Law and Cultural Identity

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Abstract

It has become common to construe modernization as a process of rationalization and systematization in which technology and instrumentality are central values. According to this model the European nation-state is evaluated more and more according to scientific ideals; bureaucracy becoming synonymous with technocracy. One dominant theoretician of this analysis is Max Weber (1881-1961), the German sociologist and economist whose *Sociology of Law* elegantly maps the ebb and flow of legal practices and legitimization from ancient cultures to modern Weimar Europe. According to Weber, the primary consequence of modernization process and its concurrent scientifization of the nation-state is the detachment of legal jurisdiction from its foundation. It is the source and nature of that absent foundation which is the object of the present paper. It argues that the absence of juridical foundation is in effect a detachment from the cultural roots of law.

Post-Weberian legal theorists (Habermas, Luhmann, Teubner, Nonet, Selznick) problematize in radically different ways the notion of rationalization as scientification. It will be our approach to construct a homology between law and culture. By demonstrating the radical generality of the concept of law it is possible to rediscovery the continuity between culture in law, in other words, the implicit presence of law in culture and culture in law. Law and culture, it will be argued, are inseparable, the one being the conceptual platform of the other.

1. From the Generality of Law to the Law of Identity

A law organizes the way we understand the world. [1] Even a
superficial etymological analysis or conceptual history of the term
"law" reveals a deep and complexly layered constellation of
structures, norms, interests and authoritative practices. From the
principle of *polis*, which organized both vertically and horizontally
Athenian society beginning in the 5th Century B.C., to the complex
of legal theories which make up the juridical landscape today, the
legality of law has never been self-evident. It has always been the
object of negotiation, of discussion, debate, opposition, contention. In
other words, it has always been a *practice*. Moreover, the *structure* of
law is fundamental. For the *concepts* we use everyday function as
legal administrators of our world. They serve to differentiate
authorized from unauthorized uses of concepts and terms, the
distinguish between identical and non-identical objects, the draw the
border of what legitimately belongs to a category and what is
legitimately excluded. [2] Concepts organize reality, shaping,
grounding and regulating the laws of the understandable.

The radical generality of law arises in part from an omnipresent myth
of pure descriptivity. The myth claims that the intelligibility of a
phenomenon is exhausted by its description: To understand a thing is
to describe it. The concept of law resists the myth of pure
descriptivity: Any understandable claim about any object, from the
color of the cliffs of Dover to the makeup of the French Parliament, is
understandable only because of *necessity* of its content, because of
the regularity of its concept, because, for example, the notion "color
of the cliffs of Dover" is regulated, governed, organized by a *law* of
conceptual belonging, or predication which situates its object in a
network of necessary associations. What is an object which is not
organized by the law of the concept? It is an object which neither
corresponds to any other *object* we have ever observed or any other
category which we have ever employed in order to understand objects
in general. It would be therefore pure and principally
incomprehensible, invisible.

Thus the naming of a thing is invariably caught up in the structure of
the governance, organization of the thing with regard to human
understanding. This collusion between law and name belongs to the
deep heritage of Western thought. *Nomos* (*law, name*) — the name of
the thing is the law of the thing, what predicates the thing is
authorized to have while still being the thing, what the name of the
thing, what the thought of thing is destined to correspond to. Thus the
repeatability or of organizational notions and the regularity of their
general validity is the first Western notion of law. This general
principle can be further delineated into a complex of notion associate
with the structure and development of law. The structure of legality,
governance and regularity, however, remain the same. Thus the term
traverse a number of discourses: (1) in "scientific" contexts as the

necessary relation between which naturally occurring elements are associated in an invariable way, (2) in "moral" contexts as normative rule, (3) as an aesthetic guideline, as (4) in a logical sense as the universal structure of human spirit, defining the universal laws of thought, (5) as rules which organize the state. The same set or principles is transmitted to the Roman *lex* and the hermeneutics of law which are generalized in the fundamentals of Roman citizenship.

Understanding law as the guarantor of the legality of a cultural unity is a contemporary development, more or less coeval with the emergence of the nation-state. Enlightenment philosophy and the 18th Century theoreticians of the nation-state conceptualize constitutional law as the codification of social, cultural relations — "laws" which somehow are intelligible but not codified. [3] The monumental purveyors of universal rights, constitutionality and nation of the 18th Century create the difference between law and code in order to emphatically unite them in the principles of political modernity. [4]

Thus the question of law is a historical question, a question of linking together the thread of legitimacy which assures the continuity of any regime. Still this horizontal, diachronic continuity is at odds with the vertical, synchronic continuity of law: The general foundation of any given legal moment. For any question of foundation is a question of rupture, of discontinuity or otherness. This is true for the very reason that the *question* of legitimacy never even arises in a situation of pure and self-present legitimacy. The context in which one asks as to the foundation of law, of its source of legitimacy, is the *absence* of immediate legitimacy. The question of foundation arises when it becomes clear that law is *not* self-legitimating, that its legitimacy is not self-present, does not contain its own legitimacy, but rather derives it from a reference to its foundation. This is the essence of the very concept of foundation: the immediate *absence* of foundation. The moral, cultural or legal foundation of any regulation is the object of reference to something else. When a law's correctness, be it moral or otherwise, is not self-evident, then it acquires that correctness by means of an association with its legitimizing basis, its foundation. A law which is radically, universally self-evident, requires no foundation. It is rather self-foundation. Its foundation is within, or more precisely, it has no foundation because there is no difference between the law and its foundation. Pragmatically, such a law would simply not be a law. For no law is self-constituting or self-authorizing. No law appears spontaneously *ex nihilo*, and thereby begins to legitimately guide human actions. Any law have an author, someone or something which accords it its legitimacy and its authority. A law is thus most commonly understood as a formulation whose meaningfulness reposes upon its situation in a network of moral, cultural, and authoritative references which Luhmann, for example, calls a "system." [5]

Identity is law. Identity, the most powerful and most tyrannical idea of Western civilization is the essence of law, the law of identity: A =

B, Jacques = Albanian, Arnold = sociologist. If an individual is to be who/what s/he is, a law of identity is immediately — even preceding the thought of identify — in place. Understanding anything as anything, (this is a pencil, that is a Belgian) is submitting to the law or identity. The notion of collectivity is based on a law of belonging. If there is a collectivity, there is a rule, a law of who/what belongs and does not belong. («Only Norwegians, that is individuals with properties x, y, z, are admissible in the Norwegian collectivity».)

The theoretical problem is thus how to generalize the concept of law. It must transcend while including the conventional legislative/juridical sense in order to include all regulative agencies. Any assembly is organized by a rule. The rule is what permits us to speak of, indeed to think of assembly. A good Bordeaux is inconceivable without the law which organizes the world according to good Bordeaux not-good Bordeaux.

The process of modernity which leads up to an produces the conception of the nation-state, is a movement of legalization of law: legalization in the juridical sense, law in the sense we've been investigating. There is thus a strange and difficult kind of double logic in the movement from the law of belonging as an organic, phenomenological, even affective dimension to the instrumentalization of belonging in the notion of *civitas*, that is belonging which is juridically guaranteed by the construction of citizenship.

The destiny of political modernity is its self-legitimacy. The statement of any law is always both necessary and impossible. *Necessary* because, as I mentioned above, it is the basis of Western thinking: thinking conceived as the making and using of concepts. *Impossible* because the law in question can never be the object of thought. It works fine for apples and oranges and Dover cliffs: I proclaim "these cliffs are Dover" and thereby inscribe the formation in a set of relations. But who legislates belonging for an Albanian? Who decides what a Norwegian is? A Norwegian? The Human Rights Commission in the Haag? Jacques Santers? God? S/he who legislates, forms the law of human collectivities, does so as self-authorized. Legislating collective identity is auto-legitimizing, in other words it is both legitimate and illegitimate.

2. From the Law of Identity to the Law of Cultural Identity

No trend has marked the last 50 years of European history as much as the as the crisis of cultural identity which plagues Europe. [6] The identity of Europe is like never before a question of identity-as-particularity. The break-up of the Soviet Union and the Eastern Bloc, the reunification of Germany, the ethnic conflicts in ex-Yugoslavia, the growing trends of racism, xenophobia, and anti-Semitism in every

European country all to some degree appear as the signs of a problematization of European identity and a revaluation of the terms of cultural identity itself. The analysis of the logic of law and legitimacy, the analysis of cultural identity has two dimensions. It is both a historical development involving the genesis and mutation of collectivities and a conceptual tension, involving a series of paradox in the logical form of any collective identity: being itself both by excluding others and by being in relation to them. European cultural identity is thus a constellation of both rupture or discontinuity with the past and a continuation, even an exemplification, of traditions as old as Europe itself. Its ideological character is likewise double: For some, the radical reorganization of much of European cultural self-consciousness falls under the sign of liberalism, diverse kinds of liberty rediscovering the greater path of history; for others, there is no precedent and no rule. At the limit, the crisis faced by Europe at the very moment it undertakes a *de juris* unification, takes the form of a radical questioning of ethnic and racial conventions, political affiliation, historical origins, linguistic norms, official jurisdiction concerning political borders, constitutional authority, representative capacity, general defense, and law enforcement. And yet the problem of European cultural identity, its patterns and politics, cannot be simply reduced to any historical unity which might stabilize or ground the debate in a fixed origin or reference. The particularity of any such situation is to be found in the way that its first appearance as a *universal* principle is contemporaneous with the conceptual *diversity* which constitutes it.

Although the notion of a European geographical unity is at least twenty-five centuries old, Europe as a universal, self-conscious concept is the product of a tradition younger than three hundred years originating within the politico-theoretical movements of the Enlightenment. The universalizing machinery of the Enlightenment is based on ideologies of opposition, delimitation and exclusion. In Montesquieu's *The Spirit of Laws* (1748), Voltaire's *Candide* (1759), Rousseau's *Social Contract* (1762), Diderot's *Rameau's Nephew* (1762) — published first in Germany in a translation by Goethe (1805), then in France (1821) — and Lessing's *Nathan, The Wise* (1775) arise the distinctions which constitute the fabric of contemporary European politics and society: nature/culture, society/politics, human/institutional, public/private. These oppositions apply and reproduce themselves automatically within modern society. They operate in a network of social-political-philosophical relations which together form a conceptual totality, the "universal spirit." Only such a unifying theoretical force would permit the internal sundering of the spheres of modern society by the introduction of its own specialization. Thus arises a fundamental dialectic of the modern: it is at once *necessary* for the restitution of social specialization and diversification into a totality and *contingent* upon the social cleavages which make it possible in the first place. Social totality is never implicitly absolute: it is always the restitution of a temporarily lost totality. This emergence of organic individualism within the spiritual whole, which functions as a socially critical counter-part to the

universalism of the Enlightenment, was a fundamental element in the thought of the young Goethe (as well as the young Schiller), and first drew him to Diderot who, with Lessing, had a great influence on the young Hegel.

European culture seen as a systematic claim to universality arises first as the *assertion* of that universality, as a corrective or restitutional gesture. It may be said, for example, that the *Declaration of the Rights of Man and Citizen* (1789) claims the universal presence of those human rights which are *de facto* not *present* but rather *virtual*. Like all such declaratory statements, its normative status is based on its absolute truth or universality while its essential sense as a statement rests on its non-truth, that is, on the necessity of its realization. This is a structural logic particularly important to Hegel's system of thought. In the *Phenomenology of Spirit* (1807), for example, he asserts that no object of knowledge undergoes the "phenomenological act" of being known without some alteration. Knowledge, he says, is a "tool" whose application does not leave the object of knowledge unchanged. Knowledge is never simply knowledge in itself; it is knowledge-knowing-itself. [7] Conceptual knowledge, the self-constitution of concepts, is an instrumental operation which, precisely because it is instrumental, renders impossible absolute knowledge of its object. With this argument, a direct attack on Kant's transcendental deduction of the thing-in-itself in the *Critique of Pure Reason* (1781), Hegel lodges a global critique of the universal spirit and its movement in human history. If Kant's thing-in-itself were absolute, Hegel argues, it would have no finite bonds or predicates; that is, it would have no qualities which are knowable by a finite subject. It could be known only by an absolute subject and would be thus absolutely unknowable. [8] Any thing, including the thing-in-itself, the thing as absolute, universal object, is accessible to knowledge only through its determinations, through the dispersion of its being in its particular manifestations. And yet, this dispersion is precisely what precludes its universality. For Hegel, this eternal manifestation of the determinations of a universal which continually reassemble themselves forming a superior universal, constitutes the dialectic of culture (*Bildung*). It is at once the constitution and the realization of the universal in its diversity. [9]

Even though the concept of European culture is supposed as universal, it has never had an absolute and universal form, has never been detached or indifferent with respect to its own meaning, has never been *in-itself*. It has always been able only to recognize itself in its instrumentality, in the moment when it applies itself to the task of discovering what it is. It has never been able to remain closed, frozen in an abstract totality. Thus the concept "European cultural identity" has sense only at the moment when it breaks off from itself and self-consciously sees itself as an object. It has sense only at the moment of its own introspective decomposition, at the moment of the rupture of its integrity, at the moment of its own cultural crisis. And yet this is also the moment which signals the impossibility of a fixed concept.

Thus the *double bind* of culture as thing-in-itself, as unitary concept: The axiom of universality is the rule of diversity: Cultural identity has always taken the form of the crisis of cultural identity, but a *crisis* which unifies and disperses at the same time. The cultural history of Europe is the history of crisis. Cultural identity thus cannot recall a time when it wasn't a *question* of cultural identity, when cultural identity was not in question, when some form of disequilibrium, dispersion, rupture was not present, sounding the alarm and the call to redefine, reestablish the identity presumed lost or threatened. Crisis is a constant. The crisis has no time. At all moments of the history of European culture it is already present, already determining its identity through the diversity of its universality. The modern imperative of absolute contemporaneity, exemplified, perhaps, by Rimbaud's axiom — "*Il faut être absolument moderne*" — cannot overtake the history of crisis: the history of crisis precedes cultural identity itself.

3. Some Variations on Culture and Law

Generally speaking, pre-Socratic philosophy articulates a philosophy of nature. Thinkers like Anaximander, Thales, Hericlitus, and Parmenides understand the causes, nature, and above all meaning of natural phenomena as components in an integrated universe. In other words, there exists no difference between principle and event, law of nature and phenomenon. Every natural occurrence constitutes its own self-contained principle. This conception is both a break with a mythological understanding of nature and a clear secularization of philosophical thought. At the same time a new notion of the *public sphere* is inaugurated, whereby e*xplanation* attains a new theoretical level. From now on there are publicly accountable theories — public assertions which are required to stand the test of criticism, revision, and rejection. [10] Both the consensus-based character of scientific research and the integrated notion of nature which dominates among the Presocratics pave the way for what might be considered the birth of legal philosophy.

In Greek civilization philosophy of nature exists as natural science. The *explanation* of a natural occurrence is its *meaning*. Whereas in post-classical scientific method, an occurrence becomes intelligible from the moment it can be related to a scientific l*aw* which generalizes it in a set regulating principles alongside a potentially infinite number of observable occurrences, pre-classical "science" renders events intelligible by revealing the system of its *naturality*. To seize the significance of an event is to understand in what sense nature itself would be harmed without the occurrence. *Otherness* — residual existence of unintelligible constituents which one is at pains to fit into the holistic understanding of nature — is precisely a symptom of defective understanding of the *phenomenon as nature*, of the naturality of the phenomenon. This "naturality," this implicit *rightness* of what exists in nature reveals nature as a kind of implicit moral essence and as a model. Nature is not simply what *is*; it is what

should be. Or more precisely, the question of what should be is unintelligible: what is *is* what should be. This insight must be associated with the movements of natural right and law which flourish starting in the 17th Century to which we will return. In the same manner, a certain moral or aesthetic space of nature is opened. According to Presocratic reasoning, a sunrise on the Ionian Sea is no more "beautiful" than the sight of a leopard tearing the liver out of a gazelle. Both simply *are*, and *are* simply as they should be. Both moral reflection and aesthetic consciousness are products of the notion of contingence, of the notion that things can be otherwise, that nature is variable, changeable, *governable*. This is the beginning of the process of the demystification of nature, and thereby the beginning of the thought of the social, of the question of how the social sphere should be *theoretically* organized. Thus when Thales, as the story goes, correctly predicts an eclipse of the sun in 585 B.C., he goes beyond simply revealing the meaning of nature, he makes a claim for the iterability of nature, for its predictability. Thus the notion of forecast constitutes a betrayal of nature's chronological meaning, the revelation of nature in repugnance of its own plan. He inaugurates a movement in human history which, as we will see, finds a certain apex in Weber. Science is no longer constituted at the service of nature, but rather nature is subsumed within the understandabililty of human intervention. Theoretical science thus arises out of the collapse of nature as a horizon-less background surrounding human affairs. This is the origin of the cleavage between what is and what should be, between theory and praxis.

The history of law as a mechanism for the organization of human societies thus begins as a negation of the referential status of nature. The history of the philosophy of law emerges from this rupture. The central sophists (Xenophon, Gorgias, Protagoras, Socrates) conceive of social questions in terms the opposition between nature (*physis*) and law (*nomos*). Nature is understood as the eternal, unchanging background upon which human events are played out. Law is the expression of human intervention. Questions of morality, justice, and obligation — the now "classic" questions of legal philosophy — emerge as a differentiation between human reality and nature. Morality, justice and obligation are henceforth understandable in relation to law (*nomos*), to the properly human as *against* the natural. This is the basis of society and culture in Western thought. It is also the opening of a Pandora's box of juridical discourses, not the least important of which serves to negotiate the very border between the *natural* and the *human*.

The *foundation* of law, the basis of its legitimacy and the moral motivation for its observance is thus to be understood as an opposition to nature. Whether the *origin* of this law is imminently human, that is, a part of human nature, or whether it is external to humans and thus the object of education, is thus a central dispute. However, universal for the sophists is the notion that morality and justice are human constructions. Legality is a constructed unity between what is right and best for humans and the norms which

organize human society. [11]

Plato writes at the time of the decline of the *polis*, the Athenian democracy. His reflections on law can be read as a resistance against the wavering legitimacy of what he sees as the rational foundation of law in human reason. The well know formulation of Plato's conception of law is to be found in the *Republic*. The ideal state, he claims in Book IV, requires no laws. The activity of legislation is mere a needless complication of the purity of a state founded on reason. The correct way to assure the proper organization is through education, that is, by instilling in citizens the taste for the ideal (*eros*), the (naturalized) desire to seek a society which corresponds to its own ideal. [12] Law and order in the *polis* should not be based on decrees, technically formulated rules which are necessarily foreign to all those who have not already thought them. The basis of law should be rooted in the *customs* of the populous, the conventions and mores which are natural to the society, or rather, to the society's «natural» inclination toward reason. The *polis* can thus be understood as a culturally based collectivity. It is an equilibrium which balances the abstract ideals of justice, on the one hand, with the happiness of individual citizens, on the other. [13] The members of the social collective are thus related by a shared inclination toward the ideals of the collectivity and by aspirations integrated into the.

By the same token, the city-state, the *politea*, is no to be understood in any technocratic or bureaucratic sense, but rather as an organic, *cultural* unity. In brief, law should be culturally base, not external. Law is *politea*: there is no distinction to be made between the natural function of the community and the community itself. "Law is not concerned with assuring the exceptions happiness of a class of citizens; it seeks to realize the happiness of the entire city-state by unifying the citizens by persuasion or force and leading the participate in the advantages which each calls c an bring to the community. If such men can thus be formed in the city-state, it is not to set them free to turn which ever way they please, but to make them compete in fortifying the bond of the State". [14] The community is defined as the properly functioning community. Law and order are not predicates but rather the essence of the collectivity. The *cultural identity* of the city state is its implicit self-sanction.

Aristotle's considerations on law and justice are multifarious and complex. In many ways, he develops a number of the procedural principles which form the background for modern juridical thought. In general however, it can be said that he continues the attack on the sophistic decoupling of culture and law. In his critique of Plato, he opens a reflection on the nature of democracy which draws into question its relation to the cultural substance of the bonds which are confirmed in democratic processes. As is known, the republic proposed by Plato, presupposes democratic principles only in the sense that all citizens are to be considered with equity with respect to their inherent gifts. This differentiated is called equitable, in the sense

that the social system which is erected as the city-state follows equitably the uneven contours of human reality. Aristotle differentiates between state (*politeia*) and law (*nomos*), the should, he claims be constructed on a (modern) democratic basis, whereas law organizes society according to the moral or cultural substance of the citizenry. In Book III of the *Politics*, he argues that a society ruled by law cannot be ruled by an arbitrary ruler. This defies the fundamental logic of law, namely its principle universality: If a proposition is a law, it is valid at all times, at all places, to all persons; if it is marked by singularities, then it is indeed no law. All citizens must be submitted to law. [15] At the same time, Aristotle understands that whereas the logic of legality is absolute, the moral substance of human culture is not undifferentiated. Legal procedure must thus be impersonal, nearly bureaucratic. In other words the protection rights in a society marked by the internal cultural differentiation is radically equity in application of law. Aristotle hastens to underscore that laws are imperfect and do not respect the contours of human reality. All general rules, though logically coherent, are "culturally" flawed. With respect to the notion of justice, laws can fail in certain cases. Aristotle thus reverts a notion of "natural justice" as the legitimization of what he calls "equity." [16]

This supplementary category foreshadows the tripartite distinction in Roman legal thought between *jus naturale*, *jus gentium* and *jus civile*. For practical purposes, *jus civile* corresponds to the doctrine practiced with regard to citizens, that is, residents of Rome. It is eventually applied analogously, such that it referred to the doctrine applicable to members of any community. *Jus gentium* is the conceptual counterpart of *jus civile*: originally law of the foreigners, applicable to all those who do not reside in Rome, by extension, to all those who did not belong to a community. *Jus naturale* is natural law in the sense that the natural is the rational, the infinitely founded and correct. In many ways *jus naturale* proves to be the ideological turning point for the historical development of the notion of foundation: In the late Middle Ages the "naturality" of natural law slides into a notion of the divinity of natural law; in the Renaissance it takes on a far more prominent signification of rationality; beginning in the 17th Century it becomes the center of the modern notion of natural law. Particular to Roman law is its *descriptive* nature. Jurisprudence in this sense does not aspire to organize both society and its peoples but rather seeks to seize and characterize the rational core of social reality. As far as the relation between culture and law is concerned, the primary opposition is that between *jus civile* and *jus gentium*. Out of the original category of foreigner arises notion of *people* in general. Jus gentium becomes law of peoples, the universal category of person which beside the *jus naturale*, is a central anchoring point for Roman cultural self-understanding. Indeed among the innovations attributable to Roman jurisprudence is the systematic categorization of persons. Such a categorization is more or less incorporated into any legal doctrine. The originality of Roman law, however, is the level of abstraction of the categorization. In the ancient versions of Roman law, the only persons accorded full rights

are male heads of family. Excluded from full rights are thus (1) slaves, (2) foreigners (3) other family members. In the period of the late Empire, these rights are significantly expanded. What remains clear is once again the *cultural* basis for excluding foreigners from rights. The treasurehouse *jus civile* is based on cultural belonging, the categorization of human before the law is cultural. This cultural difference is posed as natural, or rather the universality of rights derived from nature has limited extension. [17]

4. Modernization understood as the Rationalization of Law and the Denaturalization of Culture

Weber's *Sociology of Law* can be seen as an analysis of the process of modernization understood as a history of the emptying of law of its cultural references. This elegant history of the conditions of legitimacy of law provides a partial confirmation of our hypothesis that the cognitive presupposition of law is the cultural cohesiveness which binds any given society. Law and culture are homologous. Or rather a certain radical generalization of the law provides the structure of intelligibility of both national-cultural identity and state-law. Thus modernity's enormous project of egalitization in the name of democracy, instrumentalization in the name economic efficiency, technologization in the name progress, all devalue, to a greater or lesser degree, the fuzzy logic, the non-purposefulness, and the non-technical nature of "culture." [18] As we have already suggested, the logic of exclusion of culture from the program of modernity is remarkable indeed: Culture is excluded *because* it cannot be consigned to the various modern logics of instrumentalization, In other words, it is irreducible to the logic of modernity and therefore it must be reduced to a logic of modernity, and reject according to modernity's premises.

As we have seen, the history of legal foundation which is the object of Weber's presentation consists of a considerable variety of forms of legitimacy. What assures the continuity of the development is that legitimacy lies in the ties that bind the social group which is to be governed by the law at hand. Legality is thus as a social dimension, but it is indeed more than that. It is indeed not simply reducible to the logical coordinates of an association, but rather, a certain force (*Gewalt*) which arises from the interstices of association, from the cohesiveness of social cohesion. This is indeed what Weber majestically demonstrates the presence of in the pre-modern history of law, and what he seeks to demonstrate the absence of in the modern context.

"The old principles which were decisive for the interactive notions of "subjective" and "objective" right (Recht) that law represents a valid quality of the members of personal association which is monopolized by it: the clan-based or social class-based personality of law and a legislated particularity usurped by camaraderie or privilege have

disappeared and with them the class-based and special procedures of associations and tribunal classes. Thereby neither all particular and personal law nor all special jurisdiction is eliminated. On the contrary, precisely the most recent legal development has produced an increasing particularization of law. Only the principle of delimitation of the sphere of validity is characteristically modified".
[19]

Weber's historical development demonstrates that law is traditionally nourished by a collaboration of *objective* and *subjective* legitimacy. Subjectively legitimated law draws its force from the faculty of judgment proper to every thinking, acting subject. Objectively legitimated law orders individuals with respect to an authority which issues from some origin or platform which is foreign to the individual. Objective legitimacy emphasizes a horizontal access of judgment: value set on the basis of other individuals, other acts and experiences within the sphere of experience of an individual actor. Subjective legitimacy is vertically organized, drawing its authority from a singular source who essence and validity is closely tied to its universality. According to Weber, traditional conceptions of legitimacy repose on an interplay of these two elements. This is in accordance with the neo-kantian theories of law and ethics upon which many of Weber's points of view repose. Neo-kantianism develops the notion of transcendental yet individual categories of reason, whereby any ethical claim is both subjective and objective. This interaction assures the social cohesion which is coeval with legal legitimacy. This is why the interaction of the subjective and the objective, is both constitutive of cultural identity and of the legality of law. What is this strange force which inhabits the space between "I should" and "I shall"? The history of ethics is replete with answers to the question. One again, the most pregnant for Weber and other thinkers of his era is Kant. Freedom to act (*Handelsfreiheit*), according to Kant, is both a subjective freedom with regard to one's own individuality, an objective lack of freedom with regard to the necessary framework of natural laws to which all are subject and, finally, a subjective-objective freedom with regard to one's own moral sense. Freedom is freedom to submit oneself to the restraints of society, to chose to limit one's freedom, to oppose one's one "natural" inclinations based on a sense that it is right to choose the laws of the state. [20]

Yet the freedom of choice of non-freedom is not singular, not subjective, it is both a function of social belonging and the source of social belong, cultural cohesion. Indeed according to a more radical theory of social constructivism, the individual is produced by just a social negotiation of norms and customs. [21] An individual member of a culture is both *particular* in the sense that s/he lives the experience of law *alone*, the choice of accepting law is the choice of accepting law for oneself, not for others. At the same time, the choice of the individual is constitutive of the cultural collectivity. By choosing for myself, by recognizing the laws of state, I endorse the law of identity. The very dialectic of individual particularity and

social universality and the reciprocal conditions of intelligibility exclude any notion of individual which is not entwined in the constant subjective/objective sliding.

The neo-kantian ethical paradigm produces a validity, however, which Weber claims has disappeared. It no longer exists because the non-technical, non-technological substance, from which it derived its legitimacy has been extinguished from cultural practice. The irreducible rest of culture, the hard kernel which no science could reduced to quantifiable essence, has indeed been reduced by scientific humanism. This kernel has several forms in Weber's historical analysis. It is what he calls the clan-based or social class-based personality of law (*die stammesmäige oder ständische Personalität des Rechts*), or "camaraderie (*eine durch genossenschaftliche Einung*)" The humanity, or what we could call the cultural foundation of law, has evaporated in the shining walls of technocracy. In other words, the cultural basis of legal validity has disappeared.

What is the *measure* of validity? How does Weber draw a line between legitimacy and illegitimacy? Ostensibly its traditional site is the *Personenverband*, the "band" which assembles members of a collectivity. In other words, it is neither the collectivity, nor the individuals, but rather the force of cohesion which unites them. Not merely their common traits, not merely a simple function of a will to be collectively assembled, but rather a commonness which escapes the contingency of individuality, which is objective, not subjective, which can not be simply chosen away, which is nature. The foundation of law is thus culture. How does Weber measure the presence or absence of culture? What is the criterion for differentiating between legitimating cultural activity and non-legitimating? Where does the criterion come from? Who is the legitimate judge of who will be the legitimate judge? Who decides what legitimates the legitimate? Or to put it in other terms, what is the origin of the *right* to speak of rights? Who, exactly, authorizes the authorization? Succinctly put, the origin of legitimacy of any collectivity is both implicit in the system — it is the mechanism which legitimates *this* group instead of another — and yet cannot be isolated there. At the same time, the source of legitimacy cannot be nailed down either, cannot be attached to one person, or too several. For there too, the foundation of the whole would be destroyed by the alienation of the one who is not the foundation. The foundation belongs to the movement of the culture being itself, that is identifying itself as what it is, drawing out the tensions which spring forth from knowledge of what it is not, and the re-integration of the knowledge and counter-knowledge in the movement of the whole.

As an illustration of the modern process of evacuation, Weber presents the case of commercial law and in particular the form proper to it: the contract. Late 19th Century industrialization introduces intensive competition which brings with it the need for more efficiency -- what in today's jargon is interestingly enough called "rationalization." As has become clear, the modern reflex is

quantification. The transposition of human activity into a set of quantifiable measurements and thereby the operationalization of legal matters within and among commercial ventures. Modernization is process of streamlining and dehumanizing of humanity, a process which Weber seeks to nuance and rehumanize. The legal expert is a professional technocrat who in order to succeed in modern society must systematically avoid culture, must de-culturize law and de-legalize culture.

"One can only demand of him intellectual righteousness: to see that the ascertainment of facts, the ascertainment of mathematical or logical realities or of the inner structure of cultural goods, on the one hand, and the answer to the question of the value of culture and its individual contents, on the other hand. And then, how one should act within the cultural collectivity and the political associations — that these two problems are completely heterogeneous." [22]

Yet Weber's analysis of commercial law disregards at least two essential matters with regard to the effects of instrumentalization and operationalization. (1)The ideology of measurement and (2) the *conceptual impossibility* of the extinction of culture.

(1) Quantification is a matter of power, of controlling, surveillance, measuring and adjusting movement and production. *Measurement* thus carries with it enormous ideological conditions and consequences which we cannot analyze here. It will suffice to notice that the process of modernization which is Weber's concern both homogenizes and thereby introduces hegemonic relations of power and the norm which expresses the need for further, extended, deepened operationalization.

(2) The question of legitimacy reveals itself as a question of power. This interaction assures the social cohesion which the *question* of legal legitimacy generates. For legitimacy is always a *question* of legitimacy. A law which is perfectly, totally, absolutely saturated with its own legitimacy is simply not a law, but a fact. A law without the notion of criminality is not a law. In order for a law to be a law, it must be open to the contingency of question and doubt. It must be possible to imagine a situation in which the law is invalid. In any given situation, illegitimacy is a hovering presence. The pragmatic basis for this "otherness," for the possibility of other points of view, other personal considerations of right and wrong. This situation arises from the alterity implicit in the dialectic of culture. Thus the *law* of national or cultural identity, is implicitly repeated in the structure of state law, in the legality of law. [23]

The pursuit of legitimate action reveals a constant replacement of the ethical with the technical according to a kind of dialectic of competence. The more proficiency in legal matters grows, the more the individual becomes alienated from the general structure of identity which organizes cultural self-understanding. Technical, profession perfection is ultimately deadly because its gradually excludes its other, the ethical, the aesthetic, the cultural.

"Whether or not law and legal practices are formed under these influences, the inevitable destiny of law, in any case as the consequence of technical and economical development, and despite all lay judicial expertise, is the unavoidably increasing ignorance of it on the part of layman, given its constantly rising technical content; in other words, the specialized nature of law and the increasing appraisal of formerly valid law as a rational and thus technical apparatus capable of being purposefully (zweckrational) transformed at any given moment and which dispenses with the holiness of content." [24]

In *Basic Sociological Concepts,* Weber defines ethical customs (*Sitte*) in opposition to law (*Recht*). Customary are those actions which are carried out with reference to an internal, natural or cultural code. The legitimacy of laws of customs is thus *internal*. Their validity is not a function of external codes. Though customs maybe *learned* and thus once have appeared to be external, they are experienced as customs at the moment when their external origin is forgotten. Laws, on the other hand, are, according to Weber, always external, always conceived as otherwise, as something to be learned, understood and carried out as some kind of imposed duty. [25] If laws are entirely *internalized* — "cultural" — then they are hardly laws, bur rather individualized, reflex-based facts. The normativity of law disappears into the cultural orientations and inclinations of the individual. Law becomes what individuals do. If, if on the other hand, a custom is entirely *external*, a rule or guideline whose origin is totally foreign, totally external, unknown and abstract, then it cannot be called a custom. The "custom" is thus the ideal of a socially-culturally based code of conduct. The process of rationalization which Weber describes as typical of modernity is precisely the substitution of custom by law, "the substitute of inner adaptation to customary habits by planned adaptation to positions of interest" [26] It is the instrumentalization of normativity, that is, its extinction. If I am directed to carry out an action which is completely abstract to me, an action which is based neither on my experience, my aspirations, nor my sense of responsibility, then the direction — the rule, is incomprehensible as a rule, and the action becomes purely non-ethical, non-normative action, identical with my will. If the notion of being required to collect 5 kilograms of stones is totally foreign to me, then the act of collecting 5 kilograms of stones is and remains random, radically contingent. There is no ethical, cultural basis for carrying it out. Moreover, if ever I should acquire such an ethico-cultural relation to the act of collecting 5 kilograms of stones, this ethical sense will not be a meaningful object of law. The conceptual of legitimacy is thus the *identity* between legitimacy and legality. [27] Habermas' critique of Weber on this point is thus correct: radically formal legitimacy — legitimacy free of any ethical dimension — is precisely as unintelligible as ethical constraints without form.

"Summing up, we can ascertain that the formal qualities of law under particular social conditions which Weber examines could only have

made the legitimacy of legality possible, just as it did not recognize itself in a more kernel of civil formal law, in as far as he constantly understood moral insights as subjective world-orientations; values were valid as contents which not further rationalizable, incompatible with the formal character of law. He did not distinguish between the preference for values which recommend themselves within particular cultural life forms and traditions as preferable with respect to other values as it were, and the should-value of norms which, in the same manner, oblige all addressees. He did not separate the appraisal of values which are scattered over the entire range of competing value contents from the formal aspects of associability or validity of norms, which do not vary according to the content of norms. In other words he didn't take ethical formalism seriously." [28]

Much of post-Weberian sociology of law draws on a critique of input-output models of authority whereby the will of person A is transferred to the action of person B by one modality of power or authority. The strength of Weber's taxonomy of legal legitimacy, however, lies precisely in a problematization of the basis and movement of legitimacy. Thus Weber's point of departure already contains an essential distinction between *authority* and *legitimacy*. Though both are functionally based on an economy of *recognition*, only the logic of legitimacy draws its force from a notion of social, cultural, religious *collectivity* of the type which forms the background for a certain type of Kantian analysis of law. Already Weber's analysis of why we accept the legitimacy of law or of political or military leaders in general engages a problematization of the traditional conception of the legal subject as a kind of input-output processor, prefiguring, in particular, Luhmann's analyses of the "epistemic subject." [29] Once again, the dynamic kernel of legitimacy lies in the *collective force* of a given collectivity, in the band which ties together *different* individual members of a *same* cultural unity.

Weber outlines much of his theory on the nature of cultural cohesion as a basis for legitimacy in "The Three Pure Types of Legitimate Domination" (1922). Superficially, he explains, different forms of domination can be determined by a number of elements: different varieties of interest, consideration of purposefulness, advantages and disadvantages, customs or mere habit, affective, based on personal preference or inclination. More grave consequences arise, however, from domination-based state law. The legal grounds for domination, legitimate, law-based domination have inner support, a platform which lies deep in the cultural fabric. [30] Weber thereby conceptualizes his well-known three basic forms of domination: "legal domination," "traditional domination," and "charismatic domination." Briefly put, "legal domination" refers to "bureaucratic domination," that is, technocratic, rationalized, institutionalized, *formal* power; "traditional domination" reposes on a belief in the "sacredness" of a certain order of power which is *already* present; "charismatic domination" is based on an affective devotion to an "authority" with charisma. Though the historical process of

modernization shows a general movement toward "legal domination" all three categories can indeed be present at any given time. Essential for our purposes is, of course, "legal domination," since it corresponds to a pure formalism of authority and thereby opens the question of how pure formal legitimacy is thinkable "The entire history of the development of the modern state in particular is identical to the history of bureaucracy and bureaucratic processes in the same way that the development of modern high capitalism is identical to the increasing bureaucratization of the economic processes." [31] The question of modernization thus becomes: How can domination be rationalized, idealized, and purified to the point of being without concrete content. How can this happen where there is neither interest, nor tradition, nor affective will to carry out the legitimated law? Can the very notion of obeying when there is nothing to obey with respect to be *intelligible*? The moment of recognition of the legitimacy of the law is the moment of its own dehumanization or desubjectivization.

"It is not a person which is obeyed because of his/her proper right, but rather a legalized rule which is authoritative concerning whom and what is to be obeyed. The one giving the order also obeys a rule in as far as s/he enacts an order: the "law," or regulation, a formally abstract norm." [32]

In logical domination, the individual authority, what previously would have been a monarch, priest or a socially recognized leader, becomes equalized with those being lead. The pure rationality of law becomes sufficient unto itself, auto-legitimizing. The recognition is not determined by the concrete person, but rather by the form. The authority becomes transparent, inessential, unaccountable and thus meaningless. The legal machine, purveyor of legality and justice is perfected to the point where the content of law, the actions of individuals becomes inconsequential. The individual becomes mere static — noise in the machine.

5. Reflexive Law, Autopoesis, and the Dialectic of Cultural Identity.

Thus 75 years after the first edition of *The Sociology of Law*, Weber's notion of "formal rationality" remains the point of reference for reflection on the relation between law and modernity. The rational basis of legality in the modern world thereby rests upon a double platform: (1) a formal legal system presents itself as universal, that is, as a constellation of formally inscribed norms which are ideally and perfectly adequate to the social system which they are intended to govern; (2) a class of professional legal technocrats whose task it is to universally apply the system. Yet this detached, instrumentalized notion of formal rationality in law is only the extreme pole of the evolution of thinking on law. For a variety of reasons, the legal theories of Weber and others collapsed in the critical exchanges

which followed their construction. Epistemological doubts associated with the decline of both Neo-kantianism and the New Historical School, undermined the viability of the notion of the system as an ideal form, the prolonged critic of Enlightenment rationality carried out by the Frankfurt School lead to re-questioning of the validity of reason as the ultimate reference point for philosophical and social systems, and, finally, the experience of the two World Wars, lead to a general skepsis with regard to the promise of technology and progress. In short, the word *crisis* — both philosophical, sociological and juridical — was on the lips of all those who believed in and sought systematic solutions to the legal complexities presented by modern society. Still, it is the very notion of crisis which is a key to our analysis. For the measure of the long century which has intervened between Weber and contemporary sociology can be understood as a mutation and a reevaluation of the notion of crisis. Crisis for those who witnessed the last cries of Neo-kantianism and New Historical thought on the even of World War I understood crisis as the loss of something which could or could not be recovered, but whose recovery was in any case understood as a recover of the *same*, as a return to the specificity of time and place which created the conditions and context for that which now is gone. The last of the modern intellectual foundations — the transmutability of time and space as rational categories of human experience, pure faculties of human existence — had slipped away, and work had to focus on retrieving it. On the other hand, the notion of crisis which informs *today's* legal sociology is, as we shall see, far from a nostalgic one. More recent theories of law and legitimacy focus on crisis as *constitutive*: as somehow fundamental, productive and creative.

In the post-war period, the rise of European Social-democracy and interventionist economic and social philosophies have lead to various attempts at re-anchoring legal foundation in the substance of social and cultural reality. Many European scholars see this process of "rematerialization" the implicit project of the welfare-regulatory state. [33] The most common tactic for rematerialization is a reconstruction of the link between cultural substance and legal form through a re-historicizing or "evolutionary" approach. In this context, crisis becomes the vehicle for progress in the development of a more coherent picture of legal reality. Crisis is not the moment of loss by rather a far more dialectically marked re-absorption of the failed moment in a totality which rationalizes it as failed. The most significant systematic attempts to formulate an evolutionary reconstruction of legal rationality are offered by Nonet and Selznick, Habermas, Luhmann. [34] Nonet and Selznick see the evolution of legal systems in three distinct phases: the repressive, the autonomous and the responsive. [35] The repressive moment corresponds to a notion of rights and legality which emerges from feudal structures, mapping the transformation which Marc Bloch calls the movement from "noblesse to legal noblesse." [36] The autonomous phase corresponds to the rational paradigm developed by Weber and support by the Neo-kantianism of Rickert, Dilthey, Simmel and Droysen. The

final — responsive — phase is the product of the crisis in legal formalism. It is the process whereby new forms of law emerge which are oriented to a large degree toward "purposefulness" and the participatory dimension of law. Luhmann's evolutionary reflection is based on the notion of an internal differentiation of society and on the complex interdependency of society and legal systems. Habermas, finally, continues the general project of a critique of the modern concept of rationality in the *Theory of Communicative Action* with a differentiation of the formal rationality of law.

A fourth, compelling alternative is presented by Gunther Teubner. Teubner abstracts both Habermas, Luhmann, and Nonet and Selznick in order to construct a synthetic route between the two. Nonet and Selznick, he suggests tend to rely on variables which are internal to the system or to thematize its evolution, while Habermas and Luhmann, each in his own manner, concentrate on external or international elements between legal and social structures. [37] In his essays from the 1980's, Teubner begins the construction of an alternative to the internal and external notions of system. Building upon Nonet and Selznick's concept of responsive law, Teubner develops what he calls "reflexive law," a self-regulating system which orients itself toward the norms present in society in part according to a more or less neo-liberal model while at the same time coordinating with the external nature of social phenomena. [38] In other words, Teubner fully *integrates* the notion of the *crisis* in formal law as a constructive, meaning-producing component in a system of reflexive law. Crisis is the mode of constant problematization which forms the basis for the formation of new concepts and new approaches, always adapting to the requirements and mutations of a socially based system of self-understanding: cultural identity.

"Reflexive law" can thus be understood as a self-regulating system based on both an internal and an external mechanism of modification which derives its reference from changes in the social sphere. "The law regulates society by regulating itself." [39] "Autopoeisis" is a conceptualization of the self-production of legal and social systems. In this context society may be understood as, "an autopoietic communication system. Society consists of communications that have the characteristic of reproducing other communications. [40] Specialized communication circuits have thematically differentiated from the general communicative circuit of society, and some of them have become so independent that they have to be regarded as autopoietic social systems of the second degree. Vis-à-vis social communication, they constitute independent communicative units as their elements which are in turn self-reproducing, i.e., they produce communicative units of the same type and value. All of their system components are produced by themselves: special communications as elements, self-generated expectations as structures, autonomous processes, thematically defined boundaries, self constructed environments, self-defined identities. They are operatively closed and

informationally open to the environment." [41]

The central and most obvious presupposition for modern legal systems is that they bear a relationship to society. The theoretical debate thus becomes what kind of relationship this should indeed imply: law as a reflection of social norms such as they occur (neo-liberalism); law as a normative ambition, model or patterned on the basis of some sort of implicit rationality (natural law); law which is unequivocally imposed and accepted (positive law); etc. With his evolution to the concept of autopoeisis, Teubner posits the continuity between society and law on the *discursive* level. Society and law enjoy commonality as *communication*. Both are autopoeitic: Both consist of communications which derive their intelligibility from their production (an re-production) of communications. The challenge to modern legal theory is thus, according to Teubner, the negotiation of the discursive relation between two discursive spheres. "The legal system feels out its social environment with `sensors' (boundary roles, dogmatic concepts), reconstructs the conflicts in its own terms as conflicts of expectations, processes these through rules, procedures and dogmatics that are intrinsic to the law, and produces the binding decision as a `case norm', to which new legal communications can in turn be linked up. This all takes place exclusively in the limits of meaning peculiar to the system of legal communications." [42] The guiding question of autopoeisis is thus the question which begins the history of modern legal theory, that of crisis.

Crisis is the opening which inaugurates reflection on the foundations and boundaries of legal legitimacy. According to the logic of autopoeisis, both the legal system and social structures find themselves in a constant state of mutation. Indeed the very being of the social and the legal are hereby redefined as the self-producing, faithful to the essence of the Greek term auto-poeisis. The pragmatic question thereby becomes: Where indeed does the system close? Where does mutation, evolution, alteration cease in such a way that the solid concrete norms and legislation can be isolated, identified, conceptualized, politicized and posited as the foundation for further construction of norms and legislation? Is closure of such a system of self-reflection even possible? If a social structure or a legal system derives its very essence from a movement of reference to other components, that is by a kind of constant overture, can this movement ever be halted? This is the sort of questioning which leads Teubner, in more recent work, to interrogate the premises of a number of post-structuralist positions advanced, notably by Foucault and Derrida, and to attempt to place neo-evolutionary theory (Habermas and Luhmann) in a shared context with a number of post-structuralist notions. [43]

In the 1991 article, "The Two Faces of Janus: Rethinking Legal Pluralism," Teubner undertakes a direct confrontation between legal autopoeisis and postmodern jurisprudence, most notably, "Critical Legal Studies." [44] The "two faces" to which the myth of the Roman god Janus refers goes beyond the simple opposition of the social

sphere and the legal sphere, locating the very intelligibility of legality, its "rationality," in the field of tension of a number of opposed terms: "norms *and* rules, law *and* society, formal *and* informal, rule-oriented *and* spontaneous." [45] By understanding legal studies as a *discursive* science, a common structure uniting the social sciences and law emerges. This strategy thus distances itself from both legal positivism and positivist sociology and thereby seeks a new, more comprehensive and thus more "universal" horizon of understanding. Both legal studies and social sciences are indeed "sciences of man," and in that regard reducible to a single — though ultimately quite malleable — register of understanding: discourse. "Discourse" must itself be generalized and subsumed as a higher more generalized form of "law": what we have called the "law of the concept," the general set of presuppositions which organizes what is understandable to human actors.

If, however, such a system of understanding is general or "open" enough to encompass both the relatively heterogeneous domains of law and social sciences and allow them both to freely articulate meaning, the question arises of whether any anchoring whatsoever is possible. If understanding and knowledge are based on a movement across domains of thought, in other words, in a non- or anti-foundational type of reasoning, how can fixed meaning be possible? The fact of the matter is that both the legal sciences and social sciences produce intelligible facts and meaning which form the basis for human understanding and action. The response of postmodern legal theory is "operational closure." Auto-poeisis is indeed an endless, open process, but it is, at the same time arrested in moments of fixed, anchored meaning. If there is meaning; there is a verifiable, empirical, understandable relationship between law and society. But this fixed meaning, this *closure*, is based on the possibility of openness. The demonstration of this strange paradox lies in the very presuppositions of traditional empiricism. For what is the difference between empirical fact and conceptual foundation? Empirical fact is considered — at least according to classical doctrine of logical empiricism — as the immediately observable, unmediated knowledge-as-observation, unadulterated by systems of reference or conceptual networks. Foundation, on the other hand, is always foundation of something. A foundation is a legitimating, authorizing, justifying, essence-giving platform for truth. Science, be it legal or social, is foundational in the sense that it presents a set of universal principles — laws — which have applicability in not one but in a *variety* of circumstances. [46] Yet if we look more closely, we see that the "factuality" of the empirical sciences indeed reposes on a certain "foundation." For in order for a fact to be intelligible, it must first be *understood as fact*. We must first have objective knowledge of a thing as a fact before taking a position with regard to its factuality. A fact is only a fact in relation to the concept of "factuality" — that notion or concept of being a fact. Thus the very understanding of a fact presupposes a certain abstraction, a certain distance from the fact, and the confirmation that the thing in question is indeed a fact and can be understood and evaluated as such. In other words, it must be

understood that the thing is a *fact* and not a cat or an automobile or Henry VIII. In other words, it must be placed in a network of concepts ("cat," "automobile," "Henry VIII") with respect to which all but one is excluded. Conclusion: the factuality of facts is foundational, derives its legitimacy from something other than itself, and thus can only be understood as a network of concepts — as discursive. The consequence for our concerns is an overture of the possibility of uniting the questions of the social sciences — not the least national and cultural identity — with the legal sciences and, further, with practices which are destined to link them to political practices. The discursivization of the field of legal science is thus a breakthrough for interdisciplinary effort toward understanding national identity in particular and the europeanization of the question of identity, in general.

6. Law and Cultural Identity: The King's Two Bodies

"If postmodernity is a retreat from the blind alleys into which radically pursued ambitions of modernity have led, a postmodern ethics would be one that readmits the Other as a neighbour, as the close-to-hand-and-mind, into the hard core of the moral self, back from the wasteland of calculated interests to which it had been exiled; an ethics that restores the autonomous moral significance of proximity; an ethics that recasts the Other as the crucial character in the process through which the moral self comes into its own."

Zygmunt Bauman, *Postmodern Ethics* [47]

No one could have taught us more about the "calculated interests" of modernity than Max Weber. The *Sociology of Law* construes the epitome of modernity as the rendering-calculable — the quantification — of all interests. Rationalization — modernity's ideological anchoring point — is implemented as a strategy of control, measure, systematization, atomization, compartmentalization, mathematization, and bureaucratization. The rationalization of society is carried out at the expense of the allegedly non-rationalizable: aesthetics and ethics. Will, the force of the moral action, the nexus of law and human life, is relegated to the category of the a-rational, to the non-rationalizable, the non-quantifiable. Theorems of value or worth retain intelligibility uniquely through their inner *ratio*. The numbers tell all there is to tell; what cannot be measured cannot be understood: This is not just a feeble ideology for the weak at heart, it lurks somewhere at the very foundation of human cognition.

Yet as we have seen in our reading of Weber, no interest is completely calculable. If an "interest" can be calculated, then it is precisely not an interest, but rather, a deculturization of things, acts, experiences. — the instrumentalization of cultural identity. Yet not even Weber foresees the *double entendre* which lies beneath the surface of modernity's discrete processes of rationalization. As we

have already seen, without the possibility of delimitation, of stating clearly what a thing is and what it is not, without measuring or *calculating* its limits, it cannot be unambiguously attributed to a concept or understood as predication. Thus the calculated interest — as the expression goes — is a paradigm of modern ethical thought. To integrate *interest* in the conceptual whole of an institutional system is to digest the ethical share in that system. *Interest* is an implicit participation in a given matter. If I have interest in a red balloon it is because I indirectly participate in it, either by my appreciation of its form and color or by the personal feelings I have with regard to certain of its attributes. Interest thereby displays a double, paradoxical, relationship to the object of interest. On the one hand, interest, is inherently attached to the thing, predicated on the thing. There is no interest in a red balloon without a red balloon. On the other hand, interest does not, cannot belong to the thing. If my interest for the red balloon were implicit to in it, if the red balloon would cease to be red balloon without my interest, then it would not be a matter of interest, but rather an invariable predicate of the red balloon itself. Both internal and external, necessary and contingent, human and material. Can interest be "calculated." Not surprisingly, the *calculation* of the double logic of interest also bears the burden of a double logic.

How can interest be calculated? One the one hand, if the relation between subject and object is radically objective, if my interest in the red balloon is only the $1.35 I paid for it, excluding any affective dimensions, any emotional, ethical or aesthetic involvement, then my interested is objective and thereby completely quantifiable as $1.35 and exhausted by the calculation alone. At the same time, if my *only* relation to the red balloon is the $1.35 I have invested in it, then I have indeed no relation to it at all. This is precisely what we call *disinterest*. Summing up, only when interest *cannot* be quantified is it indeed interest, only when interest is irredu*c*ible to calculation can it rightfully be called "calculated interest." Only interest which is completely disinterested can rightfully be called interest.

Law has always been the expression of a certain interest. No surprise then that law has always been caught in the insoluble *aporias* of subjectivity. For interest is the human, the moral, the aesthetic element in any real event. If a human being is to participate in a certain event, the person is interested. If the person has no interest, there is simply no experience. In short interest is *per definition* excluded from rationalization, it was indeed one of the cultural anchoring points which refused to let itself be reduced to quantity, thereby preserving the platform for legitimacy as an act of resistance.

The same logic must be applied to the modern, and subsequently postmodern, search for foundation. Weber's genealogy of legal foundation clearly demonstrates that the historical rationalization of law, from ancient history to the early 20th Century, is accompanied by a radical shift in the foundation of legitimacy of legal practices. As we have seen, the fundamental development is an internalization of

legitimacy, that is an internalization of foundation. *Modern foundationalism thus tends toward auto-foundationalism*. The anchoring point to which the legal actor refers in order to justify his/her actions is no longer an *other*, a monarch, patriarch, religious authority, the turning inward of intellectual sovereignty, not the least with the advent of the nation-state as the ultimate guarantor of the legitimacy of the individual's intellectual sovereignty in the 18th Century.

Gunther Teubner analyzes the deconstruction of legal foundation as a particular case of the deconstruction of systems in general. Where deconstruction reveals the logical incompatibility of the components of legal foundation while at the same time confirming their factual reality, systems theory has, according to Teubner, accepted the task of negotiating the common basis of all components in a working system. Autopoeisis, as it is developed by both Luhmann and Teubner seeks a middle path. [48] Like deconstruction, autopoeitic system theory seeks to stress "law's autonomy, normative closure, structural determination, dynamic stability, emerging eigenvalues in binary codes and normative programmes, and its reflexive identity." [49] In contrast to deconstruction, however, Teubner characterizes autopoeitic system theory as "radical constructivism" — thus apparently more radical than deconstruction. Constructivism holds that reality is a "construction," and epistemological consequence of discursive interaction. "Truth about reality — in the hyperbolic version, reality itself — is produced by the confrontation, collation and reciprocal resistance of discourse. While, deconstruction would agree that truth is somehow a byproduct of language, the horizon of the "production" reaches beyond language. Deconstruction is not merely an epistemology; it also seeks to examine the structure of being, and postulates, analogous to constructivism, that what is, is also always a byproduct of a certain process of being. Constructivism's response to the question of the foundation of law is a certain discursive process, the production of foundation through the constant structural mutation of foundation in the process of negotiating that very foundation. Deconstruction, on the other hand, questions the primordiality of the world with respect to law. It is reality which appears, only to be populated by jurists who create systems of reference, which draw their authority from that reality. Deconstruction understands law itself as primordial; it sees reality as a byproduct of law. Reality, be it social, cultural, national or other, is *already* "lawful," already organized as a system of legitimation. The consequence is that the legal formulations of any juridical principle must both seek their legitimacy *within* the discursive system which is constructivism's object, *and* with respect to the principles of law which are already situated in "reality" — most immediately, for example, the laws of logic.

Teubner differentiates autopoeitic system theory and deconstruction otherwise by describing two of system theory's "responses" to deconstruction: "second-order observation" and "paradoxification." (1) *Second-order observation* refers to system theory's self-referential

nature. Legal foundation cannot be found in a stable anchoring point. Law is internal to the system in question, and derived from the play of differences of its elements. The identities, national, cultural, individual, etc. which legal discourse refers to thus change as a function of the observer's perspective, conceptual network, experience, etc. (2) *Paradoxification* refers to constructivism's alternative to what Teubner calls deconstruction's focusing on hierarchical rules where "the lower normative acts are legitimated by different levels of higher rules and principles that finally end in the constitutional legitimation of political sovereignty." [50] Instead of what he understands as deconstruction's vertical or hierarchical play of binary poles, constructivism sees the hierarchy of law as "a self-referential circularity where validity becomes a circular relation between rule-making and rule-application." [51] Thus autopoeitic system theory derives its force not from hierarchical difference, but from a pragmatic or operational circularity which hearkens considerably to a Peircian theory of truth or Gadamerian hermeneutics, and its logic of *Auslegung*: understanding as applicability.

In order to construct a synthetic combination of these two alternatives, Teubner rehearses the stereotypical characterizations of both system theory and deconstruction in order to nuance his position with regard to them. and demonstrate in what sense they are not entirely justified. To combat them, he introduces the metaphor of the "King's Two Bodies" which in some sense can be likened to the historical genesis of modernity presented by Weber.

"The King's Two Bodies — the grandiose christological fiction of the immortal Sovereign "above" the mortal human being as the supreme source of law — have protected the law against the deconstruction of its foundation and its identity. Both, the contradictory multiplicity of law's identities and the founding paradox of law are found to be hidden behind the facade of law's hierarchy at the top of which the King's Two Bodies are governing. The constitutional law construction of the political sovereign as the top layer of law's hierarchy has allowed the law to externalize its threatening paradox an to hand it over to politics where it is "resolved" by democracy. The externalizing manoevre of constitutional law is an equivalent to Hans Kelsen's attempt to externalize the founding paradox of law into the transcendentalism of the Grundnorm and the Herbert Hart's attempt to conceal it in the social acceptance of the ultimate rule of recognition. Similarly the multiple identities of law, the different use different social contexts make of it, becomes a matter no longer in the responsibility of law but of democratic politics." [52]

The king is thus far from dead: symbol of sovereignty, he is the is both source and end of national identity. For the king symbolizes the unifying power of legitimation processes. The meaning of identity is indeed that a collectivity is *one thing*. This monolithic function is the king's first role: the "founding paradox of law" refers to the notion that law's function is a universalization of what is multiple, a

homogenization of what is heterogeneous. The contradiction of law, this strange but necessary logic at the heart of any notion of cultural or national identity cannot be extinguished by modernity's processes of rationalization. As we have seen in our reading of Weber's *Sociology of Law*, this contradiction is the basis of rationality itself. Constitutional law has a deep inner function which protects itself from this "impossible necessity" — the simultaneous coexistence of the one and the many. The nation-state declares the rights of national collectivities as self-motivated, self-validating. As the *alpha* and *omega* of the cultural self, the nation erases the foreignness of any cultural collectivity*: legitimacy assures identity, by inventing it as well*.

Footnotes

[1] This "Work in Progress" is a product of discussions and encouragement of the CIRG (Collective Identity Research Group), a forum supported by the ARENA program, University of Oslo. May I here express my special endebtedness to coordinator Theodor T. Barth.

[2] Cf. J. Peter Burgess, "European Borders: History of Space/Space of History," *Canadian Journal of Political and Social Theory*, Volume 17, numbers 1-2 (1994).

[3] On the nation as a "legal-political" commuity, see Anthony Smith*, Nations and Nationalism in a Global Era* (London: Polity Press, 1995), pp. 54f.

[4] Dominique Schnapper, *La communauté des citoyens. Sur l'idée moderne de nation* (Paris: Gallimard, 1994), p. 66. Cf. also Reinhard Bendix, Strukturgeschichtliche Voraussetzungen der nationalen und kulturellen Identität in der Neuzeit" in Berhard Giesen (ed.), *Nationale und kulturelle Identität. Studien zur Entwicklung des kollektiven Bewutseins in der Neuzeit* (Frankfurt am Main, Suhrkamp, 1996), pp. 39-55.

[5] Niklas Luhmann, "Subjektive Rechte: Zum Umbau des Rechtsbewutseins für die moderne Gesellschaft," in *Gesellschaftsstruktur und Semantik. Studien zur Wissenssoziologie der modernen Gesellschaft*, Band 2 (Frankfurt am Main: Suhrkamp, 1993), pp. 45-104.

[6] This section builds on my earlier "On the Necessity and the Impossibility of a European Cultural Identity," in J. Peter Burgess (ed.) *Political Cultural and Cultural Politics in Postmodern Europe* (Amsterdam/Atlanta: Rodopi Press, 1997).

[7] G.W.F. Hegel, *Phänomenologie des Geistes* (Frankfurt am Main: Suhrkamp, 1972), p. 46.

[8] G.W.F. Hegel, "Glauben und Wissen," in *Jenaer Schriften* (Frankfurt am Main: Suhrkamp, 1972), p. 46.

[9] Hegel, *Phänomenologie*, p. 298.

[10] W.T. Jones, W., *The Classical Mind*, (New York/London: Harcourt Brace Jovanavich College Publishers, 1970), p. 19

[11] Michel Lallement, *Histoire des idées sociologiques. Tome 1: des origines à Weber* (Paris: Nathan, 1993), p. 15.

[12] Plato, *The Republic*, Loeb Classical Library (London: William Heinemen, Ltd, 1930), 425b-426b.

[13] Plato, *The Republic*, 358e-359a.

[14] Plato, *The Republic*, 519a; Plato, p. 278

[15] Aristoteles, *The Politics* Loeb, Classical Library (London: William Heinemen, Ltd, 1932), 1287b.

[16] Jean Imbert, *Le droit antique* (Paris: P.U.F., 1961), p. 44.

[17] Theodor Mommsen & Paul Krueger (eds.) Digesta: *The Digest of Justianian*, Alan Watson (trans.) (Philadelphia: University of Pennsylvania Press, 1985). Michel Villey, *Le droit roman* (Paris: P.U.F., 1945), pp. 40-44.

[18] This notion of the modernization of individual belonging to the state is in some ways evoked by Magnus Enzel's concept of "absolute citizen".

[19] Weber, *Rechtssoziologie*, p. 329.

[20] [...als reine Vernunft , auf die Willkür, unangesehen dieser ihres Objekts, angewandt, an sie, als Vermögen der Prinzipien (und hier praktischer Prinzipien, mithin als gesetzgebendes Vermögen), da ihr die Materie des Gesetzes abgeht, nichts mehr, als die Form der Tauglichkeit der Maxime der Willkür zum allgemeinen Gesetz selbst zum obersten Gesetze und Bestimmungsgrunde der Willkür machen, und, da die Maximen des Menschen aus subjektiven Ursachen mit jenen objektiven nicht von selbst übereinstimmen, dieses Gesetz nur schlechthin, als Imperative des Verbots oder Gebots, vorschreiben." Kant, *Metaphysik der Sitten*, Werkasugabe, VIII (Frankfurt am Main: Suhrkamp, 1977), p. 318.

[21] Cf., for example, Niklas Luhmann, *Soziale Systeme: Grundriss einer allgemeinen Theorie* (Frankfurt am Main: Suhrkamp, 1984).

[22]

"Wissenschaft als Beruf," in *Gesammelte Aufsätze zur Wissenschaftslehre* (Tübingen: J.C.B. Mohr, 1988), p. 602.

[23] Jorunn Sem Fure's resourceful research and reflection on the constitutional debates in Silesia after 1945 opens precisely this field of reflection. The legality of rights in general and property rights in particulary repose on two radically heterogeneous structures of legitimacy corresponding to the two sides of what is today the German — Polish Border. The question of legitimacy and the conflicts which organize repose on conflicts of culture, of the culturation of power and of the culture of administrative bureacracy: "Even if Silesia never achieved a strong political subjectivity, the region never ceased to be conceived of and treated as a geographical administrative unit. Its regional identity has been challenged by nation state ambitions and administrative divisions, but is still a cultural as well as a political reality." "Borders and Identities — Unstable Realities" (unpublished manuscript, 1997).

[24] Weber, *Rechtssoziologie*, pp. 346-7.

[25] Weber, "Soziologische Grundbegriffe," in *Gesammelte Aufsätze zur Wissenschaftslehre* (Tübingen: J.C.B. Mohr, 1988), pp. 571-573.

[26] Weber, "Soziologische Grundbegriffe," p. 572.

[27] "Die heute geläufigste Legitimitätsform ist der Legalitätsglaube: die Fügsamkeit gegenüber formal korrekt und in der üblichen Form zustandegekommenen Satzungen. Der Gegensatz paktierer und oktroyierter Ordnungen ist dabei nur relativ. Denn sobald die Geltung einer paktierten Ordnung nicht auf einmütiger Vereinbarung beruht, — wie dies in der Vergangenheit oft für erforderlich zur wirklichen Legitimität gehalten würde, — sonder innerhalb eines Kreises von Menschen auf tatsächlicher Fügsamkeit abweichend Wollender gegenüber Majoritäten — wie es sehr oft der Fall ist —, dann liegt tatsächlich eine Oktroyierung gegenüber der Minderheit vor." Weber, "Soziologische Grundbegriffe," p. 581..

[28] Jürgen Habermas, "Recht und Moral," in *Fakizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (Frankfurt am Main, Suhrkamp, 1994), p. 549.

[29] Niklas Luhmann*, Soziale Systeme: Grundriss einer allgemeinen Theorie* (Frankfurt am Main: Suhrkamp, 1984); also Gunter Teubner, "How the Law Thinks: Toward a Constructivist Epistemology of Law." Unpublished manuscript, January, 1989.

[30] Weber, "Die drei reinen Typen der legitimen Herrschaft," in *Gesammelte Aufsätze zur Wissenschaftslehre* (Tübingen: J.C.B. Mohr, 1988), p. 475.

[31] Weber, "Die drei reinen Typen," p. 477.

[32] Weber, "Die drei reinen Typen," p. 476.

[33] Gunther Teubner, "Substantive and Reflexive Elements in Modern Law," *Law & Society Review*, Volume 17, Number 2 (1983). Cf. also "`And God Laughed'...Indeterminacy, Self-Reference and Pardox in Law," (Badia Fiesolana: European University Institute, 1988); "Die vielköpfige Hydra: Netzwerke als kollektive Akteure höherer Ordnung" in W. Krohn and G. Küppers (eds.) *Emergenz und Selbstorganistaion* (1990); "Autopiesis and Steering: How Politics Profit from the Normative Surplus of Capital".in R.J. In't veld, L. Schaap, C.J.A.M. Termeer & M.J.W. van Twist (eds.) *Steering: Autopoiesis and Configuration Theory* (Dordrecht: Kluwer, 1991).

[34] Jürgen Habermas, *Theorie des kommunikativen Handelns*, (Frankfurt am Main: Suhrkamp Verlag, 1981). Nklas Luhmann, *Rechtssoziologie* (Hamburg: Rowolt, 1972).

[35] Philipp Nonet and Philip Selznick*, Law and Society in Transition* (New York: Harper and Row, 1978), p. 78.

[36] Marc Bloch, *La société féodale* (Paris: Albin Michel, 1968), pp. 454-57

[37] Teubner, "Substantive," pp. 4-6.

[38] Teubner, "Substantive," p. 19.

[39] Teubner, "Social Order from Legislative Noise? Autopoietic Closure as a Problem for Legal Regulation" in Gunther Teubner (ed.), *State, Law and Economy as Autopoietic Systems* (Berling: de Gruter, 1989), p. 609.

[40] The original theories of "autopoeisis" were developed most notably in Niklas Luhmann*, Soziale Systeme: Grundriss einer allgemeinen Theorie* (Frankfurt am Main: Suhrkamp, 1984); Humberto R. Maturana & Francisco J. Varela, *Autopeiesis and Cognition* (Boston: Reidel, 1980); Henz von Foerster*, Observing Systems* (Seaside, Cal.: Intersystems Publications, 1981); Gunter Teubner (ed.*), Autopoietic Law: A New Approach to Law and Society* (Berlin: de Gruter, 1988).

[41] Teubner, "Social Order," p. 613.

[42] Teubner, "Social Order," p. 614.

[43] Any number of texts could be evoked here. Two central points of departure are Michel Foucault, *L'ordre du discours* (Paris: Gallimard, 1971); Jean-Francois Lyotard, *Le différend* (Paris: Editions de Minuit, 1983) and Jacques Derrida, *Force de loi* (Paris: Galilée, 1990).

[44] Gunther Teubner, "The Two Faces of Janus: Rethinking Legal Pluralism." Some platform statements of Critical Legal Theory are Stanley Fish, "Working on the Chain Gang: Interpretation in Law and Literature" "Still Wrong after all these Years," and "Force," in *Doing What Comes Naturally. Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Durham & London: Duke University Press, 1989); Deconstruction and the Possibility of Justice; Ronald Dworkin, "Law as Interpretation," *Critical Inquiry* 179 (1982); Kenneth Abraham, "Three Fallacies of Interpretation: A Comment on Precedent and Judicial Decision," 23 *Arizona Law Review* 771 (1981) and "Statutory Interpretation and Literary Theory: Some Concerns of an Unlikly Pair," 32 *Rutgers Law Review* 676 (1979); David Kairys (ed.), *The Politics of Law: A Progressive Critique* (New York: Pantheon Books, 1990); David Grey Carlson*, Deconstruction and the Possibility of Justice* (New York: Routlege, 1992) Samuel Weber, *Institution and Interpretation* (Minneapolis, University of Minnesota Press, 1987).

[45] Teubner, "The Two Faces," p. 1.

[46] "Darin scheint mir die hermeneutische Situation für den Historiker wie für den Jursiten die gleiche, da wir jedem Text gegenüber in einer unmittelbaren Sinnerwartung leben. Ein unmittelbares Zugehen auf den historischen Gegenstand, das seinen Stellen wert objektiv ermittelte, kann es nicht geben. Der Historiker mu die gleiche Reflexion leisten, die aud den Juristen leitet." Hans-Georg Gadamer, *Wahrheit und Methode. Grundzüge einer philosophischen Hermenuetik* (Tübingen: J.C.B. Mohr, 1990), pp. 332-3. Cf. also Paul Ricoeur, "Civilisation universelles et cultures nationales," *Histoire et vérité* (Paris: Editions du seuil, 1955.), pp. 286-300.

[47] (Oxford U.K. & Cambridge, U.S.A.: Blackwell Publishers, 1993), p. 84.

[48] For example: "Begreift man die Legitimation von Entscheidungen als einen institutionalierten Lernproze, als laufende Umstrukturierung von Erwartungen, die den Entscheidungsproze begleitet, dann kann mit der Frage nach der Legitimation durch Verfahren nicht der juristische Bezug auf das Verfahrensrecht und auch nicht dessen rechtspolitische Würdigung gemeint sein. Ob Wahlen dem Wahlrecht, Plenarabstimmungen der Geschäftsordnung des Parlaments, Beweisaufnahmen der Prozeordnung entsprechen, und ob die vorhandenen Regelungen verfahrensrechtlicher Art reformbedürftig sind oder nicht, das sind andere Fragen. Legitimation durch Verfahren ist nicht etwa Rechtfertigung durch Verfahrensrecht, obwohl Verfahren eine rechtliche Regelung voraussetzen; vielmehr geht es um die Umstrukturierung des Erwartens durch den faktischen Kommunikationsproze, der nach Magabe rechtlicher Regelungen abläuft, also um wirkliches Geschehen und nicht um eine normative Sinnbeziehung. Ein soziologischer Verfahresnbegriff, der jenen

empirischen Sachverhalt zum Ausdruck brächte, steht nicht zur Verfügung. Bevor wir zu Einzeluntersuchungen übergehen, mu ein solcher Begriff daher erst erarbeitet werden." Niklas Luhmann, *Legitimation durch Verfahren* (Frankfurt am Main: Suhrkamp, 1993), pp. 37-8.

[49] Gunther Teubner, "The King's Many Bodies: The Selfdeconstruction of Laws Hierarchy," (Oslo: Working Paper, ARENA, University of Oslo, 1997).

[50] Teubner, "The King's," p. 3.

[51] Teubner, "The King's," p. 3.

[52] Teubner, "The King's," p. 4.