

# The Interaction of Society, Politics and Law: The Legal and Communicative Theories of Habermas, Luhmann and Teubner

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## 1 Introduction

The concept of modernity is embedded in the social changes from the rule of tradition, religion and uncontested sovereigns to the political and legal forms of communicative differentiation, democracy and polycontextuality. The functions, communications and institutions of law and politics have been a vital part of and a vital medium for these changes. They have enabled *the opening up of, the systematic differentiation and the relative forms of stabilization and binding of collective and authoritative decision-making and norm-creation*. The governing of societies was taken away from a given *sovereign* and transferred to *society*. There are many elements in this historical transformation. Trade and economic expansion, the development of cities, the ideas of individual rights, educational expansion, the technologies of the printed and mass-produced word are some of these elements. The ongoing differentiation of the legal and political function-systems with their communications, institutions and procedures have also been vital parts of and mediums and enablers of the more comprehensive societal processes of a more functionally and communicatively differentiated society. Law and politics have *enabled the communication about almost any social themes across the boundaries of other social institutions and sectors*. Collective decisions have been made by authoritative institutions which have been *perceived of as legitimate*, and common legal norms have been decided upon. Politics and law have had each their specific functions, but they have also mutually relied on an intensive, many-faceted and paradoxical interdependence. The forms, institutions and procedures of law and politics have continuously changed over time both as parts of autonomous processes and as results of external irritations and challenges. The formation of a secular and systematized state apparatus, bureaucratic hierarchies, political parties, increasingly autonomous regulatory agencies, scientific expertise and networks and many other forms have been part of this. The arenas of the political and the legal have however extended further to corporate, civil society, technological, knowledge-based etc institutions. The range of what is recognized as *political* and thus also as possible objects of political and legal regulations has also gradually changed in the direction of a more comprehensive concept of the “*social*”. Economic, technological and other knowledgebased areas are seen as political in the meaning of having political effects and are thus increasingly objects of political and legal decision-making. Law is then increasingly exposed directly and intensively to a variety of social discourses. The understanding of *the interaction between economic, technological, knowledgebased, political and legal forms of communication* are then becoming increasingly significant and acute. This will be developed in the following.

Many political and legal scientific theories have dealt separately with the two and focused on their specific and respective qualities. I will argue that this has resulted in an exaggeration of their specific functions and qualities and in underdeveloped theories on the interaction and mutual interdependence of the two, and of the social sensitivity of law, and I will argue that their mutual interdependence is an extremely vital part of the functions of the two systems in the continuous construction of a modern society. During the last fifty years two extremely significant and influential *contributions to the theories of politics and*

*law and their mutual relations and interdependence* have however been developed by the two Germans, the philosopher *Jürgen Habermas* and the lawyer and sociologist *Niklas Luhmann*.<sup>1</sup> In the following I will present and discuss the contributions of the two sets of theories *with a focus on law and on the relations of law, politics and other communicative systems, in the light of some of the recent changes in the tasks, the challenges and the societal preconditions of law and politics*. Habermas stays within the field of *normative political philosophy* and has his strength in the analysis of the legitimacy of law and politics whereas Luhmann creates a more *sociological* account of the two systems. The German lawyer and legal sociologist Gunther Teubner has made an effort to both combine elements of the two theories and to make an original contribution to further theories of the interaction between law and society.<sup>2</sup> All three theories have taken *the functional and communicative differentiation* of society and the consequences of this for law and politics as their point of departure. The implications of these theories are several and some of them rather controversial in relation to other theories of law and politics. The theories imply on the one hand an *opening up* and a *differentiation* of communication and on the other hand a systematic formation of *communicatively closed* and *autonomous* systems. Law and politics receive information from most other areas of society, but they process this information internally and then self-reflexively and continuously create autonomous systems of law and politics. From this point of departure the two sets of theories of Habermas and Luhmann take different directions.

In the following I will first present some of the relevant and acute challenges to law and legal regulation in an increasingly communicatively and socially differentiated and complex society. Then I will shortly present and discuss the socio-legal and philosophical theoretical contributions to a better understanding of the current function of law and of its challenges by the theories of Niklas Luhmann, Jürgen Habermas and Gunther Teubner.

## **2 Society and its Law: Changing Conditions of Law and Politics in Society**

Law has been a very essential part of the evolution, the enabling and the structuring of the democratic nation states as well as of international organizations and their interaction for the last two hundred years. Both *law and politics* have been based on *the democratic processes* of legislation and the system of *individual rights of freedom* – in their processes and for their legitimacy. *Politics, economics, science, law and also other communicative*

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1 Niklas Luhmann, *Das Recht der Gesellschaft*, Frankfurt: Suhrkamp, 1993, in English, “Law as a Social System”, Oxford: Oxford University Press, 2004.; Jürgen Habermas *Faktizität und Gältung*, Frankfurt: Suhrkamp 1992, in English “Between Facts and Norms”, Cambridge: Polity Press, 1996.

2 Gunther Teubner, *Reflexives Recht*, Archiv für Recht- und Sozialphilosophie, vol.LXVIII, no.1, 1982.

*systems* have over time evolved into general communicative systems and functions of society. Their *interaction and mutual dynamics* have become essential elements in the shaping of modern society. They have each evolved self-reflexively while also being conditioned and stabilized by other communicative structures. Legal forms of regulation are permeating society and have become intrinsic parts of both the political instrumental and the more social spheres, of public as well as private forms of governance. Democratic governance, public administration, contract regulations, corporations, family structures, the rights of the individuals etc. are all to a large extent legally constructed and constituted. Within these institutions there will however be complex interactions between law and other communicative functions.<sup>3</sup>

Law and politics have been dynamic and structuring elements in society, and they have also been changed by several external challenges throughout modernity. Some of these will shortly be discussed in the following.

First: *Politics and law are regulating an increasing number of areas of society*. The result is an increasing differentiation, specialization and variation of both the substance and the forms of legal and political communication. Law and politics are challenged to regulate and make decisions *on an increasing number of different types of social and institutional relations*. Teubner has in an article said that whereas previously law was asked to discipline repressive political (state) power, *today law has to discipline quite different social dynamics*.<sup>4</sup> Many of these dynamics are to a large extent based on or entrenched by knowledge, knowledge-based social discourses or new technologies.<sup>5</sup> This means that there is both a significant variation in the situations and social constellations to be regulated, and that many of these are *characterized by continuous change, reflexivity and instability*. Law will then not regulate a stable, but rather an unstable and often risk-characterized situation.<sup>6</sup>

Many of these situations are also characterized by a play of complexity and contingency in the communication of the fields. The fields and situations to be regulated are internally complex and in change. Translating these fields to political and legal forms of communication implies a new level of communicative complexity. Often the political and legal decision-making can not be based on a stabilized or consensual perception of the field in question. *The forms of law and the functions of law as enabling and producing normative expectations and predictability are thus challenged*. Normative and substantive predictability is exchanged for procedural and negotiative framework

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3 Niklas Luhmann, *ibid.*, 1993, ch. 1.

4 Gunther Teubner, *Societal Constitutionalism* in "Transnational Governance and Constitutionalism", eds. Joerges, Sand and Teubner, Oxford: Hart, 2004.

5 Michel Foucault, *The Archeology of Knowledge*, London: Tavistock, 1972; and *Lecture 14 January 1976* in "Society must be defended", New York: Picador, 2003; Niklas Luhmann, *Das Wissenschaft der Gesellschaft*, Frankfurt: Suhrkamp, 1990; Ulrich Beck, *Risk Society*, London: Sage, 1990, ch. 1 and 2.

6 Niklas Luhmann, *Risiko und Gefahr*, in "Soziologische Aufklärung 5", Opladen: Westdeutscher Verlag, 1990a; Ulrich Beck, *ibid.*, 1992, ch. 1 and 2.

arrangements. Law also has to deal with a communicative complexity in the fields to be regulated. An increased reflexivity is thus also inscribed in the process of knowledge.<sup>7</sup> We are confronted with scientific disagreements without having the proper instruments to make selections. Law has no choice, but to be part of complex, changing and risk-filled situations.

Second: The extension of legal regulation into an increasing number of social fields which are also to a significant extent constructed by knowledge- and technology-based discourses, and thus often *part of continuous change and reflexive processes*, also implies *a change in the relations of law and time*. As mentioned above many of the areas of legal regulation are now part of continuous change. Looking at and using the past or the present as frames of reference may be highly insufficient or even irrelevant in many areas. The main time reference of many areas has also changed *from present – future to a future – present*. Substantive predictability may be exchanged for procedural and other framework regulations or for the use of general standards or values which may change reflectively with the situation. In many areas this means that we *no longer have a stabilized set of reality conceptions or a fixed pattern of consensual social norms to refer to*. Particularly the regulation of new knowledge and technologies often with uncertain, unpredictable and at times irreversible consequences pose new challenges for the forms and the function of law. With a consequent future-orientation of a certain field of legal regulation the regulation itself must either remain indirect and procedural or somehow become part of the field. Paradoxically however the enormous challenges of regulating and making political and legal decisions in such complex, future-oriented and highly specialized areas do not seem to have deterred the relevant actors from doing so. Luhmann has suggested that in continuously changing, specialized and complex areas there may be a tendency from the use of normative to the use of cognitive and changeable expectations. In fact this does however not seem to have happened. Rather, areas affected by continuous change and dominated by knowledge- and technology-based discourses still seem to be legally regulated. Highly differentiated and complex societies do also need coordination and regulation even if some of the regulatory regimes seem to be complex and highly improbable structures.

Third: Vital parts of legal and political regulation today occurs *on the basis of international treaties and negotiations* and increasingly also with the use of *international courts or other dispute settlement mechanisms*. International human rights law, international trade law and international environmental and climate law have a strong direct or indirect influence over the respective areas of national legal regimes. These international legal treaties and obligations may be explained from a situation of increased factual global interdependence. The increase of global trade has led to a number of different and comprehensive economic interdependencies. Increased environmental damage and climate change also point towards global interdependence. Still, however, vital economic and cultural differences between the many nation-states participating

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7 Anthony Giddens *The Reflexivity of Modernity* in "Consequences of Modernity", Stanford University Press, 1990.

remain. The implication of this is that considerable elements of legal regulation and decision-making today occur on very accumulated levels socially, culturally and politically. *The context of such regulation and decision-making is extremely heterogeneous.* It includes enormous varieties of social, economic and cultural differences. International treaties are made explicitly to include such differences, but often with an unclear perception of the consequences of the underlying differences. International courts implement and actualize these treaties, in many cases with more binding consequences than previously, but often on unclear and unspecified interpretive preconditions. The European Court of Justice, the European Court of Human Rights and the WTO dispute settlement bodies have made several decisions with vital impact both for the parties to the cases and indirectly also for other states and citizens. Some of these decisions are accepted as valid and sound legal interpretations of the treaties, but also as groundbreaking and creating new directions of law.<sup>8</sup>

*The heterogeneous, unspecified or unclear context* of both international negotiations and particularly of international courts and other dispute settlement mechanisms is *another vital challenge for the current legal systems.* Within the context of nation-states the legal regimes have had more defined, recognized and consensual social, value-based and cultural contexts. Today more legal decisions are taken within regional and global institutions and organizations, but often with unclear or unspecified social contexts, and where the differences often are hidden in vague compromises in the treaties. International courts have however in many cases been forced to actualize and define the contents of the treaties and thus also in a way go beyond their imprecise contexts. The social and cultural contexts and thus the frame of reference of these courts is however, I will argue, undefined and unclear.

### **3 Niklas Luhmann's Sociological Theory of Law, Systems of Communication: Normatively Closed and Cognitively Open**

Niklas Luhmann's background as first lawyer and then sociologist can clearly be seen in his works on law. In his first book on law "Rechtssoziologie" from 1972 the emphasis is on a fundamental sociological understanding of the function of law.<sup>9</sup> In his next book on law "Das Recht der Gesellschaft" (1993) there is a more comprehensive treatment of the legal institutions and of law seen from the perspective of law.<sup>10</sup> This book is also part of his series of books on the different function systems and generalized symbolic media of society following his book on "Soziale Systeme" (1984) where his general theories on social systems and

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8 Francis Snyder, *New Directions in European Community Law*, London. Weidenfeld and Nicholson, 1990.

9 Niklas Luhmann, *Rechtssoziologie*, Band I and II, Frankfurt: Suhrkamp, 1972; in English "A Sociological Theory of Law", London: Routledge and Kegan Paul, 1986.

10 Niklas Luhmann, *ibid.*, 1993.

the functional differentiation of society is laid out.<sup>11</sup> In the article “Operational Closure and Structural Coupling” from 1992 we find his probably most precise description of the communicative operations of the legal system.<sup>12</sup> In “Das Recht der Gesellschaft” he emphasizes the difference of *law seen from within as a separate communicative system* with its own normative dynamics and *law seen from without as a part of society* and influenced by its more comprehensive changes.<sup>13</sup> These are two different forms of knowledge, but they may also be combined in our understanding of law as a social system. Legal science and jurisprudential theories are concerned with the normative order of law as an internal system. The sociology of law studies the cognitive effects of law, and how society affects law. Neither of these directions can however alone deal with the questions of the boundaries and the relations of law and society. Luhmann’s proposal for transcending these theoretical division lines is that on the one hand lawyers should accept that law is a social function and a part of society and thus influenced by social communication and changes. Sociologists must on the other hand accept that law also is a separate and a normative system, and that knowledge and theories of law also are dependent on knowledge from within the system of law. Only by combining these insights can we reach knowledge of changes in the boundaries of law. This implies *an interdisciplinary approach to law*, cfr. below.<sup>14</sup>

Niklas Luhmann’s theories of law are drawn on the basis of and as part of his general theories of society. Probably the most fundamental part of his theories is that society as in *the social* consists of *communications*.<sup>15</sup> Other elements of society such as human beings, institutions etc must be understood through the perspective of communications. Communications are always *self-referential*. They are part of a process of conveyance, information and understanding and cannot be reduced from these. The self-referentiality of communications also results in the formation of *communicative systems*. The systems are defined as being based on *specific distinctions or codes* as the point of departure of their self-referentiality and as being *normatively closed* on the basis of that distinction. At the same time they are *cognitively open* to any external information while always processing the information based on their own code. Social systems, in Luhmann’s sense, can be formed on several levels of society. Luhmann distinguishes between *social functions* (the generalised symbolic media), *organisations and interactions*. The *communicative functions* evolve from the generalized symbolic functions of modern societies and their codes:

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11 Niklas Luhmann, *Soziale Systeme*, Frankfurt: Suhrkamp, 1984; in English “Social Systems”, Stanford: Stanford University Press, 1995.

12 Niklas Luhmann, *Operational Closure and Structural Couplings*, *Cardozo Law Review*, vol.13, 1992a, p. 1419-1441.

13 Niklas Luhmann, *ibid.*, 1993, ch. 1.

14 Niklas Luhmann, *ibid.*, 1993, p. 25-33.

15 Niklas Luhmann, *ibid.*, 1984, ch. 4.

money, law, art, religion, politics etc.<sup>16</sup> The evolution of these systems is part of the *functional differentiation* of society, cfr. above. Communication can also be differentiated on the level of *organisations* and even less generalised: on the level of *interactions*. Communication can also be further differentiated and systematized within the systems: - as *semantics, as programs and themes*. In other theories such communicative formations may be labeled as *discursive practices, formations or disciplines*.<sup>17</sup>

One of the general theorems of Luhmann's systems theory is that the whole world must be seen as one "society", and everything that takes place in the world are part of that society. Nation-states can not any longer constitute "one society" because they can not be regarded as having closed borders – as seen on a sociological basis. They are too permeated by regional and global communications (cognitive and normative). The first decomposition of society is the system or functional differentiation.<sup>18</sup> In world society there are then several general systems or functions of communication such as law, politics, economics, science etc. They are all autonomous and normatively (autopoietic) closed around their codes (legal/non-legal, power/no-power, money/no-money etc.). At the same time they are all as part of society environments for each other and cognitively open to each other. They will thus indirectly and cognitively influence each other. The interaction and the mutual interdependencies between the various communicative functions are vital parts of societal communications, and this includes misunderstandings and lack of communication. Social complexity and its reduction are achieved by the dual processes of *internal complexity* within each system and *the interaction between the different systems*.<sup>19</sup> The internal complexity can only be reached by the setting of a specific boundary in relation to which the system can evolve and reach a further differentiation. Otherwise the system would become too undetermined. This is done by the development of a specific code which then functions as the rationality of the system (examples: law/legal, economics/money, politics/power, science/truth, religion/belief, love/love, art/aesthetics etc.).

*Law* is one such generalized function system. The implication is that law is seen as consisting of communications and as constituting a self-referential and normatively closed communicative system.<sup>20</sup> It consists of a continuous flow of legal communicative operations referring to one another. The legal system is open to any information from its environment and from the other systems, but any such information will be processed by the legal code and the various communications or programs of the legal system before becoming part of the

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16 The term "generalized media of communication" was used by Niklas Luhmann in his previous works. When he engaged in autopoietic and systems theory in the book *Soziale Systeme*, 1984, he started using the term "social systems" as the designation for communicative and social. cfr. ch. 1 and 5.

17 Cfr. Michel Foucault, *ibid.*, 1972.

18 Niklas Luhmann, 1984, ch. 1, II, no.4.

19 Niklas Luhmann, *ibid.*, 1984.

20 Niklas Luhmann, *ibid.*, 1992a, p. 1427-1428, and 1993, ch. 1.

legal system. It is only the legal system which produces legal operations.<sup>21</sup> The *function* of the legal system is to produce and stabilize *normative and contra-factual expectations* of normative expectations. The general code of law is *legal/non-legal*. Law in functionally differentiated societies is not bound to any “grund-norm”. It is an operative and self-referential system serving certain functions of modern societies.

The implication of the theories of modern societies as functionally and communicatively differentiated is that law primarily is such a communicatively differentiated operative system. It operates partly by the information conveyed to it by its environment and partly by its own internal operations transforming the external information which is found relevant, to legal operations. *Structural couplings* between law and other function systems are vital in the continuous production of law. This designates that different systems may co-evolve over time and systematically communicate about the same themes and within specific contexts, but in their specific and different codes. This may be labeled co-evolution, interpenetration or structural couplings.<sup>22</sup> It may occur within and as part of organisations, more or less formal institutions or negotiative frameworks. Within the same organisational framework different systems and codes may learn to co-evolve and also build common institutions despite the distinctive differences. These learning processes are a vital part of how the function systems and society work, and how social complexity is achieved by the duality of differentiation and integration.

In modern societies a vital part of law is produced via the structural coupling between *law and politics*. Democratic politics produce legislation by collectively binding decisions. Individuals and organizations continuously enter into contracts. The legal system decides by its procedural and methodical mechanisms when communications are valid legislation, valid contracts etc. The legal system, in Luhmann’s meaning of the term, is then a second-order observation applied according to the distinction legal/non-legal. Other function and communicative systems in modern societies are *politics, economics, science, mass-media, religion, art* etc. The different function systems are applied by *organization systems* in their operations. Organization systems have specific membership and specific themes, but which may change over time. Organizations may be polyphonic. That is: they may communicate in several codes at the same time, also several function codes. Organization systems may then also serve as structural couplings between law and other function systems. Organizational and contractual interdependencies are created while the communicative differentiation is kept within the organizations.

Luhmann recognizes that the concept of natural law has been part of the foundation of modern law. Natural law has provided the preconditions of positive law. It has been the foundation of the recognition of the rights and the rational nature of human beings. The nature of reason has again gradually been

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21 Niklas Luhmann, *ibid.*, 1992a, p. 1431.

22 Niklas Luhmann, *ibid.*, 1984, ch. 5 and 10; Gunther Teubner, *Social regulation through reflexive law*, in “Law as an Autopoietic System”, Oxford, Blackwell, 1990.

replaced by a discussion of the rational principles of legal argumentation which again has led to *the positivisation of law*.<sup>23</sup> Through the many different national legal orders legal reason was implicitly accepted as diverse and as contextual. With the enormous increase in legislative activity and thus in positive law it has been recognized that law has become changeable on account of itself. Law has also become infused with and informed by the various social, political, scientific etc discourses of the areas which it regulates, and has thus diversified its forms of legal reasoning. There is not one legal reason, but a multiplicity of legal reasonings. Law is not based on certain given values or beliefs, but on its own continuous communicative processes. The rationality of law is then constructed by collective decision-making and legal decision-making and can be observed on the level of second-order observation. Respect for individuality is expressed within law itself.<sup>24</sup> Law is on the level of programs adjusted to a society with the individuality of individuals. Luhmann insists that law seen as based on reason today unavoidably collides with, and is trumped by, the highly developed reflexivity of the communication of modern society.<sup>25</sup>

Operationally this implies *complexity and contingency* in the continuous decision-making. Within the legal communication selections and decisions are always made on the basis of a surplus of possibilities. The theory of communicative differentiation in modern societies emphasizes that communication is based on the combination of normative and operative closure on the basis of specific codes and openness to all sorts of information. The dynamic of selection is based on the play between complexity and contingency. Various existing programs and semantics of law will influence the continuous selections and decisions made in law, but new programs and semantics are also created.

Law and politics are seen as systems communicating across all social and sectoral boundaries of modern societies making *collectively binding decisions* and creating *legal norms* relevant for most social areas, but without their own direct knowledge of these areas.<sup>26</sup> They have *created meaning*, and they have had the *legitimacy* to do so in modern democratic societies. They have been labeled the immune systems of modern society because they have been able to make decisions which generally are applied accepted, but without necessarily being substantively implemented or actually solving the problems. Both law and politics are then fundamentally paradoxical systems, but they are at the same time fully applied and function as decision-making systems.

The arbitrariness of the “general will” of the people is shifted to programs of representative democracy. The arbitrariness of law is shifted to the sources of law, the methods of law and legal reasoning. The contingency formula of politics is democracy and legitimacy, and of law it is justice. Constitutions and

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23 Niklas Luhmann, *ibid.*, 1993, ch. 11, III, p. 512.

24 Niklas Luhmann, *ibid.*, 1993, p. 515.

25 Niklas Luhmann, *ibid.*, 1993, ch. 11, IV, p. 522.

26 Niklas Luhmann, *Demands on politics* in “Risk: A Sociological Theory”, Berlin: de Gruyter, 1992b, p. 145.

legislation are structural couplings between law and politics.<sup>27</sup> Democracy legitimizes constitutions, and constitutions legitimize democracy. Constitutions thereby also legitimize law. The democratization of politics and positivization of law support each other reciprocally. The political system uses law and money to actualize its decisions in increasingly systematic and comprehensive ways. The freedom of political and democratic decision-making is reciprocated by basic individual rights secured in constitutions. Both political and legal communications have forms which reduce the social complexity they refer to in unavoidably contingent ways.

There will continuously be internal communicative operations in the legal system based on the code of the system. The legal system will then continuously emerge and change based on its own normative code, in Luhmann's words: «Law communicates about the world, not with it».

### ***3.1 Normative and Cognitive Expectations: The Further Differentiation of Law and the Role of Knowledge and Learning Processes***

From a sociological standpoint the function of law is based on the need for society of having *normative expectations* (and normative expectations about normative expectations) – as opposed to *cognitive expectations*. Normative expectations are characterized by being counterfactual and may be disappointed, but will still go on existing. Cognitive expectations will on the other hand presumably be changed when countered. Normative expectations have played a vital role in the stabilisation and the coordination of society. They have been institutionalized, and thus more easily conveyed, in the form of positivised law. One could thus argue that it is the function of conveying and stabilising normative expectations that characterizes modern law, rather than that of being a coercive order. Positive law has contributed to specific forms of social order and enabled coordination over distance and among anonymous persons. The function of institutionalised normative expectations (law) which have been perceived of as legitimate, has been vital for the evolution of modern societies because it has *enabled the co-existence of complex and conflictual social problems with the creation of relative forms of stability by the use of legal norms.*<sup>28</sup>

The parallel existence of the social and the legal spheres have thus enabled the continued combination and the (productive) differences of social and legal problemsolving. Social problems may be temporarily "solved" by legal regulations while at the same time continue in their complexity and their search for a socially based problemsolving. The forms and the more specific relations of legal and social problemsolving constitute vital parts of the structuring and the characteristics of modern societies. The evolution of these relations will be discussed in this section.

Normative expectations are not created in a vacuum. They are created partly in relation to the (changing) social structures and partly in relation to the already

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27 Niklas Luhmann, *ibid.*, 1993, ch. 9, p. 416 and ch. 11, p. 512.

28 Niklas Luhmann, *A sociological theory of law*, 1972/1981, pp. 78-83.

existing norms and legal structures. *The specific structures of the normative expectations*, will then depend on *the quality of the social and communicative structures and processes of the society in question* and on *what types of normative expectations they enable*, as well as depending on *the processes and the communicative qualities within the legal system itself*. This will concern both the contents of the norms and their form.<sup>29</sup> Gunther Teubner has shown how in identifying new forms of law we must first *identify the forms of social organization and dynamics* (including the types of conflicts, interest-constellations etc.) (cfr. Habermas) and then discuss *what the adequate social complexity of the law could be* (contents and form) (cfr. Luhmann).<sup>30</sup> Identifying the social problems and deciding on the appropriate legal form are then two different questions. There is no direct connection or translation from social problem to legal form, but for the law to function effectively there should be some connection.

This may in some sense be regarded as common knowledge. Within the perspective of the theories of functional differentiation and systems theory this insight is however, by the contributions of Luhmann and Teubner, given a more radical version. In systems theory there is a realisation that *law evolves according to a totally different code or logic than other function systems*, and thus creates fully different semantics of the same field. The communicative and logical difference between law and the social discourses of area of regulation means that legal regulation is a form of translation of the respective areas. Law will always be an extreme and contingent reduction of the complexity of the relevant social field.

The form and the structure of law are dependent on the degree of complexity and on the forms of social and communicative differentiation of society. The democratically organized societies have evolved from more "simple" into increasingly complex and differentiated societies, cfr. above. Legal and regulatory regimes have as a consequence evolved from rule-of-law into more complex forms where *economic interventionism and welfare state* schemes have become integrated into or combined with the specific legal forms. Economic and welfare state concepts have become pivotal standards around which regulatory schemes are built up. This does however mean linking law much more closely to externally decided dynamics. It also means the evolution of a parallel process of legal and social dynamics, linked to each other, but with at times intransparent mutual influences. This has led to an increasingly comprehensive legal system, but also an *increasing and intricate interdependence between law and other communicative systems* which also may contribute to an increased indeterminacy in law.

The uses of forms of material law which refer to social or knowledge-based discourses or practices may then *challenge the autonomy of law*. The dependence on external social discourses may also lead to *unpredictability and uncertainty* in law. This will occur when the external social discourse becomes

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29 Niklas Luhmann, 1993, *ibid.* ch. 1.

30 Gunther Teubner, *ibid.*, 1982, p. 49.

the primary reference of a specific legislation – in ways which may weaken the reference to previous legal cases, texts etc. The more integrated such *external social discourses* are in the material forms of regulation the greater the degrees of complexity and contingency and thus also unpredictability in the application of the legal program.<sup>31</sup> Gunther Teubner has on the basis of these problems produced his theory of *reflexive law* as a possible answer to the regulatory problems by insisting on a combination of procedural paradigms of law with a focus on the identification of the internal dynamics of the field to be regulated on, cfr. below.<sup>32</sup>

Social and cognitive changes are occurring so fast that legally based normative expectations may become inadequate or unnecessary. Cognitive expectations or reality representations based on various forms of knowledge will however also include normative elements, and these will be changeable as part of the knowledge-based discourses. *Normative expectations are then to some extent replaced by forms of social and knowledge-based learning* where both cognitive and normative elements are included. A basic aspect of the evolution of law and society today is then to *what extent the new social structures are able and willing to learn on a cognitive basis*, or whether they still need normative expectations which exist beyond the immediate forms of cognitive learning.<sup>33</sup>

### **3.2 Globalization and Risk: Extensions of Law in Time and in Space**

The general tendencies of globalisation seem, so far, to have effected some of the communicative systems more comprehensively than others. The cognitive structures of the sciences and the economy seem to have been more easily open to the dynamics of globalisation than the systems of law and politics.<sup>34</sup> One very straightforward explanation of this is the fact that law and politics have been more intensively institutionalised on the level of the nation-states. They have also to a large extent been legitimised through the democratic procedures and institutions of the nation states. The democratisation has again been enabled by the existence of common languages and elements of common social and cultural history within the boundaries of the nation-states. The processes of globalisation within some of the social and economic fields have however resulted in both increased communications and increased problem-creation on the global level. This is now challenging the structures of the legal and the political systems. Common political discussions and democratic institutions are however still scarce as phenomena on the global level.

Massmedia, new forms of technology (telecommunications and information technology), science (and networks based on science) as well as financial markets are today increasingly globally based both as infrastructures and also as substantial processes. Legal or social equality or justice are in contrast themes

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31 Niklas Luhmann, *ibid.*, 1993, pp. 195-206, 278-279, 389-402, 415-420.

32 Gunther Teubner, *ibid.*, 1982.

33 Niklas Luhmann, *ibid.*, 1993, p. 555.

34 Niklas Luhmann, *ibid.* 1993, p. 555.

which are still primarily developed locally, nationally or regionally, even if the semantics of international human rights have been widely recognized.

In Luhmann's view the global situation can be expressed by the meta-code of *inclusion* and *exclusion* rather than in terms of social justice and equality.<sup>35</sup> The tendency is that either you are included, or you are excluded. This distinction is general rather than partial and sustained and dominated by economic structures. If you are excluded from some resources, there is a likelihood that you are also exempted from others. Economic and scientific processes dominate vis-a-vis the political and legal which presumably should be able to enforce at least partially such codes as social justice and equality. International human rights are in many ways a legal semantic which is not coupled to the economic system, and which thus easily becomes too inefficient.

Luhmann also emphasizes *the changing role of risk as a challenge for the legal system*. Due to technological, economic and social changes humanly created risks (in the various forms of decision-making) have increasingly become part of the dynamics of society. Luhmann connects the increasing risks to the increasing amount of decisions which continuously have to be taken in politics, in the application of technologies and in the coordination of the different social spheres.<sup>36</sup> This includes many of the areas which concern our most basic needs such as transport, the uses of energy, medical services and the production of food. In some of these areas the application of specialised technologies may result in *unknown, possibly long term and unpredictable side-effects* which cannot be evaluated with sufficient certainty on a scientific basis at the time of their first applications. In other areas the problems are primarily the unintended side-effects produced by the combinations and collisions of various fields.

Law will then also have to learn to deal with the regulation of areas with significant and possibly unpredictable consequences. The idea of this is not new to law, but *the new comprehensiveness of man-made risks*, due to the accumulated application of new technologies, has added new dimensions to the problems of their regulation. The environment including its biodiversity is being changed and manipulated in more comprehensive and radical ways than previously. New technologies are taken into use and being spread and combined much faster and more efficiently than previously.<sup>37</sup>

By the application of new forms of technology we are extending our rooms of action by increasingly drawing upon the future and the global space.<sup>38</sup> The results are dramatic increases in the number of decisions to be taken and in the amount of unpredictable consequences and side-effects produced. Also the legal

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35 Niklas Luhmann, *ibid.*, 1993, p. 577-585.

36 Ulrich Beck, *ibid.*, 1990, ch. 1 and 2; and *World Risk Society*, Cambridge: Polity Press, 1999; Niklas Luhmann, *ibid.*, 1992b.

37 Inger-Johanne Sand, *The Legal Regulations of the Environment and New Technologies*, in *Zeitschrift für Rechtssoziologie*, vol.22, no.2, 2001.

38 Niklas Luhmann, *Ökologische Kommunikation*, Opladen: Westdeutscher Verlag, 1986, ch. 11 "Recht".

decisionmaking becomes increasingly complex under such changing circumstances. *Normatively based predictability* is certainly challenged by this, and it seems hard to think that law will not change as a legal institution. *Predictability* and *trust* may have to be dealt with on a procedural level, and thus be placed in specific procedures, negotiative institutions and processes, institutional actors and knowledgebased discourses rather than in material norms. Normative expectations may hereafter be primarily procedural or integrated into knowledgebased discourses (and their learning processes) or may increasingly have to learn to deal with completely unexpected and at times brutal changes.<sup>39</sup>

#### 4 Politico-legal Theories: Jürgen Habermas' Normative Theory of Law

Habermas agrees with a significant part of Luhmann's descriptions of modern societies as consisting of functionally and communicatively differentiated systems and thus also bound to social fragmentation and disintegration. The position of Habermas is however that this confronts us with the essential problem of "how the validity and acceptance of a social order can be stabilized once communicative actions become autonomous and clearly begin to differ."<sup>40</sup> Habermas insist that societies cannot exist without social integration. Here he distinguishes between the life-world and the system-world with their equivalent forms of communication. He thus differentiates between on the one hand the instrumental systemic forms of communication such as money, administration, specialized sciences etc. with their specific codes and autonomy and on the other hand the forms of communication of the life-world belonging to cultural traditions, social orders and personal identities and which have not evolved as instrumental and specialized. Across the boundaries of the various differentiated and instrumental communicative systems belonging to the system-world, Habermas maintains that there is an "ordinary language" which functions, and which primarily is part of the life-world even if it also "threatened" by the system-world. The ordinary language does not contain a substantial or discursive "meta-regie", but it forms "a universal horizon of understanding" and possesses a merit of multifunctionality within the lifeworld. It also, to some extent, has an ability to translate between the lifeworld and the more instrumental and specific systems. It can however not itself operationalize the messages of the codes of the systemic languages.<sup>41</sup> *Law* is however in Habermas' terms a universal language with the ability to operate both in the system and in the life-world and thus also *to translate from the systemic languages of money and administrative power to the life world and vice versa* in an operational way. Law can encompass the different argumentative forms of pragmatic negotiation, moral and ethical

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39 Niklas Luhmann, *ibid.*, 1993, p. 560-562.

40 Jürgen Habermas, *ibid.*, 1996, p. 25.

41 Jürgen Habermas, *ibid.*, 1996, ch. 1, 1.2.5, p. 26-27 and 2.1, p. 56.

discourse, cfr. below. Law thus has a unique position in Habermas' theories of society.

It is however the positivisation and the legitimacy of law which has enabled its operational abilities across the borders of social differentiation. That is: law is the form of *positively given and changeable legislation* (authoritative, written, publicly available) legitimized via *democratic procedures and individual rights*.<sup>42</sup> Vital elements of the systems of money and administrative power cannot be put into societal operation without the functions of the positive system of law. In Habermas' terminology law thus guarantees a socially integrating network of communication. In arguing for this he also refers to Parsons' theories of "societal community" where he emphasizes *law and morality* as general and second-order institutions and as *safety nets or transmission belts* where other integrative mechanisms do not function.<sup>43</sup> Law thus encompasses money and administrative power as well as solidarity as the basis for its integrative and operative function.

Habermas' insistence on integrative functions and on legitimacy as preconditions for the functioning of society must be considered vital to his further theories on law, society and communication and gives his analysis a normative direction.<sup>44</sup> In assuming *the necessity of social integration* his task is then to analyze the different practices or possibilities of social integration. This includes the analysis of the practices of law and politics. His normative perspective is in many ways contrary to the sociological theoretical presumptions of Luhmann who keeps *the observation of social differentiation* and its various forms of coordination as his main focus.

Habermas agrees that the secularization and differentiation of modern societies leave them without any transcendental or otherwise given consensual substantive values that may contribute to the legitimacy of society. Social integration is however dependent on the extent to which society has reached at some kind of consensus. In modern differentiated and changing societies values do not exist transcendently. They can only be agreed upon by continuous communicative processes. Legitimacy is thus left to be based on forms of *procedural arrangements* which must be found in the general and not the systemic spheres of society.<sup>45</sup> It is then the qualities of the procedures in question which will be decisive for the legitimacy of the decisions. The general labels of these qualities are democratic and deliberative. Behind these labels are demands that decisions should include all the involved and concerned, that all information relevant for the case should be available, and that this should be discussed in a free, non-interested and fair manner. Habermas insists on using the term "valid" about the decisions which are reached at by the correct or valid procedures.

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42 Jürgen Habermas, *Postscript* in *ibid.*, 1996, p. 448.

43 Jürgen Habermas, *ibid.*, 1996, p. 73-76.

44 Jürgen Habermas, *ibid.*, 1996, ch. 1, 3 and 6.3.

45 Jürgen Habermas, *Postscript*, in *ibid.*, 1996, p. 448.

This leaves the task of legitimation with communicative forms such as law, morality and politics and their specific procedures. Habermas criticizes the use of procedural norms which are taken directly from the internal dynamics of the social sub-systems, as being insufficient for the justification of a legal argumentation. His view is that the legal system cannot operate as a closed and self-sufficient system. Even decision-making within one specific social/legal area should reflect a broader of procedural principles. Habermas presupposes that legislation is based on the existence of discursive and free forms of opinion- and will-formation in the political public sphere and in civil society. Legislation within any area should reflect a broad procedural discussion. There is an interpenetration of "discursive lawmaking and communicative power formation" across the boundaries of all social sub-systems which stem from the fact that *reasons* have a motivational force in communicative action.<sup>46</sup> In the life world there is uncoerced and unsystemic forms of communication which may be freely motivated by reason. Law is thus not only a separate and autonomous form of communication, but also one based on and *with access to general and rational forms of communication* in society and thus *to a reasoning which exceeds the particular social sectors*.

Law itself does not contain given values apart from its general basis of procedural democracy and individual rights. It is rather *a medium* for the transmission of the various interests and wills of the members of a legal community. The rational motivation of law does not come automatically. *It will depend on the argumentative and the communicative forms used in each specific case*. In the general communication of the life-world there are different modes of will-formation which are used in our everyday life. Habermas differentiates between: - *bargaining pragmatic, moral and ethical*. Each of these has a specific purpose in the everyday problemsolving. Pragmatic bargaining is used for ordering preferences or realizing goals which are already given. Ethical orientations are used to reach general norms about our shared forms of life. Moral orientations are used in normative questions following goal-oriented cooperation. Habermas insists however that law-making may encompass, use and transform them all into the legal form.<sup>47</sup> Legal argumentation is then *a general form of communication with a wide form of legitimacy*.

There must be developed some such known and generally recognized patterns of procedures for the citizens to be used whenever needed. Habermas finds that we have this within the democratic procedures for lawmaking and with the guarantees of individual rights. *The two systems of individual rights and of democratic procedures mutually guarantee the freedom of both* and thus also the legitimacy of the production of legal norms. Democratic procedures are "the only postmetaphysical source of the legitimacy of law".<sup>48</sup> Individual rights guarantee the freedom of democratic procedures and decisions. Democratic procedures provide the potentials of discursivity and pluralism in political will-

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46 Jürgen Habermas, *ibid.*, 1996, ch. 4.2.1, p. 151.

47 Jürgen Habermas, *ibid.*, 1996, ch. 4.2.2, p. 157-168.

48 Jürgen Habermas, *ibid.*, 1996, p. 448 ff.

formation. Both individual rights and democratic procedures exist in modern societies as parts of the legal structure, guaranteed by law and as preconditions for the legitimacy of the further production of law.

Law in Habermas' theories is placed at an intersection between the instrumental systems of economy and administration and the life-world spheres. *Law includes the rationalities not only of market and administration, but also of solidarity.* The processes of law may thus be contradictory and ambiguous. What seems most difficult to accept in Habermas' theories are first his too easy acceptance of how the functionally and communicatively differentiated systems of modern societies may be combined within law as a universal mode of communication endowed with the ability of encompassing the different communicative rationalities within itself. Habermas does not really confront the problems of communicative differentiation.<sup>49</sup> That is: the fact that the different social systems represent the world in different and to some extent conflictual and irreconcilable ways, and then how to deal with the different and colliding representations of reality within the framework of law. *He just presumes that law can transcend the differences.* Secondly there are equivalent problems concerning his model of "ideal" and non-interested procedures for deliberative decisionmaking. It is still unclear how the different participants in a decisionmaking procedure which all may have various contextual relations to the theme being discussed, can become sufficiently dis-interested parties as long as he also accepts the functional and communicative differentiation. It is also unclear how it can be secured that "all" the relevant arguments will be presented. Habermas does not deal with the unavoidable fact of non-knowledge. Habermas still insists on the possibilities of ideal conditions for discussions and on reaching what he calls "valid" solutions across the boundaries of functional differentiation and also on complex matters including contradictory social interests.<sup>50</sup> This means that he has no solution to the documented problems and the inefficiency of the implementation of regulatory and goal-oriented law.

Habermas also discusses the relationship between *law and morality* which is also normative and used for conflict-resolutions, and why morality cannot substitute law. Questions of *morality are connected to each individual and to his/her capacities* as rational and reasonable persons. *Law* however is *part of a collective and generally binding decisionmaking system* which the individual alone cannot dispose of. In Habermas' own words it is part of a "jointly exercised autonomy of citizens".<sup>51</sup> It thus enables communication and coordination of complex societies across borders of anonymity and of moral differences. It does not free the individual of moral thinking in each case, but on a general basis behaviour according to legal norms will be accepted. This is enabled by the generalized form of the positivity of law. Habermas conceptualizes *the positivity of law as the most advanced learning process*

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49 Gunther Teubner, *De Collisione Discursuum*, in *Cardozo Law Review*, vol.17, 1996, p. 901-918.

50 Gunther Teubner, *ibid.*, 1996.

51 Jürgen Habermas, *ibid.*, 1996, p. 451.

*suitable for complex and modern societies due to its generalized and flexible abilities.* He does not see any functional equivalent to this in modern societies for the reaching of morally obligating relations and mutual respect among strangers.<sup>52</sup>

#### **4.1 Summary of Habermas and Luhmann: Law as the Combination of Relative Stability and Flexibility. The Interdependency of Law and Politics**

Both Habermas and Luhmann emphasize the fundamental significance of the European tradition of *democratic politics* and *autonomous law* for the ordering of society. They also both emphasize the combination and the interdependence of politics as the "free" and open form of communication and law as the bounded and relatively stabilized form. Their legitimacy is also secured by the same combination. The political and the legal operations as well as their institutions rely on each other both in their operations and their legitimacy. They can thus not fully be evaluated separately. They both acknowledge the fundamental significance of the positivity of law which enable the combination of *variation and selection* (changeability and thus flexibility) with the form of relative *stabilization* and thus a liberal and transparent form of decision-making.

The legal system demands some kind of *coherence* throughout the processes of legislation, adjudication and interpretation, but the interpretive and pragmatic traditions of law allow at the same time for relative forms of variation, pragmatism and intransparency. Luhmann has called the legal system *the immune system of society*.<sup>53</sup> It does not repair its problems directly, it enables society to deal with them without necessarily confronting and solving them directly. Normative expectations and legal norms may both have vital functions even if they are only on the symbolic level. Habermas on the other hand emphasizes the role of law in social integration and will then more clearly emphasize that there are connections between social structures and legal norms.

Both Luhmann and Habermas do, however, emphasize the need *to combine the knowledge on the organizational forms of society and the corresponding (in)adequacies of the organizational and the semantic complexity of law* in order to understand the functioning of law in society.<sup>54</sup> The understanding of law as the law of society underlines the need of more comprehensive legal sciences which continuously reflect on the relationship between the organisation of society and the organizational structures of law. Both Habermas and Luhmann accept the functional differentiation and specialization of modern societies and the impact this has, in a very general way, for the relations of society and its law. They have thus both favored forms of *procedural paradigms* for their descriptions of the current forms of law. From then on their interests of

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52 Jürgen Habermas, *ibid.*, 1996, p. 461.

53 Niklas Luhmann, *ibid.*, 2004, 475-477.

54 Gunther Teubner, *ibid.*, 1982, p. 39.

knowledge depart in different directions, Habermas in a normative direction and Luhmann in a sociological.

Their primary differences, due to their different interests of knowledge, evolve around the character and the radicalness of the functional differentiation and its consequences and the role of normativity in the analysis of law and politics. Habermas' primary interest concerns the *normative* and *legitimatory* aspects of the evolution of the procedural paradigm. His preoccupation is with the socially integrative qualities of law and the legitimacy of law. In his view, cfr. above, *democratic procedures* are today the main legitimation of law.

Luhmann on the other hand has primarily a *sociological* interest of knowledge of the society and its law. In doing this he maintains partly *the functional differentiation of society and its consequences* as a primary aspect of modern societies and partly *selfreference as the primary dynamic of the social systems* and reflection as the dynamic between the systems and society. He also maintains a systems theory point of view and thus a radical closure between the different systems of communication. Normatively they produce systematically different *meanings* emanating from their codes and functions. A pluralism of "meanings" based on the different functions and activities is thus unavoidable and necessary.

## 5 Gunther Teubner: The Socially Adequate Complexity of Law

Teubner has tried even more closely than Luhmann and Habermas to combine social science and legal knowledge in trying to understand how modern law actually works in practice. In referring to their combined emphasis on the one hand on *the organizational patterns of society* and on the other hand *the structural and conceptual readiness of law* he has continued this line of research in a more specific socio-legal direction.<sup>55</sup>

In Teubner's view *the functional differentiation of society* has resulted in radical forms of functional and communicative autonomy within the various social systems or spheres of society. The result is that centralized planning and integration as the main strategy of legal regulation cannot work, and that the socially integrative mechanisms have been moved from centralized to decentralized arenas while also being dependent on the interactions of the autonomous systems.<sup>56</sup> The generalized media of communication such as money and law have immense infrastructural power, and they can function integratively on a very instrumental level. Law however can only function socially integratively as long as the legal forms of communication within the specific sub-systems are socially adequate. The increasing specialisation within the different social sub-systems, including their dependence on other social discourses and the ensuing complexity, might result in limited effects of the general forms of legal regulation. In the insistence on the relevance of social

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55 Gunther, Teubner, *ibid.*, 1982, p. 39.

56 Gunther Teubner, *ibid.*, 1982, p. 46.

integration Teubner does however include elements of Habermas' theories. Habermas insists on the significance of democratic and deliberative procedures throughout society as preconditions for its social integration and its legitimacy.<sup>57</sup> The reformist project of Teubner then becomes the search for *democratic dynamics* within the various social subsystems, and to use these as parts of the legal regulation. Teubner's significance lies in pursuing the ideas of Habermas in a differentiated manner on much more local and specific levels of society. Teubner pursues a more differentiated, socio-legal and complex level of analysis: - identifying the dynamics of the relevant social fields, - and analyzing their democratic potential and the collisions between the different social and legal discourses within the specific social spheres. Here it is not the political, but the social and the socio-legal interactions and the more socially embedded forms of legitimacy which are at stake. Teubner takes the consequence of Luhmann's processual thinking of legitimacy – as part of the operations not as pre-given – further than Luhmann does. He does this by accepting law as a social fact and changing the focus of legitimacy from the political to the social level.

The core of the theories of reflexive law is then a demand to on the one hand *identify the dynamics* within the social sub-system to be regulated and on the other hand *to create legal concepts* and forms of regulation which may be socially *compatible*. Teubner accepts democracy as a measuring standard, but by emphasising the social differentiation and the socio-legal aspects of democracy as a prerequisite for its further evolution he transcends Habermas' applications of the standard. This is however where the sociological-realistic theories of Luhmann and the normative ideas of Habermas collide on a principal level. Teubner attempts to solve the dilemma by focussing on the communicative and social differentiation of society, with resulting social autonomies. He then goes on to pursue the ideas and the possibilities of democratic procedural regulation within the perspective of a functionally and communicatively differentiated democracy. This may be done by varying the participants of the different procedures or by securing the inclusion of specific considerations or specific types of information (or elaboration of information), such as by demanding the uses of risk assessments, environmental impact assessments etc.

He thus opens up for a discussion of comparing *the internal dynamics of the systems and their "opportunity structures" with democratic patterns of procedure*, and of how to select and strengthen such democratic elements within their internal dynamics.<sup>58</sup> Reflexive regulations must use the identity of the social systems in question and their internal dynamics as the focal point of the regulation. It must hatch on to the internal processes of the systems, and from there try to analyze how they can contribute to a furthering of democratic processes within or between the systems. Teubner's concept of reflexive law thus combines the focus on internal and selfreflexive mechanisms and on increasing democratic and social procedures.<sup>59</sup>

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57 Jürgen Habermas, *ibid.*, 1996, ch. 4.2.2, p. 157-168.

58 Gunther Teubner, *ibid.*, 1982, p. 48.

59 Gunther Teubner, *ibid.*, 1982, p. 49-50.

*The specific function of law is partly to create normative expectations which can contribute to predictability and social order, and partly to solve the conflicts of other subsystems which they are not able to solve themselves.* Doing this will normally demand a model of the social reality which reduces its complexity. In other words: what is needed is a legal-specific model constructed to contribute to a legally based solution of social conflicts. This is then why the legal system is labelled the immune-system of society. Law is presumed to be able to "solve" any social conflict put before it on legal terms or within a legal rationality. Whether the conflict is actually solved socially is quite another question. There may also be a situation where the conflict is solved legally on a temporary basis, but still goes on to exist on a social basis. The search for social solutions may then go on.

Where sanctions which are adequate to the system itself, are available, such as in many economic and contractual areas, the legal "solutions" are clearly strengthened. The use of prison sentences should here be regarded as external and non-adequate, and thus more contingent in its effects, which has also been endlessly documented. Society does however need some such form of immune system which is available, and which at least temporarily and symbolically will deal with the problem. This then implies a bounded rationality of law, and it underlines the fact that law also is based on a reduction of social complexity.

One solution could then be to emphasize the procedural and organizational mechanisms of law and to hook up to and refer to the reality constructions of other systemic or knowledgebased discursive practices.

In his later works Teubner emphasizes the *autopoieses* and the *self-referentiality* of law more clearly, self-referentiality and -organization being the primary dynamics of all systems. He also emphasises the dependence of law on other social and economic processes for external information.<sup>60</sup> Teubner then continues the research on how the systems interact. His answer to this is *through the exchange of information*. In specific situations there will be exchanges and then simultaneous transformations of information in many systems. The result will be several co-evolving, but different versions. This occurs by way of *interference, interpenetration or co-evolution* between the systems. Such forms of co-evolution may take the more specific forms of structural couplings, institutions or negotiations. What Teubner wants to point to here is that there is simultaneously a cognitive openness and normative differences and thus closure between the systems.<sup>61</sup> Co-evolution will then mean the simultaneous, but also productive co-existence and interaction of different systems.

First the legal system can *improve its cognitive abilities by including information in order to construct a "legal reality"* of the sub-system to be regulated. Information from other social systems to law is only indirectly accessible and will thus always be normatively transformed in order to function within the legal system. The presence of facts in the legal system is ultimately decided by the legal rationality and its dynamics. The "legal reality" is then

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60 Gunther Teubner, *Social Regulation through Reflexive Law*, 1993.

61 Gunther Teubner, *ibid.*, 1993, p. 65 ff.

constructed by the dynamics of normative expectations and legal conflict resolutions: In order to create norms it will often be necessary to reduce the complexity of the specific area or case.

The reality constructions of the different social systems can only be parallel, but they may also be improved by the intersystemic qualities of the concepts used. These concepts may be used in all the systems in question, but will still have different meanings in each system because they relate to different rationalities. Teubner's conclusion here is that what law needs is knowledge of the processes and the interaction of the other social systems so that it may latch on to these interactions rather than to the systems themselves. This would mean *developing forms of co-variation and co-evolution* between for example the economic systems and the legal system in the parallel constructions of the field of collective bargaining or between the scientific and the legal systems in their constructions of risk oriented areas by the use of risk analysis and concepts such as scientific evidence and the precautionary principle.<sup>62</sup>

Another way of dealing with the gaps between systems is by *interference*. That is: overlapping structures, events and processes shared by several systems where they can co-evolve. Another name would be bridging mechanisms, institutions or *structural couplings*.<sup>63</sup> Such structures are then mainly events for *the co-evolution* of several systems. The systems are given an occasion for common evolution, but their communications are still system-specific and parallel. The institutions of collective bargaining may also here serve as an example of such a structure. It is an occasion where both economic and legal, and also solidaric systems, participate and co-evolve more closely, and where common institutional infrastructures are developed – while different reality constructions persist.

Through interferences the communicative systems of law, politics, economy and science are continuously creating *co-evolutionary and increasingly more intensively interactive environments* not only on the level of general functions, but also on the levels of organisations and interactions.<sup>64</sup> Such interferences may also result in the evolution of several subsystems on these levels with *new forms of co-evolution, new hybrids or common institutions*. The meanings will however be different in each system which is taking part in the event. A "risk assessment" may have different "meanings" in the systems of science, politics and law. Such concepts will combine the systems, but always at the price of a certain loss of meaning. The legal system can never alone motivate social behaviour, but if its concepts coincide with socially adequate concepts, the efficiency of the communication may increase.

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62 Gunther Teubner, *ibid.*, 1993, p. 78-81.

63 Gunther Teubner, *ibid.*, 1993, p. 65.

64 Gunther Teubner, *ibid.*, 1993, p. 83-86.

### 5.1 *Legal Differentiation and new Forms of Governance: Autonomies and Co-evolutions between Law, Science, Economy and Politics*

The processes of globalization (economy, science) have in Teubner's view further enhanced and given a decisive bend to processes which already are embedded in modernity and its processes of functional differentiation. These dynamics are now occurring at such a speed that the powers of democratic political and legal processes are being severely challenged because they have not evolved institutional forms on the global level equivalent to those of economy, science and technology, which are more structurally compatible with the processes of globalisation.<sup>65</sup> The increasing differentiation within science and the economy will also contribute to a need of equivalent forms of differentiation in law and politics, or to a deeper integration of science, technology and economy within the processes and the forms of law and politics. Teubner emphasizes the fundamental significance of *functional differentiation* as a form of *pluralism of social discourses*, not only on the level of general social functions, but also at the level of organisations, interaction and social practices. The unity of law embodied by the sovereignty and the legal constitution as "The King's Two Bodies" has become obsolete.<sup>66</sup> Law is being increasingly internally differentiated, as a response to the interactions with the socially and culturally differentiated systems.

In modernity law has lost any form of general and ontological unity. It has rather become increasingly internally differentiated due to the influence of the variety of social discourses in the fields to be regulated. Such pluralism in the social and cultural sources of law will create multiple identities also of law. This also spills over into the uses of the principles of fairness and justice. Teubner argues that the internal differentiation of law has been enhanced qualitatively – to the extent that it is shaped more by the plurality of external social discourses than by many traditional material legal categories. In Teubner's words : law has become "...a multiplicity of fragmented legal territories that live in close contact with their neighboring territories in social practices."<sup>67</sup>

The increasingly differentiated "reality" will result in equivalent forms of differentiation of the legal standards and concepts in order to reflect the various local combinations of considerations within a legal text. The meaning of concepts such as justice, fairness, proportionality etc. will vary. What is deemed to be "just" or "proportionate", will necessarily vary with the configuration of the social area we apply it within. The diversity of what may be deemed to be "just", is increasing and the range of meanings becoming more incompatible. The demand for a more socially adequate law has meant a demand for a more differentiated law.

For the understanding of the processes of law under such conditions Teubner postulates the need for knowledge of the social discourses influencing law and

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65 Gunther Teubner, *The King's Many Bodies*, in *Law and Society Review*, vol.31, 1997, p. 769 and 780.

66 Gunther Teubner, *De Collisione Discursuum*, 1996b, p. 910; and *ibid.*, 1997, p. 765.

67 Gunther Teubner, *ibid.*, 1996b, p. 916.

sociological analysis enabling a further understanding of the evolution of law via categories such as *the new triad of social differentiation, social structure and legal semantics*.<sup>68</sup> Law is *exposed directly to fundamental social conditions* and thus also to multiplicity and social contradictions more intensely than before both due to the increasing significance and intensity of the knowledgebased discourses and due to the processes of globalization and the weakening of its links to democratic politics. Teubner also talks about “*the double fragmentation*” of society – “*cultural polycentrism and functional differentiation*” – to which law now is exposed more directly.<sup>69</sup> The processes of globalization are further enhancing the processes of social and legal differentiation.

In Teubner’s words: “globalization breaks the links between democratic politics and law”.<sup>70</sup> Centralized politics and legal-politico sovereignty are replaced by new forms of governance based on a multiplicity of social discourses and environments where law and politics are included. This obviously represents some problems for democratic politics and for the legitimacy of law and politics. Teubner maintains however that the possibilities of going back to the old forms of sovereignty are non-existent. *Heterarchy via decentralized forms of knowledge, social discourses and related practices cannot be overcome by politics*. Science, technology and economics have become such comprehensive, specialised and differentiated structures that they cannot be fully “represented” by politics or law. They have also become normative in themselves, and in many cases they develop so fast and specialised that political or legal communications often have no choice other than copy their concepts and meanings. The normative elements within the social or scientific discourses are copied rather than translated.

The close symbiosis between the social subsystems to be regulated and legal semantics opens up for a deeply differentiated law, operating close to the social dynamics. Legal categories, the balancing of considerations and the configurations of justice will vary with the objects of regulation. The answer to social differentiation is unavoidably a parallel legal differentiation based on the internal operations of law.<sup>71</sup>

## 5.2 *From Centralized to Decentralized Integration and Legitimacy*

The main effect of Teubner’s theories is that he is trying to draw attention to the multifaceted forms of capillary or micro-political power relations in society connected to the practices of science, knowledge and economy, and then how these micro-political forms of power also invade and influence the legal discourses. They do this by being factual or social assumptions in the areas regulated by law. Changes in the social configurations and their processes will often change the preconditions for legal regulation (what type of normative expectations or norms which may be adequate), and what assumptions it is built

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68 Gunther Teubner, *ibid.*, 1997, p. 778.

69 Gunther Teubner, *ibid.*, 1997, p. 780.

70 Gunther Teubner, *ibid.*, 1997, p. 780.

71 Gunther Teubner, *ibid.*, 1996, p. 915-916.

on. These forms of power are often local, self-referential and specialized. There are difficulties in governing them centralized or from above in *direct* ways. The keys to more decentralized forms of governance which also have democratic elements, might be: - *an understanding of the internal dynamics of the systems and discourses*, and - *the creation of structural couplings and linkage institutions which select and give a preference to the democratic elements of the internal structures*.

This could however be much further evolved than Teubner so far has done. Partly there is need for research into *the internal dynamics* of the different systems and discourses in order to reveal their specific characteristics, and *what their democratic qualities may be*. Partly there is a need for research on *how forms of procedures and organisations may be diversified*, including how processes on micro- and macro-level might be combined. Variations in the forms of negotiations, mediations, consensus conferences, reference groups, arbitration and discussion-groups must be explored in order to create linkages and interferences between the different systems of communication and between the different levels of organisation mentioned.

Democracy on a societal level can not any longer bear the burden of carrying legitimacy alone. *Legitimacy* will also depend *on the degree to which a system or sub-system is allowed to function socially via its internal dynamics*, and *to what degree these internal dynamics are selective towards democratic elements*. The legitimacy of law can then no longer be judged solely by universal standards of democratic legislation. It must also be judged by the abilities of law to function communicatively on decentralized levels.

## 6 Conclusions: Modern Law as Evolving from Knowledgebased Discourses and Practices

Both the theories of functional differentiation and of social systems of Niklas Luhmann and of the disciplines and discursive formations of Michel Foucault are founded on observations of *the increasingly intensive and capillary roles of knowledge*, and its diverse communicative formations and applications.<sup>72</sup> Both theories assign this element a primary role in the evolution of modernity and functional differentiation of society. All our social activities are somehow part of collective practices of systematizing experiences and knowledge. From these practices arise discursive or argumentative formations and more elaborate forms of knowledge, disciplines or sciences. Modern societies are then permeated by such discursive and often knowledgebased formations which constitute micro-political, and often rather intransparent, forms of power. *Practices, disciplines, knowledge, science, discursive formations* are concepts which in Foucault's

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72 Niklas Luhmann, *ibid.*, 1984, ch. 1; Michel Foucault, *Lecture 14 January 1976* in "Society must be defended", New York: Picador, 2003, and *Governmentality* in "Power. Essential works III", London: Penguin, 2000.

terminology designate varieties of systematization of knowledge.<sup>73</sup> Luhmann on the other hand uses *social systems* as the most general category. Within this general category there are different levels of social generalisation where social *functions* are the most general social systems, followed by the levels of *organisations* and *interactions*.<sup>74</sup> These are all dynamic social systems characterized by the continuous operations of the distinctions of a specific code. Within that code there may also be new variations of patterned or clustered forms of communication such as specific semantics, programs or themes.

One could thus say that modern society consists of several levels of collective processes of communication: - general systems (functions) of communication (such as law, politics and science), - knowledgebased discourses, disciplines, sciences and practices within specific fields or social areas (organisations, semantics and programs, in Luhmann's terminology), - and the specific and local situations of argumentation and communication (interactions in Luhmann's terminology). *Meaning* will thus always be produced within these several types of formations of social communication.

Any area which is, or which is to be legally regulated, are part of such discursive social formations. There will thus be a discursive and meaningbased formation of the area previous to the legal regulation of it, *or* having evolved more or less simultaneously with and influenced by legal norms. In many areas of modern societies legal regulation, and its concepts, have become vital and also actively structuring parts of their discursive formations. Examples could be: - labour law and its regulation of collective bargaining, social welfare law, international and European trade law, general principles of administrative law, intellectual property rights etc.

With the increasing functional differentiation and the various internal differentiations the areas to be regulated are already structured with autonomous and internal dynamics. Knowledge-based fields are often already *permeated by normative elements of their own* created by their internal processes to which legal regulation will have to adapt or observe if it is to be effective. In Teubner's words: "...there must be a close symbiosis between the existing social discourse and the attempt of legal regulation".<sup>75</sup> Such areas may show significant resistance to external regulations, such as law.

The focus on social and communicative differentiation, and its increasing intensity and resulting specialisation, leads to an increasingly radical focus on *the local and decentralized levels of communication*, their dynamics and how local practices and knowledge evolve continuously. The processes of specialisation and differentiation will over time lead to continuous co-evolutions among the various communicative systems and thus the production of new and more specialised systems, sub-systems, new interferences and couplings on the local levels. The general and functional levels of communication will then

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73 Michel Foucault, *The Archeology of Knowledge*, London: Tavistock, 1972, p. 178 ff; Gilles Deleuze. "Foucault", Minneapolis, University of Minnesota Press, 1988, p. 94.

74 Niklas Luhmann, *ibid.*, 1984.

75 Gunther Teubner, *ibid.*, 1996, p. 916.

emerge as increasingly internally differentiated. This also implies that local dynamics in the forms of knowledge and practices are vital for how communicative systems on all levels emerge and change. Changes on the more general levels of communicative functions and organisations will then first occur as micro-level operations and on the levels of interaction and organization systems. If focus is changed from the level of the general functions to the level of local operations, our notion of the general functions may change – from a more static notion to one of continuous evolution and change, and thus to a more destabilized and open notion of such key concepts. Communicative operations in complex systems are always contingent. They depend on decisions which are made from a surplus of possibilities and without clear consensus as to what option to take.

The focus on the level of operations and on the evolution of new co-evolutions, couplings and hybrids on the levels of organisation and interaction may then have consequences for our descriptions and analysis of current forms of *law, politics and governance*. If the primary social dynamic is on the level of operations, we will have to emphasize the dynamical, new co-evolutions and new sub-systems also as more distinct aspects of the evolution of the general social functions. At the same time it could be argued that on the local levels knowledge-based discourses and practices would be the vital structuring dynamics. If the general functions evolve via local changes and local sub-systems and co-evolutions, then we may get a more precise picture of these changes by focusing on the local levels and on the changes of the knowledge-based discourses. This may also lead to an argument for analyzing society and governance primarily as social and local systems or discourses based on knowledge and practices, and not primarily regard new events and changes as continuations of the general functions of for example law and politics.

### **6.1 *The Changing Argumentative Rationality of Law***

Legal argumentation is often done relying on the meanings of various traditional or presumed reality constructions, values and key concepts, including the implicit assumptions of these. The analysis given above on how communicative systems and thus also meaning formations change, in our time, implies that we will often refer to reality constructions and concepts and their assumptions without being sufficiently aware of their possible changes. This should induce us to give some more attention as to how we assume the meanings of the concepts and the arguments we use, and how we then understand and construct our argumentations in law.

The locally embedded processes of change of the social systems and the local forms of co-evolution may contribute to continuous, even if incremental, processes of change also of the meanings of the general functions, key concepts, normative patterns and meaning formations which we use. The continuous and incremental character of these changes means that changes in meaning will often be difficult to observe, particularly if the presumption is on static concepts and meanings and not on change and co-evolution. The implication is that we will have to pay closer attention to what we at any time nominate as the specific and discursive *patterns of argumentation* or the *decisive arguments* within a social

field or a social system, and what *meanings* we confer on them, and not reproduce the received interpretations or the given assumptions of the key arguments and concepts.<sup>76</sup>

Changes in argumentative patterns is of course not new. It could however be argued that changes also in legal argumentation are affected by *the generally increased speed and comprehensiveness of change in society*. The accumulated application of new and specialised technologies (and knowledge), the nature of some of these technologies and the much faster turnover and production of information are some of the factors behind this. These factors could lead also to comprehensive and frequent changes also in some of our more basic reality constructions, value assumptions and more general normative patterns.

The application of specialised technologies also leads to uncertainties and risks in slightly different ways than previously. The application of new technologies implies making so many different decisions and selections that unpredictable side-effects are almost impossible to control, particularly on experimental stadiums. Technologies and knowledge are thus applied *en masse* with the knowledge also of the possibilities of extreme and significant, also irreversible, risks. We are then *systematically and comprehensively drawing upon the future* more than we have previously done, in conscious ways.<sup>77</sup> The implication is that increased attention to our patterns of and specific forms of argumentation, and how they change, is vital. *Legal regulation and the creation of new norms* in these areas is then occurring *in unstable and continuously changing environments*. Knowledge and technologies are continuously changing and thus also our preconditions for normative evaluations and judgments. Normative predictability will have to adjust to this and become more reflexive in relation to change.

When several specialized technologies are applied in combinations, the redundancy of consequences might be impossible to control or to predict. Regulatory law will also have to deal with the balancing of very incompatible elements: - the possibilities of comprehensive and "negative" ecological risks on the one hand, and – the "positive" potentials of increased food-production or economic growth on the other, both of course being socially constructed, parts of discursive formations and uncertain predictions. Specialized knowledge bring with it an increased social reflexivity and thus also contingency and a structural uncertainty on a previously unknown scale in many fields.<sup>78</sup>

Social meaning is created through and embedded in language. With processes of increased specialisation the discursive processes may also become increasingly reflexive and autonomous. This may increase the employment of *strategic, ideological and rhetorical modes* of communication, and thus also *reflexivity and contingencies* within formations of communication. How we use

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76 Karl-Heinz Ladeur, *From the Deductive to the Argumentative Rationality of Law*, in "Law, Interpretation and Reality", ed. Patrick Nerhot, Kluwer, 1990, p. 184.

77 Niklas Luhmann, *Risiko und Gefahr*, 1990a; and *ibid.*, 1992; Karl-Heinz Ladeur, *ibid.*, 1990, p. 191.

78 Niklas Luhmann, *ibid.*, 1986, ch. 11 "Recht".

language and create discourses, is increasingly influenced by several types of rationality and then becoming increasingly complex and intransparent.<sup>79</sup>

Transforming the factual descriptions to preconditions for political and legal decisions adds another layer of complexity. We have neither *the cognitive nor the sensitive or the normative abilities* to communicate about these areas sufficiently precisely. The legal regulations will have to live with instability and risk. To some extent this has resulted in procedural and frame-work regulations at the cost of substantive predictability.

At one and the same time the uses of language are becoming *more ambiguous* (hiding incompatibilities in the language) and increasingly and *deeply decisive* in our creation of social reality. How we choose to describe certain facts, how we select our arguments – from the several possibilities, may become very decisive for any further evolution both cognitively and semantically. When dealing with several competing discourses in one and the same field or case (economic, biotechnological, ethical, food-production etc.), the meanings of each discourse and the balancing between them may become intransparent and difficult to perceive of sufficiently. The balancing may also be so incompatible that comparisons seem difficult to make in a rational way. The regulation of the application of for example new biotechnologies is also dependent on how the technologies and their risks have been described, conceptualized and evaluated. That is: *how we choose to describe the various risks involved*. The definitions of who qualifies to be asylum-seekers and refugees are another example. There is no objective way of defining what a refugee or a right of asylum should be in the world we live in now. The combinations of increasingly *specialised* uses of language and the increasingly *strategic and rhetorical* uses of the same language may result in spiraling tendencies of reflexivity.<sup>80</sup>

Such a situation could mean a flight from the use of normative expectations and legal norms to making do with cognitive expectations and just dealing with the factual change as it comes. The current insurge of legal regulations also on regional and international levels have however illustrated that this has not happened. The increasing complexity of modern societies with the interaction of highly differentiated and specialized scientific, political, economic, legal etc communications seem to have resulted in a need for coordination and the use of normative expectations of normative expectations even if they may seem to be highly improbable structures.<sup>81</sup>

It is beyond the abilities of law to transcend such a situation materially. Law will have to learn to deal with more pluralistic, changing and complex situations – also the ambiguities of incompatible and colliding interests. One reaction to this would be to include the knowledge of complexity and ambiguities in our learning processes and thus to become more "realistic" as to what we do in our

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79 Karl-Heinz Ladeur, *ibid.*, 1990, p. 190.

80 Karl-Heinz Ladeur, *ibid.*, 1990, p. 192.

81 Niklas Luhmann, *Demands on Politics* in "Risk: A Sociological Theory", Berlin: de Gruyter, 1992.

selections. Another reaction would be to create and to learn to apply increasingly pluralistic procedural forms – adapted one the one hand to the internal and complex dynamics of the social systems, and on the other to our collective needs of transparency, deliberation and democracy – and also of normative expectations. Law should not only proceduralise self-organization, but also open up for references to the social discourses involved in forms which would allow for processes of deeper and more public and transparent reflections over the collisions involved also of ambiguous principles and interests – even if we know that the results may contain vital uncertainties, incompatibilities and ambiguities.