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Epistemology and Ontology

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Introduction

We are here presenting a selection of the work of scholars from the World Congress of Legal and Social Philosophy held at Lund in 2003. This is one of many such selections and the general theme of this B*eiheft* is Epistemology and Ontology. Thus the papers by and large deal with what sort of thing law or systems of law are and what the criteria for talking about them are. The papers show the diversity of the Association and we are especially pleased to be able to publish the work of young scholars at the beginnings of their scientific careers .

Anne van Aaken addresses the questions of Economics and Discourse theory. In combining constitutional economics and discourse theory she offers a theoretical synthesis of the two theories by finding points in common and possibilities of fruitful combinations concerning the problem of legitimacy, institutional design and effectiveness of legal norms.

Deniz Coskun outlines a conception of law as symbolic form. This is done through an examination of the way in which Ernst Cassirer applied his *Philosophy of Symbolic Form* to law. This implies that though law is connected with other sciences it carries its own dynamic within it. It is a mode of giving objectivity and meaning and not legitimacy. Finally, as a product of human creativity, it reflects human dignity.

Laurence de Sutter asks what we should do with legal theory. Practioners find it abstract and pretentious; philosophers find it of poor intellectual quality. For him legal theory, as it has been known so far, has to be replaced because it sees law only as a matter of observation of what the content given to the form of law is. What is important however is the practice of law; what is done in the name of law. This is not practice as opposed to theory but rather designates the set of actions rendered probable within the framework of a specific set of constraints.

Leopoldo Garcia Ruiz takes up the theme of practice and claims that only by describing and explaining law as a social practice will we be able to confront deeper legal-philosophical issues. He does this through an analysis of the work of Roscoe Pound.

For Nikolaos Intzessiloglou the most general object of study of legal science is the concept of law as an effective and efficient social system of regulating human behaviour. In this concept of law, and in the social reality of law related to this concept, general ideas and principles concerning law as well as legal norms and decisions coexist with factual elements related to the law. Law becomes an effective part of real social order and a legal order is socially established only when the legal phenomenon functions successfully as a communicative social subsystem that actively regulates human behaviour

Lorenz Kaehler asks what exactly does it mean to say that a particular question is not determined by the law? What exactly is at issue if one says that an appellate court could have decided differently as it did? The main thesis of the paper is that these claims can have different meanings and that some confusion in the current debate about the indeterminacy of law is due to the fact that different concepts of indeterminacy are mixed up. If this thesis is correct than the concept of 'legal indeterminacy' is itself indeterminate or, at least, ambiguous.

Matthias Mahlmann tries to reconstruct some core tenets of Kant's doctrine and attempts to indicate what is truly impressive in this philosophy. For him the best way to continue the project of enlightened practical reason, to preserve the analytical insights of Kant's work, to keep the humanist spirit of its material content, sometimes explicit,

sometimes to be read between the lines, is to pursue what he calls a mentalist theory of ethics and law. This theory is not directly Kantian in its outline and shape and aims not at borrowing any plausibility from Kant's authority. But it might be as Kantian as anything can be given the findings of modern theories of the human mind. In a further paper with John Mikhail and he continue this theme of a mentalist theory of ethics and law by developing the case for a moral faculty based on cognitive and linguistic approaches.

Sten Schaumburg-Müller has some reservations as regards the ability of human rights law actually to provide humans with their rights. There are many ways of probing this question. As the problem is somehow connected with the relation between ideas (in this case human rights) and facts, he takes a closer look at theories of truth. He looks at various theories of truth and asks how they impact on implementation of human rights.

Gregor Noll carries on with the theme of human rights. He claims textbook accounts of human rights tend to depict them as safeguards protecting the individual from the excessive use of state authority. Such accounts pre-suppose, amongst others, a clear distinction between law and politics, and an understanding of certain legal norms as being pre-political. He claims that the fictions of universality and inalienability of human rights collude in their exclusionary function. Human rights take part in the formation of a polis by excluding the bare life of the human being from that community, to then re-include it and subject it to regulation. Where re-inclusion does not take place, for one reason or another, the exclusionary function of human rights creates outcasts which have no more than bare life (refugees being a prominent example). Seen as such, human rights constantly remind us how devoid of protection we are outside the polis. Yet, as there is no access right to the polis, there is no right for any human in any situation to have human rights.

In legal historical literature, Puchta has been depicted traditionally as the actual founder of Conceptual Jurisprudence; espousing a legal theoretical perspective which ascribed to legal concepts an independent intellectual existence. This means that Puchta understood legal concepts as separate from the empirical reality of the law. According to this model, the scientific creation of the law is to occur in the form of abstract conceptual constructions. The method is to be based on an inductive process. The law is to be cleansed of its impurities and, in an increasing process of abstraction, one would reach a number of "pure" basic concepts from which the law in its entirety would emanate. For Peterson this view of Puchta as a path breaker for conceptual jurisprudence has been shown to be exaggerated and has been modified to a high degree in recent scholarship. A more nuanced depiction of Puchta's view as to the relationship between the actual organic nature of the law and its conceptual form is posited by him.

Puppo investigates the relationship between law, authority and freedom in Sophocles' *Antigone*. He dwells firstly on what is meant by the term 'tragedy', and secondly on the relevance of Sophocles' work – and particularly its two main characters, Antigone and Creon – to that theme. He takes a view which goes beyond the usual interpretation that Antigone's refusal of Creon's decree legitimates contradiction of the order when the written law, mere expression of that authority, is at odds with the dictates of the rule identified sometimes in the customary law sometimes in the divine law.

The concept of legal dogmatics has for many years has caused antagonism among European jurists and has been compared to theological dogmatism. However, the worst enemies of legal dogmatics, seem to be its advocates. For years, jurists

have trivialised the method of legal dogmatics to a point of absurdity. Legal scholars routinely refer to the "traditional" method of legal dogmatics, but when asked what this phrase entails, they are unable to give a proper answer. As a consequence, those who view themselves as methodologically advanced have been able to score easy points by pointing out the obvious flaws in the presentation of the method. Despite decades of intense criticism, legal dogmatics seems to be thriving in the civil law-countries. Marie Sandström looks at the genesis of legal dogmatics and finds it steeped in drama.

Burkhard Schafer looks at ontology and legal system. His paper attempts a case study to show how jurisprudence can profit from ideas taken from general theory of science to develop the conceptual vocabulary necessary to engage in a meaningful dialogue with comparative law. Comparative law is taken as an empirical basis to develop and test key jurisprudential concepts, especially the concept of 'legal system'. The problems that jurisprudence faces in reconciling its own use of 'legal system' with that in comparative law are remedied by borrowing key concepts from theory of science, in particular Sneed's and Stegmueller's set theoretical structuralism. The thus improved concept is then in turn used to refine comparative legal methodology.

The term 'person' is only apparently certain in its meaning. We are sure that it corresponds more or less to the idea that we have of a subject, corporeal or figurative, endowed with characteristics worthy of protection. However, as soon as we go beyond the level of conventional meaning, we enter a tangle of synonyms and meanings which overwhelm our intuitive idea of what the term denotes. One thing seems certain, however: the concept of *person* is today considered flawed and unable to fulfil its function in the field of legal protection. In fact, proposals have been made from various quarters to discard it. Paolo Sommaggio considers Boethius' definition of *persona* to aid our understanding of the concept

Xingzhong Yu analyses three types of societies. Firstly what he calls legal societies with rule of law and democracy, the striking features of which are demonstrated in an unswerving reliance upon law and legal institutions in social, political and economic life. America is a paradigm. Secondly there are moral societies; in such societies rather than cold, rational legal rules, live and entangled relationships are the focus of communication, transaction and interactions. China is a paradigm. Thirdly there are religious societies; they make no distinction between matters divine or secular and deals with them by means of a pan-ordering religious system which predetermines the tendency of its political and economic activities. The Muslim world is a paradigm. He asks why are there three types of societies. What is the internal logic, which has determined their separate development and what accounts for the great distinctions between them?

Finally Wojciech Załuski looks at Kantian rationality and game theory. The game-theoretical approach to law is a precise method of investigating the way in which legal rules shape human behavior. Its attractiveness lies not only in its formal elegance but also in the fact that it can be helpful for legislators in their efforts to pass efficient laws. Legal philosophers, in turn, are likely to be particularly interested in foundational questions related to it. Załuski provides an analysis of this kind of a question – namely one about the place of the concept of Kantian rationality in the game-theoretical considerations.

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Anne van Aaken

Deliberative Institutional Economics. Synthesizing the Best of Two Worlds: A Combination of New Institutional Economics and Deliberative Theories[1]

I. Introduction

New Institutional Economics/Constitutional Economics[2] and Discourse Theory stand largely unconnected next to each other, although they both ask for the legitimacy of institutions (normative aspect) and the functioning and effectiveness of institutions (positive aspect). Both assume rational individuals and the concept of consensus for legitimacy. Whereas Discourse Theory emphasizes the conditions of a legitimate consensus and could thus enable Constitutional Economics to escape the infinite regress of judging a consensus legitimate, Institutional Economics has a tested social science paradigm (rational choice) of explaining and predicting the functioning of institutions. The article outlines a theoretical synthesis of the two theories by finding points in common and possibilities of fruitful combinations concerning the problem of legitimacy, institutional design and effectiveness of legal norms.

I shall deal with the explicative and normative content of what I call 'Deliberative Institutional Economics'; my thesis being that it can better *explain* existing institutions. I also suggest that those thinking in terms of *normative* Institutional/Constitutional Economics can better assess institutional alternatives if their analysis allows for the *discursive conditions* which affect not only cognition but also the preferences of individuals involved in processes of social coordination such as court hearings, democratic procedures, and administrative action. Deliberative procedures are de facto already incorporated in most of the institutions governing the three state powers, but are neglected by economics.

Several implications of incorporating deliberation into economics will be discussed: 1) the possibility to reach consensus through deliberation (positive); 2) the legitimacy of such a consensus (positive and normative); 3) the utility to be derived from the deliberation process as such (process versus outcome utility); and 4) the effect on the individuals' interest in rule-following as a result of acceptance of the rule-making process (positive).

II. New Institutional Economics

New Institutional Economics is indebted to methodological individualism in its analysis and assumes that a person having (bounded[3]) rationality and stable preferences will

1 This contribution draws on my paper, 2003, *Deliberative Institutional Economics, or does Homo Oeconomicus argue?*. In: Deliberation and Decision. Economics, Constitutional Theory and Deliberative Democracy, edited by van Aaken, List, Lütge. Aldershot (2004).

2 Whereas parts of the literature of the New Institutional Economics focuses only on the positive aspect, Constitutional Economics focuses more on the normative aspect. Nevertheless, both will be treated together here, but where issues of legitimacy are discussed, I will refer to Constitutional Economics.

3 The concept of bounded rationality is more and more widely used in economics. For the groundbreaking work, see Simon, 1957, *Models of Man*. London et al; Simon, 1993, *Homo Rationalis*.

seek to maximize (individual) utility when making decisions in conditions of scarcity. Rather than relying on empirical behavioral analyses, it mainly uses what is known as the REMM[4] hypothesis to derive adjustment reactions expected after institutional changes. Stable preferences, and a well-defined utility function of human beings whose actions are therefore result-oriented, are standard assumptions. The model, no longer limited to economic issues in a narrower sense, now also serves to analyze political and general institutional contexts and does not question the presupposed constant preferences and their origin or ethical assessment. The underlying concept is that of the citizen who is aware of his interests and preferences.[5] The strict analytical separation between stable preferences and restrictions thus permits the empirical examination of behavioral changes with no need to discuss a change of preferences.

1. Reaching Consensus

Starting from given preferences, New Institutional (and particularly Constitutional) Economics deals with the effectiveness and legitimacy of institutions and looks for rules producing results that best suit these preferences. It normally[6] proposes to use consensus as a criterion for assessing the substantive rightness of institutions, a concept derived primarily from Constitutional Economics, on which we may therefore focus in the following.

In seeking consensus, an individual weighs advantages and disadvantages (not necessarily limited to financial and material ones), an advantage being anything he regards as such. It is assumed that nobody would accept a worsening of his personal situation caused by rules, and that rules thought to improve it are considered efficient *if* and *because* they can produce *unanimity*.[7] There is an assumed harmony of individual utility maximization and supra-individual substantive rightness. Economics in this connection is concerned with individual decision-making and disregards the possibility of previous deliberation and institutions established for this purpose.

There are, however, approaches in Constitutional Economics which no longer assume given preferences on a *constitutional* level. Vanberg and Buchanan[8] (analyt-

Frankfurt a.M. et al., for application of bounded rationality in law and economics see Jolls, Sunstein, Thaler, 1998, *A Behavioral Approach to Law and Economics*. Stanford Law Review 50: 1471–1548.

4 Resourceful, Evaluating, Maximizing Man. The REMM model (for basic information see Meckling, 1976, *Values and the Choice of the Model of the Individual in the Social Science*. Schweizerische Zeitschrift für Volkswirtschaft und Statistik 112: 545–560.) is an improvement on *homo oeconomicus* insofar as the actor thus modeled chooses between 'given' alternatives. By contrast, the 'resourceful' in REMM emphasizes that the alternatives are by no means given but often have to be found and developed through creative human action.

5 As in Frey, Kirchgässner, 1993, *Diskursethik, Politische Ökonomie und Volksabstimmungen*. Analyse&Kritik 15: 129–149, 134. Hayek, 1991, *Die Verfassung der Freiheit*. 3. ed. Tübingen., 133, with reference to Alexis de Toqueville, identifies the advantage of a democracy primarily in the *process of opinion forming*.

6 See instead of many Richter, Furubotn, 1996, *Neue Institutionenökonomik: eine Einführung und kritische Würdigung*. Tübingen, 477, 493ff.

7 See Aufderheide, 1996, *Konstitutionelle Ökonomik versus Theorie der Wirtschaftspolitik: Herausforderung des Herausforderers? Kommentar zu Stefan Voigt*. In: James Buchanans konstitutionelle Ökonomik, edited by Pies, Leschke. Tübingen: 184–192, 187 for a graphical overview of the different understandings of consensus including the interest and theory components.

8 As regards the following see Vanberg, 1994, *Rules and Choice in Economics*. London et al., chapters 10 and 11, see also Hegmann, 1998, *Wissenssoziologische Aspekte der Verfassungsökonomik – Das Beispiel der Nachhaltigkeitsdebatte*. In: Zukunftsfähigkeit und Neoliberalismus: Zur Vereinbarkeit von Umweltschutz und Wettbewerbswirtschaft, edited by Renner, Hinterberger. Baden-Baden: 175–195.

ically) single out theories and interests as components of constitutional preferences, the former being a cognitive and factual element in the (subjective) forecast of how different rules affect results, the latter involving the subjective assessment of results expected from rules, making it a pure value judgment.[9] The two components may cause differences of opinion and prevent agreement. To avoid disagreement between individuals and bring the *theory* components closer together, one can provide more information (e.g. from experts) or have a discourse. The *interest* components of preferences are assumed to remain constant, however, which excludes modification through discourse, and the question of *why* or *due to what processes* also the interest component of people might change is disregarded.

2. Legitimacy of Consensus

In Constitutional Economics, rules are assumed to be legitimate if rational individuals seeking to maximize utility (can) unanimously agree to them. Constitutional Economics assumes that efficiency cannot be defined *regardless of individual choices*. This is because Constitutional Economics argues that preferences and their intensities can not be known by outside observers and thus are not comparable on an interpersonal basis. Therefore, consent by the concerned individuals is needed.[10] For the comparison of given preferences relating to the desirability of certain goods or rules there is no superordinate standard enabling the definition of a social welfare function which could then be optimized.[11]

Other issues discussed include the voluntary character of the agreement and the type of exchange taking place, in other words, *the conditions for the validity of the consensus*. Here we find differences in Constitutional Economics, with Brennan/ Buchanan considering an agreement *non*-legitimate only if it was "extracted by force or under conditions of total duplicity by one of the parties".[12] They are satisfied if "individuals are observed to be responding freely within the minimally required conditions of mutual tolerance and respect... ."[13] No further elaboration, however, is given on the minimal conditions of tolerance and respect. Inequalities concerning income and rights or the ability to express oneself are explicitly neglected, as is the issue of whether the situation prevailing before the conclusion of the contract (the status quo) was fair.

Vanberg, by contrast, deals more thoroughly with the voluntary character and looks at the type of restrictions under which the exchange or consensus take place because"... in order to specify what is meant by 'voluntary choice' and 'voluntary exchange', one has to somehow qualify the conditions under which the respective choices are made."[14] The question then is how to define coercion. Although coercion might already be assumed if individual choice comes up against limiting factors

9 Vanberg, footnote 8, chapter 10 and particularly 169.

10 This is where we find a conflict with the Pareto efficiency in terms of welfare economics. In the words of Coleman, 1990, *Constitutional Contractarianism*. Constitutional Political Economy 2: 135–148, 143, "If, on grounds of utility or welfare, P is preferable to R, then we might expect people to choose P over R. If however, for whatever reason, they choose R over P then that is the end of it; R, not P is efficient." This contrasts with welfare economics, where Pareto efficiency could be technically determined by an outside observer.

11 See also Alessi, 1992, *Efficiency Criteria for Optimal Laws: Objective Standards of Value Jugdements?* Constitutional Political Economy 3: 321–342, particularly 329.

12 Brennan, Buchanan, 1986, *The Reason of Rules*. Cambridge, 102.

13 Buchanan, 1984, *Die Grenzen der Freiheit: zwischen Anarchie und Leviathan*. Tübingen, 6.

14 Vanberg, footnote 8, 211f.

(budgetary or physical), such restrictions are simple facts of life. Another criterion Vanberg discusses is the infringement of absolute rights. The next question would be what exactly 'rights' means, and might lead one to consider two types: one a class of pre-positive rights applied regardless of the ones defined in the legal system, the other limited to positive rights applied in the respective society. The first type is clearly incompatible with the theory of Constitutional Economics as it assumes an external criterion, the second one is contingent because coercion is defined by the rules and laws of a society. This version is opposed by Vanberg[15] because even rules applying in totalitarian states would then have to be accepted as involving no coercion. Constitutional Economics would get into a never-ending regress if it cannot resolve the following problem:

> "(O)ne cannot give normative content to the notion of voluntary choice without introducing at some point in the chain of procedural argument, some substantive criterion of 'goodness', a criterion that is more than a reiteration of the argument that the process is good to the extent that it is in accordance with rules that are the outcome of a 'good process'". "To the extent that social processes are good, measured against some criterion X, the outcomes of those processes qualify as good."[16]

The problem then is how to specify X. Vanberg therefore looks for a substantial criterion which may link up to a procedural one. The former is known as the *cost avoidance criterion* which says that the costs of choosing to refuse consensus *must not be prohibitively high and man-made*. The more alternatives individuals have, the more voluntary their choice. Vanberg does not give us a clear qualitative criterion for demarcation but at least makes it possible to discuss 'quantitative' trends. Nevertheless, what Michelman calls "paradox of democracy",[17] i.e. the problem that there is neither a procedural independent finding of the 'good' nor a purely procedural solution to the paradox, can only be solved if there are some substantive elements to escape the infinite regress of legitimacy.[18] At this point of argument, I would suggest a link with Discourse Theory because it exactly seeks to guarantee the conditions and voluntary character of a consensus in terms of a (non-authoritarian) discourse. The conditions of Discourse Theory could be a possible candidate for Vanbergs' criterion X.

3. Procedural versus Outcome Utility

Economics looks only at the *outcome utility* of decisions and uses ever more widely a concept of bounded rationality. This line of research finds its most elaborated studies undertaken in a field known as experimental or behavioral economics[19] (mainly based

15 Vanberg, footnote 8, 212f.

16 Vanberg, footnote 8, 214.

17 Michelman, 1999, *Brennan and Democracy*. Princeton, 34. See also for this problem Sabel, Gerstenberg, *Directly-Deliberative Polyarchy. An Institutional Ideal for Europe?* <www.law.columbia.edu/sabel/papers.htm>, 2001, 35.

18 See also Cohen 1991, *Deliberation and Democratic Legitimacy*. In: The Good Polity, edited by Hamilton, Pettit. Oxford: 17–34., 26: "Neither the commitment nor the capacity for arriving at deliberative decisions is something we can simply assume to obtain independent from the proper ordering of institutions. The institutions themselves must provide the framework for the formation of the will; they determine whether there is equality, whether deliberation is free and reasoned, whether there is autonomy, and so on."

19 For a survey of findings, documentation of experiments Kahnemann, 1997, *New Challenges to the Rationality Assumption*. Legal Theory 3: 105–124 and more specifically for law Jolls, Sunstein, Thaler, footnote 3.

on cognitive psychology), which deals with the specific conditions (especially cognitive ones) in which individual decisions are made. There are also approaches, which distinguish outcome from procedural utility and try to measure the latter.[20] There, utility is assumed to be measurable by individuals subjective reported well-being.

The standard model in economics assumes that preferences are independent of the situation in which they are revealed so that the description and presentation of alternatives will have no effect on decision-making. However, utility for individuals depends not only on ultimate net worth as an absolute quantity (as the standard model assumes), but also on what are called '*reference points*'.[21] To give an everyday example: the same temperature is felt differently depending on whether a person is used to warm or cold temperatures. Primary agents of utility are thus not states but events in a dynamic process. If there are no exogenous fixed reference points, it is possible to frame the situation in a way which influences the decision heavily (so called '*framing*').

The choice of the reference point is particularly crucial in negotiations (or mediation) when seeking a consensus. People tend to see things in a light that favors their own purpose, i.e. they are likely to regard reference points as 'fair' if they serve their interests ('*self-serving bias*').[22] Even those who consider 'fairness' important will interpret the facts for their own advantage. The question arises, of course, what 'fair' means. Conversely, perceptions of 'unfair' behavior or rules will again depend on a reference point.[23] These perceived 'fair' reference points are of interest in all arbitration procedures such as salary negotiations, and often prevent the parties from reaching agreement. Anomalies may be reduced through learning effects.[24] It is plausible to assume that deliberation may also be a means to promote learning effects and thus reduce individual costs. If deliberative processes could enhance the alleviation of anomalies, institutions should be so designed to allow for exactly those processes.

4. Effectiveness of and Compliance with Rules

Economics explains the question of rule-following with the individual calculus. It is assumed that people comply with rules because of *external incentives*. The individual calculus includes the expected benefit of non-compliance and the expected sanction (sanction and probability of being caught). Individuals will comply if and only if the net utility of doing so is positive. Furthermore, constitutional economists strictly differentiate between an interest in the existence of rules and an interest in rule-following and

20 Benz, Frey, Stutzer, 2002, *Introducing Procedural Utility: Not Only What, But Also How Matters.* Zurich IEER Working Paper No. 129, <ssrn.com/abstract=338568> (forthcoming in Journal of Institutional and Theoretical Economics (JITE)).

21 Kahnemann, Tversky, 1979, *Prospect Theory: An Analysis of Decisions under Risk.* Econometrica 47: 312–327. Formally speaking, the utility function depends not only on consumption at the time t; U(ct), but also on the reference point U(ct, rt).

22 Dahl, Ransom, 1999, *Does Where You Stand Depend on Where You Sit? Thithing Donations and Self-Serving Bias.* American Economic Review 89 (4): 703–727, 703: "A self-serving bias occurs when individuals subconsciously alter their fundamental view about what is fair or right in a way that benefits their interests."

23 See also Hoffmann, Spitzer, 1993, *Willingness to Pay vs. Willingness to Accept: Legal and Economic Implications.* Washington University Law Quarterly 71: 59–114.

24 Eichenberger, Frey, 1993, *"Superrationalität" oder: Vom rationalen Umgang mit dem Irrationalen.* In: Jahrbuch für Neue Politische Ökonomie, edited by Herder-Dorneich, Schenk, Schmidtchen: 50–84, 57 talk primarily of *individual* incentives to reduce anomalies. This presupposes that individuals are aware of the anomaly.

thus a constitutional interest and an interest to act (similar to rule-utilitarianism and act-utilitarianism).[25] This distinction applies both to the effectiveness of legal rules and the issue of justice and, thus, to the legitimacy of rules and their content. Constitutional Economics links up the two problems by assuming that the persons involved will more probably agree to rules which are incentive-compatible as they are less costly. Incentive compatible rules are expected to be complied with. Herein lies a huge potential for institutional analysis, as incentive compatible rules are more effective and less costly than those rules which need to be sanctioned. Nevertheless it is important to look at other determinations of rules-following, which will be done when I deal with Discourse Theory.

III. Discourse Ethics and Deliberation

Deliberative theories, particularly as they relate to deliberative democracy[26], see themselves as successors to Discourse Theory, and the theory of justice developed by Rawls (concept of reflective equilibrium).[27] Discourse theory regards human communication as something more than just an anthropologic feature and, in its assessment of actions and society, concentrate on communicative and/or discursive rationality.[28] Unlike economics or, more generally, the rational choice paradigm, Discourse Theory is not concerned with the *aggregation* but rather the *transformation of preferences* through deliberative processes. This means that individuals are assumed to be

25 Brennan, Buchanan, 1986, *The Reason of Rules*. Cambridge, 129, see also Vanberg, 1997, *Rule-Following*. Paper read at the conference "Abandoning the Hypothesis of Omniscience in Economics: What are the Implications?", 9.–10. January 1997, at Fribourg (Switzerland), chapter I and Vanberg, 1999, *Die Akzeptanz von Institutionen*. In: Handbuch der Wirtschaftsethik, edited by Korff. Gütersloh: 38–50, 43.

26 For a short survey see Cohen, Footnote 18, 17 with the following definition: "By a deliberative democracy I shall mean, roughly, an association whose affairs are governed by the public deliberation of its members." And on 21: "The notion of a deliberative democracy is rooted in the intuitive ideal of a democratic association in which the justification of the terms and conditions of associations proceeds through public argument and reasoning among equals." See also Dryzek, 1990, *Discursive Democracy: Politics, Policy, Political Science*. Cambridge; Dryzek, 2000, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations*. Oxford; New York; Dryzek, 2000, *Deliberative Democracy and Discursive Legitimacy*. Paper read at the Conference "Deliberating about Deliberative Democracy", 02.–06. Feb. 2000, at Austin/Texas; Elster, ed. 1998. *Deliberative Democracy*. Cambridge.

27 See Rawls, 1990, *Eine Theorie der Gerechtigkeit*. 5th ed., Frankfurt a.M., 38ff. There are of course important differences between deliberative theories and Discourse Theory and I would suggest that the connection between deliberative theories and Constitutional Economics is more easily made than between Discourse Theory and Constitutional Economics. Nevertheless, Discourse Theory provides the theoretical basis for deliberative theories, see also Habermas, 1999, *Drei normative Modelle der Demokratie*. In: Die Einbeziehung des Anderen: Studien zur politischen Theorie, edited by Habermas. Frankfurt a.M.: 277–292 who himself suggests a model of deliberative politics. For a (critical) discussion of Rawls, see Cohen, Footnote 18, 18ff.; Benhabib, 1994, *Deliberative Rationality and Models of Democratic Legitimacy*. Constellations: An International Journal of Critical and Democratic Theory 1: 1–50, 35ff. For a (critical) discussion of Habermas, 1992, *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaates*. Frankfurt a.M., see Sabel, Gerstenberg, footnote 17, 31ff. and Sabel, Cohen, 2001, *Directly Deliberative Polyarchy*, <www.law.columbia.edu/sabel/papers/DDPhtml>, 11f.

28 For fundamentals see Habermas, 1988, *Theorie des kommunikativen Handelns*. 2. vols. Frankfurt a.M., particularly vol. 1 and Habermas, footnote 27.

willing to change their preferences and/or interests.[29] One main characteristic of the process of deliberation is the need to give reasons.

1. Reaching Consensus

Deliberation is defined in somewhat varying terms, depending on whether the orientation toward the result[30] or the process prevails.[31] What the deliberative theories have in common, however, is that (as in Constitutional Economics) all those concerned are involved in the collective decision (democratic element) which is made after hearing and accepting arguments, and that participants in the discourse (at least officially[32]) feel committed to rationality and impartiality (deliberative part). This deliberative part concerning the *interest* component of preferences distinguishes Discourse Theory from Constitutional Economics. This makes it possible (but not necessary) to influence not only the *theory* component of preferences but also the one relating to interests. This is done through learning processes that may alter both interests *and* theories, the assumption being that people have a private and a public autonomy which supplement each other. While the former has to do with individual choices and implementing a personal concept of what is good, the latter revolves around choices to be made together with others and putting into practice a political concept of what is fair or good.[33] The latter is especially interesting for the definition of the public good, which is in principle open, that is to say, no definition of the public good is given ex ante, but is left to the constantly reversible deliberative process.[34]

Learning processes have several components. First, the deliberative forum can gather dispersed information and dispersed intelligence. Second, the arguments given need to make sense to everybody. But even if there is consensus about the

29 Ferejohn, Pasquino, 2001, *Constitutional Courts as Deliberative Institutions,* <law.wustl.edu /igls/Conconfpapers/Ferejohn&Pasquino.pdf>, 5: "But whether goals or purposes change as a result of deliberation or whether they merely remain open to revision, the way that deliberation changes or reinforces goals or purposes is by giving reasons or arguments. Deliberation in this sense is participating in the process of reasoning about public action. This entails being open to reasons, willing to alter your preferences, beliefs or actions if convincing reasons are offered to do so – and being willing to base attempts to persuade others in giving reasons rather than threatening coercion or duplicity."

30 In the result-oriented definition of Stokes, 1998, *Pathologies of Deliberation.* In: Deliberative Democracy, edited by Elster. Cambridge: 123–139, deliberation is "the endogenous change of preferences resulting from communication."

31 Cohen, Footnote 18, 23, Benhabib, footnote 27, fn. 13 and Gambetta, 1998, *"Claro!": An Essay on Discursive Machismo.* In: Deliberative Democracy, edited by Elster. Cambridge: 19–43 by contrast focus on the process itself by saying that all it takes for deliberation is a conversation whereby individuals speak and listen sequentially before making a collective decision.

32 According to Alexy, 1995, *Diskurstheorie und Menschenrechte.* In: Recht, Vernunft, Diskurs: Studien zur Rechtsphilosophie, edited by Alexy. Frankfurt a.M.: 127–164, 133, 142ff., elites and tyrants see an individual utility in justifying social systems as, in the long term, legitimacy is less costly and more stable than pure force. Legitimacy is established where elites make allowance for people's interest in substantive rightness (even if this is only alleged). The rules of the discourse can then be justified by stability interests (advantageous in the long term). Even if the interest in the rules of the discourse was not subjectively there, or just a (Machiavellian) pretext, that does not detract from at least the objective and/or institutional validity of the rules.

33 This differentiation follows Alexy, footnote 32, 127 and the analysis of concepts in the history of ideas made by Habermas, 1992, *Faktizität und Geltung*, footnote 27, 112ff.

34 See extensively Engel, 2000, *Offene Gemeinwohldefinitionen,* <www.mpp-rdg.mpg.de/pdf_dat/00016.pdf>. See also Sabel, Cohen, footnote 27, 4: "(T)he deliberate conception of collective decision making extends the idea of treating people with respect from rights and procedures to justifications themselves."