending to blur this distinction altogether.

Under the aspect of the cognitive rationality of law it is problematic if the selectivity of a supplementary remodeling of traditional individual legal attribution of responsibility (individual rights) is suffocated by a variety of legal forms of collective attributions of responsibility. This evolution may more and more shatter the inevitable differentiation between centre and periphery within a constitutional order, a differentiation, which is crucial for its operative power. For example: liberty and equality can't themselves be on an equal footing. The liberal constitutional system has used the distinction between the public and the private spheres in order to structure its self-description and in order to establish a search structure generating new knowledge and new options under conditions of bounded rationality.

Constitutional theory drawing on Habermasian discourse theory tends to ignore this basic assumption when it gives priority to a discourse on justice: It turns constitutional argumentation into a truth judgement which derives its legitimacy from the broadest participation in public discourse, and the reverse side of this assumption consists in giving the public sphere priority over the private - because in one way or another the latter is based on past decisions which may seem irrelevant or even illegitimate to us in the present. This structure is a consequence of certain preconditions of discourse theory which themselves are not candidates for discursive argumentation. You just have to accept them if you want to be admitted to the discourse. But of course, this is in itself a practical assumption which cannot be a truth condition itself.

On the other hand, the relationship between public and private is of course subject to historical transformation. However, new rules of coordination are necessary, once it is changed, either through legal norms or factual historical processes shifting hitherto established limits. The basic assumption of liberal

systems, the bounded rationality of decision-making, and the collective action problems related to it is still valid or at least has to be taken seriously. There is no fixed point of observation or rational procedure of argumentation which could create self-transparency of constitutional discourses. This is the case because the liberal system has used limits and distinctions generated by historical evolution for reflexive constructional problems in a practical operative way.

c. Identity and difference in liberal systems

Liberalism has, in a certain way, set up a system which is able to manage a paradoxical constellation: i.e. to install a system of observation which invisibilizes its own preconditions, dependent on evolution, and at the same time allows for a continuous process of a-centric self-transformation by introducing an element of disorder, of chaos, into its self-observation by giving priority to differentiation instead of unity within the process of constructing order. This a-centric character of especially the distinction between public and private is mistaken if it is referred to a kind of "socio-ontological" assumption about the absoluteness of the pre-social individual.

The thesis that individual rights are supposed to be pre-political had had itself a paradoxical political-normative structuring character: historically it was opposed to certain traditional religious or social powers or ideologies drawing on different versions of social order institutionalized by a transcendent will. But, one should keep in mind that especially the tradition of the Scottish Enlightenment (and other early liberal authors, as well) never accepted the idea of an individual, irresponsible of the consequences of his or her action. However, responsibility was owed not to his or her *alter ego* but to the more abstract institutions replacing the ancient transcendent order given by God or his worldly representatives. This construction is not an expression of indifference to others, but rather a consequence of the insight that actions and their effects can no longer be interpreted in a "holistic" unitary way - as was the case in traditional societies integrated by shared religious beliefs. A more abstract legal order needs stop-rules whose simplification and differentiation of cause-effect relationships and responsibilities are set up with the hope of creating "a kind of justice" or, at least, allow for learning from unjust social constellations - inasmuch as operative criteria for observation are made available. This approach is based on the assumption that social cooperation is precarious, that its conditions are hard to describe and even harder to control, once society has accepted the indeterminacy of an evolutionary dynamic, released from traditional identitarian religious order.

d. The example of property

Property especially has always been a problem for constitutional theory. Because of its obvious bias towards inequality, property can only be legitimized by the assumption that a reciprocity of balancing of interests cannot be obtained immediately, but that, on the other hand, social interaction is only possible if some fundamental basic problems for which there is no simple solution are not raised. In this respect the liberal system does in fact derive its dynamics from conflicts, but conflicts processed by making distinctions and separations. Finally, these conflicts are characterized by a paradoxical potential, that of breaking down a basic indeterminacy into a distributed a-centric diffuse process of decision-making which operates under conditions of undecidability created by the fragmentation of religious order. One of the main examples for this paradox is the shift of undecidable questions of the just distribution of property to the efficiency of the ongoing processing of a property system.

Any attempt to remodel post-modern constitutional systems has to take into account the basic structure of individual rights and adaptation to a context characterized by indeterminacy, and finally the insight into the internal limits of self-observation of society, as well as the necessity related to this basic structure of a continuous creation of mechanisms constructing, observing, and elaborating constraints and confronting society with these constraints and the consequences generated from its operations therewith.

The alternative to this approach very often consists in nothing but the reintroduction of a problem instead of a critical solution. For example: replacing private property as a way of managing the collective action problem by appealing to public control. Anyhow, it should have become clearer that the distinction on which liberal society is based and its effect of making some fundamental problems invisible is related to the necessity of generating some operative structure for the process of decision-making.

3. The Evolution of the Constitutional Order of the Society of Organizations

a. The cognitive role of organizational pluralism

These ideas are mainly based on a description of the liberal society taken as a society of individuals. But these elliptical reflections may bring us to a new perspective on the process of transformations coming about within contemporary observation of potentials of society, and therewith, create a new dynamic within the legal and constitutional system, as well: in a first step the pluralistic - corporatist - remodeling of Liberalism had introduced more flexibility and a broader range of action potentials into the constitutional order. However, it presupposed possibilities of standardization and aggregation of compatible interests, within industrial relations by way of collective bargaining procedures or within politics by the introduction of political parties as organizations prestructuring alternatives for public decision-making. These "hybrid" organizations, the big representative organizations, have functioned as a kind of organized memory - supplementing the knowledge-generating potentials of the diffuse a-centric structure of the society of individuals drawing on experience as a knowledge basis spontaneously evolving through trial-and-error processes. The new problems are rather characterized by the phenomenon that the structuring power of the big representative macro-organization has weakened. The productive organization is flexibilized and gains more importance, therewith, the role of forms of coordination at the level of the firm grows. Mass production in the big enterprise loses its paradigmatic force which had also introduced important transformations within the legal system, forms of organizations of production within groups of firms become more heterogeneous. This development weakens the traditional organization of industrial relations. Within the political system the structuring potential of parties diminishes, the membership basis of the representative organizations in general narrows more and more and, therewith, is prone to strategies of endorsement of minority interests: especially the interests and views of civil servants as an organized group.

b. Complexity and the self-description of the State

This - very simplified - development is all the more important, the more the weight of administration and its competences is extended, a process which has a crucial feed-back effect also on the potential of self-description of the State. For

example: every evaluation of non-traditional tasks of public authorities is always linked to the possibility of a loss of jobs. On the other hand, the growing number of administrative tasks reduces visibility and controllability by the citizen. There has never been much of a consensus on the role of the State, as many idealistic constitutional theories tend to convey. They rather appear to have formed a "package deal" which citizens more or less accept as a compromise the outcome of which is regarded as acceptable. But once more and more tasks are shifted to the administration which apparently serve interests of smaller groups, citizens react with a reluctance which in fact can lead into a self-destructive circle of trying to get "compensation" from one of the many sections of public assistance and subventions instead of openly opposing this development. This evolution tends to reduce the aforementioned cognitive structuring potential of the pluralistic constitutional system. Many analyses of the Welfare State agree on the fact that those who need help most are not those who profit from the Welfare State but rather groups of well-off clientilistic groups.

This evolution tends to reduce the aforementioned cognitive structuring potential of the pluralistic constitutional system and asks for a new step towards a more complex mechanism of knowledge generation. First of all we have to accept and take into account that there are more and more problems which are unstructured, almost indescribable, and which devalue experience, rules of attribution of responsibility and the function of organizations as a kind of social "memory" for decision-making processes. On the legal, especially the constitutional side of the problem we become aware of a tendency towards a self-blocking of the constitutional system, especially its interrelationship between normative rules and cognitive infrastructure.

c. The rise of complex causality and the problem of the self-description of society

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 won't be any "end of the pipe"-technologies, either. I will only mention one example: the explanation of unemployment. The American economist Paul Krugman has recently quite plausibly observed that all present approaches provide only partial explanations of this intriguing phenomenon and that the most realistic assumption will have to accept that this is a case of complex causality, that means, 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

sciences - must consist in gaining access to an institutionalized approach to model this new type of complex causality. In legal terms this could mean e.g. that collective bargaining processes would have to be constrained to link their tariff policy to certain model-constructing assumptions about their expectations concerning central data of the economic process, a model which would have to be designed in a way to allow for comparison and retrospective observation. This would be a way of confronting society and social actors with self-generated constraints.

d. Toward a remodeling of the liberal system - the "experimenting society"

A third step towards restructuring of the liberal system seems to be necessary: the link between such a possible new procedural third-order remodeling and its starting point, the equilibrium model of the society of the individuals, could consist in designing new institutions and procedures which are not focused on the model of public deliberation but instead are adapted to the a-centric search process guaranteed by the pattern of the loosely coupled private and public civil rights and the operative and constructive possibilities included therein. This would mean that a self-modeling and self-designing capacity, which in the past was based on trial-and-error processes within the society of the individuals, should be reconstructed and transferred to the differentiated social systems (not the individuals) with the prospect of an "experimenting society". This conception 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 intertwinement with unintended consequences, must be taken into account more explicitly. The pre-constituted order of society is now characterized by the "society of the organizations", an evolution to which institutions of the pluralistic constitutional system have only partially been able to adapt. Whereas societies in former times could draw on a shared distributed body of common knowledge and the trial-and-error procedure it made possible, in the present the knowledge generated by organizations has to be accepted and to be presupposed as the predetermined brainwork of the constitution into which new inter-organizational search and observation processes adapted to conditions of growing uncertainty have to be introduced. The productive, generative character of the accelerated innovation of knowledge is inscribed into the strategic managing processes of organizations - the reverse side of which consists in growing risks of self-

blocking or shifting unintended consequences to external groups or the State. This is an evolution which has only come about recently because the traditional representative organizations were more or less long-term oriented and had to find compromises among heterogeneous interests within their own organizational strategy, and this dualistic remodeling of the liberal society was still quite closely linked to its basic individualistic assumptions, remodeling equality through group parity and liberty through group autonomy. A new evolution crossing the limits of the pluralist order is much more heterogeneous and needs a new definition of its relationships to the roots of Liberalism.

4. Toward a Post-Modern Constitutional Theory

a. Critique of argumentative 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, functioning as stop-rules oriented at setting up "viable" distribution and attribution of decisions and their consequences. At present new distinctions are necessary which have to be adapted to self-organizational processes in society which are no longer registered by the old "representative" macro-organizations. A discourse-ethical version of proceduralization of constitutional law would rather neglect these specific functions of the legal system. The 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".

A post-modern society cannot be integrated by common shared beliefs but rather by "overlapping networks" of practical differentiated political and social interactions generating a kind of implicit knowledge can be drawn functioning as the raw material for setting up explicit conventions. Civilized societies based on the possibility of pursuing self-interests, a strategy, from which much more learning capability and universalizability can be generated than by an abstract discourse of justice which is not adapted to the description of constraints imposed on networks of collective actions, and, at the same time, the productive potential inherent to it allowing for more differentiation and

innovation. This approach could introduce new life into the a-centric distributed order of rights and competences of the liberal system.

b. Liberal institutions and the prospects of a self-organizing society

A 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 bars the way back to a pseudo-liberal "deregulated" society. But 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 change into a self-organizing society can only be imagined to come about by a procedural strategy of "punctuation" of organizations with irritations introducing 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 flexibility, the possibility of developing long-term perspectives, and that it is more requisite variety, which is at stake - not a State-defined social or ecological responsibility imposed on firms, to give an example. The possibility of self-observation of public and private organizations acting in fields with no clear evident criteria of control should be established within the intra- and inter-organizational networks of relationships. 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 to be locked in some established drag of their development. The stress of this conception 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. And at the same time it would be different from the "society of organizations" inasmuch as it would have to be open to more accelerated processes of self-modification of society which can only be managed by a higher degree of flexibility and learning capability.

c. Self-observation and self-evaluation of the State in a knowledge society

For the internal rationalization of the State the above-mentioned approach could mean e.g.: administrative tasks which are hard to structure should only be taken up if a systematic evaluation programme is set up generating information and alternatives which are no longer obvious but have to be generated themselves. Close suffocating links between political parties and administrations should be broken up by the introduction of new incompatibilities, institutions of a cultural and political sphere should also be constrained to introduce more innovative potential, once the traditional links between these institutions (broadcasting, etc.) can no longer draw on the orientation function of the big representative organizations (political parties, trade unions, churches, etc.), the educational system should be set under constraints to continuous self-observation and self-evaluation linked to processes of evaluation from outside. 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 a sense such as to generate more possibilities and widen the pool of variety of society. In this way procedural objective duties of the State could be linked to the rationality of traditional liberal rights rather than being integrated into the continuity of a substantive purpose-oriented logic of the Welfare State.

d. Outlook: a post-modern reanimation of liberal values?

After the first model of spontaneous generation of more possibilities within the "society of individuals" we had to adapt to a secondary modeling of the pluralistic "society of the organizations" and now we have to pass to a "self-organized society" preconceived as a third-order modeling of the liberal society. Of course this does not mean that this model replaces the two earlier ones but a new coordination between the three layers will be necessary. (The second-order model didn't replace the traditional model either.)

But a liberal constitution, and this is valid for a post-modern one, as well, in one way or another has to presuppose pre-constituted potentials for the development of self-stabilizing networks of interactions which of course especially ask for legal restructuring. Superimposing a substantive purpose-oriented system of government regulations would not be a model adapted to the new conditions of complexity and uncertainty. And a normative supposition of a new consensus brought about by inter-subjective argumentation oriented at an ideal outcome (as a limiting concept not in fact to be put into practice, of

course) could not take into account this basic structure inherent to indeterminacy.

The procedural approach as it is suggested in this paper would rather continue the traditional rule-based character of Liberalism adapting to a self-organizing society. Rules are characterized by the fact that they introduce binding force and reliability into networks of social relationships which themselves generate a potential for self-stabilization. A rule-based rationality processes negative constraints (not a positive "steering" programme) enabling productive interactions, interrupting unproductive lock-ins contributing to a flexible search structure for the self-organizing society.

The prospect of a post-modern constitutional order should thus be more oriented at establishing new kinds of procedural rules stressing flexibility, innovation, experimentation, incentives for long-term horizons of decision-making, confronting systems and organizations with self-generated constraints, developing self-observation potentials and evaluation capabilities within a strategy oriented at managing the unexpected through the generation of learning capabilities and not the introduction of more and more public purposes and shifting of tasks to public authorities.

To build a bridge to our starting point, one could say, there might be something to the assumption that the breakdown of Communism has also shifted the focus to some legitimation problems of Capitalism, but we must in fact dig a bit deeper in order to get a grip on some profound process of self-confirmation of liberal society. The perspective here developed consists in going back to basics of Liberalism and checking whether the basics of a rights-based individualistic society can be remodeled and introduce new vitality into a post-modern society. And this hidden strength of Liberalism could be identified in its capacity to manage indeterminacy. The cognitive infrastructure of individual liberties and a structure of rights in constitutional theory has been used as a frame of reference to which present weaknesses of constitutional systems have been referred and which at the same time - in a normative perspective - has been used in order to remodel a procedural rationality of a constitutional system adapted to indeterminacy under conditions characterized by the transformations leading into a more complex, more rapidly self-modifying and self-organizing society.

Footnotes

- 1 This has provoked reflections on the end of history, cf. F. Fukuyama, *The End of Liberty and the last Man*, New York 1992.
- 2 Cf. only A.E.D. Howard (ed.), *Constitution-Making in Eastern Europe*, Washington D.C. 1993; R. Deppe/H. Dubiel/U. Roedel, *Demokratischer Umbruch in Osteuropa*, Frankfurt/M. 1991.
3. Cf. generally H. Dubiel, *Zivilreligion in der Massendemokratie, Soziale Welt* 1990, p. 125 ss.; id., *Ungewi..heit und Politik*, Frankfurt/M. 1994; U. Roedel (ed.), *Autonome Gesellschaft und libertäre Demokratie*, Frankfurt/M. 1990.
- 4 See Dubiel, *ibid.*, (FN.3). More differentiated A.O. Hirschman, *I conflitti come pilastri della società democratica, Stato e Mercato* 1994, p. 133 ss.
- 5 Concerning tendencies of ossification created by big organizations cf. M. Olson, *The Rise and Decline of Nations: Economic Growth, Stagflation and Social Rigidities*, New Haven 1982; id., *Logica delle istituzioni*, Milano 1994.
- 6 For the concept of observation and its theoretical underpinnings cf. N. Luhmann, *Beobachtungen der Moderne*, Opladen 1992; G.F. Lanzara, *Capacità negativa - Competenza progettuale e modelli di intervento nelle organizzazioni*, Bologna 1993.
- 7 For the concept of complexity in modern research cf. F. Fogelman Soulié (ed.), *Les théories de la complexité*, Paris 1991.
- 8 Cf. L. Krüger et al., *The Probabilistic Revolution*, Cambridge/Mass., two volumes, 1987; id., *Kausalität und Freiheit*, *Neue Hefte für Philosophie* 32/33 (1992), 1 SS.; G. Gigerenzer et al., *The Empire of Chance: How Probability Changed Science and Everyday Life*, Cambridge 1989; W. Lübke (ed.), *Konsolidität und Zurechnung: über Verantwortung in komplexen kulturellen Prozessen*, Berlin 1994.
- 9 For our theoretical presuppositions cf. G. Teubner, *Law as an Autopoietic System*, Oxford 1993; N. Luhmann, *Das Recht der Gesellschaft*, Frankfurt/M. 1993; K.H. Ladeur, *Postmoderne Rechtstheorie*, Berlin 1992.

- 10 Cf. H.A. Simon, *From Substantive to Procedural Rationality*, in: S. Latsis (ed.), *Method and Appraisal in Economics*, Cambridge 1976, p. 129 ss.; see also G. Teubner, *Substantive and Reflexive Elements in Modern Law*, EUI Working Paper No. 14, 1982; K.H. Ladeur, *Social Risks, Welfare Rights and the Paradigm of Proceduralization*, EUI Working Paper Law No. 95/2.
- 11 Cf. D. Grimm, *Die Zukunft der Verfassung*, in: U.K. Preuss (ed.), *Zum Begriff der Verfassung*, Frankfurt/M. 1994, p. 277 ss.
- 12 For details see Ladeur, *ibid.* (FN 10).
- 13 Cf. J.S. Coleman, *The Role of Rights in a Theory of Social Action*, JITE 1993, p. 213, 223.
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- 30 Cf. P. Krugman, *Inequality and the Political Economy of Euroclerosis*, CEPR, Discussion Papers No. 867, London 1993.
- 31 Cf. Ladeur, *ibid.* (FN 10).
- 32 For the theoretical background see N. Luhmann, *Soziale Systeme*, Frankfurt/M. 1984; for the legal system cf. *id.*, Teubner, Ladeur, *ibid.* (FN 9); this often leads to the "humanistic" misunderstanding that a social theory presupposing communications as its basic components (and not human individuals) must lead to inhuman consequences; but a theoretical presupposition that a holistic approach is impossible because of overcomplexity cannot be refuted by the normativistic assumption that this is necessary. And of course a system of theoretical approach does not neglect individual and collective values.
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- 34 Cf. Habermas, *ibid.* (FN 14); Alexy, *ibid.* (FN 14).
- 35 Cf. generally J.G.B. Probst, *Selbstorganisation - Ordnungsprozesse in sozialen Systemen*, Hamburg/Wien 1987.
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- 41 For an economic perspective on rules see R.A. Heiner, *Imperfect Decisions and the Law: On the Evolution of Legal Precedents and Rules*, *Journal of Legal Studies* 1986, p. 227 ss.; *id.*, *The Origins of Predictable*

Behavior, *American Economic Review* 1983, p. 560 ss.; for a philosophical approach stressing the creative orientation function of rules opening new possibilities of actions cf. E.F. McClennen, *Rationality, Constitution, and the Ethics of Rules, Constitutional Political Economy* 1993, p. 173 ss.; D. Gauthier, *Impegno e scelta. Saggi sulla razionalità dei progetti, Ragion Pratica* 1 (1993), p. 163 ss.; in legal perspective cf. M. Adams, *Normen, Standards, Rechte, Juristenzeitung* 1991, p. 942 ss.

- 42 A. Peyrefitte (Du "Miracle" en économie, Paris 1995) has recently shown convincingly how post-modern society can (and should!) learn from its past experiences (instead of escaping into wishful thinking prompted by existing and "alternative" bureaucracies promising to alleviate the burden of continuous adaptation to self-generated constraints): Successful societies are built on confidence in innovation and self-transformation.



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