QUOD OMNES TANGIT: REMARKS ON JÜRGEN HABERMAS'S LEGAL THEORY

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I.

Quod omnes tangit, omnibus tractari et approbari debet.[1] The Middle Ages found this rule in Roman law. It had to do with the circumstance of a plurality of legal guardians over the same ward. In the typical case, one guardian's approval was legally sufficient authorization in legal transactions. Since every other rule had seriously damaged business dealings, the business partner's confidence had to be protected. On the other hand, this consideration—that one guardian's approval is legally sufficient authorization for an emancipation—could not have led to a fully realized emancipation of a ward. Nor could it have led to the elimination of the guardianship of all the guardians. For the relations between the guardians the rule was: what concerns everyone (*quod omnes tangit*) requires their agreement.

This seems to have been a reasonable rule. Pursuant to traditional Roman law, case decision making of this kind would, however, be concluded with general reasonings or mnemonics (*ParÖmien*). This was done in accordance with an ever continuing oral tradition of teaching that supported itself with written texts, yet referred to rules of signs (*Merkregeln*) that made it easier to remember the rules themselves. The teaching needs of the newly erected universities of the Middle Ages and the need to systematize the newly emergent legal culture, involuntarily extracted such significant rules from the texts. One compared similar passages, brought the concrete cases back to the texts, and generalized, thus satisfying entirely different needs of the times through legal doctrine. What was especially new under the title "universitas" was corporation law (*ausgebildetes KÖrperschaftsrecht*), which included the church, as well as other corporations. The corporation, as distinguished from the dominating family households, was an inner organizational framework that could supply a legal clarification to disputes. In this way, *quod omnes tangit* became a maxim of corpo-

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[1] The literal translation of this phrase is "all those affected should be heard and agree."

ration law that would then always be cited by the better descended (*melior*) or more reasonably argued (*sanior*) party, when members of sufficient social prominence want to announce and accomplish their participation.[2] The political consequences remain assessable. One recalls the conflicts that brought about the Magna Charta or the controversy surrounding the Council movement in the Catholic Church.

The case of the majority of guardians is long forgotten. Today the regulation of representation lacks any indication of social stratification in the quality of the *melior et sanior pars* already given before every dispute. Despite this, *quod omnes tangit* today appears absolutely valid. One says the Owl of Minerva begins its flight at twilight. But how high can she fly?

In other words, how much farther can the rationality of juristic argumentation distance itself from those aids to insight (*Einsichtshilfen*) than it had in its cases? And if one just lets the owl *quod omnes tangit* fly, why not another owl?

With the certainty that his concept of the lifeworld offers him, Habermas, continuing from this point, asserts that not only is a precept such as *quod omnes tangit* valid today, but that it should, with adequate modifications, be extended to maxims of legal rationality. Naturally, it is not possible for all those concerned (including the unborn generations) to be heard and agree. Therefore, the decision cannot be made in a legitimate way. But when this is not possible, one should at least try to pursue the results as though it were possible. These are, however, broad leaps from the Roman tutela to the medieval universitas, from the modern representative constitution and from there to the discourse theory. Does reason withstand this, or does it fall by the wayside?

II.

Our question is, therefore, how does the participation formula encompass *all those involved*? How, despite everything, can its plausibility be preserved? Certainly not in a practicable way because the involvement turns on the decision, thus the involvement cannot be identified in advance of the discourse. Even if this argument did not apply, all those involved would by no means accept an invitation to the discourse. To order them to do so would contradict the well considered principles of discourse theory. The

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[2] *See* HAROLD J. BERMAN, RECHT UND REVOLUTION: DIE BILDUNG DER WESTLICHEN RECHTSTRADITION 336 n.54 (1991) (discussing changed context of *quod omnes tangit*).

problem, therefore, has to be reconstructed so that questions of this kind do not arise in the first place.

Since Habermas does not locate the problem on the level of actually occurring communications, he avoids this possible approach. Instead, he employs a theory of how the reasonable coordination of action can take place if assured of the freely rendered agreement of all involved. This postulate, however, should not be dismissed out of hand as utopian and empirically unrealizable. While one could convincingly do so, such a dismissal could cause one to lose sight of important considerations which justify this conception's topical importance, as well as its concealed affinity with parallel developments in the theory of self-referential systems.

Habermas distinguishes his language-theoretical approach from the subject-theoretical concept of practical intelligence at the level of theoretical self-imaging, and in the context of a general rationality program. This involves a series of important but negative provisional judgments. One must (1) abstain from assuming a transcendental fore-coordination between all thinking subjects. In so doing, the sense of Kant's distinction between the empirical and transcendental disappears. In turn, this further brings into question the basis for assuming that all subjects can in one or another (empirical) way, think or want the same. In this case, coordination ceases to arise out of the facts of consciousness, available to every subject through self-reflection. Rather, it initially arises as the result of a linguistic communication, placed under special conditions. This means that (2) this linguistic discourse is no longer, in the manner of natural law, bound to cognitive or normative conditions which originally arose. This linguistic discourse instead decides itself on its own substantial premises. This self-binding effect (*Selbstbindungseffekt*) arises out of the peculiarities of the use of language. Finally, one must also (3) abstain from assuming contingent moral principles[3] or an ethical law. In addition, such presuppositions are available in the discourse and can only, if at all, be made understandable in a form determined by the discourse.

These assumptions deserve full endorsement, irrespective of any problems in realizing such actual discourse. They amount to an option for a system producing its own uncertainty. Whoever

[3] Habermas himself does not always operate consistently here. For example, when he engages in direct moral condemnations of the criminal attacks made by youths on asylum-seekers and other foreigners, he thereby tacitly replaces a demo-cratic with a demo-critical perspective. While one agrees wholeheartedly with him, it is a disaster for his theory. Strictly speaking, those who feel themselves affected by delays in the procedures for granting asylum should be invited to the discourses.

adopts such an option cuts all ties to the past and puts himself, and all those involved in the discussion, at the mercy of an unknown future. The uncertainty of the future is the only real invariable of the discourse theory. All procedural measures serve to support these premises much in the same way as they do in court processes or election proceedings of political democracies. The decision has to be regarded as open until it has been made. It is precisely because of this, that the postulates accepted by the discourse theory have been derived from the model of legally regulated procedure.

By intensifying (*Zuspitzung*) in this way, the discourse theory is completely in tune with the times. From a different perspective, the independent production of uncertainty has been understood as characteristic of "postmodern" legal theory.[4] A language theory, which emphasizes that all linguistic statements can assume a yes or no form, and can therefore be linguistically well understood and refused, must come to the same conclusion. The decision theory plays a part, in that it emphasizes that the decision does not arise out of the "choosables," but is rather an original beginning of sequences (*ein originärer Anfang von Sequenzen*) which, in turn, can consist of decisions.[5] The raging value dictates prevailing on the level of party programmes and in the judicial administration of the (German) Federal Constitutional Court have the same effect, because they leave the decision of value conflicts—which all involve deciding value conflicts—to the weight accorded each individual case. All value lists are waiting lists and, as such, condemn those who are seeking justice to waiting for a judge who never appears. There are indeed decisions, but the decision maker, who had constructed the alternative, disappears in the decisions as an excluded ("neutral") third; as an absentee, who remains unconsidered; as an anonymous symbol of the unknown future, which first has to be produced in a communication designed to do so. And last, but not least, in systems theory, it is a question of the same basic circumstances, hidden in concepts such as self-reference, operative closure, autopoiesis, cognitive constructivism, symmetry breaking, nonlinearities, paradoxes and dis-paradoxings (*Entparadoxierungen*), and many others.

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[4] *See* KARL-HEINZ LADEUR, POSTMODERNE RECHTSTHEORIE: SELBSTREFERENZ—SELBSTORGANISATION—PROZEDURALISIERUNG (1992). Whether the expression "postmodern" is well chosen can, in this context, be left unanswered.

[5] *See* G.L.S. SHACKLE, *Imagination, formalism, and choice*, *in* TIME, UNCERTAINTY AND DISEQUILIBRIUM: EXPLORATIONS OF AUSTRIAN THEMES 19-31 (Mario J. Rizzo ed., 1979) (contrasts the usual claims to objectivity by economic theory stylized as radical subjectivism and therefore relegated to an outside position in the economic sciences).

With such a heterogenous population theory one cannot be content with attesting to its modernity, however striking this is as a common characteristic. To insist on this commonality is indeed important and could serve to warn adherents here and abroad against misunderstandings. The bleakness of the banishment to an uncertain future can only, with difficulty, be warmed up by resorting to the coziness of traditional terminology (i.e., democracy, rationality, understanding, consensus, even *Lebenswelt*). The haphazard nature of minor political reprimands is also illuminating. The real test remains the theoretical architecture—the question: how it is done.

III.

For the foundation of the theory of legal discourse discussed here, it is decisive that Habermas sets aside the customary distinction used in the law itself between facts and norms, instead employing his own concept-titles: facticity and validity. Is this likewise a distinction? At any rate, it is not a straight-forward opposition, such as that between facts and norms, in which the edges of the distinction fit together in the sense that they mutually exclude each other. Nor is it a dialectical contradiction, destined to be eliminated by an initially excluded third. However, if it is not any of these things, then what is it?

Habermas contents himself by describing the unity of this distinction as a strained relationship (*Spannungsverhältnis*). While this is not much more than a formula for perplexity, it becomes fascinating (*spannend*) when he describes the self-transcending of the discourses. They are not simply operations, but are what they are and effect what they effect. By reason of the use of language, they transcend themselves. The relevant, valid conditions which have to be accepted in order to make this possible are described by Habermas as idealizations and also as contrafactual assumptions.

This is, at first sight, self-evident. Psychologically individualized and thereby somewhat unruly subjects must be able to assume that they are referring to the same things, despite what might be going on inside of them in terms of mixed experiences. Habermas relies in this respect on language theory. But the same also applies to perception. Even geese must do so when they run cackling through the gate.[6] More important for the overall construction of the theory is the fact that at this point Habermas concentrates on

[6] Humerto Maturana offers a theory that also considers this, taking language as merely behavioral coordination. *See* HUMERTO MATURANA, ERKENNEN: DIE ORGANISATION

the social dimension and *time stands still*. The idealizations continue to be used in the sequences of communicative actions, as if they were always the same. Formulated in Derrida's terminology, it is a question of *répétition*, not of *itérabilité*. But in reality the overall situation alters—*différence*!—and precisely in linguistic communication from moment to moment. Something said becomes past; that which lies further away thereby moves closer; one regrets and can only mend; one notes too late what one should have said. The weight and appearance of the idealizations necessary for communication alter all the time. Every identity—each and every one—is produced by a *selective* evaluation of past event-complexes and in its selectivity is continually reconstructed. In other words, identities *condense*, and in ever new situations they are *reaffirmed* and must be correspondingly *generalized*. This can happen fluidly and is a prerequisite for continuous coordination of action. In some instances, Habermas comes very close to this temporal dissolution of idealizations,[7] but in the end still does not perceive that the specifically juridical argumentation is essentially concerned with precisely this issue: fitting ever new cases into a normative structure and thereby reproducing or modifying that structure.[8]

Another disencumbering practice (*Lockerungsübung*) begins with the contrafactual validity mode of normative expectations. Habermas presupposes, and it cannot be disputed, that one can in fact expect contrafactually. While this is also thanks to language, is it not somewhat curious? One can in fact expect, and may continue to expect when the expectation not only has not been fulfilled, but rather disappointed. This is so, not only hypothetically, but also in concrete cases: "You should not have done that!" But why not, when she did it?

UND VERKÖRPERUNG VON WIRKLICHKEIT: AUSGEWÄHLTE ARBEITEN ZUR BIOLOGISCHEN EPISTEMOLOGIE (German trans. Braunschweig 1982).

7 *See, e.g.* JÜRGEN HABERMAS, FAKTIZITÄT UND GELTUNG: BEITRÄGE ZUR DISKURSTHEORIE DES RECHTS UND DES DEMOKRATISCHEN RECHTSSTAATS 37 (1992) (on the "Janus face" of validity claims).

8 This method of reasoning can be observed, with few distinctions, in both continental European law and in common law. However, it is more clearly explained in literature discussing the common law. *See, e.g.*, Edward H. Levi, *An Introduction to Legal Reasoning*, 15 CHI. L. REV. 501, 501-74 (1948); Neil MacCormick, *Why Cases Have Rationes and What These Are*, *in* PRECEDENT IN LAW 155-82 (Laurence Goldstein ed., 1987). Josef Esser once lamented that legal philosophers care more for reasoning than argumentation, "without taking-up legal fieldwork and stock-taking for long." *See* JOSEF ESSER, JURISTISCHES ARGUMENTIEREN IM WANDEL DES RECHTSFINDUNGSKONZEPTS UNSERES JAHRHUNDERTS 12 (1979).

Obviously what underlies this is a doubling of reality, such as in other fields, for example, in the pattern game/seriousness, sign/signified (that is, language), immanence/transcendence (religion), fiction/real world (art), average expectations/individual cases (inductive conclusions/statistics). Thanks to such duplications there is a real world and an imaginary world or, more precisely, a real reality and an equally real imagination. In all these cases the duplication serves to make the hardness of the real reality bearable, in religion, for example, as fate, in art as banality. But in the duplication mode this happens in very different ways. The differentiation could have something to do with evolution and with the differentiation of systems. But in this case what is the specific view of reality of the normative duplication of reality (if one compares them with religion, art, play, statistics, etc)? Habermas quite rightly recognizes a problem with those validity claims which exceed facticity.[9]

But although he sees it and stresses it, he does not long contemplate that this transgression of facticity actually occurs. But if amazement is already beginning to set in with the problem of the duplication of reality, one is tempted to ask, what constitutes the unity of the distinction between the reality of the factual and the reality of the contrafactual. In so doing, one would then run into the paradox of the sameness of that which had been distinguished. All the certainties which had been constructed also served to solve the paradox. Reason saw the primary function of consciousness and communication as providing firm, distinguishable identities in veiling this and in providing secret agreement with the relevant existing social relations.

Habermas argues consistently. He is concerned with the legitimation of the need for legitimation. For this purpose, he is content with relying on the results of linguistic research. But these results are actually not as solidly founded as it might appear. At any rate, they do furnish a very foreshortened view of the possibilities. It is not a matter of questioning or disproving this gain in insight. But the readiness with which Habermas takes it for

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9 *See* HABERMAS, *supra* note 7, at 396. In a noteworthy passage, Habermas himself speaks of idealizations as a "methodical fiction, which should bring to light the unavoidable inertial factors of social complexity, that is, the reverse of communicative socialization" or of idealizations as a contrast to a world "that is *differently* organized." *Id.* at 395 (emphasis added). This directly corresponds with the consideration formulated in the text above, that an imaginary duplication of reality not only allows the play of the imagination to be enjoyed, but also allows the contrasting hardness of reality to be noticed. But Habermas allows this only for an ideal model of communicative socialization and thinks he can escape this by taking into account the facticity of law and politics. But this would only apply if Habermas abstained in this area from idealizing conditions for legitimation.

granted exacts a price in the theoretical superstructure built upon it.

IV.

"Archaeological" excavations of the kind with which we have concerned ourselves thus far relate to the field in which Habermas attempts to develop his theory, but they do not take theoretical ambition itself into account. They do not proceed in a theoretically immanent way and are not based on a supposedly "better" theory as a basis for criticism. We have only tried to break down premises, in order to spread uncertainty. This is not a matter of the perennially possible skepticism, which can only be employed destructively, rather, it concerns the thematization of time and of observer paradoxes which can, in their turn, rely on elaborate question-formulations. One could mention names like Jacques Derrida or George Spencer Brown, but what does such digging, such temporalising and re-paradoxising, achieve?

In order to pursue this, let us return to the *quod omnes tangit* problem. All those affected by legal decisions should be heard and engaged in legal discourses until they agree in a reasonable way, or if they do not agree, they should be evaluated as unreasonable. This final division of humanity, into those that include or exclude through reason, may in itself be a vision of horror, where one can rationally (paradoxically) only vote for irrationality. But for the moment this "Last Judgment" is not our problem. The important preliminary question for the legal system is: how can one get that far in a juridically unobjectionable way.

In a critical discussion of the old liberal subjective rights and of the newer dogmatic of subjective rights, Habermas warns that the problem of communicative agreement about validity claims is not adequately considered. The legitimacy of the law cannot therefore be supported by a declaration of freedom in the form of subjective rights.[10] That is certainly correct, but the question then becomes, how it could be done differently, in a way that would work in technical legal terms. After all, subjective rights do not just guarantee freedom, they also limit legally relevant involvement (i.e., limitation of access to the processes of the legal system). If this barrier were to fall, anyone could turn up and request that the court establish rational social integration.

Habermas naturally knows that a discourse with all involved is not possible in any legal process. He therefore does not demand

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[10] *See id.* at 117.

that one should postpone the decision until the last person affected has been born, grownup, and heard. As a result, the key formula states: "Those norms for action are valid, to which all potentially affected persons could agree as participants in a rational discourse."[11] Every concept of this maxim is carefully explained with the exception of the word "could," through which Habermas hides the problem. This is a matter of a modal concept, which, in addition, is formulated in the conjunctive. Ever since Kant, one knows that in such cases the statement must be specified by giving the conditions for the possibility. That, however, remains unsaid. The master and the invisible hand will not be replaced. But who determines, and how does he do so, what *could* find rational agreement? How does this decisive operation, on which everything in the postmetaphysical age depends, become juridified? As a result, it also remains unclear, on all levels of the argument, how the conjunctive becomes an indicative, how the potential becomes a reality, or, for example, how power "comes forth" out of the freely discussing civil society, which does not of course exist.[12]

Habermas sees the problem, or he would not formulate it in such a carefully thought out manner. It is apparent that he anticipates criticism in stressing that the discourse principle cannot be applied directly to the legal process.[13] In calling for a process that would run under conditions suited to reach decisions and one to which all those affected could agree, Habermas also seeks an escape route. But with this the problem arises again, in the form of a double modality—a "would-could" (*kÖnnten-kÖnnten*). Since not all those affected can be involved in the legal process—the conditions, which specify this impossibility, are obvious—Habermas, astonishingly enough, puts his faith in the legal process. In an ongoing discussion, he speaks of the "proceduralizing" of substantial legal problems.[14] In regulating the process, there should be a

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[11] *Id.* at 138.

[12] *See, e.g., id.* at 216.

[13] *See id.* at 195. But if this is true, then the "mediation" is nothing more than a division according to types of the same principle under concretely formulated conditions.

[14] Determining to what extent this is a legacy of Max Weber, requires more careful examination. In following Weber, it is common to distinguish between formal and substantial rationality. *See, e.g.*, PATRICK S. ATIYAH & ROBERT S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY OF LEGAL REASONING, LEGAL THEORY, AND LEGAL INSTITUTIONS (1987). Here it is a question, reformulated in system-theory terms; of key considerations of juristic argumentation; of the distinction between self-reference and external reference. It is notable, that this important distinction makes no difference to the hopes bound up with "proceduralizing." This may be caused by insufficient familiarity with juristic practice. However, it remains unclear how one is to

guarantee that the parties consent to a communication in a spirit of agreement. Or at least: there should be a guarantee that the communication proceeds under the assumption that this could occur. However, this is nothing but a legal fiction since an agreement cannot really be brought about and conflicts can only be resolved by a judge in a court case and, where legislation is concerned, only on the basis of majorities. Thus in the end the suppressed paradox, previously rendered invisible, emerges in the context of another distinction. The distinction between legality and legitimacy is copied into legality and is expressed as a legal fiction. Legitimacy is legality in a form determined by this distinction.

Through various "*suppléments*"—according to Derrida—this can be repacked and in a second attempt be de-paradoxised again. In the first place, in every process, not only the natural veil of ignorance,[15] but also the uncertainty of the outcome produced by the process itself has an effect. This promotes not only the recognition of general viewpoints for a decision, but also the more or less illusionary hope of winning something through involvement.[16] Habermas himself would certainly reject this interpretation much in the same way as he has rejected corresponding proposals.[17] However, it would be well worth considering what one would gain or lose if dominance were replaced by uncertainty. In this scenario, the possibility of making the ruler see reason, for example, would be lost.

The fact that Habermas does not really make use of the argument with time and future might have something to do with the fact that he prefers a different solution to the legality/legitimacy paradox. He solves the problem by externalising in the direction of political democracy. This results in a very traditional emphasis on legislation, thereby underestimating judicial lawmaking. Such an emphasis makes Habermas appear to be a late adherent of the Merkl/Kelsen theory of the step-like structure of legal order. In an agreement-oriented administration of justice, argument objectives

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imagine that substantial problems (in practice: conflicts of legally-recognized interests) could be solved in the form of procedural arrangements.

15 *See also* JOHN RAWLS, EINE THEORIE DER GERECHTIGKEIT 159 (1975). *But cf.* ARISTOTLE, RHETORIC I (offering the same argument generalizing *qua* ignorance of the future in favor of the legislator).

16 How one can incidentally acquaint oneself with an emancipation achieved by the acquisition of procedural rules of competence (*Geschäftsordnungskompetenzen*), remains an enigma to anyone who did not experience and survive the student rebellion of the Sixties.

17 See, for example, the proposal of NIKLAS LUHMANN, LEGITIMATION DURCH VERFAHREN (2d ed. 1983).

have the advantage of giving the legislator, in contrast with the judge, the option of nondecision. Without agreement, there is no decision. Unlike the legislator, this escape route is blocked for a judge. He is subject to the ban on a refusal of justice. Traditionally this has been justified by the idea of being bound by the law; a justification which simultaneously chained and relieved the judge. But today the prevailing notion in both common law and in continental European legal orders is that this is, at best, a half-truth. Furthermore, for a sociologist it is noteworthy that most legal disagreements are decided not on questions of norm interpretation, but on factual and evidentiary questions.

V.

There is an attitude, best described as "idealization of the absent," that lies at the basis of the discourse theory.[18] This attitude lends discourse theory its seemingly irresistible Utopian charm. And Utopia—the place, which is nowhere—is itself indeed one of the most famous paradoxes. Politically, this amounts to a sociolytic therapy recommendation which has been purged of all tragedy. For this, Habermas deploys the concept of morality, by which it is simultaneously indicated that this is good. The law is allotted an application of this form, which is not deducible from it, but modified by more concrete conditions. Furthermore, the law retains a relationship to morality, which is insufficient for justifications, but is thoroughly harmonious.

If jurists do call on moral principles, this occurs more frequently in emergency situations (hard cases) and in instances where jurists hope to justify their decisions. Moreover, jurists will hardly be able to recognize or reconstruct their decision-making process. And it is this, more than anything else, that merits serious objection. In legal matters, there are many persuasive arguments and constructive viewpoints favoring the particular resolution of cases. However, since there are good arguments on both sides, opposite decisions are equally justified. This merits the question: how can discourse theory, wherein argumentation occupies such a central position, be so off-base in terms of the peculiarities of the juristic faculties?[19]

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[18] *See* W. Edgar Gregory, *The Idealization of the Absent*, 50 AM. J. SOC. 53, 53-54 (1944) (discussing a study of the homeland feelings of soldiers occupied with war).

[19] Habermas addresses this point noting that the quality of a "good reason" only reveals itself inside an "argument game." *See* HABERMAS, *supra* note 7, at 249. However, he views this as representing a "rationality gap" which he attempts to close through idealiz-

This is apparently the result of the low calibre (*Kleinformatigkeit*) of successful juristic argument. In order to equip arguments with decisive force, jurists need two cooperating contexts: cases and texts. On the one hand, the peculiarity of the case enlivens the quest to understand the text. While on the other hand, situations first appear as cases only in light of particular legal texts. Texts and cases are highly selective limitations of communication set free in the legal system by the process of differentiation. In fact, Habermas speaks in this very sense of released communication which seeks support in the law. In one respect, the room for maneuvering is widened by separating these two preconditions since this involves a circular, constitutional relationship. In another respect, it is provided with new limitation possibilities, wherein that which has found recognition as a convincing argument then firmly establishes itself. Thus, it is a complicated relationship involving the escalation of complexity through the reduction of complexity.

This strictly localized nature of juridical rationality is, for the most part, not adequately recognized even in the doctrinal methods of legal teaching. A good argument cannot and should not be understood as the correct application of the correct method. Moreover, courts guard against adopting declarations of method in stating the reasons for their decisions primarily because such statements influence the direction of further decisions.[20] Methods, however, must be available, and how they are used is determined by the aims of the argument developed from the case and the text.

If it is true that the thorough differentiation of a social legal system—or, as Habermas puts it, the dissolution of the sacred unity of facticity and validity—has led to the releasing and explosive multiplication of the system's internal communication possibilities, then this finding need not surprise us. Under these conditions, how else is the legal practice to deal with concrete communications producing sentence after sentence? Moreover, one also finds in the economic system, under the appropriate working conditions of the money economy, a similar state of affairs. The collapse of socialist

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ing and universalizing the arguments. *See id.* The logical question which remains is: does this improve the soundness of the reasons, or does it simply serve as a theoretical requirement in the context of an observation of secondary importance?

20 For a discussion of a method typology developed by a work group, see D. NEIL MACCORMICK & ROBERT S. SUMMERS, INTERPRETING STATUTES: A COMPARATIVE STUDY (1991). In a discussion of this book, judges have used case examples to demonstrate the fact that, in practice, arguments are not made with categories since that would be meaningful for a typologizing reconstruction of juristic method. *See id.*

planning showed that economic rationality is only possible on the basis of balances particular to enterprises and special markets, limited by substitution obstacles; or on the basis of budgets and hard-to-shift preferences. Or, in other words, only in a small scale, local form relative to the size of the system. That may be unsatisfactory and may diminish considerably all hopes of a "market economy." But economic theory is also beginning to recognize this and, to some extent, is beginning to switch from equilibrium models to information processing problems.[21]

This consideration need not hinder one in developing concepts for system rationality. For example, one could describe as rational a system which succeeds in internally removing the difference between system and environment which it continually reproduces; a society, for instance, which had problems with neither ecological conditions nor individuals, because everything had already been taken into consideration. But this is, like every case involving the "re-entry" of a distinction into that which has been distinguished by it,[22] a clear case of paradox. One could take this as the starting point for an endless list of desiderata for a human or ecologically-oriented social ethic. But, in the final analysis, the imaginary space of such a conception is due to a duplication of reality, and its concrete effect can only be to make the hardness of the real reality noticeable. Only much more limited claims are capable of operation respectively. But the possibilities existing here could be much better utilized. At any rate, faced with excessive claims on the one side and resignation on the other, one should avoid disavowing the attainable.

The decision in the case of the majority of guardians appears to have been quite reasonable. Whether one can say that for the *parÖmie* derived from it *Quod omnes tangit . . .*, is not in the same degree certain.

VI.

The question remains whether such analyses of the legitimation possibilities of the democratic constitutional state still belong in a tradition describing itself as "critical theory." A verdict on this

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21 Similar conclusions have been reached in the area of academic sociology where it has been found that scientific rationality is also only possible in a communicatively convincing form under local conditions. *See* Karin K. Cetina, *Zur Unterkomplexität der Differenzierungstheorie: Empirische Anfragen an die Systemtheorie*, 21 ZEITSCHRIFT FÜR SOZIOLOGIE 406, 406-19 (1992) (discussing the "social studies of science").

22 *See* GEORGE SPENCER BROWN, LAWS OF FORM (1979).

naturally depends on how far one wishes to extend the concept of the "critical." Habermas uses the theory of discourses open to agreement, in order to reformulate classical notions of liberal theory. It is a question of the free and equal access of all to processes which are so structured that they can represent a reasonable experience—whether this be agreement or understanding based on compromise (freedom and equality, once more). Neither fundamental reforms nor revolution are the aim. The critical factor only arises out of an idealizing of the desiderata: in reality they are, as Habermas repeatedly stresses, always only attained "approximately." The critical point is precisely this: one could improve the process in the stated direction. This corresponds with the ideas of German idealism and also with the critical concept of romantic poetry. What is lacking, however unfortunately, is any trace of irony, and thus any distance from the project.

But in quite a different critical tradition, it became evident that by making freedom and equality absolute, i.e., by the world of political ideas of the middle classes, something was also excluded. This was not only applicable to the anticipated inclusion of the opposite in the concepts themselves; unequal results despite equal starting conditions, or restrictions of liberty as conditions for reasonable freedom. Instead, in the form of an insistence on these rights there lay another, dark, unlighted side which manifested itself in the form of an insistence on these rights—a different reality, which could not participate in the positivity of such a society. Today this need not be understood in terms of a class analysis, which was based, in large part, on a copy of the factory organization of the nineteenth century. But the question regarding "freedom and equality," the other side of the formula, is as current today as ever before. If all can occupy themselves in a free and equal way, there appears to be no more exclusion—no more legal slavery, no more structurally determined speechlessness, no system effects by which many are excluded from work and income. Such exclusion effects, which critics have repeatedly referred to utilizing an ideological criticism, exist on a huge scale and are impossible to overlook. Wherever one wishes to look for the causes (among other things naturally in demographic growth), they appear to go back to the realization of freedom and equality. One need only consider that these principles are reliant on a self-selection of participants and were equally attractive for all as if on the basis of a deeply embedded anthropology. But, where are the many who simply do not want; who cannot want; who suffer from depression; who assess

their prospects negatively; who want to be left alone; who have to struggle for their physical survival to such a degree that there is no time or energy left for anything else. This reflects a criticism of the reverse side of the conceptualized value, whether viewed as a therapeutic problem or as one of foreign aid. Those that have witnessed the favelas of a South American metropolis, or are aware of the many lonely people who live in their communities, will quickly come to a different conclusion.

The sensible thinkers who discuss these matters may be dismayed, may devise remedies, and may, beyond relief efforts, reach a reasonable consensus. But reason is also only a form with another side. It excludes the undiscerning and the irrational or, at any rate, that which from their perspective must be so understood. But is it not possible that those people are excluded, in whose name the staging of rationality was undertaken? The hardline social critics will demand a revolution and attempt to bring one about. But today that already belongs to an obsolete tradition, since one knows that there is no other society and there will be no other besides that in which every change of structure must take place. In the final analysis, the dialectical way out is blocked, including a reflection of the dialectic of enlightenment. For when one in principle thinks postmetaphysically like Habermas, one also thinks postdialectically. There is no unity, in which the opposites can be reconciled. There are only the distinctions themselves in one or another form.

It is possible to take account of the autonomy of the social system by introducing the negation of the system into the system itself (just as the avant-garde has done with the negation of art in art). For this purpose, political thought offers the traditional form of Utopia. These days this is easily misunderstood as a kind of idea painting. But Utopias are paradoxes in the strict sense. They culminate in the statement: the positive is the negative—displayed in form differences, that can change without the paradox disappearing. This figure could fit a consistently postmetaphysical system of thought. But discourse theory lacks a sense of tragic choices and irony.

VII.

The foregoing remarks have been largely critical, both with respect to critical gestures and critical theory. But, the intellectual integrity and radicalness with which Habermas tackles a fundamental problem of modern society deserves recognition. Even if in

the end one cannot include oneself among those who, subject to the scarcely manageable conditions of a discourse about the discourse theory, could finally agree. It still deserves recognition that a theoretical idea is executed here and therefore its possibilities and consequences can be reviewed.

The starting point is: modern society can no longer externalize its own problems "metaphysically" or "religiously." It must find the solution inside itself. In other words, it must rely on its own operations and be able to relate these back reflexively. This corresponds with other circumstances, likewise observable, involving the centralisation of theoretical efforts on operations whereby structures are produced and reproduced, temporarily validated and devalidated. One finds this in the operative constructivism of epistemological, aesthetic, and therapeutic provenance, in the semiotic of reference-free sign use (such as Roland Barthes), and in the theory of autopoietic systems. Against this background, Habermas takes a decided stand against justifying the law in terms of natural law and classic rational law, and against offering a moral justification. One also would not reach a different verdict on this question from a system-theoretical position. However, if this is what they have in common, then what is the difference? What exactly is Habermas's special interest?

My impression is that what makes Habermas's efforts distinctive are that they are anchored in, and hold fast to, a normative concept of rationality. If one no longer understands this in terms of the world of ideas, but must relate it to actually realizable operations, the theory finds itself forced to become concrete. For if it is a matter of norms, it must also be shown which operations could be judged as nonconformist or deviant, and by which operations this is to be achieved. Thus, to be concrete, where do the sociolytic discourses that remain provincial with respect to the future and the universe[23] take place in a communicatively operating society?

That such communications *could* take place, is not a satisfactory answer. If the theme "facticity and validity" is to retain its meaning, they must, at some point, also take place in fact. Habermas names a series of occasions on which such a "metaphorical event"[24] could assume a concrete form—"as informal opinion forming before the political public," as political involvement inside

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[23] *See* HABERMAS, *supra* note 7, at 158. This formulation, it is true, refers only to the monopoly on violence, but it applies to every occurring communication which always happens somewhere in its own presence.

[24] *Id.* at 166.

and outside the parties, as participation in general elections, and in the consultation and decision making of parliamentary bodies, etc.[25] Apparently Habermas himself shrinks before such naiveté, although he has begun to judge the mass media more favorably than before.[26] Those who actually participate have at their disposal an ample measure of contradictory experiences. Therefore, there is also a fall back position. National sovereignty, which in discourse-theoretical terms substantiates itself, "withdraws into the equally subjectless communication cycles of fora and corporations."[27] But their institutional connection remains unclear. How are the participants chosen and what enables them to represent opinions, to which others, or even all parties, "could agree"? The current groundswell in empathy, which balances an equally strong tendency towards ethnic, national, racial, and religious narrow mindedness, could lead one to suspect that, here, Habermas is thinking of a circle. This circle can eloquently express its concern over the predicament of victims, whether they are starving or environmentally damaged, socially or racially oppressed, career-disadvantaged women, or victims of violence or neglect. This is supported by the fact that Habermas accepts, as the rule, "the advocation of moral (i.e., the highest priority) substantiating discourses."[28] The point here is not to deny the gravity of such problems. On the contrary, the problems are on such a scale that, by comparison, the reference to discourses could be taken as a mockery.

I am not certain that an insistence on a normative understanding of rationality, given the state of the world at the end of this century, has to end in such an unsatisfactory way. But if this is the case, there would be a lot to be said for giving up the idea and instead, in the tradition of Marx,[29] studying society as it is and works in order to discover possible variations, which could perhaps lead to less painful conditions. Could!

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25 *See id.* at 170.

26 *See* JÜRGEN HABERMAS, STRUKTURWANDEL DER ÖFFENTLICHKEIT: UNTERSUCHUNGEN ZU EINER KATEGORIE DER BÜRGERLICHEN GESELLSCHAFT (1990).

27 HABERMAS, *supra* note 7, at 170. Habermas's repetitive use of the phrase "subjectless communication" demonstrates that this is not just an occasional error in formulation. *See id.* at 362, 365. However, it must be asked, whether every communication is not subjectless and, if not, how this difference arises.

28 *Id.* at 224.

29 *See id.* at 66. This is what Habermas has expressed.