

## GENERAL THEORY OF NORMATIVE INSTITUTIONAL LEGAL SYSTEMS

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Concerning the need for a new conception of legal theory one question arises, above all, especially when external and internal observation as well as the critical reflexion of the premises and presuppositions of all dealings with the law permit a degree of distance, the question, namely, whether it is not an increasing application of scientific methods that is needed, in the sense that the development of a theory from the beginning involves the integration of a norm-descriptive point of view and intellectual stand-point with the norm-prescriptive theory of law, by way of complementing each other, as it were (multi-level-approach to law). This, at least, appears to be the only way of clarifying also the relationship between legal theory and philosophy and the theory and sociology of law. The inevitable consequences of the development of a theory of norms and action also have to be drawn from this.



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КРАВИЦ В. АПОЛОГИЯ ТЕОРИИ ГОСУДАРСТВА И ПРАВА. ОБЩАЯ ТЕОРИЯ НОРМАТИВНО-ИНСТИТУЦИОНАЛЬНЫХ ПРАВОВЫХ СИСТЕМ

В связи с необходимостью новой концепции правовой теории возникает, прежде всего, один вопрос, особенно в тех случаях, когда внешнее и внутреннее наблюдение, а также критическое осмысление предпосылок и презумпций всех операций с правом допускает некоторую степень дистанцированности. Вопрос состоит в том, нет ли необходимости в наращивании применения научных методов в том смысле, что развитие теории с самого начала предполагает интеграцию норма-

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тивно-дескриптивной точки зрения и интеллектуальной позиции, с одной стороны, и нормативно-прескриптивной теории права, с другой стороны, которые фактически должны дополнять друг друга (многоуровневый подход к праву). По крайней мере, представляется, что это единственный путь к пояснению отношений между правовой теорией и философией, а также теорией и социологией права. Из этого также должны быть выведены неизбежные последствия для развития теории норм и действий.

КЛЮЧЕВЫЕ СЛОВА: сравнение дуальной концепции «право — государство» или «правовое государство», одно «глобальное право»? одно «глобальное государство»? трансформация правовых систем, различающиеся виды юридической рациональности, многообразная современность, государственные правовые системы, негосударственные правовые системы, первичные и вторичные социальные правовые системы, правовая валидность, правовая коммуникация, теория норм и действий, социальные формы жизни, нормы как ожидания, социальные системы коммуникации, новое определение понятия права, бинарный правовой код, директивы и нормы, избирательность права, принятие и отрицание, многоуровневый подход к праву и правовым системам, конституционный правовой позитивизм, юридический позитивизм, право и правовые системы с философской перспективы, методологический индивидуализм, нормативное приписывание, самореферентность и воспроизведение, современная институциональная и системная теории, дихотомическое деление фактов и норм, нормативно-структурная связь.

## I. On the Withering Away of the Nation State

1. Today, when one examines the existing legal systems of central Europe, especially those of Western and Eastern Europe, one gains the impression that the state, or the states, no longer occupy the position we have hitherto ascribed to them in the social theory of state and law.

a) What is happening, is that a continuous shift in the politico — legal balance is taking place, in the sense that the individual states are losing their influence over their respective legal systems. One only has to look at the growing importance of the European Communities, the European Union and European law. The latter is superimposed *ab extra* on the legal order of the individual states and has already led to a noticeable transformation of the existing legal systems. Within individual state legal systems, too, restructuring and legal change is constantly taking place. This is usually discussed under the heading *Transformation of legal systems*. This transformation is a process of immense complexities to which I cannot give detailed attention in this context. From the point of view of a *general* legal theory it does raise the question, however, what the relationship between state and law is in this situation.

b) The above-mentioned developments and turbulences apply particularly to the central European state legal systems, especially to the *Rechtsstaat* ['law state', Rule of law] whatever that may be.<sup>1</sup> We must not be satisfied with simply

<sup>1</sup> See: *Neil MacCormick*, *Questioning Sovereignty. Law, State and Nation in the European Commonwealth*, Oxford 1999, p. 9f., 49: "Where it is so incorporated, the state is a *Rechtsstaat*, a state — under-law, a 'law — state'. ... But it will just be a confusion even to ask

describing and interpreting the respective developments in the individual legal systems on the basis of the constitution and laws, etc., in other words, with understanding them analytical- hermeneutically in the way of the humanities. We must attempt to interpret and explain them also from a different angle, namely that of an institutional approach to and a *general* theory of law and the social sciences.

2. The last point is very important for bringing legal systems up-to-date and optimizing the cooperation of legal systems and the contemporary development in modern legal theory. When one looks at the existing legal systems in Central Europe, and also at those of Western and Eastern Europe and beyond (!), there are many modernities, not one single pattern of modernization. And there are also many modern legal systems, not only one single 'World Law', as Alice Tay and Eugene Kamenka have pointed out so convincingly.<sup>2</sup> In what follows I distinguish between (i) State legal systems and (ii) Non-state legal systems. And I distinguish further between formal and informal law.

a) The concept of law based solely on the state<sup>3</sup> and concerned exclusively with formal state law seems far too narrow. The concept of law has to take into account the manifold informal social conditions and societal prerequisites for the production of law. The new concept of law, by contrast, does not, however, only come into existence in specific bodies set up by the state or in highly bureaucratized 'United States' let's say the USA, 'United States of Europe' (?), 'United States of Russia' (?), with their legal staffs.

b) The state has neither a monopoly nor a prerogative for the creation of law, but only a functional normative — institutional authority and superiority. *Auctoritas, non veritas facit legem*. I would like to distinguish here between *regional* societies and *world society* or *global society* as a whole encompassing all legal communications in our globalized legal world.<sup>4</sup> Law and global society, seen from my point of view, is but the *societal reality of law and legal order* in

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whether it [i. e. *The United Kingdom!* W. K.] could be a *Rechtsstaat*. The very term is one that has no currency in English, and 'law-state' is a barbarous neologism devised to spatchcock into British constitutional theory a concept which has no native home there."

<sup>2</sup> Cf. *Alice Erh — Soon Tay*, One world? One law? One culture? In: *Rechtstheorie* 19 (1988), pp. 1–10; *Eugene Kamenka*, Preface, in: *Werner Krawietz / Antonio A. Martino / Kenneth J. Winston* (Eds.), *Technischer Imperativ und Legitimationskrise des Rechts*, Berlin 1991: „We live all of us, in one world and many worlds." See also: *Jürgen Habermas*, *The European Nation State — Its Achievements and Its limitations. On the Past and Future of Sovereignty and Citizenship*, in: *Werner Krawietz / Enrico Pattaro / Alice Erh- Soon Tay*, *Rule of Law. Political and Legal Systems in Transition*, Berlin 1997, pp. 109–122.

<sup>3</sup> *Werner Krawietz*, *Recht ohne Staat? Spielregeln des Rechts und Rechtssystem in normen — und institutionentheoretischer Perspektive*, in: *Rechtstheorie* 24 (1993), pp. 81–133, 115 ff., 121 f. See: *Georg Henrik von Wright*, *The Crisis of Social Science and the Withering Away of the Nation State*, in: *Associations* 1 (1997), pp. 94–95; *Werner Krawietz*, *Taking State, Associations and Associational Method Seriously — On Withering Away of the Nation State and Beyond*. In: *Werner Krawietz / Csaba Varga* (Eds.), *On Different Legal Cultures, Premodern and Modern States, and the Transition to the Rule of Law in Western and Eastern Europe*, Berlin 2003, S. VII–XXI.

<sup>4</sup> *Werner Krawietz / Raul Narits* (Eds.), *Multiple Modernität, Globalisierung der Rechtsordnung und Kommunikationsstruktur der Rechtssysteme*, Berlin 2007, pp. 73–109, 81ff., 85.

(i) interaction systems, in (ii) organization systems as well as in (iii) State legal systems. At present, however, we have neither *one* global law nor *one* global state. There are also a number of reasons why it is highly unlikely that either of them can or will ever exist.

## II. Multidisciplinary Legal Investigation in Modern Legal Theory

1. The changes in the contemporary legal order are hard to identify precisely because they operate at the level of general background assumptions of the past which are usually taken for granted. The most important problem here is the lack of a socially adequate theory of law, represented by a well — integrated theoretical framework which is conceptually well-structured, empirically extensively tested and generally accepted.

a) What we actually have at our disposal are a number of contradictory and partial theories within different frameworks and various schools of legal thinking.<sup>5</sup> It is against this background of tensions between rival concepts of law that we can best understand the debates of contemporary legal theory. The conventional perspectives of the long-standing orthodoxy are no longer adequate, in my view. Instead of indulging in self-defeating controversies legal theory should make it its task to link a wide variety of legal ideas and conceptions within a broader framework and locate and interpret the law and legal principles within the societal texture.

b) Institutional legal theories both of the old and of the new provenance are so much *en vogue* again today<sup>6</sup> because basic legal research has in the last decades more clearly than previously exposed the secret deficiencies by which the merely analytical approaches in modern legal theory have always been afflicted and which they are still suffering from to this day, namely (i) the positivist constriction of its norm theory and (ii) their shortcomings in legal and social theory.

aa) In continental Europe this applies, for instance, to the various types of analytical theories of law (Kelsen, H. L. A. Hart) which probably constitute the purest embodiment — albeit each to a different extent — of analytical jurisprudence in its present form. It is quite obvious today, however, that the exaggerated philosophical positivism of these schools has hitherto prevented these approaches of analytical jurisprudence from ascertaining — additionally

<sup>5</sup> *Kazimierz Opałek*, Problems of Schools in Legal Theory, in: Eugenio Bulygin et al. (Eds.), *Man, Law and Modern Forms of Life*, Dordrecht/Boston 1985, pp. 161–173.

<sup>6</sup> For a detailed account see: *Neil MacCormick / Ota Weinberger* (Eds.), *Grundlagen des Institutionalistischen Rechtspositivismus*, Berlin 1985. A good survey over the development of contemporary British and Austrian institutionalism is offered by: *Neil MacCormick / Ota Weinberger* (Eds.), *An Institutional Theory of Law. New Approaches to Legal Positivism*, Dordrecht / Boston 1986, whose contributions to these volumes were, however, produced independently from each other. Further to this new line of research already: *Werner Krawietz*, Ansätze zu einem Neuen Institutionalismus in der modernen Rechtstheorie der Gegenwart, in: *Juristenzeitung* 40 (1985), pp. 706–714. See particularly *Werner Krawietz*, Towards A New Institutionalism in Modern Legal Thinking. Facets of Rationality, in: *Carla Faralli / Enrico Pattaro* (Eds.), *Reason in Law*, Milano 1987, Vol. 1, pp. 313–325.

and to a sufficient degree — the presuppositions and foundations of their norm theory which are provided by social theory.

bb) The renewal of institutionalist forms of jurisprudence taking place at present, described lately as neo-institutionalism does, on the other hand, appear to provide a suitable way of compensating the deficiencies in the analytical hermeneutic legal theories which the basic research in legal and social theory has diagnosed.

c) Considering what has been said so far, we are (i) in respect of the *rational orientation of law* and (ii) the *rational orientation of legal science*, clearly, faced today with a number of different *theories* of a law of reason, some of an older, some of a newer kind, not to mention the current, even internationally active, return to efforts aimed at continuing and further developing legal thinking based on traditional natural law and law of reason.

aa) Within the field of conventional general theory of law and principles there are a number of authors who never tire of advocating a renaissance of the law of reason. Their, in my view, all too one-dimensional option for the concept of reason (*Vernunft*), for rational as merely reasonable (!) principles and for rational as merely reasonable (!) norms and rules of law underestimates the practical and theoretical possibilities of a genuine *juridical rationality* as it is already applied and firmly established in jurisprudence and in the social sciences with their foundations in experience and observation and their concern with legal norms and action. Those acting in accordance with the prescriptions of the respective valid law act not only legally but also in a formal sense rationally.<sup>7</sup> It would appear to me — for reasons to be discussed below — to be ill-advised to go down that road in general legal theory. In the following I shall attempt to distinguish both empirically and conceptually between reason or rationality in regard to the law and the basic research involved in the development of a legal theory.

bb) Further, reference will have to be made to the distinction which, undoubtedly, exists between (i) institutionalized legal practice and its juridical rationality as it is practiced in everyday life within the legal system of modern society by legislator and jurisdiction and (ii) philosophical reason which in the view of some discourse *theories*, at least, is brought to bear *ab extra* on the law in a 'rational' legal discourse. This concept of reason is, by no means, identical with the rationality of law and jurisprudence because its application is not determined institutionally by norms, but, on the contrary, not infrequently *anti – institutional* in the discourse. If this is true legal discourse and legal science have to reveal the structural changes which have taken place under the surface structure of modern legal systems.

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<sup>7</sup> Elucidating this: *Georg Henrik von Wright*, *Wissenschaft und Vernunft*, Münster 1988, pp. 29 ff. He rightly regards the contemporary "discussion about rationality" as one of the "key topics in philosophy, sociology and cultural anthropology". See also: *Helmut Schelsky*, *Juridische Rationalität*, in: Schelsky (Ed.), *Die Soziologen und das Recht*, Opladen 1980, pp. 34–74.

2. Trying to give a certain gloss to the *postulates of a natural law or a law of reason* by draping the word and concept *law* around them appears, therefore, a highly problematical thing to do.

a) The use of this term must not blind us to the fact that this is an inadmissible equivocation since “natural *law*” and “*law of reason*” are not law in the sense of the *positivity of all law* (including customary practice). At best we are dealing here with normative legal-political demands inspired by moral or ethical considerations. Only a rational orientation and an empirically *and* analytically clean conceptual distinction are capable of establishing clarity in this situation.

b) The same applies to the relation between *law* and *scientific reason*. Just like the relationship between law and morality the relation between law and reason requires a clear analytical and conceptual separation which also attempts to do justice to the *societal* complexities of its subject. It appears thoroughly misguided to me, therefore, to speak of a law of reason if the intention is to pass off as valid laws what are, in fact, merely moralizing, perhaps even ‘reasonable’ or ‘correct’ normative demands not covered by democratic, politico-legal decisions. All such postulates — despite being camouflaged as reasonable truths — are by no means legally binding and represent no more than moral appeals with, at best, hidden legal-political intentions. The key question here is, whether and to what extent it is possible at all to perceive right law or the rightness of law and the legal order, in other words, to substantiate legal norms and their application on the basis of their content — and without any volitive and evaluative contribution and additional input! — in a purely cognitive way.

c) Law that is already coded, conditioned and determined by society and history as well as constitutionally and legally is *not*, in my opinion, something that could or ought to be subjected *ad libitum* to a moral-ethical or reasonable disposition by legal theory and philosophy of law.

3. If we reject the pretensions to the universality of law (in the sense of ‘natural law’ or ‘law of nature’) of which much legal theory appears to be built, how can we continue to uphold the claim of modern theories that they contribute to our *understanding and explanation of law and legal systems* in a way that goes beyond the limited horizons of *dogmatic (doctrinal) legal studies*? It may not be going too far to suggest, what we are seeing here are two contrasting types of rationality. In the following I shall concentrate on examining the normative rationality of those orientations which human actions receive from valid law — seen from the point of view of institutions and systems theory.

a) What distinguishes legal communication functionally and structurally from other forms of normative communication in the realms of religion, ethics etc. is, above all, the fact that it always occurs with reference to already valid and effectively operative legal *norms* (or to norm *sentences* in the symbolizing form of the legal language, respectively) which are used in an assumed, already established, normatively binding legal practice (vested with binding normative powers) in a particular regional society.

b) Legal validity is a product of the legal system and is worked out from moment to moment. In this way further starting points for further directives and legal norms are formed and these at the same time produce and reproduce the *legal system*. In form and content it presents itself as an *internally coherent and consistent normative whole formed by the primary and secondary systems of the law*.<sup>8</sup> We are, consequently, dealing not only with a system of norm sentences but — and this should be taken note of — with a social/societal legal system consisting of the entirety of all relevant juridical communication as well as — from the dynamic-functional point of view — embracing the constant flow of new communications and legal actions.

### III. Structural Functionalism Revised — General Theory of Indeterminacy

1. I am putting forward a version of legal thinking that is informed and shaped by history and society. According to my view, all law — with reference to all members of a legal community who are included in its normative system — is always found at a deeper socio-structural level than are all actual individuals or their formations in groups whose behavior is regulated on the basis of and in accordance with the standards of this legal system. The Legal system as a whole is and remains a Subsystem (in the sense of “Teilsystem” that means a partial system) of Society. Law gives effect to, mirrors or is otherwise expressive of the prevailing societal relations. This precisely is the central insight of my general legal theory which I share with the representatives of theory of norms and action, German, American, Scandinavian Legal realism, Sociological Jurisprudence, the sociological Institutional Theory of Law and Social Systems. I shall return to this point below.

a) Thus it is simply not the case that all law can be understood as a subsequently imposed limitation and restriction, as it were, on individuals and formations of groups. As a result I was never able to share the love that both analytical philosophy and Anglo-American idealism have had for socio-philosophical individualism, and an individualistic theory of action, which seeks to trace all human action to the properties of the individual, the acting individual, that is, to trace them to *a priori* life essences informed by reason. These approaches do not manifest an interest in the concrete social forms of life and interaction between human beings, nor an interest in the organized social relations accessible through experience and observational methods of analysis in the social sciences, let alone an interest in the societal reality of the law.

b) In their form, structure and function the legal systems of modern society — considered from the point of view of the theory of norms and action — constitute a single information — and communication system for the whole of society and with a world-wide influence. The normative networks of this system,

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<sup>8</sup> See: *Werner Krawietz, Modern Society and Global Legal System as Normative Order of Primary and Secondary Social Systems: An Outline of a Communication Theory of Law*. In: *ProtoSociology: An International Journal of Interdisciplinary Research* 26 (2009), pp. 121–149.

fixed by the language of law and founded on socially generalized expectations, serve the whole of society by providing orientation and by guiding behavior in all kinds of experiences and actions. It is the social function of legal systems to ensure that the addressees of the law act in accordance with their rules, *i.e.* to induce them to comply with the norms. This occurs when the latter fulfill the prescribed behavioral expectations set down and generalized by means of the language of law. A great deal of detailed research is still needed, however, to determine how legal communications are made legally binding and socially effective.

2. In the following I make the distinction between legal order and legal system. By legal systems I mean largely but not exclusively state legal systems in the context of modern society. They are characterized by their bureaucratic and procedural apparatus and their organization of persons and legal subjects (legislatures, courts, lawyers, etc.) who enact, apply, administer and otherwise deal with the rule of law. The legal order can be understood as an unpeopled, abstract entity that has comprehensively determined all legal rights, duties and powers within a society. As a result it needs careful structuring and systemization.

a) Legal action is defined as social behavior governed by normative or factual information. However, legal actions are constrained to limited alternatives by institutions and social systems. The term *information* has a particular meaning. There are two types of information. The *first* is practical (prescriptive) information, or knowledge of what ought to be done and of what is better or worse. The *second* is descriptive information, or knowledge of what is. Practical information of law has always to do with a norm, an ought proposition. These normative propositions include rules, principles, goals, values and interests, etc. The information, both practical and descriptive, that one communicates and processes in making a legal decision comes from learning through experience in one's cultural environment.

b) The second major determinant of human action is the scope for action permitted by institutions and social systems. Human beings operate within frameworks or structures or rules that both enable them to achieve certain ends and prevent them from achieving others. From the point of view of a socially based theory of legal institutions and social systems theories can now be defined in terms of function as I have already implied at the beginning of my contribution.

3. The legal system is a system of communication that serves to secure normative expectations.<sup>9</sup> New communications are regularly produced by

<sup>9</sup> *Werner Krawietz*, Legal Norms as Expectations? On Redefining the Concept of Law, in: Aulis Aarnio/ Karlo Tuori (Eds.), *Law, Morality and Discursive Rationality*, Helsinki 1989, pp. 109–140, 116 ff., 120 ff.; *Werner Krawietz*, Taking Legal Systems Seriously: Legal Norms and Principles as Expectations, in: *Werner Krawietz/ Leopold Pospíšil et al. (Eds.), Sprache, Symbole und Symbolverwendungen in Ethnologie, Kulturanthropologie, Religion und Recht*, Berlin 1993, pp. 361–384.

the system, but the system is programmed to steer legal communications to the legal circuit, political communications to the political circuit, economic communications to the economic circuit, etc. Which communications belong to which circuit is a question determined by each circuit itself according to its own code. The legal system, however, processes legal communications internally. The content of law and the legal order can change through legislation and judicial application. In reducing complexity, the legal system limits itself to certain kinds of communications, that is, only certain kinds of communications generate further communication and thereby continue the operation of the system.

a) In our society moral discourse is excluded from legal communication by the binary code of the legal system. The binary code which qualifies the different operations, screens out (!) other kinds of discourse. Somewhat like a digital computer, the legal system does this by selecting communications according to the binary legal code. The coding is what gives communication within the legal system its legal meaning and excludes (!) from the system other meanings. This code could be translated as law (and not: non-law), legal (and not: illegal), legally valid (and not: legally invalid), right (and not: wrong), just (and not: unjust). Only legally relevant communications are operative.

b) Obviously in today's society many communications can have legal, political, economic, cultural, religious and other (!) meanings. Because of the binary coding system, however, the communication will have only *one* meaning within *each* system. Thus a system of legal meaning is created. There is no starting point and no final point (unless the system disintegrates). One communication leads to another, which leads to another, and so forth. Following the distinction between directives and norms advanced by the contemporary analytical-normative theory of law<sup>10</sup> or by German legal realism and sociological jurisprudence it can be said that the legal system procreates itself by *self-referentially* linking new legal directives and legal norms to previously validated ones.

4. The basis for my approach is the *positivity of all law* which — in accordance with the genuinely normative theory of social institutions and systems theory advocated by me — will be understood as *societal selectivity of law* in the following.

a) Whatever is selected to become law, endowed with legal validity and established institutionally, is always a selection from other possibilities — neither more nor less. Every actually made ruling, therefore, proves contingent, considering that it might have turned out to be different. This does not, however, mean that the law is arbitrary since new rulings in the legal system — normally self-referentially (!) — follow on from previously made rulings (of the constitution,

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<sup>10</sup> Kazimierz Opałek, *Theorie der Direktiven und Normen*, Wien-New York 1986; Werner Krawietz, *Kazimierz Opałeks Rechtstheorie — in internationaler Perspektive betrachtet*, in: Werner Krawietz / Jerzy Wróblewski (Eds.) *Sprache, Performanz und Ontologie des Rechts*, Berlin 1993, pp. V–XX; Werner Krawietz, *The Concept of Law Revised — Directives and Norms in the Perspectives of a New Legal Realism*, in: *Ratio Juris* 14 (2001), pp. 34–46.

laws, legal rulings and so on). It is precisely the *way the legal system regulates and processes itself that constitutes genuine juridical rationality* as I have demonstrated on another occasion. It also dominates all practical legal action and argumentation.

b) When analyzing and describing the normative self-production it is necessary, therefore, — from the perspective of a communicative system conceived as self-referential, self-maintaining and self-reproducing — to be aware of the fact that one is not dealing with the iterative, as it were, merely repetitive and redundant production and reproduction of variations of well-known and long familiar norms and facts of the legal system.

c) Instead, it is possible also for new information to enter legal communication while the stock of existing norms remains technically speaking — according to formal law — the same. These new informations have to be interpreted and mastered with the help of the existing reservoir of knowledge of norms and facts, if necessary even by way of legal analogy.<sup>11</sup> As a result of this the stock of legal rules — of individual but generalizable legal rules, at least — is modified and in that sense increased. The question, what influence such changes exert over the legal order and whether these affect the identity of the entire legal system must remain unanswered for the time being.

d) In the following we have (i) to identify the configurations and components that constitute the *individual operation* and *normative communication of law* and (ii) to clarify which *institutional and systemic requirements* have to be fulfilled for an information to be conveyed successfully and a legal communication to be considered socially adequate. In any case, what matters is that the legal communication actually reaches the respective addressee and is, therefore, able to direct him to adhere to the behavior intended and prescribed by the law, *i. e.* that it becomes socially effective, it has a social impact.

e) From the normative-realistic point of view the *understanding* on the part of the recipient has to be regarded as a *partial aspect of selecting normative meaning*. It is both empirically and analytically distinct from information and utterance and always has a degree of independence. Among the conditions for the positivity of all law there is, therefore, no such thing as *automatic production of law*. The success of a normative communication is not measured by the fact that something has been conveyed correctly or wrongly but by the fact that a normative information has been *produced, uttered and understood* which can and may but does not have to provide a link for further juridical communication to issue from it. It only has to be *possible* in practical terms to react to the communicated legal text (law, contract etc.) by *acceptance / rejection* which presupposes in any case that it has been understood.

5. This selectivity continues on the different levels<sup>12</sup> of *law production in the secondary system of law, i. e.* in the legislative, executive and the judiciary. From

<sup>11</sup> *Antonis Chanos*, Begriff und Geltungsgrundlagen der Rechtsanalogie im heutigen juristischen Methodenstreit, Köln / Weimar / Wien 1994.

<sup>12</sup> See: *Werner Krawietz*, Neue Sequenzierung der Theoriebildung und Kritik der allgemeinen Theorie sozialer Systeme, in: Werner Krawietz / Michael Welker (Eds.), Kritik

the point of view of *legal dogmatics* it appears in the law production, on the one hand, as a means of concretizing and strengthening itself as well as securing its structures, and, on the other hand, as “*self – hierarchization*” (Krawietz) of the legal system.

a) The communication concept which is commonly used in the *general* theory of law, social institutions and legal systems may here assist us in finding our bearings. In view of the traditional, conventionally applied or implicitly presupposed concept of legal action which is commonly used in legal practice and legal dogmatics those examining the communication of law from the perspective of the theory of norms and action have to be prepared to see some overdue corrections and necessary (re-) arrangements in the design of the theory. The latter now seems imperative although the legal concept of action hitherto appeared entirely secure. Appearances can be deceptive.

b) In contrast to the traditional individualistic concept of action the following reflections take their cue from the realization that all communication of law and all legal action in the everyday life of communities has essentially always been guided and steered by normative institutions, organizations and other social systems. These normative — institutional facts have not been taken into account sufficiently, in my opinion, either by constitutional legal positivism, or by contemporary statutory and juridical positivism which today is advocated in the context of the normativism of pure legal science. Although these approaches include the actions of collective subjects<sup>13</sup> in their theories of norms and institutions they tend to continue to adhere to an essentially individualistic subject orientation and methodological individualism in their theory of action.

c) The concept of normative communication employed in the following reflections covers — both empirically and in terms of legal norm sentences — the entire field of legal communication, in other words, (i) the level of national (state) law, (ii) the level of the European communities and the law of the European Union and (iii) the level of international law of nations and communities (including national and international Non-Governmental Organizations, NGOs, INGOs). It comprises within it, therefore, the entirety of directives and norms which are *selfreferentially* produced in the legal system of modern society, that is, with continual logical and social *reference of the respective legal system to itself*, to its constitution, previously passed laws, etc. The concept of legal communication extends to all forms of legal action and all kinds of normative attribution of responsibility, in particular to the attribution and imputation of

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der Theorie sozialer Systeme. Auseinandersetzungen mit Luhmanns Hauptwerk, Frankfurt a. M. 1992, pp. 14–42. See particularly: *Werner Krawietz*, Legal Communication in Modern Law and Legal Systems. A Multi-Level Approach to the Theory and Philosophy of Law, in: Luc J. Wintgens (Ed.), *My Philosophy of Law. The Law in Philosophical Perspectives*, Dordrecht/Boston 1999, S. 69–120. For detailed account see: *Gerhard Preyer*, Multi-Level Approach der Theorie und Soziologie des Rechts, in: Mikhail Antonov / Werner Krawietz (Eds.), *Kommunikationssystem des Rechts — heute und morgen*, Berlin 2017.

<sup>13</sup> *Werner Krawietz*, Beyond Methodological and Theoretical Individualism — Are There Collective Actors or Collective Subjects in Modern Legal Systems? In: Ewa Czerwinska — Schupp (Ed.), *Values and Norms in the Age of Globalization*, Frankfurt a. M. 2007, pp. 385–396.

rights and duties as we know them today in the realms of civil law, criminal law and public law. Such a communicative social system is conceived to be self-referential, self-maintaining, and self-reproducing.

### Results and Conclusions:

— A concept of law based solely on the state and concerned exclusively with *formal* state law without taking account of the manifold *informal* social /societal conditions and prerequisites for the production of law seems, by contrast, far too narrow. By normative self-reference I mean the institutional legal fact that self-organization and self-production of the legal system and of the required laws take place in the legal systems of modern society, *i.e.* the communicative systems are conceived as self-referential, self-maintaining and self-reproducing. There is a continual self-reproduction of the legal system in the sense that it continually refers back to itself in all its normative / factual operations, *i.e.* it takes into account other operations and actions it has previously undertaken.

— From the point of view of the theory of law and of systems theory law comes into existence in *all social institutions and systems*, namely in interaction systems, organizations and in the *variety-pool* of society, be it a *regional* society or — on a higher level of abstraction — *global* society as a whole.

— What I mean by global society is not merely — as in Luhmann's approach — the one and only "world society" ("Weltgesellschaft") in its differentiation into independent functional subsystems (in the sense of "Teilsysteme" as partial systems of society) but the societal reality of law in its interaction and organization systems as well as in and between state legal systems.

— My systems — theoretical approach to law differs from Luhmann's — apart from the fact that he does not mention *state* legal systems — above all, because the concept of law and society used by me here rests on the differentiation between *regional* society and *global* society, that is, society as a whole, as I have pointed out earlier.<sup>14</sup> This distinction appears to me to be of vital importance as a guiding principle for the social observation of law. It is only by adhering to it that the theory of law can avoid the danger of missing the access to the societal reality of law in its observations and of getting lost in speculations about the world society of law. This is why — with a view to the requirements to be met by a *theory of normative communication* — an attempt is here being made to sketch the outlines of a socially adequate *framework theory of legal communication* which rejects as a matter of principle the narrow limitations imposed on legal thinking by individualistic *actor-and-subject* centered theoretical approaches.

— To construct and develop an information — and communication theory dealing with the relationship between norms and action is a highly

<sup>14</sup> Niklas Luhmann, Die Weltgesellschaft, in: *Idem*, Soziologische Aufklärung 2, 4. Aufl., Opladen 1991, pp. 51–71, 57; Werner Krawietz, Weltrechtssystem oder Globalisierung des Rechts? Konstruktion und Rekonstruktion der modernen Welt des Rechts in kommunikations- und systemtheoretischer Perspektive, in: *Rechtstheorie* 39 (2008), pp. 419–451, 425 f.

demanding task.<sup>15</sup> The concept of communication in the context of the modern institutions — and systems theories of law has to be used as a basis. This concept takes its orientation from the dichotomization into institutional facts and norms customary in the language of law. Starting-points are practical linguistic informations and normative communications — or, at least, those that can be formulated linguistically — with a social relationship to the law without this being necessarily provided by the state!

— Law is a specific form of social relation but not all law is formalized. There is, as I have pointed out on another occasion, not only a formal law but also an informal one. All forms of social behavior which serve to establish, concretize and change legal norms, be they general or individual ones, are to be counted as legal communications. In accordance with a societal differentiation established in law as early as in the nineteenth century, we shall, however, in the following make a distinction, both from a structural and from a functional point of view, between primary and secondary systems<sup>16</sup> in our analysis of law.

— In legal communication we regard the day-to-day legal actions in everyday life undertaken by private individuals or citizens and legal subjects who derive the orientation for their symbiotic behavior from already socially established legal expectations as part of the *primary system of law* while all decision taking activities by the highly organized and bureaucratized legal staff of the state, *i.e.* legislative, executive and judiciary, belong to the *secondary system of law*.

— No longer is law to be interpreted narrowly and reduced to no more than a static legal order comprising all valid norms, rules and regulations and based only on the hermeneutic access to legal texts. Instead the entire legal order is to be understood as a dynamic, and in its entirety socially established network of all legal acts, communications and actions which together constitute the legal system. Communications and legal acts occurring in a particular field always follow on from preceding communications and legal acts. In this way they contribute — by way of normative structural coupling<sup>17</sup>, that is, a kind of juridical rationality of linkage — to the continual production and reproduction of the legal system.

— It follows that the information — and communication system of law is a vast network made institutionally permanent and composed of systemic

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<sup>15</sup> *Werner Krawietz*, *Jenseits von national und staatlich organisierten Rechtssystemen — Normative Kommunikation von Recht in der modernen Weltgesellschaft*, in: *Werner Krawietz / Bodo Pieroth / Boris N. Topornin (Eds.), Kommunikation und Recht in der modernen Wissenschaft — national oder international?* Berlin 2003, pp. 27–41.

<sup>16</sup> *Werner Krawietz*, *Modern Society and Global Legal System as Normative Order of Primary and Secondary Social Systems: An Outline of a Communication Theory of Law*. In: *ProtoSociology. An International Journal of Interdisciplinary Research* 26 (2009), pp. 121–149.

<sup>17</sup> *Werner Krawietz*, *Ausdifferenzierung des modernen Rechtssystems und normative strukturelle Kopplung — sozial oder sozial?* In: *Georg Peter/Reuß-Markus Krauß (Ed.), Selbstbeobachtung der Gesellschaft und die Neuen Grenzen des Sozialen*, Frankfurt 2012, pp. 71–102, 86 et seq.; *Werner Krawietz*, *Rechtskommunikation und normativ-soziale Reflexion im sozietalem Rechtssystem und im Rechtswissenschaftssystem*. In: *Clemens Jabloner et al. (Eds.), Gedenkschrift Robert Walter*, Wien 2013, pp. 345–364, 366 ff.

operations consisting of directives and norms and made up of any number of legal communications. These are created, interlinked and thereby further developed in the everyday practice of law. This network is capable of growing in any direction thematically and of being enlarged at will. All social areas of human activity can be comprised within it and practically the entire world encompassed by it.

— The juridical argumentation which we deal with in everyday legal life as well as in the other legal practice which is normally organized by the state, *i.e.* in the secondary system of law, becomes accessible to a deeper understanding only if we distinguish both empirically and analytically between the different levels at which law is produced and analyzed as is shown in my conception of the *multi-level approach*.

— In addition it seems imperative to consider it also both in its interdependence and in the context of its impact. One might say, therefore, that the legal system gains its social identity as a result of its self-generated, deliberate normative legal acts. The directives and norms proceeding from them are not issued in accordance with a preconceived master-plan but pragmatically and in each case according to requirement, and at certain points, as it were, *ad hoc*. Directives and norms emanate from previous directives and norms which in turn give rise to new directives and norms and so on.

— To sum up I would like to say: a concept of law cannot, then, be concentrated alone on the state and its law qua medium of political action. One must also keep in mind the possibility that there is, within the state legal system, also non-state law, that is, genuinely societal law, existing alongside state law. This is to say that in the future the theory of law will have to devote more attention to, and show more regard for, the forces of communal formation and social self-regulation, and this entirely apart from the state legal systems and their mechanisms of politico-legal decision-making.

— Finally, there are also societies in which the state in the modern sense is simply unknown. What this amounts to -at any rate in the fields of legal and social theory- is no less than a departure from the narrow, positivist concept of law and legal positivism. A modern concept of law needs to be expanded through the notion that all law is, *primarily*, not the product of the decisions of a state legal staff but is, rather, a *lived law* that is, a system of human experience, norms, and actions, valid in reality and normatively efficacious. Its *expectational* structure with its distribution of rights and duties, an expectational structure *institutionally established* in multiple societies for the long run, is and remains dependent on social formation of different social systems.

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