Law and Morality – The Luhmann/ Habermas controversy and its aftermath (2019)

Paper to conference on *Moral communication observed with Luhmann's systems theory*, held September, 15th- 18th, 2020 at InterUniversity Centre, Dubrovnik, Croatia.

Gorm Harste

Abstract

The present paper contains the chapter on Law (and Morality) from my book *Habermas and Luhmann – The Controversy* (New York: Columbia University Press 2020, 295 pp.), as well as its shorter Epilogue on Habermas' final *Auch eine Geschichte der Philosohie 1-2* (2019) read through the lenses of Luhmann.

In both cases the point is to analyze the extent to which the medium of morality, including will formation, is structurally coupled with other forms and functions of communication. In the first section on Law the central discussion concerns the moral limitations of legal argumentation. In the second section, the core initially concerns the secularization of natural law in the Reformation and thereafter the controversy about Immanuel Kant's theory of communication and will formation.

The main point here is to analyze whether Habermas in his seminal book offers an answer to Luhmann – more than to anything else and fulfills the lacunae of missing semantic history in his hitherto published books, which I have claimed in my book. This partly, yet merely differentiated as philosophical learning processes, is the case.

Chapter 9

Before the Law

From the mid-1980s, the Habermas/Luhmann controversy took a distinctive turn towards the sociology of law. Yet Luhmann's continued endeavors were much larger and still concerned a wider scope of social theories and analyses, whereas Habermas rather limited his range to the philosophy of law and debates about European integration. In the first part (I), I discuss the transformation; in the second part (II) the overall

reconstruction in the seminal works on legal theory from the early 1990s, and in the third part (III) I develop eight comments as point of comparison to the controversy, (IV) focus on the more specialized discussion on legal argumentation. In 1996, the debate continued in the Cardozo Law Review, the last mutual comments before Luhmann's death in 1998. This debate is discussed in the final part (V).

I. Habermas' recognition of Luhmann's 'Legitimacy through procedure'

After Habermas' series of lectures *The Philosophical Discourse of Modernity* (1985/1987), his occupation with social theory took a legal and political turn. Social theory was not solely about the social integration of a community ('*Gemeinschaft'*) or a system integration of a society ('*Gesellschaft'*), but also about the political, organizational and legal integration of a republic (a *res publicae* or '*Gemeinwesen'*). The first of Habermas' publications to bear witness to this transformation is the 60 pages article 'Law and Morality,' presented as The Tanner Lectures at Harvard University in December 1988 (available online).

We should note that this happened in the direct aftermath of Habermas' review of Luhmann's – as some would say – first principal work, *Social Systems,* and of Luhmann's series of comments on that review. With Luhmann's *Ecological Communication* (1986/1989), Habermas probably not only saw the critical potential of Luhmann's systems theory, but also its potential for applied studies of social problems far beyond the problems of ecology and pollution.

In any case, a much further reach came from the political transformations after Mikhail Gorbachev took power in the USSR in 1985. An opening for the constitutional problems of future world society became visible. New agendas suddenly appeared, and Habermas – as usual – very quickly looked through these open windows. It was not *Between Facts and Norms,* published in 1992, but the earlier *Law and Morality* that displayed these new opportunities. Yet of course, the fall of the Berlin Wall, the reunification of Germany, the fall of the Soviet Empire, and the Yugoslavian Civil War gave an immense impulse for Habermas to push and even hasten through a new framework for a political theory of societal constitution, even if it – as many commentators have argued – could be claimed that *Between Facts and Norms* eventually was unfinished and too hastily given final form. Indeed, Habermas himself decided that a later English edition should have another afterword added.

This short history of publications also explains why *Between Facts and Norms* stimulated so many comments and discussions in the 1990s despite being almost unbearably difficult and complex. Most readers in the 1990s had to go to conferences about the book in order to find their way through it, only to find other readers who also had difficulties in reaching an adequate interpretation. But *Law and Morality* (1988) is far clearer, in spite of the difficult but classical theme of the constellation between law and morality.

The headline of law and morality has penetrated legal philosophy ever since Sophocles' *Antigone.* It developed as a core since the high medieval distinction between positive law and natural law. With the Enlightenment's legal reforms, followed by Rousseau and Kant, the philosophical construction of the form of legal and moral reasoning was clarified. Yet the challenge was still to demonstrate what it meant for law empirically – meaning not only for a sociology of law, but also for a theory of political constitution.

Law and Morality consists of two parts. The first concerns Max Weber's unfinished sociology of law (from 1913) and his distinction between a principle of formal rationality and a reality of material rationality. The second part follows in Habermas' text by a short reappraisal of three interpretations of this deformalisation.

Previously, in his *Theory of Communicative Action*, Habermas displayed his dissatisfaction with Weber's double distinction between goal-rationality and value-rationality on the one hand, and formal rationality and material rationality on the other. Communicative rationality comes in between those kinds of dual rationalities, in between the strategic goal-rationality and the value-rationality, and between formal rationality and material rationality. Yet for Weber a broad outline about cultural sense ('Kulturbedeutung') and interconnected meanings ('Sinnzusammenhänge'), in fact, also comes in between, as well as Weber's empirical developments of a whole range of rationalizations. However, in *Law and Morality,* the scope investigated is much narrower. The focus is on the interconnected or rather entangled procedures between moral communication, legal argumentation and political argumentation. Whenever law pragmatically functions, it is because of procedures that argumentatively could be justified. This allows for an analysis beyond the contract theories, from Thomas Hobbes to Immanuel Kant.

To Habermas, the philosopher, the idea of a contract leads to a model for discussion, whereas for Luhmann, the lawyer, contracts basically reduce material, social and temporal complexity: What is the subject? Who is involved? And for how long?

Justification concerns what could be valid and what is morally justified. This is the result of Habermas' elucidation of the Weberian analysis of still-increasing modern law, and it somewhat follows Émile Durkheim's famous discussion of a deliberative relation between contracts and pre-contractual social norms. The point concerns procedures, and, following the influential British legal scholar Herbert Hart, they have two levels. These two levels of first-order rules and second-order rules are not identical to Luhmann's concern for a distinction between first-order observation and second-order observation, albeit the second order in particular concerns sociological conditions. In Habermas' reconstruction:

> "For the purposes of this wider analysis, the concept [of a legal institutionalization of *procedures* is central]. It must be broadly conceived and not connected from the outset to a specific form of law. H. L. A. Hart and others have shown that modern legal systems include not only legal precepts, permissions, prohibitions, and penal norms but also secondary norms,

> rules of empowerment and rules of organization that serve to institutionalize processes of legislation, adjudication, and administration." (Habermas *Law* 1988, 229; translation revised by GH)

With this, Habermas reminds the reader of Luhmann's earlier book *Legitimacy through Procedures* from 1969. Not only a legal system, but also a polity and a society constituted as a society of procedures (a 'Verfahrensgemeinschaft'), are crucial for Habermas' reconceptualization of a theory of social, legal and political society. The German term 'Verfahren' reconciles process with procedure as a kind of 'way to go on.'

> "In this way the production of legal norms is itself regulated by legal norms. Legally binding decisions in due time are made possible by procedurally defined but otherwise indeterminate processes. Furthermore, it must be borne in mind that these processes connect decisions with obligations to justify or burdens of proof. What is institutionalized in this manner are legal discourses that operate not only under the external constraints of legal procedure but also under the internal constraints of a logic of argumentation for producing good reasons." (Habermas *Law* 1988, 229)

Habermas here initially uses Hart to re-launch the concept of procedural rules and those procedures used in legal forms of reasoning not only in courts but also in daily life. Yet from this background, he reintroduces Luhmann to his Harvard audience in the Tanner Lectures. The self-production of norms regulated by norms are close to Luhmann's and Günther Teubner's self-referential, self-organizational and autopoietic conceptions of reflexive law (Teubner 1986/2011; 1989/1993). Yet for Habermas, the value of morality is added to legal argumentation and thereby leads to legitimacy:

> "Legitimacy is possible on the basis of legality insofar as the procedures for the production and application of legal norms are also conducted reasonably, in the moral-practical sense of procedural rationality. The legitimacy of legality is due to the interlocking of two types of procedures, namely, of legal processes with processes of moral argumentation that obey a procedural rationality of their own." (Habermas *Law* 1988, 230)

Apart from the distinction between law and morality, Habermas here operates with two central themes, that of procedure and that of *interlocking* ('Verschränkung'). There is an interconnected and entangled form between legal procedures in argumentation and moral procedures. Morality learns from law and law from morality. Habermas forwards

> "the thesis that proceduralized law and the moral justification of principles mutually implicate one another. Legality can produce legitimacy only to the extent that the legal order reflexively

> responds to the need for justification that originates from the positivization of law and responds in such a manner that legal discourses are institutionalized in ways made pervious to moral argumentation." (Habermas *Law* 1988, 243-4)

This argument is somewhat similar to what Luhmann calls structural coupling. In Luhmann's theory, law and morality are structurally coupled, but not similar. The difference from Habermas is that Luhmann, in an almost Nietzschean way, does not claim that a moral theory about the good will is also *a priori* a good theory. Such a coincidence might empirically be the case, but the opposite could also be possible. To Luhmann, a modern ethical reflection of morality is conditioned by a functional differentiation. The Kantian pure ethics of will formation was conditioned by the reforms in positive law that have taken place since the early Enlightenment. Since his early publications, Luhmann repeatedly has forwarded a theory of separation of powers, including in the dissertation *Grundrechte* (1965) and *Legitimation* (1969), throughout the 1980s, and finally with *Law as Social System* (1993/2004). Any discourse-based revision of ethics undertaken by Habermas is founded on such functional differentiation, and this is also a reason, if not *the* reason, why Habermas' discourse theory ethics is not a transcendental universalistic theory, but a historically embedded pragmatic theory.

For instance, rape is morally completely inacceptable; politically too. However, legally and extremely paradoxical, in the courts, experiences of rape are acceptable *if not* it can be proven by hard observable evidence beyond doubt and often – at least if the offender is rich, have good lawyers, and a good public reputation – beyond explanations offered by psychologists, that rape was the case rather than a normal affair. Hence, hard proven evidence is subject to argumentation, but courts do argue differently than everyday argumentation and everyday expectations of even sophisticated principles of attention, respect, and care do. This legal carelessness in favor of proven evidence is what Luhmann observes as a fact – and, as we know with the Metoo-criticism, a risk.[1]

In *Discourse,* Habermas – albeit very briefly – also claimed that such a notion of legal autonomy was necessary to embed Foucault's criticism. Since this critique of Foucault's method of criticism was a major concern for Habermas in these years, this too may have led him towards a recognition of Luhmann's theory of functional differentiation. According to Luhmann, modern morality is successively conditioned by such functional differentiation and is not acceptable as a dedifferentiated moralizing culture. Habermas subscribes to such a defense of differentiation, however forwards the idea of an enlightened added value because dedifferentiation dissolves argumentative procedures and the entangled learning processes, from legal procedures to moral procedures. Certainly all three – Habermas, Foucault and Luhmann – could reconcile in

[1] Luhmann's thought about the paradoxical risks embedded in legal procedures might very well have been influenced by his job in the 1950's justification of procedures against Nazi officials and their confiscation of art and property.

a criticism of communitarian moralization tendencies, though with very different reasons. Accordingly, it seemed to be crucial to Habermas not to reduce law to morality nor to reduce politics to the combination of law and morals. This entanglement is illuminated

> "by the fact that in constitutional systems the means of positive law are also reflexively utilized in order to distribute burdens of proof and to institutionalize modes of justification open to moral argumentation. Morality no longer lies suspended above the law as a layer of suprapositive norms (…) Thus a procedural law and a proceduralized morality can mutually check one another." (Habermas *Law* 1988, 246, 247)

The point was to keep law and morality separate while nevertheless allowing for learning processes or structural couplings. Here Habermas and Luhmann's point of *relief* ('Entlastung') seems to be a common denominator: "Moreover, the professional administration of written, public, and systematically elaborated law relieves *legal* subjects of the effort that is demanded from *moral* persons when they have to resolve their conflicts on their own." (Habermas *Law* 1988, 246)

The problem, however, is that functional differentiation is not formal differentiation. Differentiation has to be observed sociologically, according to what Weber called material rationalities. One of the main analysts of law and political theory situated between Habermas and Luhmann is the Frankfurt professor Ingeborg Maus. She too urged Habermas to take up Luhmann's analyses of procedures in jurisprudence and how they related to institutional differentiations (Maus 1986a; 1986b; 1992). Albeit

> "Maus shares the liberal concern for well-defined legal propositions that narrowly circumscribe the scope of discretion for courts and administrations, she no longer sees the rationality of the Rule of Law as residing in the semantic form of the abstract and general norm. Legitimating force is exclusively attributed to the democratic *process* of legislation." (Habermas *Law* 1988, 236-7; ref. to Maus 1986b)

The point is not simply to trust democracy as the people's will nor to trust a revitalization of formal procedures. The idea is to focus on democratic procedures as an ongoing process that, in Luhmann's terms, continues the interchange between government and opposition that may lead the governing and the governed to have trust in their form of rule (Luhmann *Politische* 1966/2010; *Legitimation* 1969; *Soz Aufklärung 4* 1987; *Politik* 2000).

> "The conditions of legitimacy for democratic law must be sought in the rationality of the legislative process itself. Thus, from our discussion there emerges the interesting desideratum of investigating whether the grounds for the legitimacy of legality can be found in the

> procedural rationality ('Verfahrensrationalität') built into the democratic legislative process." (Habermas *Law* 1988, 237)

There is no automatic mechanism or legal formalism that ensures how procedures of democratic processes should become identical with the procedures of administration. So what is left? As already demonstrated by Weber, "of course, family, labor, and social law also confront the courts with material that cannot be treated according to the classical model of civil law procedures for subsuming individual cases under well-defined general laws." (Habermas *Law* 1988, 238)

In contrast to Luhmann, Habermas aims to describe some kind of morality in the procedure of law: "Political power exercised in the form of a positive law that is in need of justification owes its legitimacy instead – at least in part – to the implicit moral content of the formal properties of law." (Habermas *Law* 1988, 241-2) Luhmann's point is simply that this may be the case – or not, and in any case is not *a priori* secured. The idea of justification in the settlement of law simply does not expose a moral point of view, even if such a moral point could be inherent in what Habermas calls linguistic performances. To settle law is to establish meaning. This does not mean justified and morally reasoned meaning; it merely concerns what has meaning in the courts. Whereas according to Habermas, the 'idea of impartiality forms the core of practical reason' (*ibid*.), the realities may be far removed from such hopes. Often we may search in vain for administrative implementation of such ideas, although it is true that in reality such principles do rule in some institutions at some places.

A wide range of examples could demonstrate this point with regard to which principles are put into use, for example in Scandinavian public administrative practice (Eriksen 2001; Eriksen & Weigaard 2003). A typically Habermasian short example could show that participation in George W. Bush's illegal Iraq War was not hindered in Denmark, but was in Sweden and Norway. In most places, what has legitimating force are the procedures that distribute burdens of proof, define the requirements of justification, and set the path of argumentative vindication. Famous here is German foreign minister Joschka Fischer's oral reply to US Secretary of Defense Donald Rumsfeld: "You have to make the case and to make a case in a democracy is to be convinced, and excuse me, I am not convinced; that is my problem, and I cannot go to the public and say, 'well, let us go to war and there are the reasons and all that', and I don't believe in that." (*The Telegraph* February 11th, 2003) Reasons have to follow a certain procedure to be recognized as valid, of course depending on context, and the context of military invasion is strictly institutionalized, according to a number of criteria. The case of the Iraq invasion is notable, because formal criteria were so clear and recognized, but nevertheless were broken. Therefore, in daily administrative routine and derogations from law we would expect even looser interconnections between legal procedures and morality.

Habermas, first, correctly sees that Luhmann leaves the legacy of constating or settled norms and rules, and that means the normative implications of such an agenda. However, Habermas does not recognize the full extent of the way Luhmann (like Bourdieu and Foucault) replaces norms with symbolic codes. Code theory is more easily symbolically described and is binary in its description of forms. Whereas legal norms thereby quit the idea of normativity, Habermas proposes to reconstruct a firmer foundation of normativity. Secondly, Habermas recognizes how Luhmann forms positive law as a form that, because of its stability, paradoxically can be transformed. Thirdly, the procedures in a legal system bracket conflicts and replace them in another medium (cf. Luhmann *Social Systems* Chap. 9). Legitimation through procedures does not constitute consensus, but displaces dissent and conflict. Habermas recognizes this with a reference to Luhmann's *Legitimation* (1969):

> "At this point Luhmann gives an interesting interpretation to the idea of legitimation through procedure. With regard to the addressees, institutionalized legal processes serve to check the readiness for conflict of defeated clients in that they absorb disappointments. In the course of a procedure, positions are specified in relation to open outcomes of this sort. Conflict themes are stripped of their everyday relevance and are painstakingly reduced to merely subjective claims to such an extent 'that the opponent is isolated as an individual and depoliticized.' Thus, it is not a matter of producing consensus but, rather, only of promoting the mere appearance of general acceptance, or the likelihood of its being assumed." (Habermas *Law* 1988, 253-4)

In *Between Facts and Norms*, Habermas accordingly speaks about "the paradoxical emergence of legitimacy out of legality" (*Facts* BFN 1996, 83, cf. 130; 1992, 110, cf. 165).

In previous chapters, we have seen that Luhmann replaces norms with temporal bindings in the form of communication about stabilized expectations. Expectations are not to be reduced to psychological descriptions, but are forms that operate in communication. They are the medium of bounded communication in law, for example continued as conflict or diplomacy, war or love. In this temporal sense, Luhmann's description of law fulfils more of what Habermas demands and that he himself does not fully describe.

Luhmann's basic point, however, is that decisions always follow even if no decision is made – a classical theme in organizational decision-making theory ever since political scientists Peter Bachrach and Morton Baratz invented the theory of non-decision. Yet in Luhmann's temporal theory of decisions, expectations and law bind one situation to past and future situations. This is much larger in scope. The temporal solutions to problems often take place in commissions, where a decision is embedded in ongoing discussions that are prolonged in infinite procedural debates and includes new information, if not changes in members and staff. It may be ethical to open for such universalistic engagement with still other viewpoints, but eternally

extended discussions also likely result in displacements of focus and theme. Time – whether as extended time or as a form of impending time pressure – replaces the idea of a Hercules judge as well as an idea of moral universalism embedded in procedures (Luhmann *Law* 2004, 339). In this sense, procedures also legitimize, and may legitimize non-decisions, for example in ecological communications about pressing problems that are still far from being resolved.

Here, Habermas' moral point of view is not that there is a morality in the court, however that morality follows alongside the court, in the forecourt and in the corridors, in the comments to court, and in the arguments about what could have taken place in the court or whether administrative decisions should be taken to court. Everyday decisions anticipate what could appear and be considered valid arguments. Therefore, Habermas can follow Luhmann's analysis for some distance along the road:

> "The concept of the systemic autonomy of law also has a critical value. Luhmann sees in the tendencies toward deformalization a danger of law's being mediated by politics; in his framework, 'overpoliticization' appears as the danger that de-differentiation would take place if the formalism of law were weakened and finally absorbed by calculations of power and utility. The autonomy of the legal system depends upon its capacity to steer itself reflexively and to delimit itself from politics as well as from morality." (Habermas *Law* 1988, 255)

However, in the end, Habermas is not satisfied with what he observes as Luhmann's theory of law from 1986. Habermas asked for a more complete analysis, a request Luhmann acknowledged in a discussion in Copenhagen in 1992 and of course shortly after responded to more fully with his *Law As A Social System* (1993/2004):

> "In the meantime, however, Luhmann can no longer play down substantive and reflexive law as mere deviations. Therefore, he now sharply distinguishes between the legal code and legal programs, so that the autonomy of the legal system need only depend upon the maintenance of a differentiated legal code. About this code, however, he has nothing to say but that it permits the binary distinction between justice and injustice. From this tautological formula, no further specifications of the internal structure of law can be gained. It is no accident that Luhmann fills in with a question mark the place where the unity of the code should be explained." (Habermas *Law* 1988, 256)

Here Habermas refers to the problem of the excluded third position in binary codes as it is discussed in Luhmann's *Ecological Communication* (1986/1989, 73); this discussion reappears in their Cardozo Law Review discussion from 1996.

Habermas does recognize the pragmatic references Luhmann uses for his functional description of how juridical processes normally operate. However, with Klaus Günther, Habermas claims that in the very pragmatism of juridical argumentation, critical standards about, for instance, universalism, equality, fairness and so on can find some application (Habermas *Law* 1988, 258; Günther 1986/2011). Habermas recognizes that Luhmann's functional theory of law is no legal positivism (about what simply appears as settled law), since law is never already completely settled, and accordingly, normative criticism does not apply to a functional theory in the same way that classical natural law supplemented positive law with a framework of critical measures. A code theory of law pragmatically and operationally lets material as well as moral arguments re-enter, as long as they function (less for the purpose of, but) inside the very reproduction of justice in legal reasoning (Günther 1986/2011: 425). Legal reasoning is about preserving a legal right to communication about legality and illegality. This implies that moral standards can infiltrate legal reasoning as long as the legal form is preserved and reproduced self-referentially as autopoietic law. According to Habermas, this form of opening through closure also opens for politics and power (Habermas *Law* 1988, 259). Law is not completely apolitical nor above power. As in theological dogmatic, the idea of law originated with politics, such as king Solomon's paradoxical interpretation and application of the Ten Commandments as if it came from God, that is, as if unity, consistence and coherence could be preserved and expected in the future.

A well-argued discussion about this position has been very influential in discussions on the European Court of Justice. The important Luhmann inspired scholar Günther Teubner paved the way for such analyses with his general *Law as an Autopoietic System* (1989/1993). This was the background for the theory of EU justice as a self-referential spiral of 'acquis communitaire,' explained by the Joseph Weiler's path-breaking article from 1991 'The Transformation of Europe' (in Weiler 1999). There is no doubt that Habermas' view and Luhmann's analysis in these debates fused together with authors such as Poul Kjaer (2006; 2010), John MacCormick (2009), Menendez & Fossum (2011); Chris Thornhill (2009; 2011), Hauke Brunkhorst (2012) and Christian Joerges (1996) (Joerges, Kjaer, Ralli 2011), not to mention Günther Teubner (1987; 1997; 2007; with Fischer-Lascaeno 2007). The system of law no longer operates inside a sovereign nation-state, but in a world society. Legal systems operate in a way that is post-hierarchical and post-sovereign, yet they are not dissolved. Simply because laws cannot be less than deficient, the observation rather is, that legal argumentation develops settlements of law as if courts could be legislative, for instance in the European Court of Justice.

Legal systems still codify how legal expectations operate in communication. Moral arguments occur, for instance, if US should subscribe to an international court of justice for war crimes; whether refugees should have limited or enhanced possibilities for lawful trial and so on. Above all, arguments are accepted as valid according to criteria of whether they operate in similar legal systems; if EU law operates with an extended

liability for (pollution) emissions, this could turn into an argument in US law to do likewise. On such points, Habermas shares with Luhmann the idea that the legal system can only accept arguments that appear in the legal form; yet this does not mean that political or moral reasons cannot motivate whether an issue is brought to court.

As a preliminary conclusion, it is obvious that Habermas oriented his position with reference to Luhmann's from the mid-1980s. Still, however, Habermas did not observe the importance of Luhmann's temporal theory, a crucial theme discussed in Richard Nobles and David Schiff's *Observing Law through Systems Theory* (2013, 131-163). Furthermore, Habermas suggested that Luhmann should develop his theory of legal argumentation. This Luhmann did in Chapter 8 of his *Law as a Social System.*

After Habermas' direct reappraisal of Luhmann in the first part of the second lecture, 'On the Idea of the Rule of Law' of the Tanner Lectures on *Law and Morality*, Habermas embarked on an eleven-page historical sociology of 'reason and positivity: on the interpretation of law, politics and morality.' This, basically, concerns the interconnection of what Habermas describes as the 'indisponibility' of moral arguments for instrumental reasons in legal reasoning: they are not available for instrumental disposition. Historical analysis demonstrates that sacral divine law was not replaced by the pure contingency of a functionally equivalent resource that could legitimize law through natural law, law of reason or simply public support.

Accordingly, there is no way other than a reconstruction of the interconnected or structurally coupled legal reasoning and moral reasoning that was established from the long 12th century of legal reforms to the Enlightenment of Montesquieu, Rousseau and Kant. A group of French historians has demonstrated this (Boucheron & Offenstadt 2011). In late medieval cities in Europe, associations, corporations, city halls and courts very often experienced how quarrels and decision-making processes took place similar to procedures with forms of argumentations *pro et contra*; the *disputatio* of canonical law entered other forums that were also central to powerful disputes. The canonists tried to ensure a coherent *corpus juris* that monopolized the views of the pope, whereas the *glossatores* cemented the huge compilation of Roman law known as the *Digest* and reassembled it into a first coherent corpus by the Bologna monk Gratian. A third, more academic group followed the pedagogical concept of a university professor posing a question that should be the subject of a dispute, often focused on contradictions. With the *jus statuendi,* such procedures entered city life after the Peace of Constance in 1183.

Today, in particular the (somewhat) Habermas scholar Hauke Brunkhorst (2014), and the (somewhat) Luhmann scholar Chris Thornhill (2008; 2010; 2011) agree on the importance of this long institutional path dependency. A first and superficial view on such confrontations of texts and discussions would reveal the differences between Habermas' reconstruction of legal history and Luhmann's reconstruction. The Habermasian reading of such deliberations would tend towards interpretations that concern possibilities of

consensus, whereas Luhmann tends to look for dissent. However, in fact both Habermas and Luhmann observe the procedures of such debates, disputes and contradictions.

The problem is to observe what constituted duties and obligations in moral discussions as well as in courtly procedures throughout those centuries of early modernity. In some sense, this task is easier than it might appear, although Habermas did not elucidate empirical investigations comparable to Luhmann's.[2] Moral duties and legal obligations underwent a clarification, purification and communicative coding that finally separated legal argumentation from moral argumentation over a period from the 1690s to the mid-18th century. This happened alongside a separation of powers philosophically sustained far beyond what we know from Montesquieu. Kant's 'tribunal of justice' was very real as a philosophical endeavor in the courts of France (Behrens 1985; Harste 2016a). Lawyers had to follow procedures in the courts, yet they entered the courtyards and later the associations, the salons and the cafés and continued to discuss, argue and reason, embedded in these procedures and principles of explanation, expressibility and listening. Hence, in court they could claim that moral reasoning and norms developed outside the court, in reflections about what took place inside the court.

To Pierre Bourdieu, such analyses are important touchstones and yardsticks (Bourdieu *The State Nobility* 1989/1998, 377-382). Habermas, Luhmann, Bourdieu, and by some measures also Foucault's descriptions of the formation of rule of law, 'der Rechtsstaat' or 'l'État de justice,' is worth comparing against that background (Harste 2016a). Habermas, in *Transformation* (1962/1989), invoked such empirical and philosophical investigations but limited them to literary criticism. In the Tanner Lectures he offers only a few hints, such as the development of contract theory between Hobbes and Kant, i.e. as a medium of power and a medium of will formation. Yet Luhmann discussed legal argumentation all along from the 12th century to Kant.

[2] A classic exposition is offered by the German Princeton historian Ernst Kantorowicz, and a number of later representations, such as Harold Berman's *Law and Revolution* (1983), followed (cf. Habermas *Construction* 2014). French historian Françoise Autrand (1981) described the transformations in duties, habits and mores among higher judges in France before the abstraction and homogenizing processes of law in the 16th century – well described by Pierre Chaunu (1993, 90-129) – and the professionalization of those judges, analyzed by François Bluche (1961). The point is not only that legal procedures underwent impressive reforms that led to positive law, but also that this led to structural couplings and interconnected procedures of obligations and moral duties in the very form of reasoning. According to a classical interpretation by François Olivier-Martin (1951/1997), still more refinements in the spirit of justice, counselling and reasoning developed in France. These refinements in the civilizational procedures of negotiation and deliberation took place over a period of about 500 years. Whereas Patrick Riley (1978) underestimates that a form of early Kantian reasoning in a 'tribunal of justice' can be found in the philosophy of the Paris 'Parlement' and particularly in the writings and speeches of its dominant figure, the Chancellor Jean-François d'Aguesseau (1759) (cf. Harste 2016a).

II. A discourse theory of law or a systems theory of law?

It is tempting to compare Habermas' seminal work on political and legal theory, *Between Facts and Norms* (1992) with Luhmann's somewhat similar seminal work, *Law as Social System* (1993), which eventually was supplemented with his final posthumous *Politics as Social System*. The two books on law have almost identical length – as, in addition, their seminal sociological books, Habermas' *Communicative Action* (1981/1987) and Luhmann's *Theory* (1997/2012) as his posthumously published *Gesellschaftstheorie* from 1975.

In a discussion in Copenhagen in 1992, Luhmann recognized Habermas' work, which he at that moment had read as a manuscript. He did not pose any opposition to it, stating simply that it had a rather complex form and represented a discontinuity with Habermas' former writings. Once again, as in 1981 when Habermas published his general *Theory of Communicative Action 1-2*, he came ahead of Luhmann's publication of a general theory in *Social Systems*, published in 1984, yet this time to Luhmann's *Law as a Social System*. Whereas this strategy of finishing major books first, perhaps pressed by public circumstances, may have seemed quite wise at the time, in the longer run it may have been less wise, since Habermas increasingly used Luhmann's theory as the standard model to comment upon, revise and adjust. This certainly is the case with *Between Facts and Norms*.

What made Habermas' extremely discussed 600-page book from 1992 so overwhelmingly complex was its character as a commentary on those tremendous challenges faced by Germany, Eastern Europe, and European integration, not to mention the former Yugoslavia, *as if* those changes could find an adequate theoretical redescription. In fact, transformations began in 1985 when Gorbachev became General Secretary of the Soviet Union and new signals came that the Soviet superpower would no longer intervene with military forces in Eastern European countries.

Habermas, thereby, although much more theoretically and formally, embarked on a redescription similar to what Max Weber, 75 years before, developed in his 1913 legal sociology, in which transformations of the formal rule of law (or '*Rechtsstaat*') developed material rationalities that resulted in a certain German type of professionalized 'social state' ('Sozialstaat'). When we remember the consequences of World War I in Germany, and the indeed fatal consequences that the top-down specialized professionalism had on the more universalistic (formally rationalized) expectations had by war veterans and their relatives, then we understand the accuracy of Weber's warnings about missed opportunities for human rights and about an ice cold winter that could arrive (cf. Cohen 2001). We also see the hyper-complexity of Habermas' endeavor in the period when he wrote, and somewhat rewrote, *Between Facts and Norms* from 1989 to 1992.

Moreover, we could draw parallels to the transformations witnessed by Immanuel Kant from 1788 to 1797, when he developed his standard-setting historical, social, cultural, and legal philosophy, setting to the task *as*

if such a philosophy were possible to form. There is no doubt that Kant's measure presented a yardstick for the idea that such a painstaking task could be useful, both for research and for pragmatic reasons.[3] Habermas was the worried and concerned participant in the transformations in Europe around 1990, whereas Luhmann was the observer. This distinction, participation/observation, is fundamental to understanding the differences between Habermas and Luhmann, and indeed to understanding what it means to reason about social transformation (Habermas *Auch*, 2019, 35).

This also reveals why the Habermasian form of analysis is far more in need of the Luhmannian form of analysis than the reverse. Nevertheless, the important contribution of the book is that it admittedly displayed the over-complexity of the situation when the Cold War ended. This ran together with new forms of globalization, the internet, renewed long-term ideas about future history, an endless opening of new conflicts in Eastern Europe, Africa, and the Middle East, and with new forms of immigration and social integration. What form could Europe, European integration, and the EU take at that moment, and what was the form of the political, legal and social theory that could describe it? This also showed to be extremely relevant as agenda-setting elsewhere, for instance the Pacific integration of China began in the 1990s after the turbulence identified with the Tiananmen Square protests in 1989.

These problems are endemic to the theme of finding the particular 'structural coupling' (Luhmann) or 'co-originality' ('Gleichursprünglichkeit', Habermas) of morality, law and politics in a particular context and situation. Often, in German Idealism, the point is presented as if the general is in the particular and the particular in the general. Law and separation of powers were in transition in Europe, the nation-state became exposed to wide-ranging transformations of the political integration between and above states, and former models were rendered obsolete whereas new forms were not yet constituted. It is no wonder that it was difficult, if not impossible, to posit a clear and consistent theory about law, politics, and morality.

For Luhmann the task was much clearer. In fact, he was not greatly concerned with what happened during political Europe's transformation around 1990. His very important pupil and follower, Professor Günther Teubner (Frankfurt/London), was much closer to the transitions in European and international law, as were a number of others, such as Professor Christian Joerges (European University, Florence) or Professor Inger-Johanne Sand (Oslo), and we have to look to their writings to find a Luhmannian theory of European law. Luhmann's task was the same as it had been since the mid-1960s: to expose a theory of law, including the conditions for the evolution of law, from tribes, stratified societies and empires to states and beyond. Law as a form of communication has been transformed many times over. Hence, new forms of structural couplings develop between law, politics, justice, morality, public spheres, individuals, religion, finance, war and so on,

[3] Cf. For example Jacques Lenoble's comment (1996) to Habermas, although Lenoble certainly misunderstood not only Luhmann and Teubner's systems theory but also what systems theory is about.

all along with internal evolutions in the subsystems themselves. The subsystems may become more or less functional differentiated, and eventually new forms of networks and governance may emerge. Thus, we see developments in important post-Luhmannian positions, such as Poul Kjaer (2014). Yet Luhmann's point is less what we (we!) shall (shall!) do about it (about what!); Luhmann's aim is certainly not to embark on any strategic or moral discourse about tasks to be fulfilled. Rather, his aim is to describe and thereby defend differentiation forms and hence to protect individuals and other systems from the interpenetrating or 'colonizing' (Habermas) codifications forwarded by other systems.

III. Eight comments

At first glance, a number of topics seem similar between Habermas and Luhmann's analyses of law. First, they are both thoroughly sociologies of law, indebted to in particular Weber's, and also Durkheim's sociologies (Günther 1986/2011), as well as to Kant and Hegel's philosophies of law.

Second, constitutively, law is a form of communication and has to have communicative meaning. Law does not exist and has no validity outside communication. In *Between Facts and Norms,* Habermas seems to use Luhmann's description of what Habermas calls 'subject-free communication' (*Facts BFN* 1992, 170, 362, 365). To Luhmann, more than Habermas, the transformations were and are worldwide and due to communication processes and related to electronic media changes, which are similar to previous innovations in writing and with the printing press. Indeed, Luhmann's overall transition to a communication theory, first in the booklet on *Power* from 1975, then in *Social Systems* in 1984 and finally in *Theory of Society* from 1997, was remarkably ahead of the global transformations heralded by the internet, satellites, mobile and smartphones, tablets and whatever else is yet to come, long after Luhmann's death. Previously, Daniel Bell in his influential *The Coming of Post-Industrial Society* (1973) ascribed aspects of those early transformations in communication to productive forces from Habermas' *Technology and Science as 'Ideology'* from 1968.

Third, the same concerns power. However, Habermas' point in *Between Facts and Norms* is that there are still, realistically observed, some normative dimensions to be added. He adds them with the Luhmann scholar Helmut Willke:

> "A systems theory that has banned everything normative from its basic problems remains insensitive to the inhibiting normative constraints imposed on a constitutionally channeled circulation of power. Through its keen observations of how the democratic process is hollowed out under the pressure of functional imperatives, systems theory certainly makes a contribution to the theory of democracy. But it offers no framework for its *own* theory of democracy, because it divides politics and law into different, recursively closed systems and

> analyzes the political process essentially from the perspective of a self-programming administration. The 'realism' that systems theory gains with this selective approach comes at the cost of a disturbing problem. According to systems theory, all functional systems achieve their autonomy by developing their own codes and their own semantics, which no longer admit of mutual translation. They thereby forfeit the ability to communicate directly with another and as a result can only 'observe' each other. This autism especially affects the political system, which also self-referentially closes itself off from its environment. In the face of this autopoietic encapsulation, one can scarcely explain how the political system should be able to integrate society as a whole, even though it is specialized for regulatory activities that are meant not only to rectify disturbances in functional systems but also to achieve an 'environment friendly' coordination among systems drifting apart. It is not clear how one should reconcile the autonomy of the different functional systems and the political system's task of holding them together: 'The heart of the problem lies in the improbability of successful communication among autonomous, self-referentially operating unities. (Willke 1991, 345)'" (Habermas *Facts BFN* 1996, 335-6; 1992, 406-7).

Habermas' problem is that Luhmann and his followers very well could be right. Yet it may also be correct that some form of what Luhmann calls the 'loose coupling' of normative reasoning could enter into the political, legal and organizational circulation of power and create transformations. This, however, is not sufficient to conclude, as Habermas does, that Luhmann is not able to describe the constitution of power as a self-referential system. Luhmann's approach "operate(s) with concepts of power that are insensitive to the empirical relevance of the constitution of power under the rule of law, because (they) screen out the internal relation between law and power". (*Facts* BFN 1996, 336; 1992, 407). It is correct that Luhmann's conceptions, especially in the enlightened perspective of Foucault and Bourdieu before his seminal publication *Theory of Society*, never developed a stronger theory of power than the one expressed in *Trust and Power*. Yet we, in particular in politics and mass media, tend to explain law according to a positive dogmatic of coherent law whereas law proceeds with far more pragmatic procedures of speed, costs, lack of information, skill and what have you as metaphors, context and environment (Wiethölter 1986/2011; 1989).

Fourth, the forms of separated powers, rule of law, balance of power, 'Rechtsstaat,' and the conditions for such forms are central to a sociology of law. Yet such a separation is not only constitutive of a legal description of the separation, but also for a political description, an organizational, and a publicly mediatized description, a theory of military systems, and so on. Those different forms of descriptions are, *as such*, not identical. This is why those forms should be, primarily, conceptualized and compared in sociology if they are to have any meaning in law studies, political science, moral philosophy and so on. The sociology of law, political sociology, organization sociology, the sociology of mass media, and others, have to be

conceptualized in order to conceive of adequate comparisons and to observe and reflect their forms of power, symmetrical or asymmetrical.

Fifth, the peculiar paradox already discussed in Chapter 7 is that any conception of political self-determination, such as Rousseau-style people's sovereignty, is conditioned by the autonomy and self-reference of law, including the separate autonomies of other social subsystems. The paradox, hence, concerns the fact that political steering is constituted by the differentiation of the political subsystem from other subsystems: political steering is conditioned by the inability to steer those other subsystems. This means that political systems are overloaded with demands that are impossible to reconcile.

Sixth, human rights, and previously natural law, emerged as a reflection of the development of positive law. Habermas and Luhmann certainly do not offer the same or even similar descriptions of this emergence. Whereas Habermas in *Auch* (2019) later analyzed philosophical learning processes in history, Luhmann goes far deeper into the conceptual and semantic history of natural law, i.e. the foundational pre-modern history of the conceptions of human rights that flourished in the pre-revolutionary period before Rousseau and the founding fathers, the Federalist Papers, and the French First Constitution. A major discussion theme for Luhmann is the problem of structural couplings, or the simultaneous origins of legal positivism and human rights. To Habermas, there is a strict co-simultaneity or co-presence of positive law and its transcendence through human rights – human rights as a legal form that also has a moral and public form that transcends law. Very similar to Luhmann's conception of 'structural coupling,' Habermas repeatedly uses concepts of 'interconnection' and 'entanglement' ('Verschränkung') and concepts like 'wheelwork' ('Verzahnung'). In spite of the mechanical connotations, the point in common for our two authors is less about causality than about time and co-present developments.

The transition from natural law to human rights, however, was a major transformation, and in *Law as Social System* (chapters 6-11) Luhmann describes how it took place in French, German and English courts from the 16th to the early 18th centuries; the early Enlightenment is especially important. The common topic is: what can society and its subsystems learn, and what have they learned, from court procedures? (Harste 2001; 2016a)

Seventh, in itself it is worthwhile to pinpoint the themes of co-originality, co-presence, and simultaneity or synchronicity of private spheres and public spheres, and of human rights together with subjectivity and objectified public roles. As stated in previous chapters, Luhmann penetratingly, and especially in his *Risk* (1991/1993), develops a theory of enforced synchronization compared to evolutions of non-simultaneities ('Ungleichzeitigkeiten'), such as the risk of differentiations in time-binding norms among differentiated functional systems. In short, Habermas' foundational idea in this respect came from the apparently simultaneous, if not synchronic, publication of Rousseau's *The Social Contract* and *Émile*, both in 1762.

Moreover, *The Social Contract*, in an important conceptualization, argues that the so-called "general will" is binding to everybody. The main point is that it obliges everyone to accept and tolerate deviances and disagreements, and no one can disagree with the principle that disagreements should be allowed. Accordingly, every human – "human" in contrast to citizen or subject of power – must recognize the human right of particular differences. *Émile or On Education,* is simply the narrative of such an autonomous will formation.

Habermas, to be sure, already elegantly developed this conception of synchronicity of objectivization/subjectivization, generalization/particularization, and nomothetic law development/ideographic exception in Chapter two of *Transformation*. Yet, to the legal historian Niklas Luhmann, as he argued in the long article on *Subjective Rights* (1981), this is not sufficient to establish the point. The reason is that subjective rights of shame, honor, lust, guilt, punishment, accountability, and so on were developed semantically – if not eventually codified – far earlier, in the 12th century, and transformed several times over since. For instance, in the Reformation, a number of virtues developed, such as piety, grace, discipline, asceticism, charity, forgiveness, and so on. For example, shame, and later piety got forms in texts, yet also in bodily communication, as lifted eyebrows.

Eighth, private law and administrative law are subject to materially specified programs. Law and political ideas developed according to specified material needs, situations and contexts, which reveal pragmatic expectations about how communication will operate. Habermas may, bottom up, be inclined to develop abductive reasoning about what is done and, ethically, should be done in such situations, whereas Luhmann tends to observe new semantics and innovations that become stabilized, only to see if they provoke paradoxes, conflicts or solutions to former problems.

Many discussions that appeared in the aftermath of Habermas' *Between Facts and Norms* preoccupied themselves with controversies, whether Habermas' discussion of one or another position (of John Rawls, Richard Dworkin, Weber, Aristotle, Kant, Hobbes, Rousseau, etc.) was correct with respect to this or that, or the reverse, whether the topics were discussed adequately. Since Habermas often develops his theories in discussion with others, this makes his theoretical constructions vulnerable to debates and criticism – and difficult to follow if the reader has not read the same books as Habermas. Some find misunderstandings, purposeful or not, and these debates sometimes tend to forget the subject at hand in favor of *ad hominen* disrespect and misperception. To Luhmann, such quarrels are misleading, since communication has its own autonomies distant from ideas about how people, authors and readers identify with positions, which could be taken or not taken.

IV. Legal argumentation

In a strict and very legal sense, it could be claimed that the most central topic in the 1992-1993 debate between Habermas and Luhmann was about 'legal argumentation'. This concerns Chapter 8 in Luhmann's *Law as Social System* and, especially, Chapter 5, Part III in Habermas' *Between Facts and Norms*.

Habermas' question is whether it is possible to fulfill the task of establishing an abstract principle of discourse, which at its basic core can account, on the one hand, for simple interactions among people co-present in an interaction system, and on the other hand, for interactions among those who might have rights and claims (Habermas *Facts* BFN 1996, 233; 1992, 286-287). This, too, is the starting point for Luhmann in his exposition of the role of courts and procedural history (in *Law* 2004, 274; 1993, 297). In *Legitimation,* he begins his analysis displaying the historical fact that courts, in order to have any authority, has to have some place and scope in which communications are free to decide upon and determine matters that are not already decided and determined (*Legitimation* 1969, 21, 59-68). Courts are based on a principle of indeterminacy. The court was set, on chairs, in a confined setting in which deliberation could take place: it may have been in the middle of a village or in a setting similar to the Lord's Supper – both arrangements could serve as functional equivalents that authorized the setting. Because of this historical differentiation between court communication and everyday interaction, we may ask whether this is still adequate in modern society. In other words, is there some form of abstract discourse principle that covers both, as Habermas suggests, or do we only have the form of meaningful communication in its most general form, as claimed by Luhmann? Neither of them, in any case, would claim that legal argumentation is only a subset of moral reasoning.

Of course, there is a tension between a reasonable legitimacy of applied law and positive law as to what should be considered in connection with just decisions. Either valid law could apply to moral reasons, or moral reasoning could be used in law if such principles were allowed to be used directly in a legal argument. Yet Habermas tends to seek for a third position, where new settled law copes with former laws and practices, but also reasons with validity claims in order to cope with hard difficult cases, new issues and topics. Here Habermas tends, for empirical reasons, to let the institutional reasons rule:

> "Procedural law does not regulate normative-legal discourse as such but secures, in the temporal, social, and substantive dimensions, the institutional framework that *clears the way* for processes of communication governed by the logic of application discourses." (Habermas *Facts* BFN 1996, 235; 1992, 288; emphasis in original)

This form has obvious similarities to Luhmann's conception of reduced complexities. The modalities of communication are differentiated into certain forms that code the reduction of temporal, material and social complexity:

> "In such situations the urgent generalization of perspectives has a temporal, material, and a social aspect. Temporally, the acceptable horizon for events becomes postponed into the future; the relevant span of time becomes wider. Materially, more themes come into consideration. Possibilities of action, which do not "as such" coincide, become settled through motives, revenge, and gratitude. Socially observed, the form of encounters are simplified through a typically expected denominator, which not always should appear as new, for example as cooperation or as conflict." (Luhmann *Legitimation* 1969, 76)

At the end of the day, Habermas uses Luhmann's tripartition of a temporal, social, and material reduction of complexities involved in courtly procedures: the temporal rules against delays, the social rules of exchanges between *pro et contra*, and the material production of what become accepted as proof and facts. The organizational form becomes decisive for the functional form and its procedures for communicating a discursive principle.

If it is not clear in reading *Between Facts and Norms*, Habermas' stronghold is to discuss what social, political, pragmatic and ethical reasoning has learned from court procedures. His analysis of pragmatic discourses is apparently still bound to follow instrumental ideas of goals and means (*Facts* BFN 1996, 159-60, 164-5; 1992, 197-8, 203). This becomes clearer when Luhmann's analysis of legal argumentation in Chapter 8 in *Law* taken into account. Habermas, to be sure, uses Luhmann's description of procedure, and Luhmann directly addresses Habermas' endeavors several times in the chapter. In the chapter's first note he recognizes that "Habermas formulates the important contention that we must ensure that juridical argumentation is able to respond to other than just moral premises" (Luhmann *Law* 2004, 305 note 1; 1993, 338).

Yet he also addresses a certain difference from Habermas' topic, since Luhmann insists that we have to be aware of the self-understanding and self-description of law and legal procedures as they have developed in modern society. In a note, Luhmann coins the decisive difference from Habermas:

> "In his [Habermas'] view, which follows on from Max Weber, texts with the validity of positive law initially replace reasoning. 'The special achievement of the positivization of law consists of shifting problems of stating reasons; that is, largely relieving the technical operation of law of the *problems of stating reasons*, but it does not consist of the removal of these problems' (*Communicative Action* 1981, I, 354). Habermas takes a different turn after that. A lawyer sees the deficiency of reasons necessitating an *interpretation of texts*, which in turn requires further reasons. Habermas, however, sees the problem in the fact that the *"textuality" itself needs a reason* – neither a formal one nor a functional one (this is not possible without texts) but a substantial one in relation to postconventional criteria which are

> yet to be agreed upon. Clearly Habermas is demanding more than is and can be practiced as law in view of the responsibility courts have to arrive at (quick) decisions." (note 7 in Luhmann *Law* 2004, 307; 1993, 340)

In Luhmann's *Law as a Social System* (2004), Chapter 8 and parts of Chapter 11 are concerned with analyses of legal argumentation. However, the historical interpretations of legal evolution are the subjects of Chapters 6, 9, 10 and 11 as well, and are the concern of a number of Luhmann's previous elaborations of a theory of legal evolution.

Law is primarily about a production of texts (laws, verdicts) with texts. Argumentation as such is not valid law, and only transforms into legality by means of written procedures. Memory is not representative as such, but is only so in the form of writing. This battle of orally customary law against a still stronger and more positive written law developed from about 1100 to 1500 in Europe; written law was primarily a legacy from the Roman Empire, whereas somewhat north to Lyon customary law was more important. Since early-modern law, oral argumentation does not, as such, changes legality in the same way as written documents, though there is a structural coupling between writing and speech: "Through texts, the system is able to coordinate itself by its own structures without being committed to indicate in advance how many and which operations, such as quoting certain texts, will trigger or change the reuse of certain structures." (Luhmann *Law*, 2004, 305)

Today, interpretation in law is not about an oral performance entangled with fixed written texts. "Interpretation is about producing new text with old texts". (Luhmann *Law* 2004, 306; translation altered; see 1993, 340) In a longer note, Luhmann adds an important point – emphasized by Habermas in his comment to Weber in *Communicative Action* (TKH 1, 354) – that law in the form of legal texts relieves reasoning and offers some form of argumentative deficit that calls for further interpretation. For example: An application questions whether a law is also valid in a certain other case, and an interpretation has to follow. Invoking the jurisprudence of Jean Domat, the previously mentioned d'Aguesseau's teacher, Luhmann adds that law therefore does not take place as a first-order observation, instead only at a second-order level: "Texts are not to be understood verbally but analogously according to what gives meaning". (Luhmann *Law* 2004, 307; translation revised) The point is that the legal text was made in order to give meaning to future situations, and hence to bind law, to establish an improbable situation, and to ensure that a certain use of law also binds expectations for future situations, i.e. brackets contingencies. Texts are established in the (counterfactual) sense of not leaving much to be added in the future.

Therefore, legal reasoning develops in order to establish meaning – to valid law and not (or only accidentally) to the environments of the legal system. This takes place through a combination of redundancies and variations. Legal procedures do not cite past settled law as if it is a covering law that

forever has to be followed in its given precedence. They cite examples, not analogies. Yet examples offers variety and each new case can offer variety. Hence, to develop law has to cope with variety or even invent variation to clarify how new laws can establish valid law.

In this way, Luhmann's elucidations describe how legal argumentation establishes a kind of interconnected complex of meaning (Weber's 'Sinnzusammenhang') in-between formal law and material substantive law. This is not established in the intersubjective dialogue of speech acts and linguistic performance, but in an intertextuality that takes use of spoken language, but the point is the self-production of texts as valid law.

Law has to exist. The *raison d'être* of law and legal argumentation is not to be moral, nor political, nor to make society function as a whole, but only to leave law to law and to make law function. And thereby morality or politics, public debates or scientific argumentation are all relieved and emancipated to establish their own form of argumentation.

Thereby argumentation concerns whether arguments are good or bad, should be accepted or not and argues therefore about arguments. Hence ideas of procedural argumentation may seem to be similar for Habermas and Luhmann, but

> "theories of ethics, of any kind or the currently fashionable economic analyses are equally inadequate explanations of legal reasoning in practice. Legal reasoning often uses relatively general terms such as fault, liability, contract, or unjust enrichment. But these terms feed off their repeated use in countless different contexts. Therefore it is possible to use them as the basis for a decision within a familiar meta-context, although they are not readily applicable without a concrete explanation. By doing so, conclusion by analogy builds a bridge between dissimilar cases." (Luhmann *Law* 2004, 311)

Analogies of matter tend towards observing new things as they once were and thereby sticks to conservatism. Both Habermas and in particular Luhmann defends the autonomy of law, which – from another angle and similar to Foucault' (2004b, 86-87) – display a criticism of the ordoliberal German-Austrian idea of an economic constitution of law (Joerges & Everson 2020). This problem of structural (de)coupling and desynchronization of law with economy, politics, or moral goes back to Weber's sociology of law.[4] To be 'guilty in the court' is a completely different phenomenon from being for example taken as 'politically guilty' and responsible to the mass media. Courts developed historically to avoid violent conflicts and if trial may lead away from vendettas and use of mafia methods then courts have fulfilled their function of

[4] The 2020 pandemic demonstrated that health got priority, as previous war too, both in states of exception.

immunizing society against escalating conflicts. Thus to Luhmann, legal argumentation developed not from God or the good, but on a path away from the devil, away from conflict and escalated dissent.

Everything is not at disposition but why should certain 'good' concepts be able to enter legal argumentation better than 'bad' or 'less good' concepts?

> "Someone who does understand reasoning as a reference to reasons will find the necessity to find reasons for the reasons as well. Someone who must find reasons for reasons needs tenable principles. Someone who refers to principles ultimately refers to acknowledged principles in the environment of the system. This is especially the case when such principles carry the additional signature of 'moral', 'ethical', or 'reasonable' principles." (Luhmann *Law*, 312)

The courts do not have natural or divine law to their disposition; in our everyday lifeworld we may be inclined to claim that we could dispose of this indisposition and bring those claims with us into the courts as participants or witnesses. We may even claim our interests to be presented in courts by lawyers; but the intertextual development of law in courts primarily defends the interests of producing and reproducing law as a sustainable system.

What seems obvious in the environment of the legal system does not necessarily appear to be reasonable for the legal system and its legal argumentation. Legal argumentation and reasoning are not the same as argumentation and reasoning in other systems such as the family system, the art system, the mass media, the economy, the political system or the war system. "Can principles do away with the requirement of their having to distinguish themselves from each other? And if not: who does the distinguishing, if not the legal system itself?" (Luhmann *Law*, 312)

Law always have to operate with particularities, as if something more general could be said. Hence, there are good or bad arguments and law weights such arguments, but it does not discuss the weight of the weight: it does not argue why argumentation takes place, it simply takes place and so it has been since the Roman institutionalization of court procedure, and also outside the post-Roman legacies.

The paradox is invisible, and we cannot turn it completely visible. "The theory of argumentation is brought into the operation of argumentation". (Luhmann *Law* 1993, 343) Accordingly, Luhmann's redescription is close to Habermas' and he admits that procedure, in law's pursuit and judicial inquiry, often is described as reasonable. Especially in early Enlightenment France (Jean Domat, Henri-François d'Aguesseau 1759) this became common and part of positive law.

Habermas and Luhmann agree that in law we find a 'surplus of procedures' and a deficit of cognition and motivation. Whereas Luhmann tends to dismiss any moral idea that good or bad motivations could be forwarded in legal operations, Habermas tends to lean on the implicit moral motivations of procedures.

Accordingly, the focal point for Habermas is what can be learned, morally, from legal procedures. If Luhmann's

> "official use of law is not to destroy the belief in its legitimacy, the initiated must interpret legal procedures differently from the way clients do – namely, as an institutionalization of obligations to bear the burden of proof and to provide good reasons for any decisions. Arguments exist so that lawyers can indulge in the illusion of not making decisions according to whim: 'Every argument diminishes the surprise value of further arguments and finally the surprise value of decisions' (Luhmann: *Soziologische Betrachtung des Rechts* 1986, 35). Certainly, from a functionalist perspective argumentation may be described in this way; but Luhmann considers this the whole truth, since he attributes no rationally motivating power to reasons at all. In his interpretation, there are no good arguments for why bad arguments are bad; fortunately, however, through argumentation the appearance is created 'as if reasons justify the decisions, rather than (the necessity to come to) decisions justifying the reasons' (Luhmann: *Soziologische Betrachtung des Rechts*, 1986, 33)." (Habermas *Law* 1988, 254).

Luhmann's point is not to indulge Ronald Dworkin's Hercules judge as the foundation for legal decisions, but simply to state that legal systems strive to follow their obligation to determine or retain an interdiction against indecidability. The buck stops in the court. More specifically, the buck stops, so to say, at the best narrative in the court; or it stops in the administrative process that displays the best narrative simply because such process allows for further arguments without surprises and with a discretion that does not foster hypocrisy but allows for some honesty. As Richard Nobles and David Schiff claim in *Observing Law Through Systems Theory* (2013, 50-57),

> "To be effective, the legislature needs the judges to carry out operations that it cannot expressly authorize. Judges must make the law, in the sense of dealing with the inevitable contingency within a system that cannot provide in advance for all situations, by using communications that do not admit that law, in this sense being made. These particular examples of 'hypocritical' communication facilitates a workable version of what is commonly referred to, within the legal and political systems, as the doctrine of 'separation of powers'. Whilst the need for judges to make law is inescapable, their ability to proclaim that this is what they are doing, as they do it, leads to different forms of law making than would occur if judges could use communications that confessed to their law-making role as they were doing so." (Nobles & Schiff 2013, 54)

Of course, this is lawmaking as incrementalism. In EU law, it is called law by 'acquis communautaire'. Law has to be coherent, holes have to be filled out, at the same time as the world changes, new complexities

occur, contexts, words and concepts change, and new holes appear. This is not the personal wish of a judge held by his own political commitment. It is his job to reestablish the law to fill the gaps, which reappears repeatedly with still more variance. To distinguish between finding the law and making the law is part of routine operations, yet the discretion used in this operation is precarious.

Hence, Nobles and Schiff can conclude with some poorly hidden reference to Habermas that

> "Debates which are informed by ordinary language philosophy, speech act theory and other forms of linguistic philosophy, and focus on language and not systems, fail to identify the constraints placed by systems on actors' use of language. Arguments about the construction of meaning which limit themselves to language and its use, but ignore the restraints which arise from law's existence as a separate system of communication (with its own redundancies) have produced a series of irresolvable disputes about what truly occurs within legal systems." (Nobles & Schiff 2013, 56)

Since Max Weber's *Sociology of Law* (written 1913), a number of discussions have tried to find their way between formal jurisprudence and material jurisprudence, often in United States called substantial law. Luhmann does not accept the simplified model, that British Common Law should be more material and continental European law more formal. Rather, the conceptual development of legal dogmatic and the empirical reference to interests do not follow a simple distinction between internal law and external environment, or between rationalist ideas and empiricism. Law concepts and interests, if anything, are developed in a mutual occupation that offer concepts to interests, such as obligations to take children into consideration, or national security. 'National security' is a political and military concept, yet if it should be used in law, jurisprudence has to develop its legal conceptualization, or to neglect it and exclude it from law.

Law is not a linear trivial machine used to predictions. Law does not predict, it interprets in an ongoing cognitive openness of new knowledge and new civil norms, which enter into law only if legal reasoning is able to re-enter them in its operations. "The system cannot guarantee (…) a rational state (…) Any discourse theory (such as Jürgen Habermas') that ignores this neither does justice to the highly developed peculiarity of the legal methods of persuasion nor achieve its goal." (Luhmann *Law* 2004, 353; 1993, 402;).

The point is: which interests are accepted in jurisprudence, i.e. which interests can be conceptualized in law, and which ones cannot. Exclusion is at least as important as inclusion, as famous examples: are capital-owner interests to be preferred to consumer interests? Production interests to ecology protection? Property rights to slavery to formal rights of human universalism? (Luhmann *Law* 2004, 350; 1993, 399) To expose such preferences, the legal system, thereby paradoxically, constitutes observations and remembrance about other possibilities, and that other interests could be decided as legal.

Even lawgiving does not control how laws are interpreted. Once the law is given, settled law may offer another validity, as the consequences may become different than supposed. Yet, Habermas cannot avoid this thesis of lacking governmentality, - as Foucauldian scholars could neither. Thus, Habermas has to make recurrences to a third strategy: If communication procedures, in general, in politics and in administration, has learned from law procedure, they may get a form that is acceptable to legal argumentation: Jurisprudence does not have to bend the material argumentation in order to refer to reasonable discourses. Indirectly public reasoning is not simply any external environment to law. This concerns Hegel's 'Cunning of Reason' ('List der Vernunft') and is discussed in German jurisprudence and sociology of law, conceptualized as rationalized legalization and juridification or 'Verrechtlichung' (Maus 1986; Böckenförde 1991; Frankenberg 2011: 309).

V. Luhmann on indispensable norms

On one important topic, Luhmann's argument has shortcomings compared to Habermas' discourse ethics. Luhmann continues the classical story about the natural fallacy, i.e. that it is not possible to infer from facts to norms: 'An inference about norms cannot be made from facts.' (Luhmann *Law* 2004, 352; 1993, 401).

Hume and Kant are the classical references. Yet, even for the later Kant, the famous neo-Kantian distinction between facts and norms does not hold and neither does it in the quite accurate analysis exposed by Émile Durkheim. We cannot describe the world and the facts of the world if we are not able to infer to normative descriptions: 'if this is a bread, then it should be possible to eat it', 'if this is a text, them it should offer some meaning', 'if this is a society then some norms should be valid in it'. To Durkheim (1895/1937), rules and norms are the facts and the data to observe with sociological method. Luhmann, immediately, revised his position in another article, *Norms:*

> "(T)he legal system seeks the foundation for its own method of observing the world in the *distinction* between norms and facts. In contrast, sociology is free to deal with norms as facts as well – obviously as facts of a particular kind. A possible construction is to understand norms as formulas for *contra-factual expectations*, for expectations of behavior, that is, that do not allow themselves to be irritated by factual behavior, but which are adhered to even when they are frustrated. The guiding distinction here is not fact/norm but learning/not-learning. The usual manner of speaking, which is calibrated to 'ought' and talks of 'validity', is then conceived if as an expression for the right to refuse learning and the right to maintain expectations, even when they are frustrated." (Luhmann *Norms* 1993/2008, 20-21)

Trump's post-factual politics towards environmental issues is an example about how not to learn from facts – and this is a fact that even futures are ignored. Modalities as will-formation are parts of social

communication. The future is part of the present, in form of expectations. Social communication cannot dispense from references towards what might be expected from a contingent future. Hence, there is no simple distinction between necessity and contingency. From the point of view of sociology, Luhmann's theme could seem obvious.

However, if this solution seems easy to handle, Luhmann's initial question in the article became extremely important in political, moral and legal discussions during the decade after his death, in 1998. He raises the question if it is possible to constitute rules for a state of exception. If a terrorist, as a fact, has a weapon of mass destruction, ought we to torture? Or do we ought not to torture? Luhmann begins his analysis with this dilemma:

> "Following good legal custom, presenting a case might help attune us to the topic of this talk. Imagine: You are a high-level law-enforcement officer. In your country – it could be Germany in the not-too-distant future – there are many left- and right-wing terrorists – every day there are murders, fire-bombings, the killing and injury of countless innocent people. You have captured the leader of such a group. Presumably, if you tortured him, you could save many lives – 10, 100, 1000 – we can vary the situation. Would you do it? In Germany the matter seems simple. One consults constitutional law. Article 1 (Human Dignity) provides for no exception. Indeed, the layman is at first astounded that the norm is formulated as fact. Is it therefore possible for torture not to violate human dignity? The jurist will let him know better. So far, so good. If not in terms of justice, then at least in terms of the legality. For common law, which doesn't operate in such legal-positivist terms, there is an extensive discussion that is relevant here." (Luhmann *Norms* 1993/2008, 18)

Formal positive law is opposed to pragmatism, and none of them has no risks. Luhmann poses the question if human dignity, honor, virtue, or natural law as recognized in noble stratified societies, offer answers to solve the dilemma. Human rights have evolved as to describe the form of individualized individualities that began in the 18th century, as if individuals with chances of careers and futures should have chances to escape. Yet, he does not really find solutions in classical moral and legal philosophy, from Kant to Hegel:

> "For *Kant* 'eternal peace' can only be guaranteed through states that grant citizens legal protection. *Habermas* adds this desideratum the affected persons' democratic participation by means of constitutional procedures. Both suggestions are modern insofar as they avoid a dogmatic (metaphysical, religious, indisputable) anticipation of correct decisions that would sort the rams from the sheep in advance. But both suggestions are also characterized by other-worldliness and ignorance of the law. Neither *Kant* nor *Habermas* poses himself the problem of the right to break the law. For both the problem's solution lies in arrangements that enable

> access to the insights of reason. For its part, reason is handled like a tribunal or like a source of insight that, under conditions of uncoerced communication, enables precisely that which it presupposes, namely, understanding without coercion." (Luhmann *Norms* 1993/2008, 31)

If reasoning about law and justice is possible as some form of domination free dialogue with the terrorist then solutions could be found. This, however, is not obviously the case in this somewhat famous, if not outright non realist hard case which never adapts to the real world, but so often have been used in political phantasies about the invented real world that it almost constituted the social reality (Barry 2015).

> "However, if negation actually exists, then there is not only positive self-reference, but negative self-reference as well. The state of today's world guides the gaze more to the problem of a decision between justice and injustice that is made not in accordance with the law – for example, as mentioned at the beginning, the case of torture, or cases of international intervention, or cases of the retroactive condemnation of 'crimes' that were covered by positive law (but ostensibly not through 'supra-positive' law) at the time of their commission." (Luhmann *Norms* 1993/2008, 31)

The 'state of exception' and its necessities stating 'extraordinary' exemptions to law refers to the so-called 'reason of state' and its absolutist rule in the early 17th century. According to Luhmann, human rights will not do to make exceptions to such a state of exception. Rather, as a surprise to those who follow his cognitivist position, Luhmann proposes a notion of 'human duties':

> "In this situation one could replace the semantics of human *rights* with one of human *duties.* That would mean holding state governments responsible, at least in the sense of keeping order within their territory. And it would correspond to a mounting tendency that also structures the global societal system more strongly for politics, and that understands the state organization not only as an expression of the will of the 'people' but also, and perhaps first and foremost, as the international address for questions about the provision of order." (Luhmann *Norms* 1993/2008, 34).

This, in fact, was what two years later became proposed under the auspices of United Nation as the 'Responsability to Protect' (R2P), adopted in 2005. In this form, human duties are addressed, less to the legal system, but to some form of cooperation between the organizational system, the political system, and the legal system.

VI. **The Cardozo Law Review debate (1996)**

Habermas' German edition of *Between Facts and Norms* was published in 1992 with the somewhat untranslateable title *Faktizität und Geltung*. Immediately debates began to find which themes in it were to be selected as the more important. A 10,000 copies were sold already before publication, at the same time as political debates flourished about how to conceive the world situation after the Cold War. This was one of the books expected to tell how to analyze the social, political, legal and perhaps economic and international situation beyond the level of more normal political science, which also was so discussed with books like Francis Fukuyama's *The End of History and the Last Man* or Samuel Huntington's *The Clash of Civilisations*, both of them already discussed as articles. China was about to have its unprecedented rise; and the internet globalized. The Balkan Wars escalated in Yugoslavia and the European Union appeared with the Maastricht Treaty in First of January 1993; Bill Clinton moved into office and the Soviet Union dissolved. Theory was at its move. Critical social theory certainly, and widely influential intellectual groups expected it could take a, if not the, lead. In Germany, for sure, it was contested by Luhmann's social systems theory, in France by Pierre Bourdieu and the remnants of Michel Foucault more than by the still spectacular however loose ideas of postmodernism. In US, John Rawls' *Political Liberalism* (1993) was already debated into discussions with various strands of more or less liberal communitarianism (from Charles Taylor and Michael Sander to Amitai Etzioni and Scottish Alisdair McIntyre).

September 20 and 21, 1992 *Cardozo Law Review* established a conference with thirty-two scholars, many from Europe, and debated Habermas' book. This was published as Vol. 13, 1996 (a double volume), *Habermas on Law and Democracy: Critical Exchanges*. Among them were Niklas Luhmann and his close collaborate Günther Teubner. At the same time, Cardozo Law Review also published a major volume on *Luhmann's legal theory, Closed Systems and Open Justice: The Legal Sociology of Niklas Luhmann*, Vol. 13. 1992. Here, in the present chapter, the theme is only about Luhmann's contribution and Habermas' reply, which also ends or is the conclusion of his 80 pages *Reply* to the preceding 24 commentating articles.

In the debate, the problem is, too shortly resumed, about the reality of law and the hope that interferes. Luhmann seeks to analyze how law functions, and Habermas how people, discourses, or systems outside law, hope it functions. Luhmann's article bears the very classical Latin title from Roman law "Quod Omnes Tangit" (means: 'what concerns everyone', and is normally followed by: everyone should have a say on it). The tradition tells that those who are attained by a legal decision should be heard about it, and that is what makes it a political decision. Decisions are paradoxes insofar they decide about the uncertainty of future decisions.

So much is clear; Habermas and Luhmann agree that the distinction between legality and legitimacy is not sufficient. Therefore, Luhmann also rescues Habermas from his painstaking problems of translation: The title "Between facts and norms" might mislead: "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." (Luhmann *Omnes* 1996, 887)

Initially, the point is simple and is first about accurate translation, since in continental European languages, for example German or French this duality has a triangular form of legality ("Legalität"), rational legitimacy ("Legitimität"), and popular legitimacy ("Legitimation"). For instance, Rousseau constitutes his argument in *The Social Contract* upon this triangular form. This, of course, is extremely well-known and important to German scholars, since Hitler's regime seemingly had 'legitimation' as popular legitimacy, but not any rational legitimacy. To German intellectuals from Luhmann and Habermas' generation, this triangularity is certainly far more important and dialectically sharpened than we outside Germany might understand. Explained in Luhmann's words: "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." (Luhmann *Omnes* 1996, 892). Hence, Luhmann explains the triangularity, as well as the topic of the debate, with his methodology of distinction, form analysis, and re-entry of a distinction into the two sides of the form of a distinction legality/legitimacy. On the one hand with legal observations, law reinforced, if law were not only law, but also admittedly recognized as law with legitimacy, yet of course legal argumentation could pass even if it had no popular nor any rational legitimacy. On the other hand, rational legitimacy could argue better about decisions to cope with as acceptable decisions if they easily could be transformed into law – and perhaps even better were inspired by law. So much worse for decisions, which would have a painful way into legal forms, for instance because of privileges, lacking universality, admitted corruption, lacking rule of law, or what have you. In US' sometimes exceptional decisions too, the importance of such distinctions is enlightening.

Hence, this constitutive form is not the point of departure for Luhmann's questions to Habermas. In fact, Luhmann and Habermas do agree on so much concerning the basic analysis here that they hardly have any mutual criticism to bear upon in this part of the debate. "Habermas argues consistently" (Luhmann *Omnes* 1996, 889).

Yet nevertheless, they enter the problem from two different angles. According to Luhmann, the problem is about time. "More important for the overall construction of the [Habermasian] theory is the fact that at this point Habermas concentrates on the social dimension and *time stands still*." (Luhmann *Omnes* 1996, 887-888; Luhmann's italics) The hope or rather counterfactual hope for Habermas' discourse theory is that law refers to, or initiates, some forms and procedures of argumentation which will or should or could invent some future hopes, for instance about universality. Luhmann agrees that this often could lead to nice or good innovations, however 'good' is, then, only good as distinction to 'bad', and any argumentation about good or bad in any future daily life would then again be different to whatever might occur as legally acceptable law. To say it differently: The hopes we may hope for in our discursive daily communication are still constituted

outside the communication form of law. Paradoxically, Luhmann, the lawyer, is more skeptical about what law can bring about than whatever Habermas could hope for and that law could inform us about. Luhmann stands in the court and says 'sorry, this is not what you hoped for'; whereas Habermas stands in the parliament or congress hearing and says 'we will, should and could'. Accordingly, Luhmann concludes his comment with the problem of "could!" as his last word (Luhmann *Omnes* 1996, 899). Yet, in fact, this is a bit bizarre, because Luhmann tries to explain that Habermas might have good reasons to hope for more than law can offer; but Habermas also, according to Luhmann, have so much trust in learnings from law that he cannot avoid to get disappointed or disappoint others. Law is not very rational; perhaps law is just not or seldom directly irrational, and still differentiates better than the mafia, revenge or violence.

Habermas does not upheld any transcendental hope about legal reason; Luhmann admits that Habermas seeks elsewhere than in past traditions for a unity, which is neither in religion, nor in transcendental philosophy or in politics: Habermas' "theory forced itself to become concrete" (Luhmann *Omnes* 1996, 898). Habermas' point, and his hope, is in the pragmatics of everyday cooperation and collaborate work and its reflexive power of diplomacies, respect, politeness, capacities for expression and listening. This, of course, can be observed as nice; but this is not exactly what has constituted law. Courts are busy and most often far more busy than commoners believe. They have to improvise. Empirical sociology of law has to admit that. Whereas legal scholars sometimes clarify their arguments with overly beautiful cases of well ordered argumentation. Therefore time is a less planned or steerable issue than logical procedures of discourse ethics might admit, or 'could' admit.

At the end, Habermas reformulates Luhmann's questioning of traditional promises from Roman and Medieval legal revolutions. The dualities between nominalism and universalism cannot be sustained when "contingent temporal particulars provide the basis by which universals can be understood as equally floating constructions" (Habermas *Cardozo*, 1554). It seems that Habermas accepts Luhmann's conceptual history of law. Luhmann's temporal argumentation follows the tradition of medieval philosopher Duns Scotus. Thereby he tries to let Habermas stay alongside pragmatic traditions: Law only exist in its operations and not due to any nominal or universal form of entity.

This too, is argued in Teubner's comment to Habermas, which follows in the Cardozo Law Review's next article. Also the title of this article is in Latin: "De Collisione Discursum – Communicative Rationalities in Law, Morality, and Politics". Teubner's argument is a bit more about pragmatic incommensurabilities of fragmented discourses. This follows because Teubner addresses international laws and legal systems. If we talk about a legal system in China, how could we even identify it as legal – and not as sport, war, or family – if it was too different? Debates about (de)fragmentation of transnational or global law are ongoing among legal scholars such as Teubner, Hauke Brunkhorst and Martti Koskenniemi. Among those followers of Habermas and Luhmann, there are no more paradigmatic struggles. Rather they tend to oppose proponents of

sovereign nationalism, albeit, certainly adherents to Habermas' positions concern participation and are more actively engaged in political reforms of for example EU or UN, more than Luhmann's more ironic concerns about observation and distance. Yet it is possible and even obligatory to participate in distanced observation, and to observe inescapable participation.

Paradoxically, Habermas' critical discourse theory is somewhat rescued by Trump since his so-called 'post-factual' fake argumentation so obviously neglect validity claims and argumentative procedures that Habermas' position is reinforced as the communicative facticity and its empirical reality in which we are all embedded, or at least all research is.

Epilogue

Habermas' Limitations to Secularization (2019)

In November 2019, a Chinese habitant supposedly ate a bat without sufficient cooking. Such intake of an animal environment into a human bodily system could occur anywhere. We all know that this led into a severe social crisis somewhat similar to the Spanish Flu which killed more than 50 million people from 1917-1921. That pandemic probably departed from a lazaret in Kansas, or among Chinese workers burying corpses at the trenches in Northern France, or among British troops in England or in France amidst World War I. Spring 2020, the pandemic spread and the world closed its doors. Economic, political and motivational crises followed. Everybody experienced a new form of social (dis)order. In US, a crisis transition evolved from system to system, from health to economy, to law, to politics, and to a moral panic. This crisis transition was not unlike what Habermas analyzed in his *Legitimation Crisis* (1973/1975).

Amidst a 1000-dollars question was how it was possible in common to be isolated from others. Governments tried to behave as if they themselves governed individually, whereas everybody knows that they inspired if not directly copied each other, from China to Italy, to Iceland, and United States. World Society synchronized and became common, yet separated. Society experienced a classic theme from Rousseau and Durkheim, with whom the question of how to legitimize is about how to accept a common form of separation.

This is essentially, what the Habermas/Luhmann controversy is about. A most important still ongoing divergence seems to appear in the question of observation (Luhmann) or participation (Habermas). The "double perspective" of observation and participation creates a hybridity between functionalism and hermeneutics (Habermas *Auch* Vol 1, 2019, 35). Communication in society is observed, and is subject to participation. If not before, then the pandemic crisis revealed it to everybody. As individuals, each of us might think, perceive and apperceive, or feel observing or participating in communication whether in school classes, in families, or at work. We might unavoidably participate in linguistic performances, which stabilize the significance and meaning of our perceptions as socially recognized, although such performances do not really fit to our thoughts. Life and society is about common communication, in simultaneous synchronization of each one isolated. All kind of metabolisms between systems and their environment of differently coded systems came to the fore. However, metabolisms always were there, and they will stay with us, in society and outside it.

At the same time, in November 2019, of course without any connection, Habermas, when he was 90 years old, published his seminal two volumes chef d'oeuvre *Auch eine Geschichte der Philosophie*, (*Also a*

Philosophy of History) 1738 pages long. This is an extraordinary achievement among social thinkers, not only because of his age, being about the last survivor of the great generation of social philosophers born in Europe before Hitler's disastrous regime. It is a well-written reconstruction of the long secularization process from religion to knowledge in between history and evolution. In one word, his seminal book is about secularization from the mythical axial age to modernity. The contribution is that he attempts to clarify this often very broad and blurred concept, stage by stage, and one philosopher after another. Of course, the breathtaking scope of a historical process of philosophical thought appears extremely remote from the present crisis scenario. However, deep crises always develop as transformation of deep-layered decision-making premises and their conditions. The entire web of interconnected ideas of society, man, communication, consensus and conflict, distanced observation and part-taking subject to disruptions. Unfortunately, those trapped in "conspiracy theories" do not study books of philosophy of science and religion. To study a classic author who wrote in a remote distance from our present situation is always a hermeneutical exercise of the meeting with another known to be essentially unknown. In the interpretation, observation of the text, then, has to turn into some form of participation in the worldview of the other. This is a learning process of decentered communication. I will first comment on the very outline of Habermas' ambition in the double volume, shortly compared to other similar endeavors, such as Luhmann's (I). Second, I focus the initial secularization embedded in the model of Trinitarian communication and the Eucharist (II). Third, From Luther's interpretation of the real presence of communication there is a secularized heritage to Kant's critical philosophy of religion (III). Finally, I find some pitfalls in Habermas' interpretation of Kant's standard-setting deontological social theory (IV).

I. History and evolution

Habermas' late masterpiece is about evolution in the sense of irreversible advancements and learning processes in argumentation as if philosophy and theological reflections develop in one great community of argumentation, eventually in the actual society resulting in mythologies of politics and social realities of scientific truths. And it is history in the sense that Habermas describes contingencies and social conditions together with structural, organizational and systemic emergencies all along from the earliest stages of mankind, throughout Egypt, Mesopotamian and Chinese early civilizational take-offs. It gives Habermas' authorship and its position in social theory a classical position at the side of Weber, Durkheim, Foucault and Luhmann. Moreover, he links his reconstruction to a narrative, which in other forms is known and thoroughly studied from Kant's teleological philosophy of history and to Ernst Cassirer' three volumes *Philosophy of Symbolic Forms* (1922-1927-1929/1955). Habermas, however, does not what he usually aims, that is, to discuss with other more contemporary theories. Nevertheless, in his use of concepts, implicit comments to Luhmann is possible to follow all along.

Cassirer's achievement was the first advanced modern attempt to fulfill Kant's ambition about a well-argued evolution in communication from an explanatory *Erklären* in natural history through an interpretation (*Deutung*) of civilization processes to a cultural understanding (*Verstehen*) (Kant 1790/1974: § 77; Cassirer 1918/1974: 374-375). Of course, Hegel delineated the same ambition in his *Vorlesungen über die Geschichte der Philosophie*, and – also comparable to Habermas' endeavor – his *Vorlesungen über die Philosophie der Religion*. Yet Hegel composed this triple interpretation into one perspective of the spirit – however divided into three, subjective, objective, and absolute.

Whereas Cassirer consequently for example delivered interpretations, in which he conceived how "in the development of linguistic forms we differentiated three stages which we designated as these of mimetic, analogical, and symbolic expression" (Cassirer Vol. 2, 237). As in Luhmann's social theory, the point is "the self-thematization of society from rite to myth and by means of a cognitive self-understanding of a collectivity" (Habermas *Auch* Vol. I, 2019, 193). Moreover, "in the course of its development every religion comes to a point at which it must withstand this 'crisis' and break loose from its mythical foundations" (Cassirer *Ibid*, 239). Hence, already Kant, in *Critique of Judgment* (1790, §30) described the freedom inherent in the interdiction of picturing God and man (fx Mohamed) at a certain stage of rationalized secularization. Whereas Cassirer's three volumes were written amidst the short but immense rise of German research after World War 1 and before its break down in 1933, Habermas published his two volumes just weeks before the pandemic downfall of the post-war almost utopian paradise of modern society.

Whereas Kant, in *Critique of Judgment* (§§ 64-65) wrote about immunity systems, which coopted parts of their environment into themselves and then learned about their self-organizing organisms, Cassirer, Luhmann, and Habermas all described how Enlightenment learned from Medieval and Reformation thought to coopt heresies into orthodox communication in order to stay in order. Such an endeavor is not unlike frameworks described by Michel Foucault and Pierre Bourdieu. This cooptation replaced High Medieval metaphysical thought of societies. Forms of *Corpus Spiritus* or corporate organisms were reformed with ideas of complex systems. Opposition and deviance had to enter governmental systems of rational argumentation and deliberation more than simply voting about a yes/no, in which no one knows what is meant with a "no". If anything, to Habermas, the long British Brexit process, surely, was more important than a possible pandemic during the years he wrote this late two volumes book.

Habermas indeed uses many pages; however, *Auch eine Geschichte der Philosophie* is also far better written and readable than his previous publications since *Transformation* (1962/1991). Preferably to an extremely concentrated 400 pages book, he uses all 1750 pages, takes the reader in her hands, and leads her through the immense material of authors and texts. Still, compared with Luhmann, many authors, texts and clarifications in secondary literature are missed out, explained, and excused, in modesty. However, the depths of many authors are so much more elucidated. Luhmann analyses semantics, Habermas analyses authors.

On the one hand, Luhmann observes social communication and the individuals at their distance to it, whereas Habermas, on the other, observes that authors and governors can do something about the organization of social communication. Marx, famously in the 11th Thesis of Feuerbach from 1844, wrote that philosophers always tried to interpret the world differentially, yet what is important is to change it. Luhmann, basically, aimed to interpret observations, and Habermas to change by participation. In this late double volume, Habermas turns into interpretation and distanced observation. Nevertheless, he cannot resist to comment the present plural crises. With the pandemic crises and its repercussions into social systems, we stand with our two legs in each camp. Society, philosophy, and research, for centuries, if not millenaries, learned about itself in both camps. It observed its self-descriptions, and reacted with them. In the interpretation of Marx' functionalist theory of capitalism, Habermas recapitulates Marx with Luhmann's concepts of self-referential systems. Capital accumulates and distort environments as a "differentiated" system of "self-steering" , "self-alientation", "self-relating", "self-reflexive", "self-reproduction" processes. Albeit Marx stays in the vocabulary of an action theorist, Habermas uses "the language of systems theory", since "the self-reflexive closure established by means of a transition of the systemic communication into an abstract denaturalized medium of money." (Habermas *Auch* Vol.2, 2019, 655-6).

In the introductory chapter to *Communication Theory*, Habermas conceived a strong, yet extremely demanding and methodological point developed in the philosophy of history of Kant and in Luhmann's theory of evolution. If the general conceptualization of world as objectivity clarified in history, this cognitive achievement, at a secondary level is conditioned by societal semantics about norms (Habermas) and codes (Luhmann). Society, and in particular the research community, in its political, legal and economic conditions, could not develop contrary to this cognitive evolution. With Immanuel Kant's famous and path-breaking "Copernican Revolution", the access to any metaphysics of the world, and its civilizing process, is achieved by post-metaphysical epistemologies. Cassirer too describes this transformation (Cassirer 1922-1927-1929/1955). According to Habermas, the ontological metaphysics of world religions has transformed into epistemologies of subjective consciousness and from there into communication forms. Thereby, however, long-term semantic lessons and ideas are still in use, for example about living in one world, about coherence, and a series of binary codes. This is a daring point about development, and we may call it a process of differentiation, yet in addition, a process of rationalization. However it is, also, a risky process of irrationalization. We cannot avoid the teleological a priori of performative validity claims or as Luhmann says, the self-implication and fact of self-reference of social self-descriptions (Luhmann *Rationalität* 1981, 228). As long as evolution is about the emergence of systems, differentiated from their environment, evolution is about risks.

Simply spoken, "the world is habitable" (Habermas *Auch* Vol 2, 2019, 205). Accordingly, Habermas' 1752 pages of social evolution must evidently end up with Habermas and his discourse theory, if not with

Luhmann's idea of self-reference (Habermas *Auch* Vol. 2, 2019, 336-340, 379). The point for a critical theory since Kant is that it is a risk that different and even risky processes of systemic self-reference invalidate this process of secularization and rationalization (*Ibid*., 660). This is why Luhmann's theory, cognitively still might conceive a more critical methodology than Habermas. In an almighty nuclear war or at the tipping points of ecological disaster, research and communication might still be codified along the risky vein of a negative dialectical enlightenment (Habermas *Auch* Vol 1, 124, Vol 2, 2019, 798-9; Luhmann *Observations* 1993/1998). Research might accept this methodological blind spot, "observed from nowhere" (Habermas *Auch* Vol 1, 2019, 473), and might have to accept that even research, as mystifications, "prevents one from seeing that one does not see what one sees" (Luhmann *Theory* Vol. 2, 2013, 323).

Habermas and Luhmann both conceive the bodily organic systems and the thoughts, consciousness, and feelings of psychic systems, as well as the communicative meaning. Very importantly, they both understand this threefold differentiation in its evolutionary and historical development, in bodily rituals and in communicative semantics.

In the present book, I established some reservations to Habermas' previous social theory in comparison to Luhmann's. Hitherto, before *Auch*, Habermas' theory of the evolution of modern society had an immense gap between short descriptions of Antiquity and 18th century Enlightenment. Habermas shortly, in a note, comments to ambitions expressed in his long article *History* (1976) discussed above in the *section III, Between History and Evolution*. Many of Habermas' analyses, including *Communicative Action* (1981/1987), and there in particular "Second Intermediate Reflections" section two, felt far too short, if it should attempt to offer an answer to Luhmann's then much more developed analyses of societal self-descriptions in *Function* (1977) and *Gesellschaftsstruktur* (1980, 1981). For sure, Luhmann continued to develop his approach in *Gesellschaftsstruktur* (1989, 1995), and in particular in his chapters on Self-descriptions in *Law* (1993/2004), *Politik* (2000), *Religion* (2000/2013), *Erziehungssystem* (2002), *Ideen* and certainly in his final *Theory of Society* (1997/2012-2013).

Habermas analyzes the historical secularization theme in the medium of linguistification of sacral semantics ("Versprachlichung der Sakrale"), and in this sense elaborates the classical Durkheimian conception from *Communication Theory*. With Habermas' *Auch* (2019), we eventually find how Habermas, as usual implicitly or explicitly, attempts to answer Luhmann, and probably Foucault too. Habermas coins his endeavor with the concept of "genealogy", which certainly mainly is framed by Foucault, who mainly built his analytics upon discourses found from Antiquity over the Medieval, high Medieval, late Medieval Ages, and Absolutism until the 18th century. Nevertheless, Habermas continues to use a wealth of Luhmann's concepts about functional differentiation of social communication systems self-descriptions, self-reference (for example *Auch* Vol. 1, 2019, 654, and more emphatically Vol. 1, 2019, 852-885). Moreover, he, in a kind of proxy debate, enters into long fruitful discussions with the Egyptologist Jan Assmann, who in the 1980s

worked with Luhmann, for example at Dubrovnik's InterUniversity Centre, about Luhmann's conception of monotheism (Assmann 1985; 1986; 1988; Luhmann *Unterscheidung* 1987). One God and one coherent interpretation of communication with God embark into the conception of one world and one world society (Habermas *Auch* Vol 1, 2019, 472-475). On this point, there might be an unspoken difference between Luhmann's focus on semantic distinctions and Habermas' recapitulation of Chinese philosophy, whether Confucian, Daoist or Buddhist. Certainly, with Daoism, we merely find a dynamic difference and no unity. Albeit the Mediterranean heritage, as the Chinese, also distinguish between what in Chinese philosophy is a mandate from Heaven on Earth (Henderson 1998). In particular, the Chinese expert and Luhmann scholar Hans-Georg Moeller (2006; 2012; 2017) has greatly elucidated the affinities of Luhmann's methodologies with Daoist thought.

II. Eucharist as speech act in a communication procedure

More important to Habermas is the Christian idea of Trinitarian communication. This Habermas recapitulates in its formulation after the Council of Nicae, year 325. The Holy Spirit appears as interpretation formula for communication about the Lord and Jesus Christ as son (Habermas *Auch* Vol 1, 2019, 543). Indeed, Habermas uses Luhmann's theory of social, material, and temporal forms of codified and reduced complexity, and how this constitute meaning in communication. The communicative coherence establishes a form of simultaneity ("Gleichzeitigkeit", cf. Habermas' sociological analogy, "Gleichursprünglichkeit"). Habermas' discussion of Trinity (*Auch* Vol 1, 2019, 541-545) is typical for his immanently continued discussion (or *Auseinandersetzung*) with Luhmann. On this point, Habermas continues (p. 546ff) in a suggestive interpretation of the famous philosophy of time in chapter 11 of Augustin's *Confessions* (397/2006), and comes close to Luhmann's theory of temporality. Previously, Habermas missed an adequate answer to Luhmann's intensely repeated focus on time embedded in simultaneity or even co-simultaneity of what Parsons called double contingencies (Habermas *Auch* Vol 1, 2019, 794; Luhmann *Systems* 1984/1995, chap. 3), for example in intersubjectivity or in communication between God and human. Habermas' point is about the need to participate and not merely observe, and exactly of this reason, the Eucharist, to him, is supposed to be about the reality of the body of Christ and not merely the symbolic or semantic form. The Eucharist, in the liturgical form of Trinitarian communication, is about the inclusion of humans into social speech acts and about the organizational form of society as centered or decentered. Therefore, Habermas sticks to this communication form, and its learning processes in his treatment from the early Christian communities (*Auch* Vol. 1, 2019, 518-519), in a recapitulation from Luther and the Reformation (*Auch* Vol 2, 2019, 43-59), to Kierkegaard (*Auch* Vol 2, 2019, 698-702). Very important to Habermas – and Luhmann's – endeavors, the liturgical struggle about the Eucharist as form of communication was a core

issue in the transformation from a substantial conception of societal metaphysics to a post-metaphysical conception.

An important entrance is Habermas' recapitulation of simultaneity in bodily gestures of human communication (*Auch* Vol 1, 2019, 247-252) and later (in *Auch* Vol 1, 2019, 161-162; Vol 2, 48-51) in liturgical interpretations of the Eucharist (Wandel 2006, 94ff, 258ff; Elwood 1999). Habermas is quite right that interpretations of substance, that is bread and wine as representations of Jesus Christ, created a Catholic legitimacy for concentration of power. Whereas protestant, in particular Ulrich Zwingli's, interpretations more focused symbolism. Habermas does not focus the Reformist Calvinist interpretation, in which individuals, after the printing press revolution, in principle each one can read, interpret, and make a difference as she wishes. However, a stronger focus on Hauke Brunkhorst (2000, chapter 4) and Luhmann's analysis of consequences in the aftermath of the printing press revolution (Luhmann 2012, Chapt. 2, VI) would enable a better and more Habermasian argumentation about Lord's Supper. It developed as a form of procedural community and in this sense, an institutionalization of Martin Luther's point – about the real presence of Christ – conceived as a speech act of a social reality embedded in the Eucharist. Moreover to Luther, as rituals and communicative semantic developed in prayers and in bodily performed psalms. Whether individuals understood what actually was song in collective rituals, for example among children, and if they understood the words or not. They might participate or only observe, stay at distance or get included. During the pandemic crisis, first in Wuhan and later about everywhere, people song from the balconies and participated in common communication, synchronically, whereas they simultaneously stayed as the distance wondering about what happened. This distance, "in a form of continued Eucharist", Habermas with Sören Kierkegaard, finally, at the end of *Auch* (Vol 2, 2019, 673, 698-702) observed as the lonely existential fate of the one, the author, who could merely, as Kierkegaard, write and communicate about thoughts and experiences outside the reach of others.

In the almost conclusive third "Intermediate Reflections" ("Zwischenbemerkung"), Habermas leans up against a young Hegelian perspective of the historical interdependencies of reasoning in a functional and complex society. On the one hand, he figures ideas about how autonomy can be learned, and in particular not evade not to learn. On the other hand, in a more pessimist view, he recognizes a Luhmannian view of adaptability in a modern society distorted in powerful abuses of communication. This might be in the Adorno/Horkheimer sense of spin-doctors, propaganda, and still more advanced forms of publicity. The liturgical interpretation of dependency, interdependency, and autonomy seems constitutive for modern communication – namely as constitutionalization processes and genealogy of communicative learning processes.

III. From Luther to Kant

Not merely psalms, but in particular the Eucharist certainly was the core issue in the contested confessional conflicts. To a historical sociology, they were about the delegation, management, and organization of society as they released and appeared after the printing press, after the discovery of the "New World", and after the military revolution with guns, fortifications, and navies, all around 1500. This triggered new conflicts about the constitutions of political community (or "Gemeinwesen"). In long discussions, Habermas goes along with Kant and Hegel, yet he, somewhat amazingly ignores a great deal of Kantian scholarship. In particular, since the 1960s if not already since Cassirer's important study on *Kant's Life and Thought* from 1918, the importance of Kant's *Critique of Judgement* (1790) is analyzed (Deleuze 1963; Düsing 1968; Roviello 1984; Philonenko 1988; Riedel 1989; Makkreel 1994; Böhme 1996). Merely cited in a note (Habermas *Auch* Vol 2, 2019, 362) Habermas reduces the teleological structure of the hypothesis that natural history unavoidable is observed as an evolutionary achievement, which emerged in the autonomous freedom of reasoning. Thereby communicative evolution is embedded into a transition from natural history to civilizational and cultural history – by the way, in fact, an evolution of a desacralization extremely well studied by Habermas himself in this volume, yet already observed by Kant. At the end of Habermas elucidation of Kant's philosophy of history, Habermas finally arrives to the form of nature reconciliated with freedom, which is analyzed at the introduction to Kant's *Critique of Judgment*.

At this point, Kant's question of the Eucharist is decisive in Habermas' argumentation. The problem is quite subtle and should be confronted with another issue discussed by Kant, the general question of communication ("Mitteilung") and the more differentiated quest for publicity for example in questions of war and peace. In *Auch*, Habermas does not connect those two nevertheless interconnected themes. Neither does Luhmann, albeit his form of analysis allows for another interpretation, somewhat more independent of Kant as a source of interpretation.

"Kant is thoroughly aware that he makes two different forms of act to commitments: On the one hand the individual acts in caution of the moral law. On the other, in cooperation with others in order to obtain a morally conceived yet merely consequential commonly effort, namely as a goal of a philosophy of history" (Habermas *Auch* Vol. 2, 2019, 358)

From this level, Habermas turns his attention away from the political community and its republican learning processes and into those civilizational virtues taught by the church:

"So when we see ourselves not merely as 'humans' or private people in the civil society, but as well as citizens of a political republic, then we as moral persons 'have to contribute also as citizens in god's state on Earth and to act committed under the name of a church to the existence of such a bond' (Kant *Religion* 1794 Akademie Ausgabe 06, 105/B. 149, Suhrkamp 1977, 765) (Habermas *Auch* Vol. 2, 2019,359).

In *Auch*, Habermas interprets the problem with Kant's exposition of the Eucharist in the form of a church, or rather, the Christian Church as exposed in Kant's philosophy of religion (*Die Religion innerhalb der Grenzen der blossen Vernunft*, 1794). To Habermas, the point is that universalist duties of the subjective consciousness was realized, as speech act and social reality, in the form of sociality civilized by the Church. Whether in a later argument further developed by Hegel as a form of mediation ("Vermittlung") or already by Kant, the idea of transsubjectivity (Schwemmer 1970), should find an institutionalized conception in order to realize as social bond and commitment. Here, Habermas lets Kant take the classic and in particular the Lutheran conception of the Eucharist as the decisive learning process. In Habermas' description, it was the Eucharist and the form it got in the Church, which taught humans to socialize and participate.

As discussed above, to Luhmann, that very process, however, was inasmuch an experience of learning how to keep the distance as observer, yet immanent in communication. In the systems of education in schools, or argumentation in court, or observation of art, or hypothetical distance to truth in academia, it is as important to learn and experience. Namely, what reflected observation is about if observed somewhat similar to the liturgy of churches (Luhmann *Law* 1993, chap. 8, X; *Erziehungssystem* 2002, 79; *Art* 1995, chap. 2; *Wissenschaft* 1990, chap. 2). As Luhmann states in his theory of religion: "Hence the question is, who is the observer of religion? Theologians will perhaps offer the surprising answer: God. In order not themselves to be the observer? And should we believe in that?" (Luhmann Religion 2000, 24). Elsewhere, he continues to question the answer with the obvious question who observes God, and he proposes the fallen angel, that is the Devil (Luhmann *Religion* 2000, 167). As distanced psychic systems, humans observe that there historically is communication about such issues – whether in conflicts or in peace. In the court, the answer would have been the judge, or even more obvious, as in the legal philosophy of the tribunal of judgement from the universalist linguistic pragmatics of French Chancellor Henri-François d'Aguesseau (1727) to Kant himself. In this sense, Habermas, probably and paradoxically, should have sticked more to a Habermasian interpretation of functional equivalences of communicative learning processes from church to courts in early Enlightenment. Whereas he in *Transformation* (1962/1989) so brilliantly argued along with theatrical performances in cafés and salons.

In fact, Luhmann and Habermas, both Lutherans, subscribe to Luther's idea that (absent) transcendence is present in immanence (Luhmann *Unterscheidung* 1987, 248). This corresponds to the Lutheran reading of the first three Commandments inherent in the following seven Commandments (Bayer 2003, 93-96). The word becomes flesh and bread. This inherent linguistic philosophy is penetrates Habermas' initially when he sees Francisco Vitoria's *De Indis* as a preliminary "veil of ignorance", which decenters the European worldviews (Habermas *Auch* Vol 1, 2019, 913). Later, in his reading of C.S. Peirce, the observant communication participates, whenever "we" communicate. "I think" or "I believe" is embedded immanently into "we who speak" (Habermas *Auch* Vol 2, 2019, 782-786).

In particular, in order eventually to get to the point of participation, Habermas concludes his discussion of the importance of the Eucharist to his philosophy of communicative learning processes with Sören Kierkegaard, yet, of course, with Kierkegaard the paradox is to keep the self at bay with the inclusive form of participation in communication by means of communication. The liturgical form, which Kant and Kierkegaard both find mysterious if not silly, is institutionalized

"unavoidable, in the delicate question of the mystery of the internal worldly presence experienced in the *bodily words* of a spirit returned from transcendence. And Luther explains this physical presence of a transcendental power in the words of the pastor, when we comes to terms with his plastic interpretations of appropriate speech acts and symbolic gestures in concepts of a theory that conceptualizes as speech acts." (Habermas *Auch* Vol 2, 700; Habermas' italization).

However, behind the Eucharist, in his Philosophy of Religion, Kant already exposed a more general form. Indeed, in *Die Religion innerhalb der Grenzen der blossen Vernunft*, he from the very first phrase of the foreword (Kant 1794/1977, 649) emphatically favors Erasmus' argument of freedom in preference to Luther's argument of a higher dependency and commitment – without mentioning the names. The discussion between Erasmus and Luther is subject to Habermas' elucidation in *Auch* (Vol. 2, 2019, 52-59), albeit Erasmus' *Diatribe or the free judgment* (*De libero arbitrio*, 1525) is not cited; yet Habermas cites Luther's response *De servo arbitrio* (1526) at length. Of course, Kant's argument is not about freedom as egocentric voluntarism. On the contrary, free will is to abstain from inclinations in favor of bonds and duties. A Luhmannian argument here would reinforce Kant's argument as a *temporal* form of the modality of will formation, since will is the (present) will to (future) will. Habermas' focus more on the *social* will – as socially committed will-formation. That is, both Habermas and Luhmann embed will into a form of communicative reality. They certainly, as Kant, find their analysis on Erasmus' side.

However, Habermas does offer some theological strength to Luther's position, since the problem for Luther – behind a veil of evangelic citations – is that resistance to an authoritarian claim for obedience is only possible if a higher authority can claim grace and forgiveness. Hence, to Luther, free will is not a first order form of freedom, but a second order commitment of conscientious will formation. For example, Kant's paradox of the moral duty to lie or to speak the truth is exactly possible to solve for the indeed squeezed consciousness of a person, who believes her lies to be forgiven by a higher moral authority – God or a free discourse – when for instance the Nazi officer asks where the Jews are hidden. Habermas very well knows about this solution of the paradox. The second order communication (with a "transcendent community of argumentation", Apel 1973) outrules the first order. To Luhmann, the long run, if not eternity, outrules the short run.

IV. Kant's deontological social theory as standard

More dubious, and too obsolete neo-Kantian in its outline, Habermas over the next pages (*Auch* Vol. 2, 2019, 361-374), first ignores Kant's philosophy of communication ("Mitteilung") and then neglect how Kant's communication theory is linked to his teleological philosophy of history. Kant did not finish this theory of the evolution in communication in *Critique of Judgment* in 1790 and added some frames in *Towards Perpetual Peace* in 1795. Nevertheless, it is disappointing that Habermas did not simply mention the possibilities his own, or Luhmann's, or Bourdieu and Foucault's undertakings had to extend that frame into a more coherent whole. Habermas continues to discuss Kant's endeavors under the neo-Kantian umbrella of a subjectivist philosophy and he can only do this in a neglect of Kant's theory of communication ("Mitteilung") and, as mentioned, his idea of a tribunal of reasoning (Kant 1781/1787/1974 B 780-81; O'Neill 1989 chap 1; Luhmann 1993: 340-41).

Judgement, whether in aesthetics or about war, cannot avoid communication and even more to the point, judgement is inherently about communication, positively or negatively. Judgements of taste are not relative, they should be subject to defense as reflection albeit not as determination.

In this community ("Gemeinsinn") of rules and concepts, a social community ("Gemeinschaft") is constituted as the "we". This social community involves more explicitly argued rules and concepts, whenever cooperative judgements in case of for example declarations of war or simply political organization is involved in a political republican society ("Gemeinwesen"). The problem and its solution might not be merely in the intersubjectivity of mind as an embeddedness of mind in language, but in the simultaneity too, and it double contingencies of reciprocity in communication. Thereby, freedom from determination and unavoidability of time-binding in will formation – Luhmann's "will to will" – are still forms of subjective rights (Luhmann *Subjective* 1981, 66).

This point leads to another common ground between Habermas and Luhmann. They both conceive the so-called papal revolution (Berman 1983) in theological dogmatics, legal dogmatics, and what could be called the organizational dogmatics. Whereas Luhmann (in *Funktion* 1977, 272-320) analyses such a form of *corporate* dogmatics, Habermas repeatedly – I count more than fifty times – discusses organizational themes (in particular *Auch* Vol. 1, 2019, 654-675). This form of dogmatics and its counterposition in heresy emerged with the conception of corporate spirit ("Corpus Spiritus") in the long 12th century – from the great Schism (1054) between the Eastern and Western Christian Church to the manifold European constitutions in the first half of the 13th century. Inherent in "organ-ization" we find the idea of corps and body politics, i.e. the body of Jesus re-presented as eternal Christ.

Habermas here takes Chris Thornhill (2011) and Brunkhorst's (2014) somewhat similar analyses into account. However they all, including Luhmann, neglect the obvious self-reference in constitution of power as

a concept, which takes power over its own definition, as if mighty might might communicate and thereby constitute itself with the concept of might or power. Along with Luhmann, Habermas even writes about "the autonomization of the Church to a thoroughly self-steering system" (*Auch* 2019, Vol. 1, 662). In German, French and Scandinavian language this self-reference of power is obvious (as German: "Macht macht Macht", and French "le pouvoir de pouvoir constituer pouvoir"). In addition, Bourdieu and Foucault both do not see this systems theoretical conception (Harste 2017).

These points wrap up to differentiations between authority ("Auctoritas") and power ("Potestas"). Similar to Chinese semantics about the distinction, which constitutes the idea of a "heavenly mandate", the extremely important historical distinction between authority and power developed between observation and doing, as a distinction between counselors and decision-makers. Reasonability and even "reason of state" developed with this distinction.

Kant certainly, as Habermas, discusses the role of the Church in the communicative learning processes – and Habermas indeed emphasizes civilization and secularization as learning processes. However, the Church community is merely one particular form of communication institutionalized with liturgical procedures. Legal procedures in courts, theatrical procedures, parliamentary procedures, and procedures of academic discussions, politeness in court and in love affairs were as important, in particular in the aftermath of the Reformation. And in non-Western cultures too. In French Counterreformation, the procedures of dinner communication may have had previous learning processes in gastronomic experiences of supper, however secularized Lord's Supper. Secularized processes demonstrated how communicative and bodily meaning were independent of the media of the Church and certainly possible to develop and continue as substantial meaning in another and more temporal earthly form than the Eucharist. What Kant in *Critique of Judgment* (§ 40) describes as "the fine distinctions" ("die feinen Unterschiede") in dinner communication, certainly was to be loaded with meaning (Bourdieu 1979/1984).

Of course, Habermas very well knows about the commitment to publicity in argumentation about decisions about war and peace. This, to Kant, was more important than aesthetic judgments. However, Kant's famous analysis of aesthetic rationality was to Kant, as the immensely clever philosopher, foremost a demonstration that obligatory communication about judgment in case of war and peace, certainly would be committed to public forms *if* he could, as he indeed did, demonstrate that judgment in cases of aesthetic judgment was committed to public communication ("Mitteilung"). He himself, was not particular interested in art (Böhme 1996).

Altogether, a conclusion to Habermas' critical theory of crises and their systemic tipping points, is that moral panic risks to implode into fundamentalist metaphysics, for example in conspiracy ideologies. This reduces the double complexity of structurally coupled self-referential systems as well as the internal complexity of

each system, scientific, legal, economic, political, and what have you. Habermas' recent endeavor is to let us remember and take account of the long learning processes, in which functional differentiation of complex systems and themes ran along with secularization of communication. If we do so, we will not escape into moral panics.

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In the text, references often are indicated as for example 1977/1984, the first year to mark the original German edition, the second to mark the year of the published translation. Likewise, a revised edition is marked after the original as for example 1963/1971.

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In Habermas' books, list of references are normally included with indexes to authors. Luhmann's books , contrary to this, contain normally references to concepts. Yet Luhmann refers to Habermas in many of his publications. Accordingly his publications have useful conceptual indexes but no indexes for authors. Below I have indicated some of Luhmann's references to Habermas. Sometimes, the references do not mark the name of Habermas but simply obviously refer to his positions. The list that follows is not complete:

Macht, 1975: 133
Gesellschaftsstruktur und Semantik Bd 1, 1980: 11, 237
Gesellschaftsstruktur und Semantik Bd 2, 1981: 269
Gesellschaftsstruktur und Semantik Bd. 4, 1995: 138
Soziale Systeme, 1984: 106, 110, 112, 352, 643, 652,
Ökologische Kommunikation, 1986: 59-60, 75, 170, 215, 249-254 (a response to Habermas 1985: 424-444)
Soziologische Aufklärung 4, 1987: 16, 138-39, 154
Die Wissenschaft der Gesellschaft, 1990: 109-110, 610, 710, 715
Die Kunst der Gesellschaft, 1995: 152, 163
Die Gesellschaft der Gesellschaft, 1997: 11, 35, 36, (90), 173-75, 177, 200, 229-30, (245), 618, 766, 775, 797, (826), 986, 1027, 1029, 1030-32, (1078), 1098.
Die Politik der Gesellschaft, 2000: 42, 52, 124, 125, 220, 265, 282, 291, 301, 352, 362-3, 368, (417)
Ideenevolution 2008: 134, 210
‚Globalization as World Society' 1997: 69