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EQUALIZATION AND LABOUR RELATIONS:
A TENTATIVE RECONSTRUCTION OF TEUBNER'S MODEL OF REFLEXIVE LAW

by

MICHEL ROY, B.A.

A thesis submitted to
the Faculty of Graduate Studies and Research
in partial fulfilment of
the requirements for the degree of

Master of Arts

Department of Law

Carleton University
Ottawa, Ontario
10 January 1995

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**Equalization and Labour Relations: A Tentative Reconstruction of Teubner's Model of
Reflexive Law**

**submitted by Michel Roy B.A.(Hons.) Carleton University
in partial fulfilment of the requirements for
the degree of Master of Arts**

A handwritten signature in dark ink, appearing to read "J. B. B.", is written over a horizontal line.

Thesis Supervisor

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Chair, Department of Law

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January 13, 1995**

Abstract

This thesis comprises an examination of the neo-evolutionary theory of reflexive law, and in particular, the theory of Gunther Teubner and his labelling of labour law as reflexive. Drawing on the insights of Jurgen Habermas' model of discursive rationality, the thesis argues that a concern for equalization of bargaining power is critical to reflexive theory. Teubner's model, which is characterized by a certain "inconsistent" approach to equalization is reconstructed. On this reconstruction, the "reflexiveness" of German labour relations law is considered. The analysis concludes that the realm of collective bargaining is characterized by a "redistribution" of bargaining power between labour and capital which for the most part is not reflexive. However, it is argued that the regime of co-determination is oriented along much more reflexive lines, although even this regime fails to completely equalize bargaining power between labour and capital.

Table of Contents

Acceptance Sheet	ii
Abstract	iii
Table of Contents	iv
List of Appendices	vi
 Introduction	 1
I. On the relation between "reflexive law" and labour relations law	2
II. Scope	4
III. Theoretical and methodological approach	6
IV. Outline	8
 Chapter I. Reflexive Legal Theory	 12
I. Legal evolution and rationality "types"	12
Formal rationality	16
Substantive rationality	18
"Regulatory trilemma": the failure of substantive law	21
a. When nothing happens	23
b. When too much happens: society	23
c. When too much happens: law	24
Reflexive rationality	26
Reflexivity: self-reference and self-regulation	28
a. Self-reference	28
b. Self-regulation	30
II. Regulating regulations: bargaining as the "point of convergence"	32
Reflexivity and labour law	36
 Chapter II. Towards a Retrieval of "Equalization" in Reflexive Law	 38
I. Reflexive rationality and discursive legitimation	42
How reflexive law does its job: the institutionalization of discursive legitimation	46
"Modes" of equalization and discursive rationality	56
II. Equalization and the redistribution of legitimacy capacity	62
Summarizing a "reconstructed" reflexive law	66

Chapter III. Labour Relations and Reflexion: an Assessment	69
I. Collective bargaining and co-determination: distinct modes of equalization	70
Collective bargaining	70
Co-determination	72
II. On the potential and limitations of co-determin- ation law in equalizing bargaining power	75
Limits to discursive rationality generated by co-determination law	81
Conclusion	87
Conclusion	89
"Discoursing" capitalism away?	91
Bibliography	94
Appendix A	101

List of Appendices

Appendix	Description	Page
A	Types and Dimensions of Modern Legal Rationality	101

Introduction

The purpose of this study is to explore and discuss from a critical perspective the recent development of neo-evolutionary legal theory. In particular, I examine the theory reflexive law and its links with labour relations law, seeking indication of the potential of reflexivist legal analysis and prescription in this area of legal regulation. I suggest that one reason for those interested in labour relations to take account of a reflexive model of law has to do simply with the way that the realm of workplace regulation, through collective labour law, is cited as indication of the empirical validity of its claims.

The problem I seek to identify and resolve in this thesis concerns the accuracy of the description of labour law offered by reflexive legal theory. My thesis is really comprised of two elementary claims. The first is that reflexive legal theory, and its model of labour law, potentially offers an excellent opportunity for understanding some of the elements of some labour relations regimes¹. The second is that in order to afford a "clearer picture" of the ways that labour relations regimes can serve to both help and hinder the

¹ To avoid the certain question of what I consider a "labour relations regime" to be, I must attempt a definition. I offer only a cursory one however, which is admittedly "loose." By labour relations regimes, I mean to characterize the structures, legal and otherwise, which both hamper and facilitate the "interest aspirations" of workers and employers in the context of the labour market.

efforts of workers in challenging capitalism, it is necessary to "reconstruct" what I take to be a core element of reflexive theory - a concern with equalization of bargaining power between labour and capital.

As such, a substantial component of my "problematic" rests on a notion that reflexive law must include a substantial commitment to equalizing bargaining positions in situations where discursive rationality is said to be responsible for legitimating decision-making procedures.

I. On the relation between "reflexive law" and labour relations law

Gunther Teubner, following Luhmann and Nonet and Selznick, has posited the appearance of a new "mode" of legal rationality which characterizes the West.² It is suggested that this "new" mode is supplanting a substantivist, welfare-state interventionist type of rationality with one which is less concerned with the "justice" of legally mediated relationships. This "new" post-welfare state legal rationality is defined by a principle of reflexion, and is thus known as reflexivity. Reflexive legal rationality and the legal instruments through which it is operationalized, is said to be primarily concerned with allowing social sub-systems to self-regulate, in a manner which promotes flexibility and consensus-driven legitimation. Of course, the emphasis on bargaining and negotiation that is integral to the

² G. Teubner, "Substantive and Reflexive Elements in Modern Law", Law and Society Review, Vol. 17, No. 2, (1983), p.276.

notion of a reflexivized legal order (a notion which is accentuated by the proposed absence of the state in the determination of the outcome of bargaining) makes the theory of reflexive law of particular salience for the study of labour relations regimes.

The claim is that contemporary labour law (post-World War II in most cases) demonstrates some of the characteristics of a reflexively oriented legal system - a concrete example of the trend toward "reflexivization":³

Labor law... is, with respect to collective bargaining, characterized to some degree by a more abstract control technique in which we can recognize a "reflexive" potential. The legal regulation of collective bargaining operates principally by shaping the organization of collective bargaining, defining procedural norms, and limiting or expanding the competencies of the collective actors. Law attempts to balance bargaining power, but this only indirectly controls specific results.⁴

One might take from this a suggestion of the potential of reflexive law for addressing the exploitative underpinnings of employment relationships in a capitalistic labour market by balancing bargaining power. This approach would be laudable, and in fact, is one that I am most interested in, but the theorization of reflexive law places little emphasis on this

³ G. Teubner (1983), p.276; Teubner, "Juridification - Concepts, Aspects, Limits, Solutions" in Juridification of Social Spheres: A Comparative Analysis in the Areas of Labor, Corporate, Antitrust and Social Welfare Law, G. Teubner, ed., (Berlin: de Gruyter, 1987), p. 35.

⁴ Teubner (1983), p.276. Emphasis added. See also p.256.

"goal" at present. As such, a motive to "equalize" must be constructed, in order to address what I identify as a basic contradiction or antinomy in the theory of reflexive law. In Teubner's work, the aspirations of reflexive law to power-equalization and balance are at times significant and at other times of marginal import. I suggest that this antinomy is important to identify and address, not only because equalization seems to be theoretically necessary to reflexive theory, but also because equalization has been a practical concern for organized workers in perhaps one of the "most reflexive" of contemporary labour relations regimes, the German one⁵, which Teubner relies upon to ground his comments on the reflexivity of labour law.

This thesis, then, involves a critical and immanent reconstruction of reflexive law, and an investigation of its potential (in the labour relations context) for overcoming exploitative relations of domination in a capitalistic labour market.

II. Scope

Where labour law is involved, the theory of legal reflexivity may be relied upon for an authoritative account of

⁵ The German labour relations regime serves as the main example of the reflexivity of labour law for Teubner. As an example of the importance of at least one type of formal equality to organized workers in the German context, Streeck makes it quite clear how the struggle for parity of employee and employer representatives on co-determined management boards played a major role in the development of the German labour relations regime. See W. Streeck, "Codetermination: After Four Decades," in Social Institutions and Economic Performance: Studies of Industrial Relations in Advanced Capitalist Economies, (London: Sage Publications, 1992a).

some of the historical elements of the development of labour relations regimes. In large measure, however, there remain areas where healthy speculation is warranted. My purpose (and argument) centres around the illustration of some deficiencies which, in the final analysis, hinder the accuracy of the reflexive characterization of labour relations law.

Two classical "critical" labour relations concerns interest me in this regard. As a direct implication of the emphasis on negotiation and bargaining in reflexive theory, it is necessary to consider "the scope and form of worker participation in management, [and] the bounds of institutionalized conflict between labor and management,"⁶ in assessing the reflexiveness of labour law.

I propose a model of reflexive law that contains two interrelated components. The first of these involves the flexibility, "learning capacity," and cognitive ability of a regulated sphere to adapt to its external environment. This component characterizes the primary element of Teubner's reflexive theory.⁷ Beyond this component, I seek to

⁶ C. Becker, "Comment on Weiss," Law & Society Review, Vol.23, No. 5 (1989), at p.775. Becker correctly raises these three issues, and indicates their centrality to labour relations in a discussion of an article by Weiss; "Recent Trends in the Development of Labor Law in the Federal Republic of Germany," Law & Society Review, Vol.23, No.5 (1989), p.759.

⁷ The concepts here will become clearer in the text of the thesis. For the moment, it is sufficient to note that for Teubner, at least, the development of the noted capacities by a regulated social sphere represents a sort of "end". That is, for Teubner, a reflexive ordering of relations might be said to have occurred if the area of regulation (a firm, for example) exhibits these characteristics.

demonstrate the importance and viability of a second one, which involves the challenge to "established orders" of power, that reflexive law addresses in its concern for balancing bargaining power and preventing abuses of power - what I refer to as the equalization component. I suggest that this two-part model of reflexion helps to illuminate how even in contemporary labour relations regimes which are characterized by a distribution of decision-making authority to workers, limitations on joint decision-making authority limit the extent to which such regimes may be labelled reflexive.

III. Theoretical and methodological approach

It will be clear that a Marxist perspective, with its emphasis on the place of social relations of capitalist production in expressing exploitation, informs this work. This perspective is useful for attempting to understand the relations of power which constitute and contextualize the capitalist labour market and capitalist production. It is also recognized, however, that merely to invoke the name of Marx is not sufficient (or should not be) to demonstrate or discover "truth." Accordingly, this element of the theoretical approach of the project is undertaken with an explicit recognition that although the Marxist paradigm does have its difficulties, it can still successfully serve as the foundation for class-based analyses. One of the more prominent difficulties inherent to the Marxist paradigm has been the tendency of some of its adherents to prioritize class

struggle and the relations of production over all other struggles and relations of power.⁸

I approach the concept of reflexive law and labour relations not only from a generalized Marxist "sense" of history, but also from a particularly class-based analysis which holds that labour and capital each have separate interests of their "own" on a capitalistic labour market.

Yet, it is clear that there are considerable obstacles to specifying "a clearly differentiated and homogenous set of Marxist theories or explanations which systematically elucidate relations between unions and employers, workers and managers." This dilemma is at least partly resolved, Hyman suggests, by the notion that as a matter of methodology, what can distinguish a Marxist approach to industrial relations is the pattern of inquiry itself, rather than exclusively its conclusions. That is, it is "the framework of what is taken for granted and what is regarded as problematic that most

⁸ Hunt has offered a useful critique of the determinist tendencies of Marxists to prioritize "class struggle." In "Can Marxism Survive?", Rethinking Marxism, Vol. 5, No. 2, (1992), Hunt suggests that the political crisis of Marxism is at least partly due to this theoretical problem. Suggesting that "Marxism as method" is the path to be taken, he offers that rather than religiously applying traditionally accepted Marxist concepts, a revitalized Marxism would seek to apply only useful conceptual devices to concrete historical occurrences. In this manner, actual situations can be examined with reference to such important notions as the "relations of production" but in a way that does not automatically imply precedence over other sites of struggle.

⁹ R. Hyman, "Theory in Industrial Relations: Towards a Materialist Analysis", The Political Economy of Industrial Relations: Theory and Practice in a Cold Climate, (London: MacMillan, 1989c), p. 127.

differentiates" a Marxist analysis of industrial relations.¹⁰

IV. Outline

In the first chapter, the development of Teubner's neo-evolutionary theory of law and reflexivity will be considered.¹¹ This thesis focuses so heavily on Teubner's theorization of reflexive law for two reasons. The first is that he is the foremost theoretician of reflexive law. His eminent position in this regard is to be gauged not only by the prolificity of his works on the subject, but also by the extent to which he has, perhaps more than any other, consistently sought to refine his model of reflexive law.

¹⁰ Hyman (1989c), p.128. In sketching out the requirements of a well developed sociology of labour law, Clark has indicated at least three relationships which should not be taken for granted and which therefore require scrutiny. He describes these as the main substantive concerns of such a sociology: "the relation between law and social domination (the function of the law in social relations of domination and subordination); the relation between law and the political structure (the law, political power, and the role of the state); and the relation between law and the economy (The role of the law in the processes of industrial and economic control)."; J. Clark, "Towards a Sociology of Labour Law: An Analysis of the German Writings of Otto Kahn-Freund," Labour Law and Industrial Relations: Building on Kahn-Freund, Lord Wedderburn, et al, eds., (Oxford: Clarendon Press, 1983), p.102.

¹¹ As one of the chief proponents of reflexivity and the integrally related concept of autopoiesis in law, the works of Gunther Teubner will be widely consulted in this thesis: *supra* notes 2 and 3; "Autopoiesis in Law and Society: A Rejoinder to Blankenburg", Law & Society Review, Vol. 18, No. 2, (1984); "The Transformation of Law in the Welfare State," Dilemmas of Law in the Welfare State, G. Teubner, ed., (Berlin: de Gruyter, 1985a); "After Legal Instrumentalism: Strategic Models of Post Regulatory Law," Dilemmas of Law in the Welfare State, G. Teubner, ed., Berlin: de Gruyter, 1985b; "Industrial Democracy Through Law? Social Functions of Law in Institutional Innovation," Contract and Organization: Legal Analysis in the Light of Economic and Social Theory, T. Daintith and G. Teubner, eds., (Berlin: de Gruyter, 1986); "Introduction to Autopoietic Law" in Autopoietic Law: A New Approach to Law and Society, G. Teubner, ed., (Berlin: de Gruyter, 1988a); "Evolution of Autopoietic Law" in Autopoietic Law: A New Approach to Law and Society, G. Teubner, ed., (Berlin: de Gruyter, 1988b); "How the Law Thinks: Toward a Constructivist Epistemology of Law", Law & Society Review, Vol. 23, No. 5, (1989); and Law as an Autopoietic System, A. Bankowska and R. Adler, Trans., Z. Bankowska, ed., (Oxford: Blackwell, 1993).

The second reason is that Teubner has tended to refer to labour relations law in particular, to exemplify some of the elements of his model.

Rather than engaging in a detailed criticism of its evolutionary heritage, the more central objective will be to "map out" some of the theory's general terrain and its origins. The notion of reflexive law itself assumes a role in the even larger paradigm of autopoietic legal theory. For the most part, I will avoid the considerable and complex debate on autopoiesis in law. The discussion on reflexivity and autopoiesis has entered (and derives from) a certain category of broadly abstract "grand" systems theorization. As such, there is a certain pressure to succumb to the "'Jabberwocky' of sociolegal theory"¹², for which Zolo has prescribed "linguistic therapy"¹³ as a result of the field's often exceptionally complex lexicon. One might be forgiven for turning away from these developments in exasperation, but it is not for this reason (solely) that I will avoid some of the "grander" aspects of these trends. Actually, because the task at hand involves a limited examination of reflexivity and

¹² Teubner (1989), p.727. There is certainly no question that comprehension of the latest work in the fields of post-structuralist analysis, discourse theory and autopoiesis in law does not always come easily. In fact "[o]bscurity of language,...is the most common critical comment on those recent European theory fashions.... The language is said to be overly complex, often incomprehensible, and to conceal usually trivialities behind a smoke screen of trendy words like legal discourse, communicative rationality and legal autopoiesis."; pp. 727-728.

¹³ Danilo Zolo, quoted in Teubner (1993), p.17.

labour relations law, it proves more burdensome than useful to attempt to engage the entire set of conceptual/theoretical provisions of this debate, though certainly they will arise. Teubner himself is careful to point out that there are various "self" concepts which make up the core of the theory of autopoiesis, and they do not all equate with each other.¹⁴ As such, it is perfectly plausible to investigate one of these concepts in particular, without necessarily isolating it from the totality of the theoretical debate of which it is a part.

The second chapter will constitute an attempt to situate the principle of equalization in a more prominent place than reflexive theory (in Teubner's model at least) presently conceives. I argue that the basis for such an emphasis lies within the premises of reflexive legal theory itself, by virtue of its reliance on discursively rational legitimation strategies. In a sense, this tack involves making a more plausible case for how reflexive law might be distinguished from the formal and substantively rational legal orders that it supposedly replaces. I aim to show how the negotiative/discursive premises of reflexion's legitimation must serve as a key measure by which the reflexivity of regulation may be gauged.

Based on the "case" made for equalization in chapter two,

¹⁴ So notions like self-reference, self-production, self organization, reflexivity, and autopoiesis may fruitfully be analyzed as particular constructs. There are, it seems "various phenomena of self referentiality" to be considered under the aegis of the study of legal systems from an autopoietic standpoint; Teubner (1993), pp.16-19.

the theme of the third chapter is the "measuring up" of the German labour relations regime. The analysis suggests that to the extent that the German regime of co-determination is predicated on certain rights of participation in decision-making for workers (as against the prerogatives of their employers), it approximates the conditions of discursive rationality. Yet, the proceduralization of decision-making in the "best case scenario" of the German regime, can also be understood to fall short of the mark. That is, according to my reconstruction of reflexive law, it is possible to assert that even the German regime fails to equalize bargaining power between workers and employers in a fashion that would allow for its characterization as guided by an *entirely* reflexive type of rationality.

In the concluding section, I suggest that while particular labour relations regimes may indeed fail to provide the conditions of discursive rationality required for a democratic distribution of the capacity to make decisions, a reflexive theory which is based on such goals has a certain potential for democratizing capitalist production.

Chapter I. Reflexive Legal Theory

In this chapter the theory of reflexive legal rationality and reflexive law is considered in some detail. The following analysis explores the nature of legal evolution as proposed by reflexive theory and includes consideration of the rationality "types" of formal, substantive and reflexive legal orders, the concepts of "regulatory trilemma," the distinction between self-reference and self-regulation, and the significance of "bargaining" in reflexion. While these related concepts may not seem particularly germane to a discussion of labour relations initially, they do constitute some of the core features of Teubner's model of reflexive law. As such, it is necessary to consider them in some detail.

I. Legal evolution and rationality "types"

The neo-evolutionary school of contemporary legal thought alleges that the legal orders of western capitalist societies have witnessed an evolutionary¹ development of the "rationalities" that underwrite their legal orders. These rationalities are characterized by fundamental or "core" variations in their justifications, structural supports, and functions. As a result of the development of neo-evolutionary

¹ For Teubner's distinction between "evolutionary" and "evolutionist" accounts of legal development see Teubner (1993), pp.47-50: "'Evolutionist' concepts, in which a particular direction is attributed to processes of change, such as progress, logic of development, and perfection, are not under discussion here.... However, 'evolutionary' concepts, which are based on the *mechanisms* of development rather than its direction, give less cause for concern."

legal theory, and certainly in addition to it, Teubner synthesized a response to what he perceived as the "inadequacies" of legal rationalities categorized as formal and substantive.² Building on the works of two German and two American legal theorists, Teubner combined tenets of legal evolutionism and systems theory to generate a set of new concepts (such as covariation) integral to the "neo-evolutionary" explanation of the evolution of law and legal rationality. This theorization of a reflexive "point" in the evolution of western law³ proposed not only to differentiate between types of legal rationality, but also suggested the existence of an emergent form of reflexive legal structure and practice.

As indicated, Teubner's initial theorization of reflexive law found its germination in the work of Habermas, Luhmann, and Nonet and Selznick, who each pursued and elucidated particular themes regarding the evolution of law and society, and whose distinct neo-evolutionary models he sought to restructure into a synthetic whole. The impetus for such a reconstructive synthesis of evolutionary legal theory was the growing debate on the "crisis of juridification" and the

² Teubner (1983).

³ I use the term "western" here to denote the specificity of Teubner's thesis to legal regimes of the liberal democratic and social democratic western nations of the world, which have more or less all experienced historical progression through similar societal formations (i.e. industrial or Fordist capitalism, welfare statism, etc.).

"'legalization' of various spheres of social life" - a debate which arose supposedly as a result of living "in a time of increasing disenchantment with the goals, structures, and performance of the regulatory state."⁴ Teubner rationalized his recomposition of various elements of the previous evolutionary analyses by proposing points of commonality shared by each of the theorists named above:

These three neo-evolutionary accounts seek to identify different "types" of law, show the progression from one type to another, and explain the processes of transition. While there are substantial differences among them, these theories are concerned with a common problem: the crisis of formal [legal] rationality."

The typical language of debate on reflexivity (and autopoiesis to an even greater extent) tends toward the incomprehensible, but without engaging in too pernicious a narrative, it is possible to illustrate the general outlines

⁴ Teubner (1983), p.240.

⁵ Teubner (1983), p.239. It would seem that both the disenchantment and the debate about it continue. See for instance A. Bartholomew, "Democratic Citizenship, Social Rights and the 'Reflexive Continuation' of the Welfare State," Studies in Political Economy, 42, (1994).

⁶ Teubner, (1983), p.242. Blankenburg was unconvinced, however, of the plausibility of conceptual amalgamation: "Teubner's theory of evolution towards 'reflexive law' transfers elements of theories that are themselves transferrals and thus is doubly dangerous. Teubner cites work by Nonet and Selznick, by Luhmann, and by Habermas without considering the historical sources on which their theories rely and the fit or lack of fit between them. Teubner's approach is not to integrate these theories at their core but instead to select elements of each, guided by a sometimes distorted view of where they might fit together. Standing on the shoulders of giants, he hardly touches the ground."; E. Blankenburg, "The Poverty of Evolutionism: A Critique of Teubner's Model of Reflexive Law," Law & Society Review, Vol. 18, No. 2, (1984), p.274.

of the theory's depiction of the transition from a legal order characterized by one type of rationality to another.

The distinctions that Teubner makes between formal, substantive and reflexive legal rationality are drawn by reference to three characteristic dimensions of law. These dimensions are the "justification of law ('norm rationality')...; external functions of law ('system rationality')...; [and] internal structure of law ('internal rationality')".⁷

According to the constellation of these three elements in a legal regime, Teubner suggests that separate "historically specific configuration[s]" of law can be identified.⁸ In the era of formal rationality, the justification of the legal order is linked to the promotion of individual autonomy; the external function is the structural mobilization of resources and commodities in a market economy; and the internal structure of the law is characterized by "formal" or rule-oriented decision making. The substantive regime, in contrast, has as its justification the "collective regulation"

⁷ In using these categories, Teubner follows Habermas (whose corresponding terminology appears in brackets), who in turn was building on some of Weber's original formulations. Teubner, in respect of these categories, offers: "System rationality refers to the external social functions of law. It designates the capacity of the legal order to respond to the control problems of society at large. Norm rationality, in contrast, refers to the fundamental principles which justify the specific way that legal norms should govern human actions." Teubner (1983), p.252. The internal rationality or structure of a legal order is somewhat a function of the "interplay" between prevailing norm and system rationality; see p.253.

⁸ Teubner (1983), p.252.

of social and economic activity; its external function is the "modification of market-determined patterns and structures of behaviour"; and the prevailing internal structure is purposive or outcome-oriented. The justification of reflexivist legal rationality is demonstrated by a concern not for protecting individual autonomy or generating substantive outcomes through regulation, but rather is targeted at "controlling self-regulation". The external function of such a legal order is the "structuring and restructuring of systems for internal discourse and external coordination", while internally the law would be oriented toward "relationally oriented institutional structures and decision processes".⁹

Formal rationality

Generally speaking, each of the types of legal rationality correspond with historical developments in the political economy of the west, that is, with respect to the historical development of capitalism and the state. It is submitted that formal rationality predominates in the era of "classical" capitalism. The influence of Weber, who earlier conceptualized the legal regime which was consonant with this era as formally rational or autonomous, is easily discerned here. It is perhaps helpful to recall some elements of his categorization of formally rational law.

Of chief importance for a formally rational legal order is the creation and maintenance of at least the appearance of

⁹ See table at Appendix A.

a relatively seamless web of logically consistent decisions and processes. The processes must be oriented to creating consistent decisions and the decisions must be oriented to underscoring the consistency of the reasoning processes. As a central element of this formally rational order, the approach of the law to factors such as "evidence," is one which witnesses the application of strict rules to determine the applicability of "external" information, leading to "tests" of relevance which must be satisfied before such information is admitted as a legal construct to the determinative process.¹⁰

Concerning the rule-oriented rationality of formal law, Handler has proposed that formal law

is conceptually abstract, precise, and procedural; its rules of interpretation strive for uniformity and continuity. It seeks to resolve social conflicts without regard to ethical, political, economic, or social consequences. It is ostensibly substantively neutral. As such, it fit the needs of the rising bourgeoisie by

¹⁰ M. Weber, Economy and Society, G. Roth and C. Wittick, eds., Fischhoff, E., et al., trans., (Berkeley: University of California Press, 1978), pp. 656-657. Weber enumerates five postulates from which the "science" of formal legal logic departs: "...first, that every concrete legal decision be the 'application' of an abstract legal proposition to a concrete 'fact situation'; second, that it must be possible in every concrete case to derive the decision from abstract legal propositions by means of legal logic; third, that the law must actually or virtually constitute a 'gapless' system of legal propositions, or must, at least, be treated as if it were such a gapless system; fourth, that whatever cannot be 'construed' rationally in legal terms is also legally irrelevant; and fifth, that every social action of human beings must always be visualized as either an 'application' or 'execution' of legal propositions, or as an 'infringement' thereof...."; Weber (1978), p.657-658.

providing for the maximum amount of market freedom and certainty.¹¹

Substantive rationality

Substantive rationality, it is proposed, becomes prevalent during the era of the welfare state. In the debate on juridification, the implied effect of this rationality shift is the burgeoning "materialization" of law. According to Teubner, the central function of law can no longer be characterized as conflict resolution; instead, law is increasingly used as an instrument of state intervention. In this phase of the instrumentalization of law the political system assumes custody of social concerns, which requires "the definition of goals, the choice of normative means, the ordering of concrete behavioral programs and the implementation of norms."¹² Concurrent with the growth of material or instrumental law, is the germination of a "new inner legitimation"¹³ for law itself. Whereas, as noted above, the era of formal legal rationality was supposedly maintained by a legitimation based on the protection it offered autonomous action, material law is legitimated and legitimates itself on the basis of its interventionist results. Thus the claims of law's ability to produce

¹¹ J. Handler, "Dependent People, the State, and the Modern/Postmodern Search for the Dialogic Community," UCLA Law Review, Vol. 35, (1987), p.1043.

¹² Teubner (1987), p. 14; (1983), p.254.

¹³ Teubner (1987), p.15.

"justice" undergo a considerable shift - from simply maintaining the terms and conditions of freely entered contracts to ensuring the "just" outcomes/results of legally constituted relationships. In terms of the structural changes to law caused by the materialization of law, a few effects have been suggested. It is argued that these include the undermining of a universalistic application of law, deviation from the autonomous model of interpretative method, and significantly, what Teubner labels the "unstoppable rise of 'purpose in law'."¹⁴ According to Teubner's analysis, this represents a shift from the application of explicit or particularly defined legal norms to the "administ[r]ation of] ill-defined standards and vague general clauses."¹⁵ The corollary of this shift is a change in the "mode of legal thinking, a shift which can adequately be defined by the term 'result orientation'."¹⁶

To cite Handler, whose interpretation of this phase of development corresponds with Teubner's, the evidence of substantive legal rationality is linked to the identification of a temporal space where:

The state began to regulate abuses or imperfections of the market and law became increasingly particularistic. Over time, legislative and judicial intervention in the content of commercial

¹⁴ Teubner (1987), pp. 15-16.

¹⁵ Teubner (1987), p.16.

¹⁶ Teubner (1987), p.16.

arrangements increased and law began to reflect explicit normative considerations. In this century, law has changed from formal rationality to substantive rationality. With the rise in regulation, there has been a vast increase in the use of law to accomplish specific substantive goals in concrete situations.¹⁷

Thus in Teubner's analysis, evolutionary processes, both internal and external to law, essentially lead to the "over-burdening" of welfare state formations and their substantivist tendencies, culminating in a crisis.¹⁸

It is critical to recognize that for reflexivists and autopoieticists, the ability of the political system to effectively utilize law for purposive ends is highly suspect. The reasons for this are two-fold. In the first place, those of this school argue that purposive legal rationality cannot bring to bear on society a sophisticated or complex enough analysis or program to meet the requirements of the "complicated self-referential structure[s] of the various social subsystems."¹⁹ In the second place, it is suggested that as a result of this inability to match the complexity of societal subsystems, the unsuitability of law for governance

¹⁷ Handler (1987), p.1043.

¹⁸ Handler offers the following description of the crisis of substantively orientated law: "This crisis of law is either lack of effectiveness or a failure of implementation. Since law now serves as one of the major instruments of the welfare state, it must satisfy enormous demands. To be able to discharge effectively its burden of directly regulating vast and diverse social areas, law must incorporate vast new bodies of social, economic and scientific bodies of knowledge into the legal system."; Handler (1987), p.1043.

¹⁹ Teubner (1984), p.298.

and instruction in these areas plays itself out in one of two ways: either law destroys the dynamic of the subsystem, or the dynamics of social subsystems ravage law.²⁰

The complicated self-referential subsystems that Teubner is referring to here include such a broad abstraction as the economy. In this analysis the interventionist state, with its "primitive" purposive programmes, cannot hope to match the complexity of the economic realm, and effectively regulate it.²¹ Teubner has characterized this set of conclusions (concerning legal evolution and the resulting crisis of juridification that arises from purposive or instrumental law) as the "regulatory trilemma."²²

Regulatory trilemma: the failure of substantive law

What was originally conceptualized by Teubner and others²³, as the "crisis of the interventionist state"²⁴ was later developed into the more sophisticated axiom of

²⁰ Teubner (1983), pp.266-270; (1984), p.298; (1988b), p.236.

²¹ Teubner (1984), p.298.

²² Teubner (1987), pp. 19-27.

²³ Habermas, for example, characterizes as "unavoidable" the damaging effect of successful welfare provision; J. Habermas, The Theory of Communicative Action: Volume Two, T. McCarthy, trans., (Boston: Beacon Press, 1987), p.357. He has suggested that "the legal and administrative means for the implementation of social welfare state programmes do not represent a passive medium, devoid of its own particular properties. Rather, they are bound up with a practice that isolates and considers separately the legal facts of the matter, that normalizes and places under surveillance."; J. Habermas, "The New Obscurity: the Crisis of the Welfare State and the Exhaustion of Utopian Energies," Philosophy and Social Criticism, Vol.11, reprinted in The New Conservatism: Cultural Critique and the Historians Debate, (Cambridge: MIT Press, 1989), p.9.

²⁴ Teubner (1983), pp.267-270.

"regulatory trilemma"²⁵, which describes the crux of the juridification problems inherent to substantively oriented law in the era of the welfare state. It seems clear that the derivation of this description is linked to a quite Habermasian sense of the "damage" law does daily:

An important element of the critique of welfare states which issues from the Habermasian literature focuses on the intrusive legalization, or juridification, associated with welfare states. The contention is that the expansion and densification of law's empire into the "lifeworld," via social welfare law [for example], produces a critically important paradox.... Welfare state juridification is thus used by Habermas as the quintessential illustration of his more general thesis of the "colonization of the lifeworld."²⁶

As formulated by Teubner, the explanation of why juridification acquires a problematic tenor has to do with both the sheer unsuitability of law for governance in some spheres (as a result of its extension beyond its means) and the difficulties that arise as a result of this. It is claimed that one of three occurrences arise when the substantive legal order of the welfare state confronts the intricacies of social subsystems.

²⁵ Teubner (1987), pp.19-27.

²⁶ Bartholomew (1993), pp.143-144. Bartholomew's work is innovative in the manner that she seeks to further elaborate the distinctions between lifeworld interventions which might be "less colonizing" than others. She points to the distinction between "welfare rights" and "citizenship based social rights" to demonstrate the potential of a dialogical model of social rights to "'curb' the colonizing tendencies of the state itself, providing direct limits on colonizing administrative state power...."; p.147.

a. When nothing happens

The first of these occurrences is "mutual indifference", whereby, simply put, nothing happens - there is little or no ascertainable result, the area to be regulated is essentially immune (for example, as a result of some form of regulatory prescription derived from legislation).²⁷ The contention here is that mutual indifference "represents an important case of the application of the 'symbolic' use of politics.... In politics great reforms are introduced which never reach society because they disappear when they are translated into law."²⁸

b. When too much happens: society

The second prospect described by regulatory trilemma is "social disintegration through law,"²⁹ whereby the destructive anti-lifeworld effects of substantively-oriented law wreak havoc on the area of social life to be regulated:

²⁷ Teubner (1987), p.22. The example of attempts at regulating the realm of business figure prominently here. In this failure, the legislative instruments by which regulation is undertaken are known colloquially as "paper tigers", p.23.

²⁸ Teubner (1987), p.23. Paradoxically, Teubner suggests that the reason why this happens is linked for example to the extreme complexity of legislation which seeks to regulate particular social spheres, citing "the inadequate litigability of modern legislative decisions on the micro and macro level" (p.22). Significantly, Teubner notes that "In the case of Germany, the conflicts between classical company law and the current laws on codetermination provide a good example of this situation....it is said that company law has primacy over codetermination law.... This would therefore be a case of such indifference of law to politically motivated change" (pp.22-23). This example of the insufficiency of legislatively procured codetermination law for the undermining of classical company law (the legal underpinnings of capitalist production and control of productive property) is an important revelation and it will arise again below.

²⁹ Teubner (1987), p.24.

Regulatory law, by delimiting class conflict and shaping the social state, has a freedom-guaranteeing character. Yet at the same time juridification reveals a dilemma. Tendencies to destroy life-world structures emanate from the very character of juridification itself in the welfare state and cannot be regarded only as undesirable side-effects of this process.³⁰

c. When too much happens: law

The third possible outcome of substantively-oriented legal intervention is labelled "legal disintegration through society."³¹ This refers to the effects on law of its political-instrumental use. In this case it is implied that the internal structure of law suffers from "successful attempts to increase the effectiveness of legal control".³² It is precisely the successful calls from the societal and

³⁰ Teubner (1987), p.24. He goes on: "Social security law itself is the most important instance of this dilemma. Modern social security certainly represents an improvement on traditional measures for care of the poor, yet bureaucratic procedures and the cash payment of legal entitlements have damaging effects on the social situation, on the self-image of those affected, and on their relations to their social environment. The alien 'if...then' structure of conditional law programs cannot react adequately, let alone preventatively, to the causation of the facts requiring compensation. Legal subsumption and bureaucratic procedures subject the concrete life-problem to 'violent abstraction'."

In a similar vein, Preuss implicates the proclivity of the welfare state toward "consumerism and its tendency to destroy traditional social, cultural and political values and the sense of collective identity as a source of individual life satisfaction."; U. Preuss, "The Concept of Rights in the Welfare State," Dilemmas of Law in the Welfare State, G. Teubner, ed., (New York: de Gruyter, 1985), p.155.

In direct opposition, it seems, to the general tendencies of this literature on the colonizing effects of substantive law, which has an inclination to posit reflexivity as the "way forward", Sheuerman has quite recently called for a "re-formalization" of law, based on the principle that the "Rule of Law" offers relief; B. Sheuerman, "The Rule of Law and the Welfare State: Toward a New Synthesis," Politics and Society, Vol.22, No.2, (1994).

³¹ Teubner (1987), p.25.

³² Teubner (1987), p.25, emphasis added.

specifically political realm to utilize law for purposive ends that result in the overburdening of law. A compact metaphorical expression of this explains how law, in such a situation, becomes "sandwiched":

on one side by social state policy, which calls for legal enforcement and thus for the adjustment of law to the logic of political guidance and on the other by the regulated areas of social life, with their autonomous logic with which law must become involved if it is to be successfully implemented. These double demands on law can go so far as to endanger its own self-reproductive organization.³³

So law, in this interpretation, becomes somewhat "tainted" by being forced to meddle in the affairs of social spheres for which it is ill equipped. In this fashion it is alleged that the pressures on the internal requirement of a legal order to justify itself in self-referential style, are too weighty, and the internal crisis of legitimation takes root. And so again we come to the apogee of autopoietic legal theory: the evolutionary emergence and the positive normative characteristics thereof, of reflexive legal rationality.

I shall return to this concept below. For the moment, it is sufficient to recognize that the result of the inability of legal systems to "cope" with such pressures is said to be the rise of reflexivity.

³³ Teubner (1987), p.25.

Reflexive rationality

Reflexive rationality, it is suggested, evolved in the "post-modern" era in which welfare states suffer crises of maintenance and legitimation. The thematic of hyper-juridification and the "welfare state" being in crisis is one that dominates the literature pertaining to reflexivity. As Rosanvallon has phrased it, the state formations in the west that adopted the substantivist outlook and justification that characterize welfare states (with their loosely-defined predilection for intervention in the market) have encountered a "developmental crisis...the two main aspects [of which]...have come to the fore: a financial crisis, and a crisis in terms of efficiency/effectiveness." While the former points to the increasing difficulty of funding the redistributive interventions of the state into the realm of the market (on behalf of those who are susceptible to the rigidities of the capitalist market), the latter refers to a crisis of legitimacy in the sense of the "objectives" of the welfare system.³⁴

Whether expressed as "procedural", "relational", "post-liberal", "socially adequate" or "reflexive" law, "post-

³⁴ P. Rosanvallon, "Beyond the Welfare State," Politics and Society, 16, (1988), p.533 and 535.

³⁵ Teubner (1984), p.299, citing the terms used by Wiethoelter, Willke, Unger, and Luhmann, respectively. The term used by Nonet and Selznick (1978), "responsive law" incorporated both purposive and participatory elements; P. Nonet, and P. Selznick, Law and Society in Transition: Toward Responsive Law, (New York: Harper, 1978), p.111. See also Teubner (1983), pp.250-251.

modern law, post-interventionist law, ...neo-corporatist law, ecological law, [or] mediating law,"³⁶ the central element of this type of legal rationality and legal form is a concern with self-regulation and self-reference, the focal points of autopoietic analyses.

Above all else, the model of reflexive law that Teubner devised is multifaceted. Its justification is linked to the desirability of coordinating patterns of social cooperation through the redefinition and redistribution of property rights. Its social function is to structure the discourse within and between semi-autonomous social systems. In order to accomplish this function, the internal structure or rationality of reflexive law is tied to procedural norms which regulate "processes, organization, and the distribution of rights and competencies".³⁷ With respect to the justification, function, and internal rationality of reflexive law as elucidated by Teubner, it is clear that some fairly

³⁶ Teubner (1993), p.66.

³⁷ The major characteristics of Teubner's model of reflexive law is set out as follows: "(1) The justification for reflexive law is...the desirability of coordinating recursively determined forms of social cooperation. ...But reflexive law does not merely adapt to or support "natural social orders." ...Rather it attempts to guide human action by redefining and redistributing property rights.

(2) The external social functions of reflexive law are ...to structure and re-structure semi-autonomous social systems,...by shaping both their procedures of internal discourse and their methods of coordination with other social systems...creat[ing] the structural premises for a decentralized integration of society....

(3) The "internal rationality" of reflexive law is represented neither by a system of precisely defined formal rules nor by the infusion of purpose-orientation through substantive standards. Instead, reflexive law tends to rely on procedural norms that regulate processes, organization, and the distribution of rights and competencies."; Teubner (1983), pp.254-255.

large distinctions are made between reflexive law and its predecessors.

Reflexivity: self-reference and self-regulation

As may be evident from the text above, one of the central themes of reflexive theory is concerned with establishing a quite complicated relationship between law and society. A simplification of the postulates of reflexive theory in this regard is difficult. One aspect of reflexivity has to do with the way that "post-modern" law interrelates with society generally. This involves the way that law, as a system, relates to its environment, which might be best characterized as a collection of other systems - such as the economy. Another aspect of reflexivity has to do with the way that more "compact" areas of social life are regulated by reflexive rationality. In this sense, reflexivity involves the ability of a firm, for example, to relate to its environment. The articulation of these related aspects of reflexivity in a more lucid way may be accomplished through the division of reflexivity into particular sub-concepts: self-reference and self-regulation.

a. Self-reference

The concept of self-reference is one that would be of much more utility if the present study were primarily concerned with autopoiesis, which it is not. Yet it is an important concept for understanding reflexive legal theory. Legal self-reference refers to the ability, and orientation of

legal structures to "reflect" upon themselves and their social (and legal) environment.³⁸ Not only do these structures exhibit an ability to analyze the external environment, but they also develop "filters" by which the significance of external pressures are screened and by which the entrance of external normative considerations are decided. It is a central tenet of neo-evolutionary legal theory that legal structures arise which are self-referential:

Legal structures so conceived reinterpret themselves, but in the light of external needs and demands. This means that external changes are neither ignored nor directly reflected according to a "stimulus-response scheme." Rather, they are selectively filtered into legal structures and adapted in accordance with a logic of normative development.³⁹

This notion of law "reinterpreting itself" is a foremost tenet of the autopoietic model of how law "thinks," acts upon itself, observes itself, and communicates with itself.⁴⁰ As

³⁸ The critique of this formulation is grounded in its reification of social structures, and the invisibility of human action in this conceptualization. In response to the charge that perhaps the notion of system "self-referentiality" was lacking social agency, Teubner claimed otherwise, offering the station of "psychic systems" to social actors (i.e. humans), and went so far as to concede that "'persons', as social constructs, are absolutely necessary for the attribution of actions."; Teubner (1993), p.21. See also at p.45: "...the social constructs of 'persons' are absolutely essential for society to be able to constitute actions from communications by means of self-observation." Humans are "brought back in" by modelling them as systems in a virtual sea of systems.

³⁹ Teubner (1983), p.249.

⁴⁰ For a detailed explanation of the way in which autopoietic concepts may be used to fully articulate the means by which law and legal system acquire and utilize a cognitive sense of self, see Teubner (1989), p. 739: "institutions such as law do 'think' independently from their members' minds. The law autonomously processes information, creates worlds of meaning, sets goals and purposes, produces reality constructions, and

modelled in autopoietic theory, law as a social system is defined most basically as a "network of elementary [communicative] operations".⁴¹

b. Self-regulation

I briefly turn now to the concept of self-regulation, which carries a related, yet distinct, set of connotations. Like self-reference, self-regulation is undeniably characterized by a concern with reflexion or introspection, allowing it a rightful place in the autopoieticist account. But it is plausible to suggest that in at least one sense, the "referents" involved are slightly more tangible. That is, a central tenet of reflexive theory suggests that the actual effects of evolutionary legal development and the supposed autopoietic orientation of law is the growth of reflexively-oriented legal structures aimed at fostering self-regulation. These particular structures are said to develop in such a manner as to enable an arena of social life to self-regulate. More simply, one of the foremost tenets of autopoietic legal theory is the claim that self-reference leads to self-

defines normative expectations and all this quite apart from the world constructions in lawyers' minds."

⁴¹ "Law is defined as an autopoietic social system, that is, a network of elementary operations that recursively reproduces elementary operations. The basic elements of this system are communications, not rules; law is not, as analytical-normativist theories have it, a system of rules.... The self reproductive character of law as a social process becomes intelligible only if one chooses communications as the law's basic elements."; Teubner (1989), p.739.

regulation.⁴² Whereas it is sometimes difficult to identify the actual manner in which communicative processes within law cause it to function (indeed, this is the terrain of the dedicated autopoieticist!), it is easier to identify the societal effects of its functioning that autopoietic theory suggests. Thus, the posited evolutionary nature of legal systems with its central guiding axiom of self-reference comes to develop structures which facilitate self-regulation. It is by way of examples such as corporate law, antitrust law, labour law, and social welfare law, that the development of these auto-regulatory regimes are demonstrated.⁴³

⁴² I have necessarily made uncomplicated the relation between self-reference and self-regulation here. Using the terminology of autopoiesis is fraught with difficulty. There is of course the danger of forwarding an "incorrect" interpretation, but more problematic is the possibility of confusing "senses" of particular words. This is one reason for attempting here to distinguish two senses of self-reference as it is found in this literature. In any case, self-reference in one sense is (or may be) coexistent with self regulation - precursors or preconditions, in a manner of speaking, for autopoietic system development. In another sense, that which I am presently referring to, self-reference represents a pseudo-autopoietic state of a system which leads, in the case of law, to legal self regulation in specific social spaces. In the first case, we might consider the example of classical legal analysis of contract, where under the aegis of formal legal rationality the law performs a self-regulatory function by imposing upon itself the necessity of internal coherence through rules of interpretation, etc. In the second case, as the end result of autopoietic development, the legal order, aware (self-cognizant) of the complexities of regulating a particular social sphere, contents itself to design a "constitutional ordering" appropriate to that particular social sphere which is meant to foster its self-regulation.

⁴³ Indeed these areas constituted the subject matter for the edition on juridification edited by Teubner (1987). In that volume, on labour law see S. Simitis, "Juridification of Industrial Relations"; J. Clark and Lord Wedderburn, "Juridification - A Universal Trend?"; G. Giugni, "Juridification: Labor Relations in Italy"; on corporation law, see P. Kubler, "Juridification of Corporate Structures"; R. Buxbaum, "Juridification and Legitimation Problems in American Enterprise Law"; P. Corsi, "Recent Developments in Italian Corporate Law"; on antitrust law see K.J. Hopt, "Restrictive Trade Practices and Juridification: A Comparative Law Study"; R. Markovits, "Antitrust: Alternatives to Delegalization"; on social welfare law see H. Zacher, "Juridification in the Field of Social Law"; M. Partington, "The Juridification of Social Welfare in Britain".

Evolutionary stresses on law lead to the emergence of a situation where reflexivists can call for

strategies...which tend towards more abstract, indirect regulation by law. Law is relieved of its task of regulating social areas and is instead burdened with the control of self-regulating processes.⁴⁴

The crisis of juridification then, begets a resolution, at least in the evaluation of reflexivist and autopoietic analysts, in the form of the emergence of "more flexible mechanisms" of regulation.⁴⁵

II. Regulating regulations: bargaining as the "point of convergence"⁴⁶

Subsequent to positing the evolutionary trend⁴⁷ toward reflexive legal rationality, Teubner was careful to suggest that it was "as yet undeveloped and not [a] fully defined alternative to the regressive tendencies of the reformation of substantive law."⁴⁸ His was an

⁴⁴ Teubner (1987), p.33.

⁴⁵ Hopt (1987), p.321. Markovits' analysis of anti-trust practices leads him to a somewhat critical approach to some of what he calls the "procedural" or "institutional" regulatory alternatives to substantively oriented intervention in the market. He even suggests that "...the American experience with ...industry self-regulation...was almost uniformly disastrous. Nor can any comfort be gained from the American or the European experience with professional self-regulation by lawyers, doctors, and dentists"; Markovits (1987), p.367.

⁴⁶ Teubner (1983), p.273.

⁴⁷ At least one critique of reflexive legal theory has centred on disputing the distinction between a reflexively oriented rationality and its precursors, and the validity of a claim to legal evolution as opposed to cyclic developmental patterns. See Blankenburg (1984), p.279.

⁴⁸ Teubner (1983), p.254. For a call for the reformation of law, see Sheuerman (1994).

undertaking to distinguish a particular type of legal rationality and regime which:

...seeks to structure bargaining relations so as to equalize bargaining power, and it attempts to subject contracting parties to mechanisms of "public responsibility" that are designed to ensure that bargaining processes will take account of various externalities. However, within the limits of the arena that has been so structured, the parties are free to strike whatever bargains they will. Reflexive law affects the quality of outcomes without determining the agreements that will be reached. Unlike formal law, it does not take prior distributions as given. Unlike substantive law, it does not hold that certain contractual outcomes are desirable.⁴⁹

With respect to the notion of accountability that Teubner calls upon here, it is important to identify that it is no simple measure of "public responsibility" that he seeks. In fact, he is quite disdainful of "naive" attempts to enforce public accountability between negotiating parties through the imposition or attempt at enforcement of what he terms a "public interest clause."⁵⁰ This emphasis on the evolution (and the positive effects thereof) of a set of procedural, constitutional, constraints or "facilitants" to negotiations which "force" a genuine consideration of the external effects of settlement on negotiation figures prominently in Teubner's work on juridification. The development of spheres of

⁴⁹ Teubner (1983), p.256.

⁵⁰ Teubner (1987), p.35.

decision-making which offer little space for direct state intervention is posited as an actually occurring dynamic - one which Teubner suggests is underpinned by a commitment through law to "control indirectly the quality of the negotiation results through a balancing of negotiating power."⁵¹ Yet, he is quite clear in specifying that the area to be accorded more importance than "rearrangements of social power by means of law"⁵² is that of the possibility of "control of self-regulation"⁵³ in accordance with criteria that lead to the institutional internalization of responsibilities to the "world" outside of the purview of negotiation.⁵⁴ In the next chapter I will argue that Teubner's prioritization of self-regulation is undertaken in such a way that leads a basic antinomy to surface in his model of reflexive law; one which fails to account for the crucial role of discursive rationality in *rearranging social power* so that participatory decision-making may serve as the basis for reflexive self-regulation.

⁵¹ Teubner (1987), p.35.

⁵² Teubner (1987), p.35.

⁵³ Teubner (1987), p.33.

⁵⁴ For example, if a self-regulatory regime created a joint decision making body in a firm, the external world that the institution should become "sensitive to" would include the physical, social and economic environment. A reflexive regime of regulation would promote this "responsibility" to the external world not only through rules which require it, but ultimately, through the particularly discursive structuring of decision-making.

With respect to labour law, it must be clearly stated that Teubner's model of bargaining "spaces" devoid of state intervention is a highly contestable formulation. As well, Teubner's prioritizing of the "institutional internalization" of responsibility to the "world" outside a negotiation "space" becomes suspect when translated into the lexicon of labour relations. It is a relative commonplace in critical labour relations parlance to identify such instruments as the peace obligation (the obligation not to strike or lockout except under certain conditions) or restrictions on labour picketing as regulations meant to force bargaining parties to "limit their impact" on the rest of society. Not only do these instruments typically entail a high degree of state involvement through surveillance and enforcement of the "rules", but they also constitute important means by which workers abilities to effect favourable bargaining outcomes are hampered.

Above all else, the assertion that a characteristic of reflexive law is that it "does not take prior distributions as given" must undergo evaluation. Precisely because I am interested in the possibilities that a reflexive orientation might offer for democratizing relations of production, I put a great deal of emphasis on this element of reflexion when considering labour relations law. I believe that the link that Teubner suggests between reflexive rationality and its very justification (the "desirability of coordinating

recursively determined forms of social cooperation" and the attempt "to guide human action by redefining and redistributing property rights"⁵⁵) can support an interpretation which weighs heavily on the side of positing a concern with bargaining power and the structures in which negotiations take place, as fundamental to reflexive rationality.

Reflexivity and labour law

While Teubner's identification of the reflexive orientation of labour law⁵⁶ might seem reasonable, the example of labour law is really useful for demonstrating how a reconstructed version of reflexive law (one which more rigorously incorporates the postulates of Habermas' discursive rationality) is "better equipped" than Teubner's model for an analysis of the reflexivity of labour relations law. In their restatement of Teubner's position, Cohen and Arato identify that element of Teubner's analysis which suggests that his theory of reflexive law is highly reliant on a notion of equalization, which entails "changing the weights" of different parties:

reflexive law tries to establish norms of procedure, organization, membership, and competence that can alter decision making, change the weights of different parties and members, and make overall processes of decision sensitive to side

⁵⁵ Teubner (1983), p. 257. See table at Appendix A.

⁵⁶ Teubner (1983), p.255 at note 7, p.276; Teubner (1986); Teubner (1987), p.35; Teubner (1993), pp.96-97.

effects and externalities. Common to all of these devices is the desire to achieve new effects through an alteration of procedures, that is, through procedural rather than formal or substantive law.⁵⁷

As one of many "procedural" modifications meant to encourage the "achievement of new effects," it seems likely that the suggestion here (and inherent to Teubner's analysis as well) is that it is through the manipulation of the means by which decisions are reached that the outcome of social relationships will be modified. The conceptual grounding for this suggestion originates in a particular model of "discursively rational" procedure - a model which figures prominently in the discussion of how reflexive law goes about generating legitimation. As reflexive legal rationality is said to arise out of the ashes of a previous legitimation "crisis", it seems clear that the "new" discursively rational legitimation upon which it is based, must figure prominently in the orchestration of reflexive law. Teubner, however, only inconsistently adopts this premise, and so the next chapter will involve a discussion of these issues.

⁵⁷ J. Cohen, and A. Arato, Civil Society and Political Theory, (Cambridge, Mass.: MIT Press, 1992), p.482.

Chapter II. Towards a Retrieval of "Equalization" in Reflexive Law

In this chapter, I argue the case for the significance of the "discursive" equalization of bargaining positions in distinguishing reflexive law from other types of law and in specifying the "core" of reflexive law. I have characterized this task as a retrieval because the origins of this claim stem from a basic premise of Teubner's theorization of reflexive law - a premise which posits discursive rationality as the foundation of proceduralist legitimation strategies in a "post-modern" age. The motivation for making this argument in particular derives from the larger purpose of this analysis, which is to interrogate the "reflexiveness" of labour relations law in the contemporary capitalist context. In order to demonstrate how the limits on equalized bargaining power (between labour and capital) entailed by contemporary labour relations law (including both collective bargaining and co-determination type law) hinders an attempt to label it reflexive, it is of course necessary to demonstrate that equalization of bargaining power is itself a necessary condition of reflexion.

Those familiar with the debate around reflexive law and Teubner's work might be suggest that I am attempting to demonstrate the existence of that which does not exist. Indeed, given Teubner's concern with the demonstration of how reflexive legal rationality allows for the development of

cognitive, self-limiting law and regulatory moments which are best able to "cope" with the complexities of system conflict and closure, the question might be put: just what does equalization have to do with anything? A response to this query requires a critical reconstruction of Teubner's reflexive legal theory which attempts to resolve a basic antinomy in his work. This antinomy is characterized by statements which alternate between those which prioritize the role of reflexive law in balancing power relations to overcome power differences and those which dismiss or "underplay" such a role for reflexive law. For example, Teubner suggests that:

Political and social power is needed to exert external pressure on established social systems to externalize their self-reference. The imposition of an "external constitution"; the redistribution of property rights to hitherto excluded constituencies; the redesign of decisional procedures; all constituting the core elements of "reflexive law:", aim at a power change within the subsystem in question and demand strong support from the outside.¹

To underscore the point above, Teubner cites another of his previous works, including one passage which asserts that reflexion in social subsystems can occur "only insofar as processes of democratization create discursive structures within these subsystems."² The tenor of such passages hint

¹ G. Teubner, "After Legal Instrumentalism: Strategic Models of Post-Regulatory Law," Dilemmas of Law in the Welfare State, G. Teubner, ed., (Berlin: de Gruyter, 1985b), p.317.

² Teubner (1983), p.273.

at a significant role for equalization of power in Teubner's model of reflexive law. Such remarks as these, however, are invariably followed by passages which declare that power equalization is "not the primary aspect"³ of reflexive law, or that the "primary function of the democratization of subsystems lies neither in increasing individual participation nor in neutralizing power structures".⁴

From my perspective, Teubner's treatment of equalization is unsatisfactory. He never really probes the issue of equalization in an in-depth or meaningful way. Typically he indicates, as above, how equalization or the balancing of bargaining power is an important component of reflexive law, and then goes on to remark that it is not as important, ultimately, as the ability of the sphere under regulation to effectively self-regulate. In Teubner's model, equalization is characterized as a *means*, and reflexive self-regulation as an *end*.⁵ The former is only facilitative of the latter, and as such, it seems that in Teubner's analysis equalization is somewhat "expendable".

At one point Teubner suggests that "if we are looking for normative criteria to judge social institutions, responsiveness to human needs ... is what is required and not

³ Teubner (1985b), p.317.

⁴ Teubner (1983), p.273.

⁵ Teubner (1985b), pp.317-318.

neutralization of power."⁶ By distinguishing between each of these criteria as two poles of an oppositional dichotomy, I think Teubner misses the important point, which is precisely about the relationship between equalization of power and responsiveness to human needs. I argue that if we consider a primary purpose of reflexive law to be the discursive legitimation of decisions about which needs need to be met, then the discursive sphere in which those needs are considered must be governed by principles or rules which are premised on equalizing participatory rights in the discussion. My approach involves suggesting how the notion of the legitimacy capacities of discursive rationality (as an internal and integral component of reflexive regulatory law), offers a formula for democratizing relations of production within capitalism.⁷

By equalization, then, I am referring to processes whereby law explicitly goes beyond simple mediation of power differentials between parties to bargaining or negotiation situations. The extent to which equalization can be said to

⁶ Teubner (1985b), p. 318.

⁷ Such an approach is somewhat at odds with the functionalist systems analysis which partly grounds Teubner's reflexive theory. The influence of this paradigm on Teubner's theorization is evidenced in the way that a special type of "social adequacy" is forwarded as the measure of law and legal concepts. Daintith and Teubner define concepts as "socially adequate if they satisfactorily reconcile the internal requirements of legal consistency with the external social demands on the legal system."; Daintith, T., and G. Teubner, "Sociological Jurisprudence and Legal Economics," Contract and Organization, Daintith, T. and G. Teubner, eds., (Berlin: deGruyter, 1986), p.18. In this fashion, social adequacy refers not to "justice" or some other such normative consideration - instead it refers to the ability of the legal system merely to "cope" or function in its environment.

take place. for my purposes, must be a function (though not an uncomplicated one) of the enhancement or increase of power that reflexive law generates for subordinates in negotiating arrangements. From within the paradigm of reflexive law, equalization of bargaining power should appear "discursive" in nature. By this I mean that the reflexiveness of a regulatory order should be gauged by the extent to which "public" spheres of decision-making are carved out in institutions (such as the firm) which enable all participants to engage in open and non-coercive decision-making.

I. Reflexive rationality and discursive legitimation

Teubner's contention, of course, is that the development of reflexive legal rationality is reflected in the development of compromise-generating negotiation structures. As such, his project, within the bounds of autopoietic systems theory, leans toward an analysis of the possibilities of a society reflexively ordered with the help of law, as opposed to merely demonstrating the self-organization capacity of social subsystems.⁸ This project found its genesis in a combination

⁸ In this respect Teubner partly diverges from a more rigid Luhmannian-inspired systems-theoretical analysis. Such an analysis is predicated on a notion of law as only one of many communications "systems" that are effectively closed to each other. Willke described this element of autopoietic theory well: "Law is concerned with the continuation of legal operations. The economy is concerned with the continuation of economic operations and not at all with effects on the environment or 'externalities'. Law as the legal (social) system operates according to legal criteria and in a way that allows the continuation of legal functions. Even if the external effects of legal operations seem to be problematic or harmful, this is not a problem of the law but of the social environment...."; H. Willke, "The Autopoietic Theory of Law: Autonomy of Law and Contextual Transfer", Controversies about Law's Ontology, Amselek, P. and N., McCormick, eds., (Edinburgh: Edinburgh University Press, 1991), p.113.

of the insights offered by both Luhmannian and Habermasian social theory. While his break with Luhmann on the issue of law's systemic "isolation" is significant, Teubner's minimization of equalization represents a departure from Habermas which is of more fundamental importance. A somewhat paradoxical situation arises when one considers the important differences in Teubner's conception of reflexive law from Habermas' notion of discursive rationality, which significantly, Teubner uses to ground his theory.

Teubner, especially initially, placed a rather significant emphasis on Habermas' conviction that

only a "discursive" rationality emerging from autonomous evolutionary processes in the normative sphere could resolve the legitimation problems of the modern state. This view is based on a theory of political legitimation which asserts that irreversible developments in the normative sphere mean that modern principles of legitimation must be procedural.'

For Teubner, two elements of Habermas' account were instructive. The first was Habermas' elucidation of the emergence of legitimation crises in organized capitalism and

While retaining many of the elements of this approach to law, Teubner has pursued an argument concerning the remaining possibility of regulatory intervention through reflexively rational legal structures. For a fairly wide-ranging discussion of how he suggests this is possible see Teubner (1993), pp.64-99.

⁹ Teubner (1983), p.269.

the welfare state.¹⁰ The second was Habermas' emphasis on discursive rationality as the "solution" to the legitimation problems that arise as a result of these crises.¹¹ The full influence of Habermas' analysis on Teubner's is indicated by the fact that Teubner based the internal legitimation of his model of reflexive law in procedural discursive rationality - representing the evolutionary "solution" or "synthesis" to the crises of legitimation that correspond with formal and substantive legal orders.¹² Teubner's model of reflexive law, where legitimation is concerned, is grounded in an

¹⁰ "Because of the growth of monopoly power and the increased role of the state in managing the economy, the market mechanism loses its power as a device which legitimates what once were portrayed as "naturally" justified distributive outcomes. To the extent that state intervention takes over the political responsibility for market substitution and market compensation, the political system becomes increasingly dependent on mass loyalty for its political-economic decisions. However, the political production of legitimizing ideologies is limited, according to Habermas, by the resistance of normative structures."; Teubner (1983), pp.268-267. Tweedy and Hunt also formulate this conceptualization neatly: "as the political administration now directly intervenes in the sphere of production to control the dysfunctions of the market, the market itself is thereby repoliticized. The capitalist system, no longer finding itself supported by the ideology of the market, thus finds itself facing a legitimation deficit. The political sub-system seeks to offset the missing legitimation by extending rewards conforming to the imperatives of the system, rewards of money and power which support the 'bourgeois ideology of achievement'. Habermas predicts that a legitimation crisis will occur either when the state runs out of the ability to supply such rewards or when expectations arise that cannot be satisfied by them."; d. Tweedy and A. Hunt, "The Future of the Welfare State and Social Rights: Reflections on Habermas," Journal of Law and Society, Vol. 21, No. 3, 1994, p.295.

¹¹ Teubner quotes Habermas: "Since ultimate grounds can no longer be made plausible, the formal conditions of justification themselves obtain legitimating force. The procedures and presuppositions of rational agreement themselves become principles."; Teubner (1983), p.269.

¹² What remains of course, is to determine the institutional means by which legitimation can be maintained: "The subsequent question of institutionalization, i.e., the question of which organizational structures and which discussion and decision mechanisms can produce procedurally legitimate outcomes, depends on 'concrete social and political conditions, on scopes of disposition and so forth.'"; Teubner (1983), p.269, quoting Habermas.

interpretation of Habermas which posits the congruence of procedurally-oriented law and discursive rationality.¹³ With some justification, then, reflexive law might be characterized as unconcerned with an allocative approach to outcomes, but directed rather at administering a distribution of "inputs." By this notion of a distribution of inputs, I mean to signify how reflexive law (grounded in Habermas' discursive rationality) seeks to structure discourses so that participants are capable of and entitled to making decisions about matters which affect them. Habermas refers to "substantive normative rules of argumentation" to express this.¹⁴ Teubner adopts this perspective when he asserts that reflexive law goes about constitutionalizing discourse by

providing norms of procedure, organization, and competences that aid other social systems in achieving the democratic self-organization and self-regulation which... are at the heart of

¹³ Teubner posits: "As we have noted, reflexive rationality in law obeys a logic of procedural legitimation. This orientation, Habermas suggests, reflects the emerging organizational principle of post-modern society. In a recent publication Habermas ... makes an important distinction between law as 'medium' and law as 'institution.' As a medium, law, in a sense, is an independent socio-technological decisional process which replaces the communicative structures that exist within the 'life-world' of social subsystems, and so allocates goods according to its own criteria. As an 'institution,' law functions merely as an 'external constitution' for the spheres of socialization, social integration, and cultural reproduction. When it serves as an 'institution,' law facilitates rather than endangers the self-regulatory processes of communication and learning. Since this facilitative role is congruent with emergent forms of discursive rationality, reflexive law, with its procedural orientation, seems well-suited to the legitimation problems of post modern society."; Teubner (1983), p.270. Emphasis added.

¹⁴ J. Habermas, Moral Consciousness and Communicative Action, C. Lenhardt and S.W. Nicholsen, trans., (Cambridge, Massachusetts: MIT Press, 1990), p.86.

procedural legitimacy.¹⁵

How reflexive law does its job: the institutionalization of discursive legitimation

It is necessary, then, to explore discursive rationality and its relation to reflexive law. Rather than a comprehensive overview of the rather idiomatic literature on discourse and discursive rationality, the following appraisal is meant to raise the significance of some of the characteristic elements of discursive rationalization/legitimation that point the way to redeeming the significance of equalization of bargaining power in reflexive law. As has already been indicated, as opposed to legal interventionism of the formal or substantive type, reflexive law's "job" becomes the ordering of self-ordering. At different levels, the law aspires to constitutionalize discussions in areas where conflicts arise, as opposed to selecting the "right side" or "right answer" in a dispute. In this, discursively rational law precisely displaces that which is formally or substantively rational. Habermas asserts that:

The place of law as a medium must be replaced by procedures for settling conflicts that are appropriate to the structures of action oriented towards communication - discursive processes of will-formation and consensus-oriented procedures of negotiation and decision-making.¹⁶

¹⁵ Teubner (1983), p.275.

¹⁶ J. Habermas, "Law as Medium and Law as Institution," Dilemmas of Law in the Welfare State, Teubner, G., ed., (Berlin: de Gruyter, 1986), p.218. See also Teubner (1983), p.275.

Here, some of the "essential" characteristics of discursive rationality are suggested. There is an orientation towards the generation of consensus or compromise through procedural norms, which are themselves aimed at facilitating negotiations with the final goal of making decisions. What Habermas terms the "necessary presuppositions of argumentative speech" underwrite these procedural norms.¹⁷ Habermas divides these "presuppositions" into three categories; logical-semantic, procedural, and process-oriented. The first of these categories is comprised of rules which are meant to ensure the logical consistency of discourse. Following Alexy, Habermas lists a few rules as examples:

- (1.1) No speaker may contradict [him/herself].
- (1.2) Every speaker who applies predicate *F* to object *A* must be prepared to apply *F* to all other objects resembling *A* in all relevant aspects.
- (1.3) Different speakers may not use the same expression with different meanings.¹⁸

Of more significance are the presuppositions of argumentation at the level of procedure. Habermas suggests how "in procedural terms, arguments are processes of reaching understanding that are ordered in such a way that proponents and opponents" can test the validity of assertions.¹⁹ As such, at a procedural level, the presuppositions of

¹⁷ Habermas (1990), p.86.

¹⁸ Habermas (1990), p.87.

¹⁹ Habermas (1990), p.87.

argumentation have to do with the particular structure or form of interaction which is oriented towards a "search for truth".²⁰ Habermas suggests that at this level:

Examples include recognition of the accountability and truthfulness of all participants...[and] general rules of jurisdiction and relevance that regulate themes for discussion, contributions to the argument, etc.²¹

Finally, at the level of process, Habermas argues that as a communicative process that has as its goal "reaching rationally motivated agreement"²², argumentative speech is structured in a fashion which makes it "immune to repression and inequality in a particular way".²³ The "particular way" that the process-oriented rules of discourse must assure non-repression and equality is described by Habermas as the manner that they allow for the development of communicative interaction which "approximates ideal conditions."²⁴ It is

²⁰ Habermas (1990), p.87.

²¹ Habermas (1990), p.87.

²² Habermas (1990), p.88.

²³ Habermas (1990), p.88. Emphasis added. Habermas goes on (at p.89) to list (again following Alexy's catalog of rules) the following process oriented rules of discourse:

(3.1) Every subject with the competence to speak and act is allowed to take part in a discourse.

(3.2) a. Everyone is allowed to question any assertion whatever.

b. Everyone is allowed to introduce any assertion whatever into the discourse.

c. Everyone is allowed to express [their] attitudes, desires, and needs.

(3.3) No speaker may be prevented, by internal or external coercion, from exercising [their] rights as laid down in (3.1) and (3.2).

²⁴ Habermas (1990), p.88.

from these notions that the concept of an "ideal speech situation" developed, with its premise of the "reconstruction of the general symmetry conditions that every competent speaker must presuppose as adequately fulfilled."²⁵ These symmetry conditions, without which genuine discursive legitimation may not ensue, involve ruling out "all external or internal coercion other than the force of the better argument".²⁶

It is important to note that although Habermas' model of the argumentative speech situation that leads to discursive legitimation epitomizes an ideal speech situation, the model is designed to have practical implications. That is, it is Habermas' purpose to define an ethics of discourse which guide the legitimation of discursive decision-making in real life, not to merely pose a theoretical model for so doing. Habermas is careful to distinguish his model from those of Rawls and Mead, both of which hinge upon an impartiality generated by participants either pretending not to know each other's actual social position or assuming ideal roles, respectively.²⁷ Furthermore, Habermas emphasizes the importance of a

²⁵ Habermas (1990), p.88.

²⁶ Habermas (1990), p.89.

²⁷ Habermas comments: "John Rawls, for example, recommends an original position, where those concerned meet as rational and equal partners who decide upon a contract, not knowing their own or each other's actual social positions. G.H. Mead for his part recommends a procedure that he calls ideal role taking. It requires that any morally judging subject put itself in the position of all who would be affected if a problematic plan of action were carried out or if a controversial norm were to take effect."; Habermas (1990), p.198.

"principle of universalization" in practical discourse which links the validity of any norm to the acceptability for all participants of "the consequences and side effects of its general observance"²⁸, in the context of actual rather than ideal conditions. Thus, Habermas goes on to assert that in practical discourse:

Argumentation insures that all concerned in principle take part, freely and equally, in a cooperative search for truth, where nothing coerces anyone except the force of the better argument....it is a warrant of the rightness (or fairness) of any conceivable normative agreement that is reached under these conditions. Discourse can play this role because its idealized, partly counterfactual presuppositions are precisely those that participants in argumentation do in fact make....²⁹

In less abstract terms, insofar as reflexive law's legitimation capacity relies on discursive rationality, regulatory programs which are reflexive must adopt two important "structural" characteristics. The first involves

²⁸ Habermas (1990), p.197.

²⁹ Habermas (1990), p.198. See also Habermas, J., Justification and Application: Remarks on Discourse Ethics, C. Cronin, trans., (Cambridge, Massachusetts: MIT Press, 1993), at p.36, where Habermas further illuminates the "practical" character of his model of ethical discourse: "[T]he principle of universalization, as a rule of argumentation, must retain a rational, and thus operational, meaning for finite subjects who make judgements in particular contexts.... Clearly, only situations actually used by participants, on the basis of their state of knowledge, for purposes of paradigmatically explicating a matter in need of regulation can be taken into account in the conditional components of a valid norm. The principle of universalization must be formulated in such a way that it does not impose impossible demands; it must relieve participants in argumentation of the burden of taking into account the multitude of completely unforeseeable future situations in justifying norms."

the conceptualization and creation of "public" decision-making spaces within institutions. The second involves recognizing the actors in such institutions as competent participants, capable of engaging in discursively proceduralized decision-making. Habermas mentions both of these "principles" in a discussion of school constitutions:

The framework of a school constitution under the rule of law, which transposes "the private law of the state into a genuinely public law", should be filled, not by the medium of law, but through consensus-oriented procedures for conflict resolution - through "decision-making procedures that treat those involved in the [pedagogical] process as having the capacity to represent their own interests and to regulate their affairs themselves."³⁰

Peters offers an excellent account of some rules which may guide discursively rational legitimation strategies.³¹ He mentions how a fundamental tenet of the procedural or discursive model of legitimation is epitomized by the possibilities these rules raise for questioning the "propriety, fairness and desirability" of decisions.³² Using the example of Dutch works council law he demonstrates how three factors combine to democratize the decision-making capacity of an institution. These factors are publicity, independence, and competence:

³⁰ Habermas (1986), p.219, quoting Frankenburg.

³¹ A.A.G. Peters, "Law as a Critical Discussion," Dilemmas of Law in the Welfare State, Teubner, G., ed., (Berlin: de Gruyter, 1986).

³² Peters (1986), p.255.

Publicity means that everybody may see how affairs are conducted, hear the arguments, know what is at issue. Publicity in this sense implies access. As a matter of principle, there can only be "open meetings" where everybody has "standing", may make [their] views known and is entitled to have them seriously considered. Independence means that discussions are not to be dominated by external conditions, particularly forces in the interaction-system the normative premises of which are in debate. Much is demanded of the civic competence of participants.³³

With respect to the competence of participants in the discursive exchange mentioned above, Peters argues that where political matters are concerned, as opposed to technical matters, everyone is competent of judgement.³⁴

The democratizing capacities of this model are obvious, not least due to the significant weight that Peters places on the necessity for law as a "critical discussion" to take place "independent of forces in the environment."³⁵ Indeed, the "reflexiveness" of law as a critical discussion must, according to the criteria set out above, be judged on its capacity to generate a "free and equal" discussion. There is a crucial distinction to be made between a discourse which

³³ Peters (1986), p.258.

³⁴ Peters (1986), p.259. In the context of works councils and co-determinative bodies, a critically important question arises concerning economic matters confronting a firm: are economic matters technical or political? This is a significant issue for an analysis of the reflexiveness of labour relations law, for it involves issues of both jurisdiction and competency. This subject will be raised in the next chapter.

³⁵ Peters (1986), p.260.

"admits only a certain kind of question, which can accommodate only a certain kind of truth, and discourse aimed at uncovering such limitations, aspiring towards liberation."³⁵ The point of such a direction, apart from the normally positive implications of liberatory aspirations, is the legitimacy capacity of procedures which uncover, rather than mask "truths," and which bring out into the open, for purposes of attempting reconciliation (for everyone involved) the conflicts and contradictions which beg resolution. The extent to which such proceduralized discourse can be said to generate legitimacy for decisions taken depends to a large extent on the rational justification of those decisions in public conditions of free, equal and open discursive exchange.³⁷ The overcoming of the negative effects of discretionary power (or inequitable distributions of power in the realm to which the discussion pertains) can be engineered only through the resolve of participants to adhere to what might be characterized as two cardinal rules, which are responsible for constitutionalizing the discussion. The first of these involves conducting the discussion "outside" or "external to" the confines of the normal sphere of social interaction, such

³⁶ Peters (1986), p.261.

³⁷ "In the procedural concept of law advanced here, a central role is assigned to rational justification of rules and decisions. Law is seen as institutionalizing the conditionality of positive law and order in a procedurally created space in which prevailing rules and authority are, actually or virtually, suspended and room is made for questioning their validity."; Peters (1986), p.269.

that all participate as equals.³⁸ The second of these rules involves the inapplicability of normative claims based on other than a validity derived from critical discussion:

There can be no a priori validity of normative claims, for example, the claim that a particular policy should be followed or that a particular rule should apply. The validity of such claims can only be established in critical discussion.³⁹

Finally, the complementary legitimacy and democratizing capacities of the model of law as critical discussion emerge. The concept of "law as a critical discussion" that Peters uses effects a neat linkage between Habermas' notion of law as an institution and Teubner's aspirations to demarcating reflexive law. As "critical discussion", law surpasses its "traditional" role as medium in establishing rules of behaviour and entitlement. Under its "institutional guise" law serves as a justificatory system for the generation of "truth" through discursively-generated consensus. As such, the concept of law as discussion encapsulates the features or

³⁸ In Peters' model, there are really two dimensions to this rule. The first involves participants in a discourse taking a position "outside the concrete context of social action, in order to reflect on it and discuss its normative validity and wisdom generally." The second, which follows partly from the first, involves the relinquishing of social positions, to allow everyone to enter the discussion from an equal position. As Peters' model draws on Rawls' notion of the "veil of ignorance", it represents an approach to discursive ethics which differs from Habermas. See Peters (1986), pp.271-272. Nonetheless, this element of Peter's model is directed at establishing what in Habermas' terminology is a principle of universalization meant to assure the moral validity of discursively justified norms.

³⁹ Peters (1986), p.272. See also Habermas (1990), p.197: "Only those norms may claim to be valid that could meet with the consent of all affected in their role as participants in a practical discourse."

characteristics of self-regulation that a reflexively rational legal order seeks to facilitate in particular social spheres.

The attributes which make the model of law as discussion a "procedural theory of justice",⁴⁰ which aspires to demonstrate the plausibility of a ubiquitous rational and political morality are discernible.⁴¹ The response to Weiner's question "Does the Habermasian project offer a path for a Newer Left, a non-grieving Left?", finds its foundation in the disposition of the Habermasian model to affirm "our Moral Capacity to Reason Together" bolstered by a "rules jurisprudence approach".⁴² What Weiner is getting at is the way in which Habermasian procedural rationality is "bound to a logic specific for communicating about norms: to the logic of moral argumentation."⁴³ The model of legitimation through discursive rationality represents nothing less than a transformation of legitimacy-generation. The transition involved is one from rules as their own justifications to

⁴⁰ Tweedy and Hunt (1994), p.306.

⁴¹ In the words of Weiner: "The argument... is that it is possible to elicit normative standards and establish them as true in a consensual sense; that is, the validity of norms can be tested not in accordance with sanctions of coercive power, but in accordance with the consensus reached through rational debate and the strength of plausible reason. The legitimation of the law occurs not on the basis of natural law or abstract principle of markets, but on the basis of a procedural rationality, which has, more or less, been institutionalized."; Weiner, R., "A Newer Left's Turn to Civil Society and Critical Legal Studies," (Paper presented at the Re-Thinking Marxism Conference on Marxism in the New World Order at the University of Massachusetts, 14 November 1992), p.8.

⁴² Weiner (1992), p.16.

⁴³ K. Eder, "Critique of Habermas's Contribution to the Sociology of Law," Law and Society Review, Vol.22, No.5., (1988), p.936.

"principles and purposes as terms for justification of decisions."⁴⁴ The logical result of such discursively structured interactions as the model proposes, is the sovereignty of the discursively generated "general will" over self-interest.⁴⁵

"Modes" of equalization and discursive rationality

Based on a model of discursive proceduralization which "opens up space" for reflexive self-ordering (and legitimation) of spheres of social interaction it seems almost self-evident that the concept of "fairness" demanded by reflexive bargaining structures makes "equalization" more than a quaint aspiration, more than a goal to be cited but never seriously expected; and certainly deserving of more than the antinomic treatment it receives from Teubner. Habermas's model does not for just any reason stipulate that more than just the time and place for discourse be "regulated":

Viewed as a form of communication, rational bargaining has to satisfy the procedural conditions that allow fair compromises to come about.... *Such regulation must take equal account of all pertinent interests, must equip all the parties with equal powers and restrict discussion, given a sufficient flow of information, to the pragmatic (i.e. the most rational, but morally indifferent) pursuit of each party's own respective*

⁴⁴ Peters (1986), p.273.

⁴⁵ Or as Peters suggests, "in a free and rational discussion only those norms and policies can be accepted as legitimate which can be demonstrated to be in the interest of all, specifically including the most deprived groups." Peters (1986), p.273.

interests."⁴⁶

At this point it is necessary to raise what I will heuristically label "modes of equalization." By this term I mean to distinguish between different types of legal ordering which are oriented towards producing different levels of equalization in bargaining situations. This differentiation is useful on a theoretical-conceptual level, in that it facilitates a consideration of how the underlying premises of different procedural regimes lead to their particularities (similar to Teubner's initial categorization of legal rationalities according to certain criteria). On a practical-empirical level, such a differentiation is useful because it allows for the identification of distinctions between actual procedural regimes; for example, between collective bargaining and co-determination.

The first mode of equalization to be considered, corresponds somewhat with a pluralist analysis of institutional power. The pluralist mode of equalization is predicated on an aspiration to social stability through the application of rules directed at structuring bargaining relationships. The "settling" of contested issues through bargaining is prioritized in this mode. Procedural regulation

⁴⁶ J. Habermas, "Towards a Communication-Concept of Rational Collective Will-Formation. A Thought Experiment," Ratio Juris, Vol.2, No.2., (1989), p.152. Emphasis added.

is indeed a central component of a pluralist system.⁴⁷ However, referring to labour relations regimes, it is important to recognize that in this mode, any bargaining that goes on to determine the terms of employment contracts is perceived to take place within an arena which is roughly characterized by a balance of power. That is, to the extent that this mode of equalization goes beyond the individualist image of the labour market, and permits labour to contract collectively, it is perceived to institutionalize negotiating conditions which are roughly equal and fair, even though the boundaries of the "arena of discussion" are set by existing property rights.⁴⁸ In this mode of equalization, any inequality of bargaining power which arises as a result of social inequality, is part and parcel of the realm of

⁴⁷ Indeed, as Beatty puts it, referring to the pluralist model of labour relations, "it is the procedures by which the terms and conditions of employment are determined that is important as a matter of industrial justice."; D. Beatty, "Ideology, Politics and Unionism," Labour Law, (Kingston: Industrial Relations Centre, Queen's University, 1986), p.28.

⁴⁸ Hyman suggests that there are three assumptions which undercore the notion of "pluralism" in its labour relations application: "The first is that there are no undue concentrations of economic power, particularly in the labour market. Such power is either so extensively diffused that there exist no large accumulations; or else the power which, it is recognised, can be wielded by large corporations is more or less balanced by that of organised labour. The second assumption is that, despite the plurality of sectional interest groups within contemporary society, it is meaningful to refer (usually without the slightest indication of the conceptual and theoretical difficulties entailed) to a 'public' or 'national' interest. Thirdly, the state is regarded as the more or less impartial guardian of this 'public interest', not subject to excessive influence from the economically powerful (precisely because no such homogenous group exists), but on the contrary able to deploy its own power to buttress the weak and restrain any groups which may display signs of undue aggrandisement."; R. Hyman, "Pluralism, Procedural Consensus and Collective Bargaining," The Political Economy of Industrial Relations: Theory and Practice in a Cold Climate, (London: MacMillan Press, 1989a), p.62. Emphasis added.

bargaining. The "rules of engagement" that govern bargaining are typically directed at regulating behaviour in such a way that makes the grossest abuses of bargaining "advantage" untenable. However, in this mode of equalization, ultimately the power resources of those engaged in bargaining are based on rights in property and contract. Streeck makes an excellent distinction between regulatory regimes based on separate but related notions of contract and status.⁴⁹ Simplifying considerably, a mode of equalization based on contract gains its legitimacy from the operations of markets, while for a mode of equalization based on status, legitimacy arises from status-rights which are politically generated.⁵⁰ In a contract-based regulatory order, status-rights do emerge for participants to bargaining situations, but mainly as a result of the bargains they strike. For example, having entered into a contract that allocates rights to the parties covered permits them to demand that the terms of the agreement are adhered to. As Streeck points out:

What looks here like status is based not
on citizenship but on property rights,
and is therefore not only not

⁴⁹ W. Streeck, "Revising Status and Contract: Pluralism, Corporatism and Flexibility", Social Institutions and Economic Performance: Studies of Industrial Relations in Advanced Capitalist Economies, (London: Sage Publications, 1992b). In another publication, Streeck and Schmitter make a similar distinction between "social orders" based on associative and market models. See W. Streeck, and P.C. Schmitter, "Community, market, state and associations? The Prospective contribution of interest governance to social order," Private Interest Government: Beyond Market and State, Streeck, W., and P.C. Schmitter, eds., (London: Sage Publications, 1985).

⁵⁰ Streeck (1992b), p.70.

transferable and generalizable through collective action, but also unusable as a motor for redistribution and redistributive justice.⁵¹

As opposed to the pluralist mode of equalization, it is possible to identify what I will term a neo-pluralist mode of equalization. In this mode, the legitimacy of bargaining and negotiated arrangements rests on a type of status which is generated by the legal "constitutionalization" of the realm of negotiation. Habermas's model of discursively generated legitimation, and the conditions of equalization which are the presuppositions of free and open discussion, falls under this category. In this mode of equalization, the regulatory impulse is one of setting up "rules of engagement" which, while not directly overcoming "external" imbalances of social power, aspire to creating a bargaining or discursive arena in which all participants are entitled to the benefit of equal treatment. By structuring the rules so that the input of all concerned is accorded equal weight (within the decision-making discourse), the discursive mode of equalization "pretends" that social inequalities do not exist. While this notion of equalization leaves unresolved certain problems⁵², from a

⁵¹ Streeck (1992b), p.71.

⁵² One of these problems involves the question of whether by equalizing bargaining power in discursive "arenas", the social inequalities outside of the sphere of bargaining can be successfully "bracketed out". In the context of labour relations regimes in capitalist societies, it is plausible that social inequality outside the realm of bargaining (for example the control of the means of production and accumulation that capital is accorded in capitalism) fundamentally impedes the democratizing effects of institutionalized discursive equalization. While this issue can by no means be simply "passed over", my analysis

perspective which seeks a democratic ordering of decision-making it seems clear that the neo-pluralist mode represents an advance over the pluralist one. The primary advantage of the neo-pluralist model of discursive equalization, is not only that the allocation of status-based rights to the actors in a collective enterprise gives those actors a certain type of stable "standing" to engage in argumentation over decisions, but also because the "democratizing effects" of such status-rights have positive "spin-off" effects. As Weiner phrases it, this model, which involves a democratization through constitutionalization of decision-making also leads to:

the empowerment of individuals as individuals..., an empowerment in their everyday institutional, group and... work experiences where their interests are affected by decision making processes. Such empowerment experiences would have transformative effects in their social group membership/citizenship identities: making them more knowledgeable, more public spirited, more attentive to the interests of others, more probing of their [own] interest.⁵³

These "spin-off" effects of the neo-pluralist mode of equalization can be linked to a significant "aspiration" of reflexive self-regulation, in that through a distribution of participatory authority, the particular type of

proceeds on an assumption that at the very least, a discursive orientation of institutional decision-making does offer some substantial promise of democratization.

⁵³ Weiner (1992), pp.16-17.

proceduralization involved (discursively rational) promotes the development of a sensitivity to externalities, or as Weiner has it, an attentiveness to the interests of others.

II. Equalization and the redistribution of legitimacy capacity

The question which arises at this point is "where does Teubner's model of reflexive law fit?" with reference to the modes of equalization outlined above. As a result of the antinomy in Teubner's model suggested above, the proper response is that Teubner's model of reflexive law awkwardly "has a foot in" both modes of equalization. This results partly from the manner in which his model is insufficiently directed at distinguishing discursive rationality from other types of proceduralization. As it is through the postulates of discourse ethics that equalization gains its special character in reflexive regulation, Teubner's notion of the equalization component of reflexive law is left far from the central or core role that it should have. It seems that Teubner's model of reflexive law accords with elements of both of the posited modes of equalization because on the one side, he professes that the basis of reflexive law is discursive rationality, yet the equalization component of discursive rationality is consistently undermined in his analysis. As such, his model indeed prioritizes proceduralization, but some of the key elements of discursive proceduralization are wholly neglected.

As suggested previously, Teubner seems to establish the

case for the importance of law for modifying relations of power within organizations. He backs this claim with the argument that the "redesign of decisional procedures", which enables a shift of power in the discursive arena, is a core element of reflexive law.⁵⁴ By referring, yet again, to the "[h]istorical examples" of collective bargaining and co-determination, Teubner posits the central role of law for "influencing power relations" and changing "power relations inside the organization."⁵⁵ Yet, we are confronted by those assertions of Teubner's that specify that equalization "is not the primary aspect of 'reflexive law'"⁵⁶ and "the primary function of democratization of subsystems lies neither in increasing individual participation nor in neutralizing power structures".⁵⁷

The reason why this is so for Teubner, is linked to his commitment to Luhmannian systems theory⁵⁸ and a certain conceptualization of societal conflict. For Teubner, it is the capacity of a legal order to generate a stable yet flexible social order that takes precedence over the capacity of a legal order to generate democratized decision-making

⁵⁴ Teubner (1985b), p.317.

⁵⁵ Teubner (1985b), p.317. The "organization" in this example refers to the capitalist firm.

⁵⁶ Teubner (1985b), p.317.

⁵⁷ Teubner (1983), p.273.

⁵⁸ For a discussion of Luhmann's work, see M. King, and A. Schütz, "The Ambitious Modesty of Niklas Luhmann," Journal of Law and Society, Vol.21, No.3, (1994).

structures. At its base, this element of Teubner's reflexive model privileges the need for responsibility to the external environment (i.e. society), because, in his model, it is the radical separation of "systems" like law, economy, science, and state from each other which characterizes fundamental societal conflict.⁵⁹ In this fashion, reflexive law seeks primarily to reconcile such sub-system differences as can be reconciled, with the main emphasis being placed on law's ability to maintain its own internal consistency. We seem to be faced, then, with a dichotomous choice; either equalization of power, or socially adequate, learning-capable law. Teubner typically chooses the latter over the former.⁶⁰

The question that requires posing, I suggest, is how the latter can obtain without first taking account of the former? That is, if the basis of reflexive law's capacity to legitimate decisions is explicitly discursive (modeled after Habermas' notion of discursive rationality), how can law institutionally promote socially adequate self-regulation if it does not incorporate the features of discursive

⁵⁹ From the following remarks on social autonomy, it is possible to discern how for Teubner's analytical approach, questions of increasing or decreasing the capacities of social actors are quite marginal: "Social autonomy, however, is first and foremost a cognitive problem for the law. As far as the law is concerned, we are dealing with the factual rather than the normative dimension of social autonomy. Social autonomy presents lawyers or politicians with the problem of knowing what it is they are actually trying to regulate. This is so irrespective of whether the aim is to unleash market forces through legal policy or subject them to political constraints."; Teubner (1993), p.68.

⁶⁰ Teubner posits that "More important than the issue of power is the kind of social knowledge that is necessary to enable the law to intervene successfully in self-referential systems."; Teubner (1985b), p.318.

legitimation in the first place? Teubner's observation that under certain conditions institutions characterized by power imbalances may be more "responsive to human needs" than institutions which are power-symmetrical fails to answer this question.⁶¹ In response to Teubner's suggestion that "[if] we are looking for normative criteria to judge social institutions, responsiveness to human needs is what is required, not neutralization of power"⁶², is it not pertinent to address the possibility that institutional asymmetries of power quite plausibly act as the very fetters to a responsiveness to human needs?

A more fundamental element of this same complaint involves recognizing that Habermas' model of discursive legitimation (upon which Teubner builds his reflexive theory) itself represents the procedural means through which human needs are legitimately determined in "post-modernity" - through free and open argumentation. Teubner's "polarization" of responsiveness to human needs and power neutralization is an inappropriate image for understanding reflexion. According to my understanding of the implications of grounding reflexive law in Habermas' model of discursive rationality, a reflexive regulatory order promotes decision-making through discursive exchange, which is itself guided by an ethics of discourse aimed at producing acceptable compromises for all in decisions

⁶¹ Teubner (1985b), p. 318.

⁶² Teubner (1985b), p. 318.

concerning which "needs" need to be met.

Summarizing a "reconstructed" reflexive law

In order to recapitulate my contention that a "discursive equalization" of power is central to reflexive law, it is useful to begin with a premise that Teubner himself sets out:

it does not make sense to tie the concept of "reflexive law" too closely to power equalization within social subsystems, especially private organizations. *The minimization of power is not a reasonable normative end in itself, it is an instrumental device for achieving certain social goals.*⁶³

From my perspective, it is plausible to characterize a reflexive regulatory program itself, (with its democratized procedural rationality and legitimacy-generation capacity) as a worthy "social goal". Teubner cautions, however, that power equalization strategies "make sense only if those goals are expected to be achieved through symmetrical power relations."⁶⁴ I respond by positing that a reflexively rational program of regulation must be organized in a manner which is consistent with the ethics of discourse that the Habermasian model posits, since the legitimacy of decision-making rests on discursive rationality. This is a goal which in the last instance can only be achieved through an equalization of the right to contribute to decision-making discourses, and an equalization which takes place between

⁶³ Teubner (1985b), p.318. Emphasis added.

⁶⁴ Teubner (1985b), p.318.

participants, within the confines of discourse.

In this way, it is possible to see how equalization and reflexive law must be tied closely together. My overall point is that equalization of power in no way constitutes an unreasonable "normative end in itself" in the above example. Rather, it is a requisite means to an end. The end in this case is the reflexive regulation of a social arena.

Although there is always a danger in reducing complicated relationships to the status of metaphor, a mathematical formulation may help to distinguish the ways that Teubner and I perceive reflexive law. In my case, the formula is $A + B = C$. In this example, "A" represents equalization of power and "B" represents flexibility and cognition of the regulated area. "C" equals "reflexion" or a successful regulatory program ordered by reflexive law. It is clear that my analysis posits the impossibility of getting to "C" (reflexion which is legitimated through discursive rationality) when "A" is missing from the formula. For Teubner, there is no need for addition, since "B" (cognition and flexibility) and "C" (reflexion) are for all intents and purposes one and the same thing.

The preceding analysis has highlighted how Teubner's remarks on the role of equalization of bargaining positions in reflexive law are inconsistent with the Habermasian model of discursive rationality on which he relies. In opposition to this, I maintain that if reflexive law arises (as it is

supposed) as a response to a crisis in legitimation, and that which differentiates it is said to be the means by which it legitimates itself (discursive rationality), then the "new" forms of regulation should demonstrate (above all else) a commitment to the premises of discursive rationality, which in the case of production, should include a fair and equal distribution of decision-making capacity to those whose interests are involved.

Chapter III. Labour Relations and Reflexion: an Assessment

So far, the development of Teubner's reflexive legal theory has been considered, and an attempt has been made to reconstruct reflexive law that requires a discursive equalization of bargaining power as part and parcel of a reflexive regulatory program. What remains is to evaluate the reflexivity of labour relations law according to this "democratically invigorated" model of reflexive law. I concur with Teubner's suggestion that contemporary labour law incorporates a reflexive orientation (as compared with a formal or substantively rational orientation).¹ However, I maintain that the extent of the "reflexiveness" of the regimes of collective bargaining and codetermination can only be identified with the help of an analysis which questions their capacity to institutionalize discursively rational decision-making. In this chapter, I consider how contemporary labour law "measures up" against such a model of reflexive law.² I contend that while collective bargaining does not, for the most part, exhibit a thoroughly reflexive rationality, the regulatory order of German co-determination is based upon a much more reflexive orientation. Even so, however, there are

¹ Teubner (1983), p.276.

² In considering the accuracy or otherwise of Teubner's remarks concerning the operation of regulatory labour law, my argument is confined to the German experience, since it grounds many of Teubner's claims about labour law generally. See especially Teubner (1986).

reasons to suggest that co-determination law fails to fully institutionalize the kind of discursive rationality that reflexion requires.

I. Collective bargaining and co-determination: distinct modes of equalization

According to the critical reconstruction of Teubner's theory of reflexive law which I have forwarded, which indicates that equalization must be a core component of reflexive law (because of its reliance on discursive rationality), the characterization of labour law as reflexive relies in large measure on the "equalization effects" produced by the legal regime in structuring negotiation. In order to be distinguishable from a liberal-pluralist description of labour relations in capitalism, the reflexive "label" must be supported by evidence of discursively rational equalization in decision-making spheres.

Collective bargaining

The labour relations regime in Germany represents a highly legalized system of employment regulation that includes the schemes of collective bargaining (at the regional or industrial level), works councils (at the level of plant or workplace) and codetermination (at the level of the firm).³ Of these procedural mechanisms, collective bargaining is the

³ For a description of the German regime see Streeck (1992a); see also M. Weiss, "Recent Trends in the Development of Labor Law in the Federal Republic of Germany," Law & Society Review, Vol.23, No.5, 1989; and A. Hyde, "A Theory of Labor Legislation," Buffalo Law Review, Vol.38, 1990, p.410.

"least" reflexive. Collective bargaining refers to a system of negotiation where unions, representing their members, bargain with employers to establish collective contracts of employment. Collective bargaining does involve a proceduralization of negotiation, but this proceduralization is limited to the first "mode of equalization" that I suggested earlier, in the sense that the arrangements reached are based on a market or contractual legitimation, as opposed to a discursive one. What this means, is that while the "rules of engagement" do indeed "shape the organization of collective bargaining"⁴ they do not do so in a way that relies on the allocation of effective status-based "rights" to workers to engage in a discursive process of consensus generation.⁵ Any "right" to agree or disagree provided for in the realm of collective bargaining is for the most part made effective (or not) through the economic strength (or weakness) of a party to the negotiation rather than the "force of the better argument" as is required by discursive rationality. It is important to recognize that collective bargaining is "good" for workers in the sense that their

⁴ Teubner (1983), p.276.

⁵ Weiss neatly phrases how the regulatory order based on contract as opposed to status, allows social conditions of inequality to enter the arena of negotiation: "Collective bargaining is implied by the guarantee of the freedom of association in Article 9, Section 3 of the constitution. But how far can the state regulate matters of collective bargaining that have traditionally been management prerogatives? ... Article 9, Section 3 is only one of a number of conflicting articles in the Constitution, the most important being Article 14, the guarantee of private property. Since this article also includes the means of production, it protects core management decisions."; Weiss (1989), p.765.

contractual achievements or advances gain a certain legitimacy and enforcement potential, due to the boundaries or rules set by the regulatory regime.⁶ In the bargaining itself, however, the legal regime only grants workers legally-recognized permission to collectively exercise rights of contract on a capitalistic labour market.⁷ The recognition and legal enforceability of such rights is by no means unimportant, and it is not entirely unlikely that their collective exercise may lead to significant gains for workers, but the proceduralization of discourse involved here is of an order which does not lend itself well to consensus-generation through discursive equalization.

Co-determination

A very different case may be made for the system of employment regulation characterized by the allocation of co-determinative rights. There are two related "forms" of representation which arise as a result of legislation;

⁶ For example, the development of a collective bargaining regime typically represents an improvement for workers bargaining power because it permits the formation of collective labour contracts. This alone allows workers the advantage of a de-commodification of labour on the market. For a discussion of de-commodification, see G. Esping Andersen, "Citizenship and Socialism: De-commodification and Solidarity in the Welfare State" in Stagnation and Renewal in Social Policy, Rein et al., eds., (London: M.E. Sharpe, 1987).

⁷ The manner that the collective bargaining regime is structured, with its reservation for employers of the prerogative of management, in fact allocates to the owners and managers of capital a type of status based right which is not equally distributed amongst the parties to collective agreement negotiation. As Weiss, phrases it, "decisions whether to engage in business at all, whether or not to invest, and whether or not to increase personnel remain management's prerogatives" assured by the "guarantee of private property" enshrined in the Constitution; Weiss, (1989), p.765.

workplace works councils and co-determinative company supervisory boards. Under the Works Constitution Act of 1952, workers in establishments with at least six employees were entitled to elect a works council to represent their interests. Amended in 1972, the Act accords rights to "information, consultation, and co-decision making on a wide range of subjects."⁸ Worker representatives may also be entitled to release from their normal duties so that they may function more effectively.⁹ In terms of the specific rights that councils are accorded, with respect to their employers, Streeck outlines the following:

the Act entitled works councils to co-determination on all matters relating to working time unless regulated by law or industrial agreement. Moreover, it extended co-determination to the setting of piece rates and the design of workplaces and the work environment, and it made it obligatory for an employer to ask the works council in advance for its assent on "any engagement, grading, regrading and transfer" of employees.¹⁰

Furthermore, the legislation also provides works councils with veto rights which prevent employers from acting unilaterally on certain issues.¹¹

⁸ W. Streeck, "Successful Adjustment to Turbulent Markets: The Automobile Industry," Industry and Politics in West Germany: Toward the Third Republic, Katzenstein, P.J., ed., (Ithaca: Cornell University Press, 1989), p.127. This article is reprinted in W. Streeck, Social Institutions and Economic Performance: Studies of Industrial Relations in Advanced Capitalist Economies, (London: Sage Publications, 1992).

⁹ Streeck (1992a), p.146.

¹⁰ Streeck (1992a), p.147.

¹¹ Streeck (1992a), p.147.

The other level of representation where the German labour relations regime allocates decision-making authority to workers is the level of the enterprise supervisory board. The Works Constitution Act of 1952 allocated one-third of the seats on supervisory boards to workers in certain types of companies with at least 500 employees.¹² In the coal and steel industries, separate legislation (the Co-determination Act of 1952) allocated half of the seats on supervisory boards to worker representatives in companies where employees numbered more than 1000.¹³ The Co-determination Act of 1976 allocated parity representation on supervisory boards to workers (outside the coal and steel industries) in companies with more than 2000 employees.¹⁴

Even such a general outline of the co-determinative elements of the German labour relations regime facilitates an understanding of the differences which separate it from the regime ordering collective bargaining. The co-determinative regulatory order is one which is premised on status-based rights, as opposed to contract-based ones. As indicated above, in reference to the entitlements of works councils, the

¹² In "joint-stock companies, companies with limited partners holding shares and limited liability companies" with the requisite number of employees, workers were entitled to elect one third of a company's supervisory board; Streeck (1992a), p.138.

¹³ Another important difference from the Works Constitution Act, was that the Co-determination Act extended beyond the supervisory board and called for the creation of the position of "labor director" on the company's management board; Streeck (1992a), p.139.

¹⁴ Streeck (1992a), p.148.

capacity of worker representatives to participate in decision making is based on a type of "inalienable" right to veto an employer's plans on certain issues. In this manner, an employer's ability to act unilaterally, and therefore without the approval or consensus of those whose interests are at stake, is effectively nullified. As Weiss puts it:

Codetermination means that management cannot make any decisions without the consent of the works council. In the absence of a consensus, any move by management would be judged illegal. [Codetermination] gives both sides an equal voice in the decisionmaking process.¹⁵

This, much more than in the realm of collective bargaining, approximates the conditions of discursive rationality that were the subject of the last chapter, since discussion takes place in an arena where the participants (worker representatives and their employer) are roughly equal, with respect to their joint authority and capacity to decide on certain issues. A "codeterminative rationality" evinces some commitment to the requirements of discursive rationality as specified in the "neo-pluralist" mode of equalization.

II. On the potential and limitations of co-determination law in equalizing bargaining power

Even in the relatively "discursively rational" mode of equalization that the system of works councils and parity

¹⁵ Weiss (1989), p.768. Weiss uses the term *codetermination* here to refer not exclusively to the practices of decision-making at the level of the supervisory board, but rather to a notion of co-management on prescribed issues at the level of the works council.

codetermination entails, there are some not inconsequential deficits which remain. Teubner raises some of these problems in his exploration of German co-determination,¹⁶ but from my perspective, his treatment leaves some important ground unexplored. My first concern is that Teubner's marginalization of the importance of a discursive equalization of bargaining power for a reflexive regulatory strategy leads him to dismiss, rather cursorily, the whole question of whether co-determination can deliver democratizing effects to individual workers in firms. He considers some assessments of co-determination which indicate a rather limited or negative perception on the part of individual workers, of positive or democratizing effects resulting from co-determination:

workers did not have more satisfaction, trust, sense of responsibility or work motivation.... Rather than to democratize the workers' situation, the representative bodies [works councils] are perceived to function as part of the control structure.... rank and file employees do not know much about the work of their representatives...."¹⁷

From this information, Teubner posits that searching out the democratizing effects of co-determination for individual workers is done in vain, and that "co-determination law should

¹⁶ Teubner (1986).

¹⁷ Teubner (1986), p.264. Teubner goes on to cite Streeck: "Workers under parity co-determination were as much subject to hierarchical control as workers everywhere else, the organization of their work continued to be determined by impersonal mechanisms beyond their influence and understanding, and their attitude toward their work did not differ in any perceptible way from that of workers in other industries."; Teubner (1986), p.265.

give up this orientation toward a non-suited purpose [participatory industrial democracy] and concentrate its regulatory powers" elsewhere.¹⁸ He concludes that the proper understanding of the function of co-determination involves its contribution, on an inter-organizational level, to assuring the institutionalization of public accountability. Teubner characterizes co-determination as an important element of a neo-corporative order, the goal of which, as Streeck and Schmitter put it, is the design of "politically privileged structures for publicly responsible interest accommodation."¹⁹ Teubner's analysis is concerned with demonstrating the role of co-determination as "one of the main integrative devices in a society which is characterized by extreme functional differentiation."²⁰ As such, it operates

neither on the level of individual participation, nor on the intra-organizational level of labor-management-relations, but on the societal level as a re-integrating mechanism.²¹

Teubner's assessment is not an incorrect one, but it seems that because his version of reflexive law is not grounded in a deep enough commitment to democratization through discursive proceduralization, his analysis of what is

¹⁸ Teubner (1986), p.264.

¹⁹ Streeck and Schmitter (1985), p.21.

²⁰ Teubner (1986), p.269.

²¹ Teubner (1986), pp. 269-270.

supposed to be (by his own account) a reflexive legal order conveniently passes over what I take to be a rather significant issue, and one which likely generates certain negative repercussions for the capacity of the neo-corporative order to generate a legitimate (that is, not based on force or state coercion) re-integration of the various interests which compete in such a highly differentiated society. This problem is precisely the "large social distance between individual interaction at the workplace and organizational decision making in the corporate hierarchy"²² which Teubner notes. Rather than question how the particular proceduralization of bargaining as institutionalized by co-determination contributes to this separation of worker representatives from other workers, Teubner moves directly to a demonstration of how, in terms of the relationships between labour and capital, co-determination contributes to the generation of order on a societal scale. In this, his analysis again prioritizes the "ultimate" goal of a reflexive legal order that facilitates the development of self-regulating social spheres. The "end" (self-regulation, reflexion, re-integration) in a way takes precedence over the "means" (democratization of decision-making capacity). In adhering to this dichotomous model, Teubner evades a discussion of how the proceduralized regime, with all its benefits, might itself be responsible for hindering rather than encouraging a kind of democratization

²² Teubner (1986), p.264.

which is necessary to integration under complex "post-modern" differentiation. Rather than concluding that co-determination is simply not suited to the institutionalization of widespread participatory industrial democracy, if Teubner were more concerned with the whole question of discursive equalization, he might have engaged in an analysis of how the very structure of co-determinative bodies may contribute to the dearth of positive effects to be felt by individual workers.

Teubner identifies a problem with the German neo-corporative order of industrial relations that I think is directly related to this issue of "social distance" between decision-makers and their constituencies. One of the functions of co-determination law (and the discursive proceduralization of decision-making) is to effectively encourage a co-operative mode of interaction between workers and employers. Teubner's assertion, is that the real value of this system is to be found in the way that, as a component of a neo-corporatist order it helps to "re-integrate" various competing interests,²³ while at the same time allowing for a high degree of differentiation. The problem arises with respect to the "success" of the differentiation which the neo-corporative order maintains. As Teubner phrases it:

²³ As Streeck and Schmitter put it the neo-corporative order "requires the protection and/or creation of corporative-associative actors and policy-making arrangements which, by their inherent institutional dynamics, arrive at interest definitions which are, at least in part, compatible with the objectives of public policy - i.e. that produce, in the pursuit of 'categoric goods', 'public goods' for the society as a whole.; (1985), p.21.

The more successful cooperation between capital and labor on the level of the organization transforms them into a collaborative "productivity coalition" the more they tend to exploit their environment and the less they are open to successful external regulation.²⁴

To the extent that this represents the resistance of decision-making bodies to internalizing external interests, it militates against one of the primary aspirations of reflexive-self-regulation. The overall point I want to make is the possibility that, because the proceduralization of decision-making that co-determination represents (at a micro level) does not allocate to individual workers the kind of democratic rights to participate in every-day decision-making, and rather allocates these rights to their representatives, the potential for the internalization of external interests may be hindered at this level. In this respect it is useful to recall Weiner's comment regarding the "transformative purpose" that underlies a discursive democratization strategy, where the empowerment of individuals is sought in their everyday experiences, in order to promote:

transformative effects in their social group membership/citizenship identities: making them more knowledgeable, more public spirited, more attentive to the interests of others, [and] more probing of their own interests.²⁵

I do not intend to engage in a detailed discussion of how

²⁴ Teubner (1986), p.271.

²⁵ Weiner (1992), pp.16-17.

the design of "proceduralized discourse" in the German labour relations regime might prevent a widespread distribution (to individual workers) of decision-making authority. I do want to suggest that a model of reflexive law which is more deeply committed to the importance of democratization for the generation of the sense of "public spirit" is a useful platform from which to examine the interesting problem of the resistance of co-determined firms (successful "productivity coalitions"), to internalizing a responsibility to external interests.

Limits to discursive rationality generated by co-determination law

Another issue that requires consideration is that, even though Teubner introduces his examination of co-determination as an attempt to discover the "potential and limits"²⁶ of the German approach to industrial democracy, he fails to identify some of the means by which co-determination may "violate" the conditions of discursive rationality that reflexive law requires. As is clear from the text above, co-determination, based as it is on legal rights to elect "empowered" representatives to a decision-making council, does grant German workers some very useful leverage in dealing with their employers. A significant example of just how useful status-based rights can be for workers may be found in the manner that the German Federal Constitutional Court upheld the Co-

²⁶ Teubner (1986), p.262.

determination Act of 1976 against constitutional challenges brought by German employers.²⁷ Even more significantly, the Federal Court upheld the position of unions who challenged the right of companies to revise the structure and capabilities of their supervisory boards in order to avoid the consequences of employee parity, as required by the Act:

As a general principle, [the Court] pointed out that the ...Act took precedence over the civil-law autonomy of joint-stock companies since co-determination was a matter of the public interest. Company by-laws designed to circumvent the 1976 Act were therefore void. In particular, the Court held that *all members of supervisory boards had to have equal rights and responsibilities, and that any discrimination among them, other than provided for in the Act, was illegal.*²⁸

There is little doubt that such a legal "entrenchment" of what amounts to a form of discursive equalization is of critical importance for explaining the inherent advantage for workers who are subject to such a constitutionalization of decision-making. However, in the emphasized passage of the quotation above, there lurks an indication that the co-determinative order is more enigmatic than it might seem. What I am referring to here, is the manner in which the laws governing works councils and supervisory board representation are indeed responsible for a limitation of the scope of

²⁷ Streeck (1992a), p.149.

²⁸ Streeck (1992a), p.150. Emphasis added.

discourse and the distribution of decision-making authority, which may be unjustifiable. Recalling Peters' distinction between a discourse "which admits only a certain kind of question, ...and [a] discourse aimed at uncovering such limitations",²⁹ it is necessary to probe how limitations on discourse can be perceived as "watering down" the reflexivity of co-determination. Weiss suggests that while the scope of allowable action for works councils may be wide, it is precisely prescribed, and the powers of the co-determined supervisory board are limited to "only a few subjects."³⁰ In the case of the relationship between works councils and their employers, Hyde stipulates how employers retain the rights of "technical and commercial management."³¹ By the provisions of the Works Constitution Act of 1972, employers "retained the right to [make] economic decisions and to [make] managerial decisions that do not increase employee workload."³²

In the case of supervisory board representation, because of the division of supervisory and management functions, the power of elected worker representatives may also be effectively limited. As Weiss puts it:

Workers are represented only on the

²⁹ Peters (1986), p.77.

³⁰ Weiss (1989), p.768.

³¹ Hyde (1990), p.408.

³² Hyde (1990), p.412.

supervisory board, which has a purely control function. The management board has exclusive authority to run the company. The supervisory board elects the management board and monitors its activities, but it does not perform management functions.³³

The supervisory board must be provided with "comprehensive information on all basic issues" annually by the management board, and additional requests for information must be complied with.³⁴ It is possible for the supervisory board, by majority vote, to extend its own influence "to establish rules whereby some important decisions of the management board require the supervisory board's consent",³⁵ but in the event that the supervisory board refuses to agree, the management board may appeal to a meeting of shareholders, which has the power to "supplant" the consent of the supervisory board.³⁶

It is useful to recall Peter's statement (raised in the previous chapter) to the effect that where political rather

³³ Weiss (1989), p.769. Streeck is careful to specify however, that the influence of worker representatives in appointing management board members is somewhat limited; Streeck (1992a), p.155. One of the reasons for this, at least with respect to supervisory boards falling under the Co-determination Act of 1976 (outside of coal and steel; more than 2000 employees) may be found in the way that in the event of a deadlocked vote on the chair of the supervisory board, the shareholder representatives, as opposed to the labour representatives, are entitled to decide. Subsequently, when a deadlock occurs, the chair is entitled to the deciding vote. In the event of a significant conflict between shareholder representatives and labour representatives on the supervisory board, the 1976 law is structured in such a way that accords "the final word" to the shareholder representatives; Weiss (1989), p.769.

³⁴ Weiss (1989), p.769

³⁵ Weiss (1989), p.769.

³⁶ Weiss (1989), p.770.

than technical matters are concerned, the capacity for decision-making should be widely distributed. With respect to co-determination, the question arises whether management and economic decisions are of a political or technical nature. It is perhaps obvious that I would characterize them as political, so as to allocate to worker-representatives the rights to effectively participate in making any economic and management decisions. However, there is a more fundamental question than whether some inherently political status of economic decisions can be relied upon to underpin the right of worker representatives to decision-making participation. This concerns examining the means by which a decision-making body decides whether it has the authority or jurisdiction over particular issues. Perhaps the best "test" of the reflexivity of a decision-making institution which is based on discursive proceduralization is whether or not the institution can generate a genuine consensus around a highly contentious issue. In less abstract terms, what I am getting at here is the notion that a highly reflexive decision-making structure would rely on discourse to decide whether management prerogative was legitimate, and whether economic decisions should be above the purview of negotiation. To the extent that the German regime of co-determination, at both the level of the works council and the supervisory board, allows limitations which are "decreed" by the enabling legislation, rather than discursive legitimation to determine decision-

making authority, there remains some reason to question its reflexivity.³⁷ The "reserve" powers of shareholders to undermine the decision of a supervisory board to extend its influence over the management board exemplifies how this is a problem, since it amounts to prioritizing the stake of one group of interested parties over the interests of others in such a way that legitimately arrived at decisions may be overturned.

It is important to note that there is evidence that on the whole, management is likely to consult works councils on a "broader range of subjects than is required by law, and employers seek the consensus of the works council even if legally they do not have to."³⁸ Yet, in his analysis of developments in West German labour law in the late 1980s, Weiss makes the point that the limitations on worker representatives entrenched in regulations governing co-determination in fact has led to a discussion concerning the possibility of extending, by collective agreement, the scope of works council powers as well as those of the supervisory

³⁷ There is a way that this question of determining jurisdiction by "searching the rulebook" does not violate the conditions of discursive rationality which are necessary to reflexive law. In Habermas' model (as discussed in the previous chapter) the presuppositions of argumentative speech on a procedural level include the setting of jurisdiction and a concept of relevancy to guide discussion. However, an expansive approach to discursive legitimation could certainly accommodate the argument that agreement on normative claims generated through a discursive process would be superior to agreement based merely on a "reading" of the rules. One might also argue that the legitimacy of the rules themselves might hinge on their having been agreed to in conditions of discursively equalized exchange.

³⁸ Streeck (1992a), p.154.

board." This would seem to indicate that workers have identified and are seeking to rectify what might be characterized as a legitimation "deficit" left by the co-determinative regime.

Conclusion

The regime of collective bargaining that Teubner identifies as reflexive, produces far less in the way of equalized bargaining power than is required for genuinely discursive rationality. The reflexive "capacity" of labour law must be judged on its ability to equalize the bargaining positions of workers and employers in decision-making. Where labour law does not accomplish this, and for example, is characterized by regulations which hinder the power of workers by restricting the deployment of some "economic weapons" (such as the strike or slowdown) on the part of workers, at the same time as preserving the use of some economic weapons (such as the prerogatives of management) on the part of employers, then the extent of its reflexivity is highly questionable.

The realm of negotiation and compromise-generation entailed by co-determination rules (including both levels of representation) is organized along much more reflexive or discursively rational lines. However, it is possible to identify how some of the limitations on discourse entailed by regulation indeed hinder the labelling of even this mode of equalization as entirely reflexive. Drawing on Teubner's

¹⁹ Weiss (1989), pp.769-770.

words from one of those moments where he granted considerable weight to power equalization, a reflexive "strategy necessarily fails if social asymmetries of power and information can resist institutional attempts at equalization."⁴⁰ The preceding examination has held that under the influence of "labour law," certain relevant social asymmetries of power do remain. The reservation for shareholders and management boards of certain types of decisions is illustrative of how the power relations between workers and their employers remain asymmetrical in certain significant respects.

⁴⁰ Teubner (1983), p.277.

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Conclusion

In concluding this examination of reflexive legal theory and its applicability to the realm of the German labour relations regime, I want to suggest that the concept of reflexive law itself offers a certain potential to extend industrial democratization beyond its present limits. As Weiner and Preuss have both noted, the value of Teubner's reflexive model is that it emphasizes proceduralization and constitutionalization, or the use of "law as institution" rather than "law as medium."¹ From my perspective, the point of law's use as institution is the potential it offers for delivering equity to the sphere of human social interaction under consideration. I have indicated that the form of proceduralization is crucial to the realization of this goal of democratization, for what is required is an order of decision-making which corresponds to the conditions of discursive rationality, including a concern for structuring a free and equal generation of consensus. As Preuss notes, an equitable self-regulatory orientation can only be possible "if social asymmetries of power and information are abolished." I think it is crucial to recognize that neither collective bargaining nor co-determination abolish such disparities in power because they do not, quite pointedly, abolish

¹ Weiner (1992), p. 18; Preuss (1985), p.171.

² Preuss (1985), p.171. Emphasis added.

capitalism, which in its many complexities is inevitably at the root of those disparities of power between labour and capital in capitalism. I do not mean to suggest here that the abolishment of capitalism is some sort of facile project, but it is critically important to note that the reflexive orientation of labour law, in some important respects, fails to completely equalize the bargaining positions of labour and capital on the capitalist market. As well, it is important to recognize that even in the "relatively" reflexive order of German co-determination, the devolution of decision-making authority to the level of works councils and co-determinative supervisory boards has not delivered individual workers a markedly enhanced sense of control in their day to day experience of work.

Nonetheless, it would be foolish to ignore the democratizing effects of institutionalized decision-making structures which accord employee representatives the power to veto some of their employer's plans, which in effect means that on certain issues (at least), negotiations must take place in order to reach a consensus. The processes of engaging in collective determination of policy, and of participating in the generation of consensus, are ones which require a commitment to equalization if they are to generate the kind of legitimacy that reflexion aspires to. This legitimacy is not one based on coercion, either in the form of capital owners enforcing their rights of ownership as accorded

by the rules of property (as provided for by formal legal rationality), nor on the external imposition of standards by the state (as provided for by substantive legal rationality). Instead, the legitimation that a reflexive orientation requires is an internal one, which arises out of the collective generation of consensus. For this legitimation "mechanism" to work, its participants must be capable of rendering decisions from a position of equality.

"Discoursing" capitalism away?

The paradoxical situation that arises out of the co-determinative neo-corporative order in Germany is that of a partially democratized capitalism which retains (from the perspective of individual workers) those elements of productive relations that leave them subject to hierarchical management control ("management" being a partially joint function of the works council and the employer). Rather than asserting the value of the reflexive paradigm for designing a regulatory regime that functions to provide a type of social order at the societal level, I propose the utility of the reflexive paradigm for attempting to resolve this basic paradox. My assessment of reflexive law weighs heavily on its utility for institutionalizing the conditions within which certain hierarchies are dissolved. Handler has characterized the "modern/post-modern search for the dialogical community" as

reject[ing] classical liberalism, the
promise of governing human relationships

through formalism, as well as the epistemological aggrandizement of positivism. Instead, it seeks to break down hierarchy, to explicitly introduce values, commitments and intuitions into the discourse of action, and to create the conditions whereby people talk to each other.... It asks: in these spaces, what are the conditions necessary for community?³

Following this line of inquiry, I suggest that the question for reflexive legal theory to answer is how indeed are the conditions for the creation of community on a wider scale to be institutionalized in capitalist production?

I want to end, finally, with what might seem to be a jarring conclusion. One reason that it is worthwhile to think about reflexivity, and in particular the reflexive theorization of law, has to do with the possibilities the theory offers for the regulation of production and employment in a manner quite different from the way that capitalism operates. In this, I mean to suggest that through my examination of the paradigm, I have been struck by two conclusions. The first, as is clear, raises the difficulties of the reflexive paradigm for completely overcoming the authoritative and inequitable hierarchy of capitalist production. The second suggests that notwithstanding the difficulties the reflexive analysis may have in subjecting capitalism to assault, it serves as a marvellous platform for arguing for, and perhaps organizing, a mode of production

³ Handler (1987), p.1000 1001.

which would appear antithetical to capitalism. Indeed, a well-articulated and mature theorization of how to manage a socialist economy must certainly take account of many of the postulates of discursive rationality, democratic rights in production, and interest aggregation at a multitude of levels. It just may be that the theory of reflexive law might be particularly suited to such an organizational task. Chief among the reasons for allocating such potential to the theory of reflexive law, is the way that it relies upon an order of status rights (citizenship, membership in a productive community) as opposed to rights of contract (the juridical freedom to contract the sale or purchase of labour power) to allocate to persons the right to participate in decision-making. Of course the substantial question of how to get from "here to there" must serve as the subject matter of another analysis.

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Appendix A

Types and Dimensions of Modern Legal Rationality*

Dimensions	Types		
	Formal	Substantive	Reflexive
Justification of Law	the perfection of individualism and autonomy; establishment of spheres of activity for private actors	the collective regulation of economic and social activity and compensation for market inadequacies	controlling self-regulation; the coordination of recursively determined forms of social cooperation
External Functions of Law	structural premises for the mobilization and allocation of resources in a developed market society and for the legitimation of the political system	the instrumental modification of market determined patterns and structures of behavior	structuring and restructuring systems for internal discourse and external coordination
Internal Structures of Law	rule-orientation: conceptually constructed rules applied through deductive logic	purpose orientation: purposive programs of action implemented through regulations, standards, and principles	procedure orientation: relationally oriented institutional structures and decision processes

* Reproduced from Teubner (1983), p.257.

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