

Chapter III

ON SOME ASPECTS OF FACE-TO-FACE COMMUNICATION

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REFLECTIONS ON STRUCTURAL ANALYSIS OF COURTROOM INTERACTION

"You want justice, but do you want to pay? When you go to the butcher's you know that you have to pay, but to court you go like to the repast".

B. Brecht, Der kaukasische Kreidekreis

I

In connection with this quotation from Brecht there arise a lot of questions which sociological analysis of courtroom interaction has to answer, before one can turn to the popular business of criticizing institutionally regulated interaction and, along with this, the dark powers - godfathers, states, and ideologies - symbolically represented in the institutions. Social institutions and their specific type of interaction are "social facts" in the "classical" sense established by Durkheim. Their analysis requires going beyond the stucco and the superficial polish of ideologized institutional apologies and to make appear in the actual socio-historically symbolical expression of the institution the real causes of the emergence and induration of the institution and its constituting conditions of construction. The interaction type "trial" or "jurisdiction" and its institutionalized form, "court", belong to the historically oldest social constructions. Its causes,

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functions and fundamental structures are efficient until today - inspite of all its administrative and technical disguises. They guarantee continuity and efficiency, as well as the transformation and "self-critique" of professional judicial acting.

In this paper I wish to show some of the characteristic features and premises of courtroom interaction. The analysis is based on a research project which I am conducting since a few years at a German youth court. Therefore some of my considerations might seem to be valid for nothing but criminal jurisdiction. But anyone who makes the effort to analyse the characteristics and premises of the principles of social construction of the process of reaching consensus in other judicial institutions - which have historically emerged from criminal jurisdiction - and to compare them with the following considerations will find less differences than he might have expected.

Of course, in a limited essay like the present one there cannot be given a survey of the historical changes, culture-specific forms, political deformations and ideological apologies which this institution has experienced or generated itself. Nor is this the place of a case study. I think however that I can provide some good foundations which will make possible a more solid critique of concrete judicial interaction as well as the elaboration of specific case study questions.

Looking for the specific achievements, premises, and structures of courtroom interaction I wish to follow the Brechtian dictum which leads me to the following questions:

1. What are the social costs for anyone who searches for justice within a social institution?
2. What is the difference between bargaining and negotiating justice and the everyday negotiating with the merchant; the difference between the judge and the butcher (a difference which actually sometimes disappears in political jurisdiction) and between everyday communication and institutionally regulated judicial interaction?
3. To what corpse the everyday actor, the layman, gives reverence when going to a repast?
4. Finally and additional question: Why is it that people in quest of justice and laymen in general feel such a helplessness face to precisely this institution they expect help from?

As theoretical guides in my search for answers to these questions I shall use especially the sociological reflections of A. Schütz, G. H. Mead and M. Weber.

II

The central issue on which everything else depends seems to be the following: what distinguishes institutionally regulated interaction - in our context: at court - from everyday interaction out of which it has emerged and has been given a specific function? Generalising this query referring to the conditions of successful communication, the following questions arise for the analysis of courtroom communication:

1. Which are the conditions of success of everyday communication?

2. Which of these conditions are suspended in courtroom communication any why?

3. Which is the interaction structure necessary for the aim of judicial communication and how can this structure be sufficiently relieved against the elements covering it such as status vindication, apology, bureaucratisation, and exercise of power, i.e. the social "second code"?

Searching for successful everyday communication it quickly becomes evident that there exists no exemplary situation in daily life such as to be used as a model or measure. If there was a particular situation one could not qualify it anymore as "everyday" situation on account of the fact that everyday life is not characterized by fundamentally successful communication. Therefore the following analysis has to find the fundamental suppositions and rules of everyday interaction in examples of successful communication and to round them up in an ideal-typical model of everyday communication. Such an ideal-typical construct of successful communication has to include those conditions of success for communication which everyday communication as such presupposes, to which it refers contrafactually, and with which it measures its adequacy even if disturbance, strategical acting, imposture, etc. occur.

Asking oneself and others for situations of successful communication one finds that their specificity does not reside in the

often evoked "human closeness" of the communication partners nor in the harmony of their souls, nor in a particular empathy, things that some schools of behavioral psychology wish to make us believe and to teach us. Rather, the empathy-hypothesis and the corresponding invocation of harmony and affective understanding are being used almost always as explanation of something they just provide another vocabulary for. This vocabulary conceals the analytical claim of decoding the structure and social function of a phenomenon which instead it should materialize. Hardly anybody will deny the fact that the gift of empathy is very unequally distributed among men and that also it can be learned, trained, enlarged and refined. This implicit knowledge about structures, the interactive using and producing of social order, includes above all the competences and rules of understanding an alter ego of intersubjective orientation and community action in general. But community action and intersubjective orientation can be shown, described, analytically reconstructed and explained in most spheres of social interaction and in any institutional context without invoking harmony of affects.

Not only ethnographic research, but also some attentive observation which should be within the reach of anybody, can make evident the order and rules underlying the en- "acted" expression and above all social exchange of strong and supposedly unrestrained affects. Not only can we differentiate clearly the culture-specific expressions of hatred, love, anger, affliction, etc., also the course and succession of the different gestures and speech acts expressing one single affect are being ordered, based on innate behavioral schemes of the species and on an implicit knowledge about cultural and group-specific shaping of these original schemes acquired in concrete historic interaction.

The social setting of a highly valued type of affect and action as for instance "love" is submitted to such a strict order; in its expressions, behavioral rules and situational references it is so well typified, socially elaborated and implicitly known, that, observing love, we can scarcely recognize the "extraordinary" we wish to attribute to it. The Fine Arts, the theater, the film - they all live on the explication of our implicit knowledge about the structures and rules of social order. Their scenarios reproduce parts of the lifeworld scenario of social acting. Thus the

analytical elaboration, reconstruction and explication of implicit human knowledge about structures and rules of social order and social acting is a task which social sciences fundamentally have to face. However, it has been long neglected, the social sciences being seduced by and addicted to what they considered "facts", the only reality: but a reality and "facts" which weren't given as such, having been actually constructed - often in different ways and forms - by the members of human society on the basis of implicitly known structures and rules of lifeworld.

According to this I wish to establish the thesis that empathy and affective "harmony" are not the presuppositions for understanding the social actions of an alter ego, but they result from the development of species-specific abilities, from competences acquired during socialization and from an implicit knowledge of rules of the structures of social acting acquired in the same way.

Successful communication is being experienced conversing with friends in a pub, talking with one's neighbor across the garden-fence or in a foreign country with the painstakingly located "natives", it is experienced in the company of one's friends and sometimes still in one's family or partnership. This means that successful communication requires presuppositions and rules of a much more formal nature than we wish to believe. These social rules do not presuppose a harmony of sentiments or affects, much on the contrary, the latter are probably produced by the formal rules alluded to.

The ideal type of successful everyday communication, the conditions of which - so I maintain - we continually carry with us as an implicit, almost unconscious knowledge - if there exists something like that - consists of a set of positive communication experiences, principles of construction and schemes of order for communication which have been acquired during socialization. We have aggregated them into an implicitly known and familiar "pattern of communication".

The ideality of this pattern of communication is shown in the perpetual experience of communication being successful only approximately or even failing - but at the same time it remains oriented towards that pattern. Its reality consists in the efficiency of its fundamental assumptions which are de facto regulating communication: in the construction of the meaning of interaction

achieved by them, without which no meaningful common action nor social cooperation would be possible. Its social function, finally, consists in the fact that it orientates beforehand the individuals socio-intentionally as an encompassing scheme of order acquired in the interaction of socialization, thus being a subjective pattern of interaction preceding the individual and encompassing society as a whole.

Analysing the scientific procedure and its process of reaching consensus one discovers some of the basic assumptions founding and regulating communication¹. Disregarding any academic dispute, positivists, structuralists, pragmatists, interactionists, and phenomenologists agree in considering scientific work as being based on the following assumptions, most of which - as can easily be seen - are nothing but explications of the "tacit knowledge" regulating everyday communication as well:

- the common wish and competence of the interaction partners to take over mutually the perspectives,
- the postulate and the assumption of the "rationality" of arguments,
- the assumption of the possibility of achieving consensus,
- the contrafactually efficient rational construction of the identity and rationality of the interaction partners which is performed despite all contrary experiences,
- the equal right for all interaction partners of speaking and asking questions,
- the obligation to prove and test any conviction brought forth.

Disregarding the last assumption all others act as regulating principles in everyday communication as well - even if in the form of contrafactually efficient idealizations. But unlike the scientific type of action, the everyday communication is set within an immediate context and exposed to pressure of acting. Therefore it intends a maximum avoidance of frictions and thus a maximum economy of the common "stock of behavior". This gives rise to the specific maxims for communication in everyday life:

¹ See also: J. H a b e r m a s, Vorbereitende Bemerkungen zu einer Theorie der kommunikativen Kompetenz, [in:] J. H a b e r m a s, N. L u h m a n n, Theorie der Gesellschaft oder Sozialtechnologie, Suhrkamp, Frankfurt a. M. 1971, p. 101 and n. ps.

- the assumption of fundamentally identical stocks of knowledge of the interaction partners,
- the confidence in the - at least potential - identical social systems of relevance,
- the abstention from testing the so-called "evidences",
- the confidence in routines and forms of communication that have proved to be efficient; in what has always worked,
- the confidence in ad-hoc solutions without application of tests.

This characterization of everyday idealizations of interaction and maxims of communication can now be used to find concrete answers to the question of how to distinguish form and function of institutionally regulated courtroom communication from everyday communication.

III

One of the most general of the above mentioned basic assumptions of "normal" - i.e. everyday - communication consists in the aptitude and ability of mutual take-over of perspectives which the communication partners attribute to each other. Thus the convention is expressed that one and wants to at least understand one another, inspite of possibly different opinions or even irreconcilable standpoints. Moreover one presupposes that the communication partners are - disregarding possible differences of age, position, authority, knowledge, and status - equally competent, i.e. mature interlocutors, that means as communication partners they are fundamentally equal. Each of them thus possesses the same right to express or not to express opinions, to ask questions, to give or to refuse answers, and to ask counter-questions.

From the perspective of the layman - whether he appears at court as a petitioner, an accused person or as a witness - this basic assumption is acutely disturbed by the formal-institutional regulation of the interaction process normally unknown to him, by the often unilateral definition of relevance, and by the professionally acquired, also unilaterally distributed knowledge of the representatives of the institution.

Even if the principle of exchanging perspectives can by no

means be suspended, its actual realization is permanently called in question. For even if the layman at court presupposes that the judge is able "to enter into his feelings", he himself is unable to take over the perspective of the judge or of the public prosecutor because this perspective is characterized by the institutional competence and definition of relevance. He normally sees the judge from the familiar perspective, that is, on the background of everyday typification and routines. Thus the judge, although holding a dominant position, is seen as evaluating his actions and opinions from the everyday standpoint. The process regulations, evaluation criteria, and behavior regulatives which precede and standardize the actions of judges and public prosecutors as lawyers and representatives of a social institution, do not enter the focus of the layman - even if he has been trained by television courts. The institutionally formed perspective is professionally learned, it has been routinized and lubricated in the institutionalized practice and is for the layman hardly immediately understandable. This becomes most evident in relation to the transformation - often not noticed by layman, or if recognized, not understood - of everyday descriptions of events and representations of reality into juridically pre-coded characteristics of circumstances and juridical classifications. The competence and necessary knowledge to operate this transformation have not to be denied explicitly to the layman, he does not possess them, and he knows or experiences this.

When training judges, sociologists almost always try - and this is necessary, considering the tendency of the institutional perspective to narrowmindedness encouraged by bureaucratization, prestige thinking and indolence - to teach judge the standpoint of the layman. This standpoint as such is easily recognized by the judge: outside of the court he constantly uses the everyday glasses - being a father of family, a hobby sportsman or a member a municipal council. The layman however cannot understand the professionally learned perspective by a comparably easy change of glasses. In face of the process regulations (mode of criminal or civil procedure), juridical norm and behavior codices and purposes acting for the professional representatives of the institution as producer's directions, which are unknown to the layman and which he has to accept, he - being prosecutor or accused - errs through the "drama" staged mainly for him and in which he plays a central part

without knowing its producer's directions or perspectives. These however are known to all the other actors.

Such a dramaturgy shows all the basic features of crisis experiments, despite the fact that the process regulations and pre-codings actually should prove the contrary: They have been constructed aiming at the removal and avoidance of arbitrariness, hazard, in general: uncertainties, and at securing order and impartiality. However, they can only serve this purpose if all participants are permitted the necessary insight into the producer's directions.

Legislation in most countries provides the possibility of judges initiating layman into the institutionally regulated process procedures, that is, interaction procedures, or expects this initiation to be carried out by the attorneys. Any observer at court however can notice that this assistance usually is not given, that the laymen err through the procedure and try, at best, to uncover the mysteries of juridical formalisms and process regulations by the scheme of trial and error.

This shows a vestige from the efficiency of magical concepts dating from the early history of jurisdiction as well as their connection to religion - from which jurisdiction never could nor wished to completely free itself and which it has only bureaucratically disguised in societies or times that wished to consider themselves as being enlightened. Durkheim has pointed out in his analysis of religious ritual that religious formalism probably is the first form and foil of juridical formalism. Both ground on the conception that the formula to be said and the ritual to be performed bear in themselves the source of their efficiency, that means that also the juridical rituals would lose their efficiency if not executed in just the same way as those religious rituals which have been sacralized by their social success. Maybe even laymen secretly believe the more in the necessity of these rituals the more mysterious or unusual they appear to them. If this is true we would have a first answer to the Brechtian question: It is because people have passed through the preparatory school of religious institutions in which the harmony of religious and juridical conscience inquiry and sentence is suggested and imposed as an almost sacred action, that they do not go to the judge like to the butcher's.

Unlike most public institutions in democratic countries, courts with this "early history" attitude function in face of society and themselves like a "closed society" transforming their routines into quasi-religious rituals and hiding their regulations from outsiders; thus throwing a cloak of mystery around the principally rational process of jurisdiction.

By this mystification of institutional rules of interaction - symbolized by a mask borrowed from the religious ritual which anonymizes the individuality of the professional juridical personnel - the layman more or less is sentenced to incompetence. Within the institution he is the inferior, he necessarily gets into a position of defence, he experiences himself as being a stranger in the institution, and - if we put it nastily - because this should stay unchanged one consequently assigns or recommends him a juridical assistance. This assignment has two aspects. It does not only mean a support for the client at court, it also shows his supposed helplessness: the person who is prescribed a crutch is at the same time attested helplessness.

By institutionally assigning an assistance the institution frees itself from the obligation to uncover its cards and it accentuates the incompetence of the client. In any case, both factors, the real or only pretended strengthening of the client by the juridical assistance and the helplessness which this symbolizes at the same time are not only directly related to one another, they exert a specific influence on the layman's appraisal of his own part played at court. The observable, uncertain questioning glances directed to the "assistance" show how much his behavior is formed by the prescription of "the crutch". It expresses clearly the latent uncertainty of laymen at court, such as they place on record if being questioned.

Being disguised and mystified the professionally necessary regulation of the interaction structure at court, whose function it is to secure equality and common order, thus becomes a permanent source of uncertainty for the layman as well as of exercise of power and bureaucratic abuse by the institution. Even if this often is the case it is by no means a juridical necessity; nor can it be reconciled with the claim - founded in the democratic principle of the responsible citizen - for rationality of arguments. The self-image thus projected by the institution and accepted by

the public has very much to do with prestige-oriented impression management, and much less with rational goal-orientation.

IV

Everyday action and everyday communication are based on the assumption and presupposition of "matters of fact" known by everybody and not having to be verbalized: the interaction partners mutually presuppose a common knowledge about a common reality and in case of doubt they content themselves with a superficial test of this common stock of knowledge. This confidence in a common world of implicit agreement serves the coorientation, cooperation, and greatest possible absence of disturbance, and thus the quickness of common action and reaction as they are required in everyday life. Thus, permanent procedures of testing are avoided and conflicts are seen as soluble within the frame of daily routines of reaching consensus.

Certainly also at court one presupposes a common knowledge of all interaction partners, for example about social norms and values, about a social "basic norm". But the very fact of their being permanently and explicitly invoked shows that they are already lost or at least threatened. The absence of disturbances presupposed, or within easy reach in everyday life, is gone. Thus the functions and the *raison d'être* of judicial institutions are not deduced from the absence of conflicts and from social consensus but from part or possible future conflicts. Therefore one meets at court. It is one of those institutions which are invoked when the daily and "private" routines of conflict regulation have failed or if this failure is expected, or if a conflict (a "deviance", a trespass) is given, of which the participants and/or the concerned society think that it is no more privately, but only publicly and institutionally soluble.

The question of what has to be paid to get public and institutionalized justice points at different ways of making accounts:

1) in our culture and times one has already paid privately and affectively with a series of disappointments, before one appears in public,

2) one knows secretly that one has to pay a "social" bill even after a successful public and institutionalized conflict re-

gulation, because private conflicts and disappointments can not be paid off with public means, or, in other words: broken private worlds cannot be amended publicly and institutionally;

3) one pays these social costs - apart from the material ones - or one has to pay them in order to "gain" the classification of a particular conflict within a general social scheme of order and valuation in order to be explicitly assigned a place within the social hierarchy of values whether it be ascending, keeping one's place or "falling down".

The formal interaction precepts of the process regulations determine the interaction of parties whose interaction community - and thus also their implicit routines of reaching consensus - have become cracked. This is the interaction theoretical meaning of the process precepts: originally they are rules of procedure for private conflicts. This constitutes the real possibility of a social profit and of conflict solution, but a great danger as well.

Public and institutionalized regulation on conflicts leads necessarily to a rational and supra-individual, i.e., "unpersonal" process regulation. Its function - and this is not a paradox, it is a meaningful and humane consequence - is precisely the protection of the person and his privacy which should in no case be institutionally injured. This is the primary function of the unpersonally working elements of institutional process regulations: Efficiency and reiterability of the rules "without respect of persons", the realization of the principle of equality, the possibility to generalize social phenomena, the retention of affects in evaluating persons and events (an often infringed principle).

This being the functionally necessary and socially meaningful aim of bureaucratization of morals as a public and institutionalized conflict regulation, the observation of the "really existing" courts and the trials conducted within them show the following functionally and rationally unwanted secondary effect, serving nothing but the status interests of the institution and its representatives: the moralization of bureaucracy, that means the institution considers itself no more as a means of rational discussion of morality and social conflicts, on the contrary, it becomes itself moralized, takes the aura of the sacred, punishes trespasses of institutionalized regulations like a sacrilege and thus possibly more severely than the discussed delicts. All too often it re-

sults from this ideologized, unprofessional perspective that in trials two cases are being tried and the consideration of the ideologically demanded pretention of the institution itself.

V

With the participants knowledge about the preceding or anticipated conflict which cannot be settled any more with the means of everyday life there appears at court - instead of a common daily perspective being relatively free from disturbances - a kaleidoscope of conflicting perspectives, a reflex of the contest of conflicting parties. The common world is out of order and the causes of disorder are to be found, evaluated, and done away with: not an ordeal but an arbitration should reestablish order. The consensus which has to be reestablished is not meant to be believed, but - according to the professional claim - has to be justified and thus be rationally understood and accepted by the participants.

This process of rational establishment of consensus presupposes a rational and extensive analysis of the causes of disorder. This transforms the confidence in the daily world of evidences and implicitly shared common knowledge, of the common perspective into a conscious analytical search for the causes of dissension and for the inconsistencies of the special patterns of interpretation and action of the interaction partners. Instead of the evidences there appears uncertainty, instead of common knowledge - testing of knowledge, instead of action there appears reflection, instead of one perspective - different perspectives, instead of one reality - multiple realities, instead of one world - different worlds.

Upon the judge there devolves a complex task. He is - this is the demand - at the same time actor, participant observer, commentator and interpreter of the events, translator and addressee of the different representations and interpretations of reality, and representative of the "concrete generalized other": of the State - its norms, values, and attitudes. Disregarding the latter and reducing the margin for interventions of the judge there appears a certain parallel between the functions of the judge and those of the psychoanalyst. Both interpret in reconstructing the view of reality and the understanding of facts of laymen who sit-

her have entrusted themselves to them or who have been delivered to them by others. Both aim at decoding the objective behavior and action regulating principles of coping with reality, often concealed and only vaguely perceived by them.

But while the judge in his interpretation represents the state in a normatively abstract way and adopts its reality norms as a measure for the reality view of laymen, the psychoanalyst in his analytic-mimetic attitude towards the patient keeps up the position of normatively indifferent, pure representation: the position of value-neutral interpretation.

The judge and the psychoanalyst also share the relation to the elements of reality, to the supposed facts and events they are confronted with and which constitute the actor's concrete reality.

Like the psychoanalyst the judge does not know in the beginning, and he never knows immediately the concrete original conflict, the event, the motives of acting, the original action situation. He lacks the experienced authenticity in the narration of the events. Initially his information is "second hand" information drawn from the files and documents. He does not know the event or the conflict, but "only" its different presentations and interpretations. From this there arises an analytical attitude of interpretation and asking questions which is not limited temporally; in the case of psychoanalysis it exists until the interpretations of the patient and the analyst are converging, in the case of jurisdiction until the decision of the judge rationally and consistently represents the completely explicated original conflict. This means that nobody can know beforehand at which point questions will come to an end, how often the "certainties" will have to be revised. Anyone who knows this structure knows, or will experience - just like Kleist's village judge Adam - what is the meaning of an analytical-reconstructive process as an action configuration. And anyone who has ever observed a judge playing the part of the witness or the accused has been shown strikingly the efficiency of this knowledge and the basic uncertainty which it produces.

Both the judge and the analyst then carry on their analytical task of interpretation and they do this by means of a formal regulation of interaction processes and of a formal setting. But while the analyst in the "classical" analytical setting avoids visual

contact with his client, the patient, in order to concentrate on the spoken text and the gestures without being compelled to react and being as little as possible distracted from the suggestion of visual exchange; the legal proceedings are - from the origin and up to now within the courts immediately orientated towards social conflict - organized as group related settings of the face-to-face interaction. The psychoanalyst concentrates predominantly on the spoken text. The judge has passed through the analysis of written texts before the legal proceedings, by analytically replaying in a face-to-face situation the original conflict, its interpretations, justifications, and evaluations under the formal direction of the institution, test the results of the analysis of documents using the criteria of interaction, of society in actu.

Unlike the private desire of being understood and cured, jurisdiction is fundamentally a public affair and of public interest. Even if institutionalized acting has emerged and been separated from daily action routines, by public interest it remains tied to common sense and everyday life. Accordingly it embodies elements of daily routines of securing and testing credibility, which - although being formally transfigured and explicitly set to rules - remain unchanged regarding their quality and aim. These elements are the immediate exchange of impression records in face-to-face interactions, the interactive testing of social attitudes and social typifications, the evaluation of an interpretation or opinion following the "quality" of their presentation, briefly: elements permitting to draw conclusions from the presentation of an exterior appearance and the presented interaction competence, from impression and interaction management, to an "inner" attitude or the "character" of a person.

How insecure and annoying this test procedures may ever be, the court cannot do without them. Analysis of documents and analysis of interactions can only be tested in this manner - one through the other - while at the same time the existence of common sense, its loss or the possibility to restore it are being interactively tested. Thus the judicial face-to-face interaction is at the same time a pre-test of the efficiency of judicial solutions for daily life after the trial. This pre-test, however insecure, is indispensable.

The psychoanalyst works face to - or should one say "with"

- his client according to the principle of "substitutive interpretation" (Freud, Oevermann). Partial realities, covert action structures, encoded communications and interpretations, are to be rationally combined to a consistent pattern of interpretation and explanation for the action patterns and possibilities of a single case. The single case thus is interpreting itself through the professionally interpreting substitute. A concrete morality as existing beyond the case is not given nor provided for.

The judge, too, works according to the principle of substitute interpretation. The trial is formally structured so as to systematically bring forth the different points of view of the parties and generate a disharmonic body of "different realities" and interpretations reaching as far as to the concluding pleadings of lawyers and/or public prosecutors.

Here at the latest it becomes evident that "the court" is not looking for a past reality which could at best turn up in the form of a rational construct and thus as a feeble imitation of itself. Rather the trial serves primarily the common construction of a consensus acceptable at all. In this process the judge has the function of substitutively arranging, from the perspective of a generalized other, the individual presentations and interpretations of reality as well as the partial realities of the parties within a more general social scheme so that the partial realities are being removed, so that the particular perspectives become translatable, and only thus understandable and evaluable.

The fascination emanating from the role of the judge has, except for the originally religious "golden background" illuminating the judge until today, yet another cause. It lies in the specific professional meaning of the independence of the judge, which on its part is founding the social acceptance of his role as a mediator. Unlike the psychoanalyst, but also unlike the attorney representing his client and the public prosecutor representing the "state", the judge in fact has no client, unless one takes society as a whole - and not the state - for the "client": this independence from clients secures him the potential liberty of perspective which although being limited by norms, clearly appears to be more general than that of all the other participants including the state also represented by him.

Despite of his function as a controller of norms and his being

bound to the code, one can expect from him not only the abstract perspective of the law, but also the maintenance, of the justification of the particular case perspective: only thus can he mediate between the specificity of the case and the universality of law.

If the principle of the social construction of justice performed always anew and in a different way in every particular case through the mediation of the singular case and the general norm is broken, there happens what nobody can possibly wish; *fiat iustitia, perest mundus et homo*.

This coordination of the singularity of the case and the universality of the law is described only inaccurately, not to say: in a dangerously distorted way by the judicial concept of "subsumption". Any trial is - or at least should be from the perspective of judicial professional ethics - a piece of currently applied social science, in which the *hic et nunc* historically efficient and possible social attitudes and principles of construction of social reality - which are represented also in the particular perspectives - are constructively used to achieve concretely consensus concerning a common reality. If this happens it is never "the" law or "the" laws which are reproduced, but they are adapted to the singular case just as the latter is adapted to the former and in this process a piece of concrete social reality is produced which cannot be equated to "the" law, being rather a reality which law and laws - as is shown by the history of jurisdiction - can only reach to be transformed by it.

As in the analysis of several decisive aspects of juridical action, parallels to religious types of action and meaning, as they were produced above all in the christian-judaic culture horizon, again become evident. Both religion and jurisdiction are characterized by the interpretation of a dogmatically unalterable text - religion postulating *expressis verbis* a timeless and supra-individual claim to a general truth, a bias which characterizes jurisdiction in just the same way. This truth and the symbolical reality of typical persons, events and problem solutions worked out on the basis of the unalterable text, perennially have to be adjusted to extratextual and changing sociohistoric realities within a concrete historic process of interpretation of particular situations.

If this adjustment cannot be achieved, if neither the respective historic view of reality of a society or of a particular case

can be related to texts claiming universality of explanation, nor the dogmatic texts can be related to the social perception of original phenomena, then it is to be expected that the texts' claim to establish meaning and order will lose its credibility and thus be declined. In their historic practice of interpretation the representatives of the institutions of religion and jurisdiction - of churches and courts - have very different answers to this challenge. This shows very impressively the supersession of religious action and meaning patterns by juridical interpretation and professional juridical acting: While the church leaves unchanged the canonic text considered to be sacred and admits the historic element of its use only in the documentation of the historically changing practice of interpretation and in the history of dogmatic theology, the practice of jurisdiction changes the text, by initially adapting itself imperceptibly to the historic change and to the historically changed social view of reality. Irresistibly, the legislator takes the necessary action resulting from the changing social practice: The faith in an unchangeable order supposed to be of divine origin gives way to the insight in the social construction of reality and its changing historic orders.

The structural comparison of religion and jurisdiction as well as of their constitutive types of action and meaning indicates their common origin and at the same time it points to the process often labelled the "secularization of the sacred" in the history of jurisdiction. A closer observation shows something different: In the historic process of text and world interpretation the attributes of the sacred are progressively extracted from the text and transferred to those dealing with and interpreting textual and extratextual reality. Using the language of enlightenment and of a democratic society: The dignity of the text should not be the measure of man, but the dignity of man is becoming the measure of the text. This is - or tends to be - a contemporaneous social element of our construction of reality - which itself is submitted to further adjustment.

VI

The results of the above elaborated interaction theoretical structure analysis of courtroom interaction which follows the teleology of social action types seem to show nothing but an idealtypical vision of institutional function. But the analytically achieved basic structure of courtroom interaction is more than that. It cannot only be gained from empirical data, it can also influence these showing the concrete ideologies and deformations which "court" may experience if - as almost always happens - it is abused for actual political purposes or in the service of ideologies.

But I haven't yet given an answer to the question as to what corpse the layman gives reverence to when going to court as to a repast. The answer is: He takes leave of the idea which he cherishes and came to like, "one" - but above all he himself - could deal quasi privately with any conflict, because everybody had to think like he himself or because he could easily take over the others' perspectives. He discovers: We have to presuppose the possibility of mutual assimilation of perspectives because, unlike other species, we have to deal also with our being different from one another. He buries the idea of the still somehow given unanimity and the concretely discoverable consensus of all.

But nevertheless there is a reason for gaiety - even if only for a very restrained one according to the repast. The paradox of the efficiency of social idealizations of interactions along with the actual experience of the permanent susceptibility to disturbance of society and the heterogeneity of the members of society and their interests has not only led to the permanent war of all against all or to unflinching wars of religion. It has led also to the social construction of institutions which were bound to construct rational compromises about a common reality in which there is place for competing interpretations and in which the causes of conflicts are being discussed and explicated, which is a vital presupposition for societies basing on the existence of competing realities and systems of relevance as well as on the effort to reach consensus which is necessary for cooperation, and on the concrete negotiation of - temporary - constructions of reality.

Of course, the invention of such institutions should not

arouse to much optimism, but anyway: The one who goes to the re-
past is still alive.

Hans Georg Soeffner

UWAGI O STRUKTURALNEJ ANALIZIE INTERAKCJI SĄDOWEJ

Autor artykułu analizuje różnice między komunikacją potoczną a komunikacją mającą miejsce w sądzie. Podstawą teoretyczną są koncepcje Alfreda Schutza i Maxa Webera, a oparciem empirycznym - badania zespołu - kierowanego przez autora - nad sądem dla nieletnich.