

Gunther Teubner, Frankfurt  
Law and Social Theory: Three problems

Summary: Three theory disasters are the reason why legal doctrine which, particularly in Germany in the early 20th century, had developed a close symbiosis of law and social theory, has immunized itself against the influence of social theory. The alternative to this self-immunization is a distanced approach, whereby the law does not take social theories at their nominal value, but in a complex process of translation generates added value to legal doctrine. The article deals with three problems in the relation between law and social theory: (1) Competition between theories: How is the law supposed to make a selection if competing social theories give rise to mutually incompatible analyses of social phenomena? (2) Knowledge transfer: Can the results of social theories be directly applied within the law? Can social theories guide the selection of legal rules and sanctions? (3) Finally, there is the extremely difficult question of the normativity of social theories: Can normative criteria for legal practice be derived from social theories? The article uses as an example the problem of horizontal effects of constitutional rights in semi-private networks of medical research.

Keywords: law and social theory, sociological jurisprudence, theory catastrophe, knowledge transfer, normativity, publication bias

The relationship between law and social theory has occupied me since I wrote my doctoral thesis, i.e. for the past 40 years. I would like to summarize my experience:

- 1 There is no single social theory upon which the law could orient itself. Such a theory cannot exist, neither ought it to exist.
- 2 Over the last 80 years, German law has on three occasions succumbed to the temptation to subject itself totally to a theory of society. This has led to two theory disasters. It remains to be seen whether the third such disaster will also influence the law.
- 3 The law is faced with a dilemma. Total acceptance of a social theory is impossible, yet of necessity the law is exposed to the influence of social theories. The way out could be: a “distanced approach”, whereby the law does not take social theories at their nominal value, but in a complex process of translation generates “added value” to legal doctrine.

*Verba docent, exempla trahunt.* So let me begin with a legal case.

### ***1. Publication bias: A legal case and three theses***

Publication bias – this is a worrying but widespread phenomenon that is being discussed in a number of countries.<sup>1</sup> In order to develop an effective drug against a serious but rare disease, various private and public institutions join together to form a private-public partnership (PPP) network, based on bilateral agreements among them. Since the high costs make such projects unprofitable for the pharmaceutical industry, the financing is mainly provided by a private foundation, and subsidies are paid by the national health department. A university institution undertakes the basic research, while the clinical studies are carried out by a private research institution, a contractual research organization. A private pharmaceutical company organizes production and marketing of the drug. A communication agency takes care of the dissemination of information and publication of results in scientific publications and other media.

Following successful licensing on the basis of the clinical studies presented, the drug comes on to the market. However, after a while reports begin to mount up on serious side effects in many patients. Subsequent systematic research shows that the PPP network has been responsible for serious manipulation. The side effects were well known within the network, but the network has successfully prevented publication of the relevant results. The publication of experiments in which negative consequences occurred has been suppressed.<sup>2</sup> This had been indeed authorized by the bilateral agreements between the research institutions and the pharmaceutical company.<sup>3</sup> Other series of experiments have been published, but their results have been falsified in favor of positive effects.<sup>4</sup> It was not just the pharmaceutical company that was involved in the manipulation, but also the groups of researchers and the communication agency, which had their own interest in providing a falsified presentation of the results.

The numerous scandals surrounding publication bias have certainly given rise to strong reactions. Empirical studies have shown that this is a ubiquitous problem.

---

<sup>1</sup>Cf. *Fujian Song/Lee Hooper/Yoon K. Loke*, Publication bias: what is it? How do we measure it? How do we avoid it?, *Open Access Journal of Clinical Trials* (2013), 71–81; *Fujian Song/Sheetal Parekh/Lee Hooper*, Dissemination and publication of research findings: an updated review of related biases, *Technology Assessment* (2010), 1–220; *Gisela Schott et al.*, Finanzierung von Arzneimittelstudien durch pharmazeutische Unternehmen und die Folgen, Teil 1: Qualitative systematische Literaturübersicht zum Einfluss auf Studienergebnisse, -protokoll und -qualität, *Deutsches Ärzteblatt International* 107 (2010), 279–285; Teil 2: Qualitative systematische Literaturübersicht zum Einfluss auf Autorenschaft, Zugang zu Studiendaten sowie -registrierung und Publikation, *Deutsches Ärzteblatt International* 107 (2010), 295–301.

<sup>2</sup>An example: at the end of the 1980s the pharmaceutical group Sandoz commissioned a working group at the University of Tennessee at Memphis to carry out the MIDAS study, which was supposed to compare a new calcium channel blocker with older and cheaper drugs. When the results revealed that the new drug offered no benefits compared with tried and tested ingredients, and in fact indicated many harmful side effects, Sandoz tried to prevent the publication of the study data by putting pressure on the research team. Cf. *William Applegate/Curt Furberg/Richard Grimm/Robert Byington*, The Multicenter Isradipine Diuretic Atherosclerosis Study (MIDAS), *Journal of the American Medical Association* 277 (1996), 297–298.

<sup>3</sup>A researcher at Irvine University of California received a research grant from Boots Pharmaceuticals and undertook not to make any potential negative results public without the agreement of the Group. On the basis of the contractual censorship clause, publication was prevented over a period of years. A legal action was brought against the Group for suppression of data, dishonest advertising and violation of consumer regulations. Cf. *Ralph T. King*, Bitter Pill: How a Drug Firm Paid for University Study, Then Undermined It, *The Wall Street Journal* of 12.04.1996, 1, 6.

<sup>4</sup>In 1997 Pfizer published only a small part of the the studies actually carried out on its antidepressant drug, specifically only the positive results, while data concerning potential side effects and the efficacy of the ingredient were withheld. Cf. *Dirk Eyding et al.*, Reboxetine for acute treatment of major depression: systematic review and meta-analysis of published and unpublished placebo and selective serotonin reuptake inhibitor controlled trials, *BMJ* (2010), 341.

Initial attempts are also being made to take regulatory countermeasures.<sup>5</sup> Yet the problems that arise here are not simply problems of political control, but also fundamental issues relating to constitutional law: does the fundamental right of academic freedom also give rise to third party effects within semi-private PPP networks? Can the fundamental right of patients to health be asserted vis-à-vis the network or individual members of the network?

The question of whether and how fundamental rights can claim validity vis-à-vis private networks is also of great interest as far as social theory is concerned. Theories of the “network society”, as developed by Manuel Castells for example, see the collective actor networks throughout society as the distinguishing characteristic of postmodern societies, and identify “network failures” as serious social risks.<sup>6</sup> The way fundamental rights are being endangered in non governmental spheres, in markets, organizations and networks, is not only a matter of concern to jurists, but is also an issue raised by various social theories, for example the constitutional sociology of Chris Thornhill; it is a phenomenon which is attributed to the expansionary tendencies of non governmental collective actors.<sup>7</sup>

Since both of these subject areas are juristic “virgin territory”, the findings of social theories may well prove to be highly relevant for the law. However, if we are seeking specific conclusions as far as legal practice is concerned, we are faced with some thorny problems:

1. Competition between theories: How is the law supposed to make a selection if competing social theories give rise to mutually incompatible analyses of networks, or simply do not agree concerning the validity and effect of fundamental rights vis-à-vis non governmental collective actors? On this point, my general thesis in a single word is: transversality.
2. Knowledge transfer: Can the results of social theories be directly applied within the law, i.e. can they be implemented in network adequate standards of fundamental rights. And can social theories guide the selection of sanctions against violations of fundamental rights so that they can be effective vis-à-vis the particular logic of networks? Again, my thesis can be expressed in a single word: responsiveness.
3. Finally, there is the extremely difficult question of the normativity of social theories: Can normative criteria for fundamental rights in mixed public-private networks be derived from social theories? My thesis: self-normativity.

## ***II. Thesis 1: Transversality***

### ***The particularities of German history***

In Germany the relationship between social theory and law has experienced highs and lows which have not arisen to such an extreme extent elsewhere. It started at a general European level, with periods in which jurisprudence existed in a close symbiotic relationship with theories about how humans live together. This applies not only to cosmologies of natural law, but also to the period of the Enlightenment, when philosophy boldly claimed to develop a theory of society which would lay down

---

<sup>5</sup>See VO (EG) 726/2004 on the implementation of government registers. The EU-RL 2001/20/EG, implemented 12. AMG amendment, BGBl. I, 2004, 2013, establishes for clinical trials a simultaneous assessment by ethics committees.

<sup>6</sup>Manuel Castells, *The Rise of the Network Society* (Oxford 2000); Johannes Weyer, *Soziale Netzwerke: Konzepte und Methoden der sozialwissenschaftlichen Netzwerkforschung* (Munich 2011).

<sup>7</sup>Chris Thornhill, *A Sociology of Constituent Power: The Political Code of Transnational Societal Constitutions*, *Indiana Journal of Global Legal Studies* 20 (2013), 577 ff.

binding principles in regard to politics and law. The law of reason expressed this symbiotic relationship, in which, according to Franz Wieacker, the old western philosophy of law and society ('natural law'), in the form which had been given to it by the early Enlightenment, acquired direct influence on jurisprudence, legislation and the administration of justice among most European nations.<sup>8</sup> This development reached its high point in the German-speaking countries, when Carl von Savigny responded to the social theory of Immanuel Kant, formulated as a society of individuals, with the modern-day Roman Law system: "All law exists because of the moral freedom inherent in each individual human being."<sup>9</sup> Kant's social theory, which states that citizens have spheres of freedom of choice which are ideally delimited from each other in such a way that the law can assume a form which is capable of generalization, was translated into a legal doctrine which saw law as a comprehensive system of subjective rights.

Soon, however, philosophy had to give up its role as the "leading science" for the law. Due to the accelerating functional differentiation of society, different spheres of rationality within society each took on their own separate existence, so that it was no longer possible to hold on to a single overriding viewpoint from which a unified legal concept of society could be developed.<sup>10</sup> In today's "society without any apex or center", as Niklas Luhmann describes it,<sup>11</sup> it is in principle impossible to devise any generally valid social theory into which the law could be incorporated. "The social system itself becomes so complex under such conditions as to no longer allow one to get away with a single system description."<sup>12</sup> Instead, based on different social rationalities, a multiplicity of independent social theories are developed that are utterly different, and yet are interwoven with and dependent upon each other. This situation does not even give rise to a "normal" controversy of theories that could ultimately be decided in favor of whichever theory is the most plausible. On the contrary, an entirely new kind of situation arises, to which the philosopher Gotthard Günther has given the name "poly-contextuality".<sup>13</sup> Out of their own specific rationality, different social "meaning worlds" create their own separate theories of society, which can no longer be reduced to a single standard theory, but exist side by side on a basis of equal origin. Max Weber has already spoken of a "new polytheism" in a historical situation, which makes any "monotheism" of theories impossible.<sup>14</sup> There is no longer one theory of society, but only equally justified partial theories relating to areas of society. Yet each one of these – and this is what gives rise to concern – at the same time lays claim to universal validity as the sole theory of society. It is this paradox – a multiplicity of partial rationalities with totalitarian claims

---

<sup>8</sup> Franz Wieacker, *A History of Private Law in Europe: With Particular Reference to Germany* (Cambridge 1996), § 15 I.

<sup>9</sup> Friedrich Carl von Savigny, *System des heutigen römischen Rechts*. vol. 2 (Berlin 1840), 2.

<sup>10</sup> The most important sociological contributions to social theory are probably theories of social differentiation as developed by Emile Durkheim, Georg Simmel, Max Weber, Talcott Parsons, Pierre Bourdieu and Niklas Luhmann. A summary can be found in Uwe Schimank, *Theorien gesellschaftlicher Differenzierung* (Opladen 1996). The law and legal doctrine itself are also covered by this autonomization process (see Section III below on this point) with the consequence that legal positivism is becoming predominant.

<sup>11</sup> Niklas Luhmann, *Political Theory in the Welfare State* (Berlin 1990), 43.

<sup>12</sup> Niklas Luhmann, *The Coding of the Legal System*, in: Alberto Febbrajo and Gunther Teubner (eds.) *State, Law, and Economy as Autopoietic Systems: Regulation and Autonomy in a New Perspective*, Milano (1992), 145-185, 156.

<sup>13</sup> Gotthard Günther, *Life as Poly-Contextuality*, in: Gotthard Günther, *Beiträge zur Grundlegung einer operationsfähigen Dialektik I* (Hamburg 1976), 283–306.

<sup>14</sup> Max Weber, *Gesammelte Aufsätze zur Wissenschaftslehre* (Tuebingen 1968), 605 ff.; cf. Wolfgang Schluchter, *Religion und Lebensführung*, vol. 1 (Frankfurt 1988), 299 ff., 302.

– that the law has to face today, if it aims to find a satisfactory relation to social theories.<sup>15</sup>

Economic theories have long since gone beyond the boundaries of their actual subject area – the economy – and claim to provide a theory of all social relationships, which society, and therefore also the law, understands as a vast network of utility calculations. Efficiency becomes a principle of law.<sup>16</sup> In a similar way, political theories perceive society as power and interest conflicts between groups and political associations and claim to represent a binding “leading science” in regard to society and the law.<sup>17</sup> The democratic-consensual foundation as the core of political rationale demands to be implemented everywhere in the law. In their turn, sociological role theories, which were developed for the micro level of society, are extrapolated to the macro level, raising the reciprocity of social roles to the status of a general social norm.<sup>18</sup> Again, moral criteria typically take the form of specific interactions as a demonstration of mutual respect. And yet the social theories of moral philosophy claim regulatory sovereignty over social (nowadays, principally ecological) issues and demand to be implemented in the form of legal norms.<sup>19</sup> Finally, social theories are also being developed in the scientific system itself, for instance in critical rationalism. Such theories insist on the impartial search for truth as the core of scientific rationality, and limit social theories to diagnosis and prognosis. Nevertheless they demand the general scientification of the law in a process of “technocratic universalization”.<sup>20</sup>

At the “Laboratorium Weimar”, where the loss of a general social orientation was seen in the law, the pluralization of social theories and law reached its high point. Faced with the accelerating pluralism of social theories – sociology, economics, political sciences, and moral philosophy – German jurisprudence embarked upon some bold experiments. The great controversies concerning constitutional theories (Carl Schmitt, Hans Kelsen, Hermann Heller), the dispute surrounding the alternative economic constitution or economic democracy (Franz Böhm and Hugo Sinzheimer), the invention of legal sociology, “Free Law” and the “Jurisprudence of Interests”, the competing approaches of sociological jurisprudence, the “economic viewpoint” in the law and “political justice” are an expression of this pluralism. In particular it is the acquisition of independent status by autonomous areas of the law (especially economic law, social law and labor law) that bears witness to the huge influence, which the pluralization of social theories has had on the pluralization of the law itself.<sup>21</sup>

---

<sup>15</sup>On the different rationality claims in greater detail: *Gunther Teubner* (1997) *Altera Pars Audiatur: Law in the Collision of Discourses*, in: Richard Rawlings (ed.), *Law, Society and Economy* (Oxford 1997), 149-176 with further references.

<sup>16</sup>Cf. *Horst Eidenmüller*, *Effizienz als Rechtsprinzip* (Tuebingen 1995).

<sup>17</sup>An informative summary can be found in *André Brodocz/Gary Schaal*, *Politische Theorien der Gegenwart* (Opladen 2009).

<sup>18</sup>*Ralf Dahrendorf*, *Homo Sociologicus: Ein Versuch zur Geschichte, Bedeutung und Kritik der sozialen Rolle* (Opladen 1958); *George Herbert Mead*, *Mind, Self and Society from the Standpoint of a Social Behaviorist* (Chicago 1967).

<sup>19</sup>The *praeceptor Germaniae postbellicae* knows how to answer almost any legal question with the authority of social theory, *Jürgen Habermas*, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge 1996), *passim*.

<sup>20</sup>*Hans Albert*, *Rechtswissenschaft als Realwissenschaft: Das Recht als soziale Tatsache und die Aufgabe der Jurisprudenz* (Baden-Baden 1993).

<sup>21</sup>On these developments in the 20th century in private law: *Wieacker* (Fn. 8), § 28 f., in public law: *Michael Stolleis/Thomas Dunlap*, *A History of Public Law in Germany 1914-1945*, (Oxford 2004), 45 ff. (constitutional law doctrine and constitution), 139 ff. (concerning the dispute over method in Weimar), 188 ff. (differentiation of administrative law).

However, German law abruptly abandoned this pluralism of social theory and law when, under massive pressure from the political sphere, it became subject to the monopolistic claims of a single *Weltanschauung*. During the low points of the more recent history of German law, totalitarian social theories were successful in imposing their normative rules upon the law whenever these rules were at the same time supported by the political system. In the 20<sup>th</sup> century, Germany law succumbed more than once to the temptation to subject itself to such an “imperialism” of one social theory, basing not only its fundamental principles but even single rules on the requirements of whatever leading political theory was dominant at the time.

The racial theory of National Socialism was the first and also the most horrifying low point in terms of the dominance of a political theory over the law.<sup>22</sup> Following the theory catastrophe in 1945, the relationship of the law to social theories in Germany led in the direction of two opposing and extreme positions. In the east, under massive political pressure another totalitarian social theory, dialectical materialism, took control of law and state – with fatal consequences for the rule of law.<sup>23</sup> The west, by contrast, responded to the unspeakable theory/law symbioses of fascism and real socialism with a different extreme: a kind of “immune reaction” of the law against any invasion by the “bacillus” of social theory.<sup>24</sup> Having presumably become wiser after this twofold experience, legal doctrine in the Federal Republic, which regarded itself as autonomous, rigorously fought off all alien influences of social theory. This self-imposed defense against any kind of interdisciplinarity remained unshaken even by the brief yet feverish attacks of social theory which occurred in 1968; indeed, the phenomenon of “sociology before the gates of jurisprudence”, which was feared to be a reversion to totalitarianism, further increased the trend towards the “self-immunization” of legal doctrine.<sup>25</sup> In legal comparison it is astonishing how extensively the law opened itself up to the social sciences in other legal systems, particularly in the Common Law. Foreign observers are quite disconcerted to register how German jurisprudence, which because of its strong theoretical orientation enjoyed international respect in the 19<sup>th</sup> and early 20<sup>th</sup> centuries, went on to deliberately narrow its focus to mere doctrine.<sup>26</sup> It is ironic that German law in the post-war period, in its state of profound uncertainty, followed many international influences, with a particular preference for the American legal world, but it resolutely turned away from the numerous “law and ...” movements which predominated in the USA.

There was however one exception. For in the seventies and eighties of the 20<sup>th</sup> century, one social theory with a claim to sole representation, which had already for some time dominated all areas of the law as a “leading science” in the USA, enjoying

---

<sup>22</sup> Cf. *Bernd Rütters*, Die unbegrenzte Auslegung: Zum Wandel der Privatrechtsordnung im Nationalsozialismus (Tuebingen 2004).

<sup>23</sup> Cf. *Michael Stolleis*, Sozialistische Gesetzlichkeit. Staats- und Verwaltungsrechtswissenschaft in der DDR (Munich 2009), 28 ff., 43 ff.

<sup>24</sup> Incisive criticism on this point by *Rudolf Wiethölter*, *Rechtswissenschaft* (Frankfurt 1968), 10, 27 f., 39 ff.

<sup>25</sup> *Rüdiger Lautmann*, *Soziologie vor den Toren der Jurisprudenz: Zur Kooperation der beiden Disziplinen* (Stuttgart 1971).

<sup>26</sup> „German jurists once wrote short but profound treatises like those of *Puchta* and *Windscheid* which attempted to explain the foundational principles of private law. Now, many German academics write contributions to long multi-volume treatises, each volume divided into a multitude of subsections and each subsection written by a different author. (...) Die *Einheit der Rechtsordnung* is either left to take care of itself or is handled by cross-references.“ *James Gordley*, *The State’s Private Law and Legal Academia*, in: *Nils Jansen and Ralf Michaels* (eds.), *Beyond the State: Rethinking Private Law* (Tuebingen 2008), 219, 222.

massive political support and an abundant flow of private financing, appeared on the scene in Germany as well.<sup>27</sup> Transaction cost theory, the theory of property rights, public choice and economic analysis of the law are various movements in economic theory which aim to substitute the worn-out concept of justice with economic efficiency of the law.<sup>28</sup> These movements claim to entirely supersede the former orientation of the law on moral philosophy, and refuse to countenance any other social theories whatsoever. They self-confidently and openly profess a kind of “theory imperialism”, permitting interdisciplinarity (for example in institutional economics), but only on their own terms. However, after economic theories had over a period of thirty years succeeded in expanding massively into all areas of life, right through to the economic analysis of love relationships and religious faith<sup>29</sup>, there occurred – in the financial crisis of 2008 – the third theory catastrophe, under the effects of which the interpretation monopoly of economics in many disciplines collapsed.<sup>30</sup> However, the question of whether this catastrophe also marks the end of the imperialism of economic thought in the law remains undecided.

### ***The distanced approach***

What does the law in its relationship with social theory need, following such abrupt changes between heights and depths? – A distanced approach. Admittedly, in light of these theory catastrophes the dedicated self-immunization of German legal doctrine after the war appears to be almost the only option. Yet there is a possible alternative: transversality. In philosophy, transversality was developed as a reaction to a similar situation, as a process for dealing with the postmodern plurality of discourses which has followed the collapse of the “*grands recits*”.<sup>31</sup> Transversality in the law would mean: The law recognizes that under extreme differentiation of society, there is no more a justification for the existence of any single generally valid social theory, but only for a multiplicity of theories of social areas which are equal in terms of their origin. These derive their justification from their coexistence, i.e. from the high level of autonomy and the simultaneous reciprocal interdependencies of different social rationalities. The law would then reject not only its one-sided economization, but also its one-sided politicization, sociologization, scientification and moralization. It would defend itself against any claim to totality of any theory; however, it would accept the intrinsic right of social theories that exist side by side. It would transform – and herein lies today’s challenge – the new plurality of language-games into the formation of legal concepts and the formulation of legal norms. This is possible if the law insists on the partiality of the various social theories and only opens itself up to their influence to the extent that they make statements, which are valid for their social sphere.

---

<sup>27</sup>Cf. *Steven M. Teles*, *The Rise of the Conservative Legal Movement: The Battle for Control of the Law* (2008).

<sup>28</sup>A brief presentation of legal economics can be found in *Brian E. Butler*, *Law and Economics*, *Internet Encyclopedia of Philosophy* (2011, <http://www.iep.utm.edu/law-econ>). Admittedly legal economics has not so far achieved a position of dominance over legal thinking in Germany in the same way as it has in the USA. One probable reason for this is the self-immunisation tendencies of doctrine which we have referred to.

<sup>29</sup>Particularly radical Gary Becker, cf. *Ingo Pies/Martin Leschke*, *Gary Beckers ökonomischer Imperialismus* (Tuebingen 1998); for a favourable evaluation see *Edward P. Lazear*, *The Quarterly Journal of Economics* 115 (2000) 99 ff.

<sup>30</sup>This collapse occurred even in the US corporate law, cf. *Eric W. Orts*, *Business Persons: A Legal Theory of the Firm* (Oxford 2013).

<sup>31</sup>Particularly by *Wolfgang Welsch*, *Vernunft: Die zeitgenössische Vernunftkritik und das Konzept der transversalen Vernunft* (Frankfurt 1996).

However, transversality means more than just recognizing the territorial autonomy of the theories associated with different social spheres. The proper response to the interconnectedness of social spheres which is associated with their autonomy must be a systematic exploration by the law of the inner logic of all competing theories.<sup>32</sup> Max Weber anticipated this transversality when he spoke of a “chain of final decisions” which is inevitable in the new polytheism, decisions which situationally have to be taken over and over again as we pass through the claims of different rationalities.<sup>33</sup> This would not be any arbitrary “pick and choose”, but a self-imposed obligation to carefully examine the claims of all theories in order to do justice to the plurality of social rationalities.

Transversal reason in the law would categorically reject the claim to totality currently asserted by economic theories, while at the same time acknowledging them as self-descriptions of the economic system. The autonomy and simultaneous interconnectedness of many partial social theories would be properly taken into account if the primary relevance of economic expertise is acknowledged in economic law, which would however at the same time mean that within economic law other social theories are also legally relevant in a secondary sense.<sup>34</sup> A similar principle applies in respect of political theories of the law, such as John Rawls’ theory of justice, which can claim primary (but not exclusive) validity only in regard to the field of political constitution, or Habermas’ discourse theory, which has arrogated to itself the status of a social theory but which must be demoted to that of a moral theory of interaction, and only in that context can aspire to discursive rationality. Even the systems theory (which is the one I personally favor) cannot lay claim to becoming a new “super-theory” and thus a leading science for the law, for in its turn it is only a partial theory of social communication, its differentiation and its interdependencies – a specialist in regard to the general, so to speak – which expresses no preference for any of the partial rationalities of the modern age, and certainly does not develop any partial rationality of its own with a claim to sole representation, but instead takes as its central theme the equal validity of different social rationalities.

Let us return to the subject of “publication bias”. What does transversality mean for the legal classification of a public-private network, in which pharmaceutical companies, academic institutions and public bodies cooperate in order to develop a new drug? The starting point is that a new kind of social phenomenon such as a PPP network cannot be satisfactorily covered either by the law of contract or by corporate law. Neither the legal concept of the contractual purpose nor that of the corporate purpose does justice to the aims of a network of different institutions. On the contrary, as numerous authors have come to agree, a separate legal concept has to be developed, that of the “network purpose”.<sup>35</sup> Here, the law readily opens itself up to

---

<sup>32</sup> Particularly emphasised by *Wiethölter*, for whom the law is only abreast of the times if it has thoroughly processed the messages of systems sociology, critical theory and economic institutionalism, *Rudolf Wiethölter*, *Zur Argumentation im Recht: Entscheidungsfolgen als Rechtsgründe?* in: Gunther Teubner (ed.), *Entscheidungsfolgen als Rechtsgründe: Folgenorientiertes Argumentieren in rechtsvergleichender Sicht* (Baden-Baden 1995), 89, 95f.; furthermore *Dan Wielsch*, *Die epistemische Analyse des Rechts: Von der ökonomischen zur ökologischen Rationalität in der Rechtswissenschaft*, *Juristenzeitung* 2 (2009), 67 ff.

<sup>33</sup> *Max Weber* (Fn. 14) 507f.; on that point *Wolfgang Schluchter* (Fn. 14), 339 ff.

<sup>34</sup> An exemplary study is offered by *Dan Wielsch*, *Zugangsregeln: Die Rechtsverfassung der Wissensteilung* (Tuebingen 2008), who in regard to the law of intellectual property in the Internet initially has recourse to economic theory, but then turns to competing social theories in order to do justice to political, scientific and artistic requirements.

<sup>35</sup> E.g. *Stefan Grundmann*, *Contractual Networks in German Private law*, in: Fabrizio Cafaggi (ed.), *Contractual Networks, Inter-Firm Cooperation and Economic Growth* (Cheltenham 2011), 111-162;



the analyses of economic transaction costs theory, according to which rational actors choose the novel form of a network when it offers advantages in terms of transaction costs by comparison with the structures of contractual or corporate law.<sup>36</sup> But as soon as the economic theory goes beyond this and insists that the network purpose is exclusively based on minimizing transaction costs, and if in addition it tries to hand over the regulation of conflict principally to private governance in the network, rejecting any intervention by state law on grounds of inefficiency<sup>37</sup>, the law must oppose the economic monopoly on interpretation. Only in the transversal examination of other social theories does it become clear that the new legal concept of the network purpose covers an area of greater complexity than any mere minimization of transaction costs. It is to be understood as a multiple orientation, embodying a commitment to the various individual projects of the network participants, on the one hand, and on the other hand to the overarching project of the network as a whole.<sup>38</sup> With a transversal approach, the law successively reacts to the impulses coming from economic, political, sociological, ethical and other partial theories. At the end the law understands intersystemic networks as organizational arrangements in which the conflict between different social rationalities is actually institutionalized. A legal concept of the network purpose, which is defined in this way, places an obligation on the actors to adjust their behavior to different and contradictory logics of action. In the case of the public-private research network, the participants are required simultaneously, although with varying priorities, to take into account four mutually exclusive categorical imperatives, specifically the contradictory requirements of economic profitability, scientific knowledge, medical standards and the political focus on the common good. In fact, as various social theories have stated, networks appear as a result of their hybrid nature to be almost tailor-made for absorbing several contradictory rationalities within themselves, permitting mutual interference without any hierarchical classification.<sup>39</sup>

Can the law of networks re-pond to such challenges? Instead of merely promoting the minimization of transaction costs, a legal constitution of networks will have to develop principles of institutional autonomy, fundamental rights, procedural fairness, the rule of law and political responsibility in these mixed public-private

---

from a comparative law perspective *Fabrizio Cafaggi*, Introduction, in: Fabrizio Cafaggi (ed.), *Contractual Networks, Inter-Firm Cooperation and Economic Growth* (Cheltenham 2011), 1, 11.

<sup>36</sup> *Fernando Gómez*, Cooperation, Long-Term Relationships and Open-Endedness in Contractual Networks, in: Fabrizio Cafaggi (ed.), *Contractual Networks, Inter-Firm Cooperation and Economic Growth* (Cheltenham 2011), 21, 22, 25; *locus classicus Oliver E. Williamson*, *The Economic Institutions of Capitalism: Firms, Markets, Relational Contracting* (New York 1985), 180 ff.

<sup>37</sup> *Oliver E. Williamson*, Comparative Economic Organization: The Analysis of Discrete Structural Alternatives, *Administrative Science Quarterly* 36 (1991), 269, 273 ff.

<sup>38</sup> On double attribution in networks from the perspective of both the social sciences and the law, *Gunther Teubner*, *Networks as Connected Contracts* (Oxford 2011), 154 including detailed references; *Gunther Teubner*, 'And if I by Beelzebub Cast out Devils, ...': An Essay on the Diabolics of Network Failure, in: Stefan Grundmann, Fabrizio Cafaggi and Giuseppe Vettori (eds.): *The Organizational Contract: From Exchange to Long-Term Network Cooperation in European Contract Law* (2013), 113-135, 124 ff.

<sup>39</sup> On conflicts of rationalities in inter-systemic networks *Marc Amstutz*, The Nemesis of European Private Law: Contractual Nexus as a Legislative Conundrum, in: Stefan Grundmann, Fabrizio Cafaggi and Giuseppe Vettori (eds.): *The Organizational Contract: From Exchange to Long-Term Network Cooperation in European Contract Law* (2013), 319 ff., 350 ff.; *Marc Amstutz*, The Constitution of Contractual Networks, in: Marc Amstutz/Gunther Teubner (eds.) *Contractual Networks: Legal Issues of Multilateral Cooperation* (Oxford 2009), 309-346, 335 ff.; *Gunther Teubner*, *Coincidentia oppositorum: Hybrid Networks Beyond Contract and Organization*, in: Marc Amstutz/Gunther Teubner (eds.) *Contractual Networks: Legal Issues of Multilateral Cooperation* (Oxford 2009), 3-30, 28 ff.

configurations.<sup>40</sup> The legal network purpose ought not to recognize any social theory as having a monopoly – there must be no exclusivity for the reduction of transaction costs, or for policy orientation, or for the acquisition of scientific knowledge, or for ethical standards of behavior. Instead, this legal form must seek to cover the multi-dimensionality of the networks by exploring different social theories. It is forbidden for the law to accept the dominance of any other partial social rationality.

A similar multiple orientation has already been developed in the legal concept of “corporate group interest”.<sup>41</sup> This is hardly surprising, for corporate groups are networks in just the same way as the contractual networks which we are addressing here. But by contrast with the law on corporate groups, which in addition to the legal guarantees of the autonomy of subsidiaries also protects the purely economic interests of the subsidiaries against the parent company and vice versa,<sup>42</sup> a great deal more is at stake in the case of inter-systemic networks. In our example, it is not just the acquisition of profits that may be regarded as the legal network purpose, but also the institutional integrity of research institutions, medical facilities, private trusts and public administration have to be respected in the decentralized structure of a network. While it remains expedient in the law on corporate groups to formulate a common economic corporate interest, which is common to all members of a group in the form of procedural and substantive legal norms, a network purpose in PPP cooperation can only consist in a search for an area of compatibility between different rationalities.

This associative purpose of inter-systemic networks finds its legal embodiment – in parallel with the contractual purpose and the company purpose – inter alia in duties of loyalty for the network participants.<sup>43</sup> These duties apply both in regard to the other participants (and therefore require their separate interests to be taken into consideration) and also in regard to the network as a whole (and are therefore directed towards the success of the project as a whole).<sup>44</sup> The manipulations of the research results, which in the circumstances of the case we have de-scribed were carried out, on the basis of their respective separate interests, by the communications agency in cooperation with the pharmaceutical company and the scientific establishment responsible for carrying out the clinical studies, were a blatant violation of both forms of the duty of loyalty, and give rise to serious legal sanctions. Unlike the contractual purpose or the company purpose, the network purpose imposes an obligation to promote the different rationalities involved and at the same time to balance them against each other. By contrast with the traditional balancing of interests in the individual case, the result of the transversality approach would be that different rationalities, and the way in which they are interconnected, are examined in a legal balancing process.

---

<sup>40</sup>Teubner (Fn. 39).

<sup>41</sup>Cf. Volker Emmerich/Mathias Habersack, Aktien- und GmbH-Konzernrecht-Kommentar, 7th ed. (Munich 2013), § 18 no. 7, before § 311 no. 47–50, § 311 no. 77–81; Michael Hoffmann-Becking, Gibt es das Konzerninteresse?, in: Bernd Erle et al. (eds.), Festschrift für Peter Hommelhoff (Cologne 2012), 433, 441 ff.; for the European discussion on „corporate group interest“ Tim Drygala, Europäisches Konzernrecht: Gruppeninteresse und Related Party Transactions, Die Aktiengesellschaft 16 (2013), 198 ff.

<sup>42</sup>Only the approaches of sociologically informed corporate group law go beyond this monotextural orientation, e.g. Marc Amstutz, Konzernorganisationsrecht: Ordnungsfunktion, Normstruktur, Rechtssystematik (Bern 1993).

<sup>43</sup>The external liability of networks is the other area of the law for which network-adequate norms have to be developed, cf. Teubner (Fn. 38), 235 ff. including detailed references.

<sup>44</sup>For a comparative law analysis Emily M. Weitzenboeck, A Legal Framework for Emerging Business Models: Dynamic Networks as Collaborative Contracts (Cheltenham 2012), 186 ff.

### III. Thesis 2: Responsiveness

The distanced approach is also recommended in another respect. If the law, in the transversal process, has reached a decision through its contacts with social theories, then these require that their findings be taken over into the law without being modified in any way. Legal doctrine in particular (the scientific character of which is in any case dubious) appears to be guilty of obfuscation here.<sup>45</sup> Accordingly, inspired by Jhering's polemic against conceptual jurisprudence, American legal realism has ridiculed traditional legal doctrine as "transcendental nonsense" and replaced it with a conception of the law (based on political theory) as a consequence-oriented social policy. Critical Legal Studies has intensified the "trashing" of doctrine on the basis of critical social theory and has demanded the open politicization of legal conflicts. The principal representative of economic legal theory, Richard Posner, has denied any autonomous contribution by legal doctrine to the rational establishment of norms and has called for the obsolete moral-political orientation to be replaced by criteria of economic efficiency. Other authors in turn have demanded the unity of the social sciences, so that jurisprudence as a "real science" is only a subsection of the social sciences and has no independent status.<sup>46</sup>

This must be vigorously contested: Any authentic transfer of knowledge from social theory into the law is an impossibility. It cannot succeed because of the unyielding autonomy of the legal system. This is the lesson not only of traditional legal doctrine, but also of advanced systems theory.<sup>47</sup> The functional differentiation of society which we have already addressed encompasses the law itself, as well as other social systems. Supported by the exclusive validity of the legal/illegal "binary code", the law develops a complex structure of concepts which we call "doctrine", which is in fact incommensurable with scientific theories. The code of law, which is different from other "binary coding" of society, forms the basis of the incircumventable autonomy of legal doctrine, which categorically excludes any one-to-one takeover of social theories.

Nevertheless, in light of the interdependence of social rationalities an interconnection between social theory and doctrine is necessary. However, this interconnection can only arise on the basis of autonomy on both sides. It is therefore misleading to speak of the relative autonomy of the law; on the contrary, a relationship of mutual enhancement exists between the autonomy of the law and its interdependence with other social systems.<sup>48</sup> In the first place, this means a strict division of tasks between two independent search processes: social theories provide structural analyses of social phenomena, they identify social problems which are generated by these phenomena in their environment, and they are able to provide directional information aimed at finding possible solutions to the problems, which they

---

<sup>45</sup>On the problematic question of the scientific nature of jurisprudence, a summary of the discussion is provided by *Klaus F. Röhl* and *Hans C. Röhl*, *Allgemeine Rechtslehre: Ein Lehrbuch*, 3rd ed. (Cologne 2008), 79 ff.

<sup>46</sup>*Loci classici: Felix S. Cohen*, *Transcendental Nonsense and the Functional Approach*, *Columbia Law Review* 35 (1935), 809 ff.; *Duncan Kennedy*, *Form and Substance in Private Law*, *Harvard Law Review* 89 (1975), 1685 ff.; *Richard A. Posner*, *The Decline of Law as an Autonomous Discipline: 1982–1987*, *Harvard Law Review* 100 (1987), 761 ff.; *Albert* (Fn. 20).

<sup>47</sup>*Niklas Luhmann*, *Law as a Social System* (Oxford 2004), 455 ff.; furthermore *Thomas Vesting*, *Rechtstheorie: Ein Studienbuch* (Munich 2007), 141 ff.

<sup>48</sup>The distinction is important. Relative autonomy means that dependence and independence are based on the same mechanism; a relationship of mutual enhancement is possible if dependence and independence are attributable to different mechanisms. The independence of the law is based on the interlinking of legal acts, while dependence is based on the challenges presented to the programs of the law.

subject to a functional comparison. This is something that legal doctrine can connect with, if (diachronically in the path dependency of historically developed legal concepts, and synchronically in the context of the code of law and existing law programs) it develops independent norms.

The interconnection between law and social sciences goes beyond the mere staking out of territorial boundaries at the point when legal doctrine starts to carefully examine different legal institutions in order to determine whether, in terms of their internal normative logic, their “inner basis” as jurists like to frame it, they are capable of responding sensitively to the structures and problems of the social phenomena as perceived by the law. These subtle search operations, which are performed with the aid of the sensory concepts of doctrine, are to be referred to here using the term “responsiveness”.<sup>49</sup> The responsiveness of the law is not to be judged before the forum of the social sciences, which ensure the authentic use of the term, or before the forum of a superordinate third instance acting as an intermediary between law and social theory, but only before the “*forum internum*” of the law itself. In a complex examination, the law is challenged by the external problem analyses of social theories, but only if they are usable according to law’s own selection criteria, and it reconstructs these internally in its own language, in which it can then match problems and solutions together. Only when this process of reconstruction places legal argumentation in a position where it can distinguish within the law between norms and facts, between legal concepts and social interests, has a point been reached where the law is able to raise the question of social adequacy, in other words the question of whether legal decisions do justice to those aspects of the outside world as these have been internally reconstructed.<sup>50</sup>

This requires one further stage, namely a predictive estimation of how the legal norm change will be accepted in the social world.<sup>51</sup> Through subsequent monitoring of the „social world effects“ of the law, these estimations will be corrected when similar social conflicts are again brought before the law and modifications are sought in the course of longer chains of case law. The law thereby seeks to balance out the alienation effect that arises as a result of the fact of the law reconstructing social conflicts in its autonomous language and only producing solutions that are internal to the law. It should be emphasized once again that this monitoring involves operations for observing the environment that are internal to the law. Here, social science analyses of the effect exerted by the law can again trigger challenges to the law and modify the simple operation of monitoring via chains of case law. Responsiveness of the law vis-à-vis the social sciences is therefore not limited to the reconstruction of conflicts before the legal decision, but extends to observation of the consequences of legal decisions as these arise within society.

To that extent the legal reception of social theories is never an authentic takeover, but always a “re-entry” of the system-environment difference, through which an imaginary space arises in the law, i.e. it is always an internal legal reconstruction of

---

<sup>49</sup>*Locus classicus: Philippe Nonet/Philip Selznick, Law and Society in Transition: Toward Responsive Law* (New York 1978).

<sup>50</sup>On “enaction” of the environment as an alternative to its “representation” *Francisco J. Varela, Whence Perceptual Meaning? A Cartography of Current Ideas*, in: Francisco J. Varela and Jean-Pierre Dupuy (eds.), *Understanding Origins: Contemporary Views on the Origin of Life, Mind and Society* (Dordrecht 1992), 235 ff.

<sup>51</sup>*Amstutz* (2013, Fn. 39), 324 ff.

external demands made by society, by people, and by nature.<sup>52</sup> Responsiveness, as the law's capacity to be challenged by social theories, is by no means a "floodgate" through which – as Niklas Luhmann puts it – "social knowledge could increasingly and, as it were, unhibitedly flow into the law. On the contrary, the stress is on system subjectivity, if one may use this term, and thus on the inevitable system relativity of all perspectives".<sup>53</sup> The conflict between autonomous law and autonomous social theory is in principle not insuperable, indeed it is to be desired.<sup>54</sup> It can only (to use an exaggerated formulation) be overcome by means of a productive misunderstanding within the law. The misunderstanding is unavoidable, and becomes productive when legal doctrine treats social theories as external "challenges", but instead of dismissing these in splendid isolation reconstructs them within the law, forming its own concepts, and responds to them with the autonomous formation of norms.

If the "translation" of social theory into legal doctrine is undertaken in this way, then it has the potential to generate added value in terms of legal doctrine.<sup>55</sup> The process occurs not as a mere transfer of identical meaning in another language, but in such a way that the law's own terminology allows itself to be challenged, in accordance with the conditions of its inner development logic, by social theory constructs, and thereupon to be inspired to create quite differently structured new formations. It is only the sequence (executed within the law) of challenge – reconstruction – norm change – observation of effect that generates the doctrinal added value that cannot be achieved either in the self-immunization of legal doctrine or in the direct transfer of social theory constructs into the law.

Where would the doctrinal added value lie within the PPP network with regard to the legal questions we raised at the start of this paper? "Network" is not a legal concept. There is no way that the efficiency principle, on the basis of which economists analyze networks as hybrids between market and hierarchy, is able to serve as a legal guiding principle, far less as a directly applicable legal norm. Neither can the „social embeddedness“ of economic transactions, which sociologists emphasize as the characteristic feature of networking.<sup>56</sup> Instead, strict division of tasks is necessary. Sociological and economic theories identify the networks' idiosyncratic logic of action, reveal opportunities and risks of network dynamics, and open up alternatives for structural solutions that extend beyond market and hierarchy. Contract law allows itself to be challenged thereby, reconstructs network problems in the language of legal doctrine, and on the basis of its own traditions develops norms and

---

<sup>52</sup>On the connection between „re-entry“ and „imaginary space“ *George Spencer Brown*, *Laws of Form* (New York 1972) ; in relation to the application of the law and its environments *Luhmann* (Fn. 47), 105 ff.

<sup>53</sup> *Niklas Luhmann*, *Some Problems with Reflexive Law*, in: Alberto Febbrajo/Gunther Teubner (eds.) *State, Law, and Economy as Autopoietic Systems: Regulation and Autonomy in a New Perspective* (Milano 1992), 389-415, 397.

<sup>54</sup>The conflicts need to be nurtured, not eliminated, cf. *Isabell Hensel*, *Grundrechtskollisionen in der Stiftungsuniversität: Überwältigte Einheit oder organisierte Vielfalt*, in: Graf-Peter Calliess, Andreas Fischer-Lescano, Dan Wielsch and Peer Zumbansen (eds.), *Soziologische Jurisprudenz: Festschrift für Gunther Teubner zum 65. Geburtstag* (Berlin 2009), 509, 521 ff.

<sup>55</sup>On the connection between challenge, reconstruction and symbolic added value generally, *Marc Mölders*, *Kluge Kombinationen*, *Zeitschrift für Rechtssoziologie* 33 (2012), 5 ff., 18 ff; in relations between social theories and law *Gunther Teubner*, *Contracting Worlds: Invoking Discourse Rights in Private Governance Regimes*, *Social and Legal Studies* 9 (2000), 399-417, 407 ff.

<sup>56</sup>„Network“ in an economic context: *Williamson* (Fn. 37), 180 ff.; in a sociological context: *Walter W. Powell*, *Neither Market nor Hierarchy: Network Forms of Organization*, *Research in Organizational Behavior* 12 (1990), 295-336.

principles for networks which can serve as appropriate legal solutions for the new coordination and liability problems.

The real challenge for law's responsiveness is to find out which, among various historically developed private law institutions, is most likely to have the normative potential for devising network-adequate rules. Which legal institution is capable of achieving, over and above the bilateral agreements, a comprehensive legal commitment by all parties to the overall configuration? Potential candidates are partnership, comprehensive network contract, contractual basis (*Geschäftsgrundlage*), contract for the protection of third parties, connected contracts. Corporate law rules are not suitable for networks, since they include the exclusive orientation to the company interest, and would have to classify the simultaneous orientation to individual interests which is a characteristic of networks as unlawful. The construct of a comprehensive network contract concluded between all participants fails to appreciate the legal reality of networks, since it has to invent a multiplicity of legal fictions in regard to representation and authorization of all parties for all parties.<sup>57</sup> The rules of contractual basis (*Geschäftsgrundlage*) have to be excluded because it is only directed towards execution and cannot generate any positive legal duties.<sup>58</sup> A contract with protective effect in favor of third parties does indeed generate binding effects in respect of third parties, but is not suited to multilateral relationships, and it lacks the orientation towards contractual performance which is necessary in a network.<sup>59</sup> The doctrine of connected contracts, developed for financed purchase agreements, proves to be the most suitable for networks, since it precisely illustrates the tension between the independent individual contracts and their reciprocal interlinking; it formulates the network-typical double orientation towards network nodes and the network as a whole; and it establishes three precise conditions for connected contracts: (1) (implicit) mutual references between the bilateral contracts, (2) a common purpose, and (3) a de facto cooperation.<sup>60</sup> Network versus connected contracts – this difference between social theory and juristic classification holds the potential for generating the doctrinal added value we are seeking. The question of whether connected contracts represent the appropriate legal solution for the conflicts that arise in networks will ultimately be decided by how the law observes the effects of its decisions in the social world.<sup>61</sup>

#### **IV. Thesis 3: Self-normativity**

Finally, our “publication bias” case raises the most difficult problem: Can the law obtain normative criteria from social theories - in our case for fundamental rights effects in mixed public-private networks? Present-day advocates of the unity of theory and practice see this as their noblest task, i.e. to reveal, in an analysis of society as a whole, normative potentials for social development which provide guideline information for politics and law.<sup>62</sup> And the normatively cool systems theory

---

<sup>57</sup>The construct of a comprehensive network contract in *Mathias Rohe*, *Netzverträge: Rechtsprobleme komplexer Vertragsverbindungen* (Tuebingen 1998).

<sup>58</sup>Suggestion of *Stefan Grundmann*, *Vertragsnetz und Wegfall der Geschäftsgrundlage*, in: Lutz Aderhold/Barbara Grunewald/Dietgard Klingberg/Walter G. Paefgen (eds.), *Festschrift für Harm Peter Westermann zum 70. Geburtstag* (Cologne 2008), 227 ff.

<sup>59</sup>Suggestion of *Knut Werner Lange*, *Das Recht der Netzwerke* (Heidelberg 1998), 195 ff., 200.

<sup>60</sup>*Teubner* (Fn. 38), 158 ff.

<sup>61</sup>On this point again *Amstutz* (2013, Fn. 39), 330 ff., who identifies subtle self-corrections in the initial stages of a chain of case law of the BGH on contractual networks.

<sup>62</sup>A notable example being *Jürgen Habermas*, *Theorie und Praxis: Sozialphilosophische Studien* (Neuwied 1963), particularly 231 ff.

is required first of all to perform a “normative turn” if it wishes to make statements that are relevant to the law.<sup>63</sup>

Yet here too – for the third time – we are forced by the functional differentiation of society to make a correction. This differentiation irrevocably destroys the old European unity of theory and practice, constraining science by an exclusive true/false coding which does not allow that social theories can also (instead of mere cognitive statements) make normative statements in the code of politics, morality or the law. The social sciences cannot in principle supply other action contexts with normative criteria.<sup>64</sup> Normative recommendations are always trans-scientific issues.<sup>65</sup>

This self-restriction also – and in a particularly painful way – affects philosophy, from which the law (in spite of Rawls’ and Habermas’ best efforts) cannot expect any import of normativity. Philosophy cannot escape from the Münchhausen trilemma of the foundation of norms – infinite regress, curtailment, circularity. Ultimately, all attempts to normative foundation run up against paradoxes. However, deparadoxation cannot be effected by philosophy in a normative guise, but only by social practices in communication and by individuals in their introspection.<sup>66</sup> The consequence of this failure of theory is: self-normativity. This is achieved in two entirely different processes: the self-normativity of the law and the self-normativity of social practices (to which the law can have recourse). The law itself is one of the social practices that generate self-normativity without being dependent on their scientific or philosophical basis. This conclusion is forced upon us by (to name a few important authors) Hans Kelsen’s basic norm, Herbert Hart’s internal view and Niklas Luhmann’s binary code of the law.<sup>67</sup> Legal self-normativity functions as self-reproduction of norms on the basis of applicable law and as production of deviating norms according to the conditions in which the law operates. And it is only within the framework of this legal self-normativity that social theory can become normatively relevant (although only in the context of challenge and reconstruction as described above).

However, such self-reproduction of the legal system only generates one kind of self-normativity, i.e. the self-normativity that is internal to the law. Externally to the law, the self-normativity of other social practices supplements the internal production of norms, insofar as the law has recourse thereto. Social systems generate not only their own rationality – rationality in accordance with Max Weber –, but also their own normativity. This has been demonstrated most clearly by Lon Fuller, who describes the morality of associations as an emerging phenomenon of social communication. Yet from Wittgenstein to Lyotard this insight has become common wisdom in linguistic philosophy. The normativity of a large number of language games is based on their “life forms” (*Lebensform*) and is not accessible to any ultimate justification. In

---

<sup>63</sup> Lyana Francot-Timmermans/Emilios A. Christodoulidis, *The Normative Turn in Teubner’s Systems Theory of Law, Rechtsphilosophie & Rechtstheorie* 40 (2011), 187 ff.

<sup>64</sup> Niklas Luhmann, *Die Wissenschaft der Gesellschaft* (Frankfurt 1990), 627 ff. The science system also develops normative orientations, but only for its own practice.

<sup>65</sup> Alvin M. Weinberg, *Science and Trans-Science*, *Minerva* 10 (1972), 209 ff.

<sup>66</sup> More on that point Gunther Teubner, *Exogenous Self-binding: How Social Systems Externalise Their Foundational Paradox*, in: Giancarlo Corsi and Alberto Febbrajo (eds.) *Transconstitutionalism* (Farnham 2014), forthcoming

<sup>67</sup> Hans Kelsen, *General Theory of Norms* (Oxford 1990); Herbert L.A. Hart, *The Concept of Law* (Oxford 1981), 55 ff.; Luhmann (Fn. 47), 165 ff.

a very similar way, institutionalism identifies social practices as generators of norm ensembles under the guidance of an "*idée directrice*".<sup>68</sup>

At this point it becomes clear that the driving motive for an interdisciplinary encounter between the law and social theories is certainly not primarily contact with academia, but contact with society. Over and above its self-normativity, the law seeks normative orientation in different environments and their local norms, and in addition asks social theories to provide help. Yet upon closer inspection it emerges that much of what goes by the name of social theory is not a scientific theory in the strict sense, but a practice of reflection in different social worlds, or perhaps more accurately "reflection dogmatics", similar to theology and legal dogmatics, which generates normative orientations in social practices.

Legal normativity always develops in contact with these reflection dogmatics of other sectors of society. It is therefore important to avoid the scientific misunderstanding, which is promoted by the programmatic statements by sociological jurisprudence, political legal theory or legal economics, which regard themselves as social sciences. As important as the social sciences are for the responsiveness of the law (as has been demonstrated above), nevertheless the focus is elsewhere here, on normative orientations which in principle cannot be provided by the "impartial" social sciences, but only by normatively loaded "dogmatics" of social practices. Just as legal dogmatics, or the mother of all dogmatics, theology, are not sciences, but self-reflections of the social practices of law or religion which have been systematized as dogmatic systems, so large areas of business economics, economic science, and political science are also not parts of the social sciences which has to observe the binary true/false code, but reflection dogmatics of social "meaning worlds", appearing in the guise of scientific social theories, i.e. dogma concerning the right way to act in business, in industry, or in politics, sharing and informing the respective normative basic orientations of their practices. In any event a clear internal differentiation ought to be made between the academic disciplines (just as a distinction is made in jurisprudence between legal theory as an internal reflection on practice and legal sociology as an external scientific observation of the law) into discourses which as reflection dogmatics are allocated to the respective social practices, and discourses which as social theory in the strict sense are to be allocated to the science system.

The law searches contact with the self-normativity of social practices, which are refined in the reflection dogmatics of economic and social practice.<sup>69</sup> As compared with the scientific misunderstanding referred to above, the gain is twofold. The orientation to social reflection dogmatics provides a wealth of normative perspectives, from the abstract *idées directrices* of social institutions, to concrete social expectations, claims, entitlement to basic rights, and individual hopes of persons involved, to collectively obtained insights of the social systems concerning their performance capability, to definitions of their overall social function.<sup>70</sup> This could

---

<sup>68</sup>Lon Fuller, *Principles of Social Order: Selected Essays of Lon L. Fuller* (Durham 1983); Jean-Francois Lyotard, *The Differend: Phrases in Dispute* (Manchester 1987); Maurice Hauriou, *La théorie de l'institution et de la fondation: Essai de vitalisme social*, in: Maurice Hauriou, *Aux sources du droit* (Caen (1986 [1933]), 89-128.

<sup>69</sup>Particularly noteworthy, the institutionalized norms of the professions; on this point, with results of empirical research, Martin Herberg, "Bringing Professions Back in: A Fresh Look at the Dynamics of Institution-building in (World) Society", in: Christian Joerges/ Josef Falke (eds.) *Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets* (Oxford 2011), 107-129.

<sup>70</sup>*Ladeur* in particular stresses repeatedly how heavily the law depends on a „social epistemology“, i.e. on the knowledge of social practices, *Karl-Heinz Ladeur, Der Staat gegen die Gesellschaft: Zur Verteidigung der Rationalität der ‚Privatrechtsgesellschaft‘* (Tuebingen 2006). Furthermore *Ino*



never be generated by “presupposition-free” and “prejudice-free” social theories, but neither could it ever be devised by legal doctrine on its own terms. At the same time, however, there are once again distancing possibilities for the law, if it has to enforce its own “particular-universal” orientations by means of legal controls. The vessel that sails under the flag of the scientific approach as sociological jurisprudence, legal economics, legal politics and legal ethics ought in reality to change its colors to do justice to the conflict between different reflection dogmatics.

To return once more to the subject of moral philosophy: is it possible, then, to adduce Rawls or Habermas for the justification of legal norms? It depends. No, to the extent that they claim to produce a social theory in the strict sense, since (contrary to their self-understanding) they are incapable of establishing any norms in the binary true/false code of science. Yes, to the extent that both philosophers can be understood as participants in moral practice or political practice and are working on the reflection dogmatics thereof. Even as such they are still not directly juristically relevant, but must first go through the legal filter of legal theory, legal doctrine and judicial decision-making practice.

Let us return one final time to publication bias. What does the interplay between the self-normativity of the law and the self-normativity of social institutions mean for the third party effect of fundamental rights in private networks? The answer in short, norms need to be established for the institutional protection of expertise, on the one hand, and for the integrity of the health system on the other hand, against the expansionary tendencies of economic rationality.

The horizontal effect of fundamental rights cannot be established on the basis of social theories, but is initially a product of operations taking place inside the law. The principle of equality, as the fundamental principle of the self-normativity of the law, requires that the protection of fundamental rights be guaranteed not only vis-à-vis governmental instances, but also vis-à-vis private networks, if fundamental rights are similarly put at risk in situations involving private power.<sup>71</sup> The manipulations which trigger publication bias – the bans on publication and the falsification of research results – violate the fundamental right of academic freedom and the fundamental right to health. However, as is demonstrated by the vehement protests of those who uphold the sanctity of private law against any such kind of third party effect, it is problematic whether any effective protection of fundamental rights can be achieved through a balancing of individual rights as envisaged by prevailing doctrine.<sup>72</sup> A way out of this dilemma is to shift the protection of fundamental rights against private power from the individual level to the institutional level. The horizontal effect of fundamental rights (in our case, the right to academic freedom and the right to health) is then guaranteed not by individual rights on the basis of which legal action

---

Augsberg, Informationsverwaltungsrecht: Zur kognitiven Dimension der rechtlichen Steuerung von Verwaltungsentscheidungen (Tuebingen) 2014, Kap. 6... On the „subcutaneous“ influence of the decorum of art on the case law concerning questions of personal rights, *Fabian Steinhauer*, Bildregeln: Studien zum juristischen Bilderstreit (Munich 2009), 174 ff.

<sup>71</sup>According to prevailing doctrine, the influence of fundamental rights (indirectly) extends to private law relationships where a structurally based situation of danger exists on the basis of social power, for example in monopoly structures, leasing relationships and employment relationships. On this subject in detail *Theodor Maunz/Günter Dürig*, Grundgesetz, Kommentar, 68th supplemental volume (Munich 2013), Art. 1 Abs. 3 GG no. 59–65.

<sup>72</sup>Particularly critical *Wolfgang Zöllner*, Regelungsspielräume im Schuldvertragsrecht: Bemerkungen zur Grundrechtsanwendung im Privatrecht und zu den sogenannten Ungleichgewichtslagen, *Archiv für die civilistische Praxis* 196 (1996), 1 ff.

can be brought, but by organization and process that guard their institutional aspect.<sup>73</sup>

The question of what organization and what processes can then be used to protect the institutions of science and the healthcare system is then no longer answerable from inside the law. The normative content of such institutional guarantees can only be obtained from outside the law, from the self-normativity of social practice. Science and the healthcare system, in their separate codes and programs, give rise to normative orientations which are not the same as the conventional opinions of individuals, but have an institutional character.<sup>74</sup> An institutional normativity of this kind is embedded in historically developed structures, reactivated in the reflection dogmatics of science and the healthcare system, and re-formed in “political” debates and decisions, before they are absorbed by the law.

As far as publication bias is concerned, the reflective discourses of science and healthcare have in fact devised an institutional alternative to individual protection: trial registration as a third party effect of the right of academic freedom and the right to health through organization and process.<sup>75</sup> Public registers of studies and results are being set up, which cover all aspects of studies from their very beginning in order to facilitate transparency and control.<sup>76</sup> At the same time specialist journals are making the registration of all studies carried out a precondition for publication.<sup>77</sup> Clinical studies in respect of products that are intended for distribution on the market must first have been registered on the clinical trials register with all study results.

## **V. Conclusion**

We have attempted to show here in a general way, using the example of the horizontal effect of fundamental rights in semi-private networks, that at the point where social theory meets law an added value can be generated in terms of legal doctrine if the precarious relationship between autonomy and interconnectedness in three different dimensions is respected.

- 1 Transversality draws conclusions from the autonomy of different incommensurable social theories and their mutual interconnectedness. The law denies any monopoly claim and selects points of contact in a transversal exploration.
- 2 Responsiveness insists on the autonomy of legal doctrine vis-à-vis social theory and takes account of its interconnectedness with them by the law’s self-exposure to the challenges posed by social theories, drawing inspiration from this for normative innovation, and observing the effects thereof on the social world.

---

<sup>73</sup>In the third party effect discussion, individual fundamental rights are usually balanced against each other; the institutional dimension of fundamental rights is rarely used here, cf. *Hensel* (Fn. 54) 517 ff.

<sup>74</sup>*Vesting* (Fn. 47), 95 ff. speaks of „social conventions and implicit knowledge“

<sup>75</sup>The USA functions as a model with the „FDA Amendments Act“ von 2007, Food and Drug Administration: FDA Amendments Act (FDAAA) of 2007, public law no. 110–85 § 801 (<http://www.gpo.gov/fdsys/pkg/PLAW-110publ85/pdf/PLAW-110publ85.pdf>).

<sup>76</sup>Initial examples are provided by the US government register [ClinicalTrials.gov](http://ClinicalTrials.gov) and the Deutsche Register Klinischer Studien at the Universitätsklinikum Freiburg ([www.germanctr.de](http://www.germanctr.de)).

<sup>77</sup>*De Angelis C./Drazen JM/Frizelle FA et al.*, Clinical trial registration: a statement from the International Committee of Medical Journal Editors, *N Engl J Med* 351 (2004), 1250 f. There are also some Internet journals which primarily publish negative studies, e.g. *Journal of Negative Results in Biomedicine* (<http://www.jnrbm.com>).

3 Self-normativity: the law achieves normative orientation not from social theory, but solely from internal processes of the law and at the same time from the self-normativity developed by the reflection dogmatics of other social systems.

Specifically, in the case of publication bias: In the circumstances of our case, different doctrinal constructs – a “network purpose” which is distinct from the contractual purpose and the corporate purpose, “connected contracts” as a legal concept for social networks, and an institutional guarantee of the horizontal effect of fundamental rights through organization and process in the form of trial registration – can be regarded as socially adequate developments of the law which arise in the distanced approach to network theories adopted by the law.