



What is juridification?

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Abstract

“Juridification” is an ambiguous term, both descriptively and normatively. The authors distinguish between five dimensions of “juridification”; constitutive juridification, juridification as law’s expansion and differentiation, as increased conflict solving with reference to law, as increased judicial power and as legal framing. In the first part they clarify the five dimensions. In the second part they discuss the relationship between them, and in a third and concluding part they briefly comment on some of the challenges they are faced with from a normative point of view.

Introduction¹

Juridification is an ambiguous concept with regard to both its descriptive and normative content. In descriptive terms some see juridification² as “the proliferation of law” or as “the tendency towards an increase in formal (or positive, written) law”³; others as “the monopolization of the legal field by legal professionals”⁴, the “construction of judicial power”⁵, “the expansion of judicial power”⁶ and some quite generally link juridification to the spread of rule guided action or the expectation of lawful conduct, in any setting, private or public⁷. These are but a few of the shorthand definitions presented in the “juridification literature”. In normative terms juridification is sometimes seen as the hallmark of constitutional democracy, the triumph of the rule of law over despotism; at other times as undermining not only efficiency, but also democracy and civil society, for example in the

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² Juridification is related to two other concepts, “judicialization” and “legalization”, concepts that are sometimes used more or less synonymously or at least overlap with the concept of “juridification” as we understand it.

³ J. Habermas, *The Theory of Communicative Action*, Vol. 2, Boston: Beacon Press, 1987, p. 359.

⁴ See Penny Brooker, “The Juridification of Alternative Dispute Resolution”, *Anglo American Law Review*, Vol. XX (1999), pp. 1-36, p. 1 n. 1.

⁵ See Alec Stone Sweet, “Judicialization and the Construction of Governance”, in Martin Shapiro and Alec Stone Sweet *On Law, Politics and Judicialization*, Oxford, Oxford University Press, 2002, p. 71: “I will use the term ‘judicialization’ as shorthand for... the construction of judicial power.”

⁶ C. Neal Tate and Tobjörn Vallinder, *The Global Expansion of Judicial Power*, New York University Press, 1995, p. 2. Tate and Vallinder are using the term “judicialization”.

⁷ See for example Harry W. Arturs and Robert Kreklewich, “Law, Legal Institutions, and the Legal Profession in the New Economy”, in *Osgoode Hall Law Review*, Vol. 34 (1996), No. 1, p. 29: “This process of extrapolating expectations of lawfulness and fairness from state courts to other public agencies, and from the state sphere to private institutions, we will refer to as juridification.”

form of “legal domination”⁸, and eventually the rule of law itself.⁹ Today the question of juridification is actualised through the emergence of new democracies at an unprecedented scale; the proliferation of rights discourses globally, regionally, and nationally; and the growth of international law generally and the use of international courts and war crimes tribunals more specifically. Simply put the twin ideals of the rule of law and legally assured human rights have conquered and continue to conquer new ground worldwide. The paradigmatic case of juridification at the international level no doubt is the development of European Community law and we will mainly use this development to exemplify, and hopefully show the usefulness, of our conceptualization.

No doubt the normative questions are the most interesting ones and as such hard to resist. Still, in order to talk about juridification in normative terms we first have to know what it is. What is needed is a conceptualization that is complex enough to grasp the different meanings of the term and still simple enough to work as an intersubjective

⁸ Cf. James Bohman, “Constitution Making and Democratic Innovation: The European Union and Transnational Governance”, in Eriksen, E. O. (ed.), *Making the European Polity*, London: Routledge, forthcoming. “I argue that the problem the constitution has to solve is *juridification*, or the possibility of legal domination in the face of institutions that cannot organize a singular and unified popular sovereignty. Such legal domination is not simply tyranny, but rather the imposition of a cooperative scheme upon others who cannot influence or revise its terms.”

⁹ See for example Jean Cohen, *Regulating Intimacy. A New Legal Paradigm*, Princeton and Oxford: Princeton University Press, 2002, and the discussion of liberal and welfare state models of law in Bernhard Peters, *Recht, Rationalität und Gesellschaft*, Frankfurt am Main: Suhrkamp, 1991. See also the enumeration of the downsides of juridification by Otfried Höffe in *Vernunft und Recht*, Frankfurt Suhrkamp, 1996, pp. 41-42.

standard. Ideally we should be able to tell stories of juridification using roughly the same language, to compare notes and start working on more general normative assessments of juridification. Aware of the dangers and difficulties involved in such an endeavour we still believe it would be overly defeatist not to try to clear the conceptual ground.¹⁰

With this in mind, we propose a broad, five-pronged conceptualization of juridification where we still limit ourselves to cases of national, international or supranational legal systems, thus excluding cases where juridification is not in some way linked to sovereign states or cooperation between such.¹¹ In the first part, we outline the five dimensions of juridification in descriptive terms; in the second part we discuss the relationship between them at a general level in order to better understand the complexities involved; and in a third and concluding part we briefly comment on some of the general challenges we are faced with from a normative point of view.

¹⁰ In aiming at a description we do not of course believe that a purely descriptive account of a phenomenon like juridification is possible. The description is normative in the double sense that it aspires at being the best possible account and as such should be informed by the relevant normative standards involved. What we try to avoid is a too thin account that precludes important normative questions and a too thick account that prejudges the normative questions involved. Compare also J.H.H. Weiler and Joel P. Trachtman “European Constitutionalism and Its Discontents”, *Northwestern Journal of International Law and Business*, 1996-97, pp. 354-397, p. 355.

¹¹ Meaning, for example, that we will not cover cases where a voluntary organization or a business organization becomes more regulated by the autonomous adaptation of formal rules to guide action within an organization or between organizations. Furthermore our focus is on legal rules “as opposed to rules produced by administrative or political decision-making” (Barbara Mauthe, “The Notion of Rules and Rule-Making in the Central Local Government Relationship”, *Anglo American Law Review*, 2000, p. 317).

Dimensions of juridification

Juridification, as we understand it, takes place within a legal order or a legal order in the making, be it at a national, international or supranational level. It is a process in the sense that something increases over time. If the process is reversed we speak of dejuridification. The “actors” involved, broadly speaking, are governments, legislatures, administrative actors, the judiciary, legal experts and other non-state actors including individuals as well as institutional and corporate actors. The real issue then is what exactly juridification refers to, stated in terms that make some measurement possible. Short of a workable generic definition we will proceed by delineating five dimensions of juridification. First, constitutive juridification is a process where norms constitutive for a political order are established or changed to the effect of adding to the competencies of the legal system. Second, juridification is a process through which law comes to regulate an increasing number of different activities. Third, juridification is a process whereby conflicts increasingly are being solved by or with reference to law. Fourth, juridification is a process by which the legal system and the legal profession get more power as contrasted with formal authority. Finally, juridification as legal framing is the process by which people increasingly tend to think of themselves and others as legal subjects.

1. Constitutive juridification (A)

According to the first definition juridification is a process where norms constitutive for a political order are established or changed to the effect of adding to the competencies of the legal system. Roughly one may distinguish between constitutive norms concerning procedures, the acceptable uses of state power and the separation of powers. The constitutional state (*Rechtsstaat*) is characterised by procedural rules on how to pass and effectuate political acts, content rules that limit political power and protect individual rights, and institutional rules that give one part of a political system exclusive competencies relative to another.¹²

The first wave of juridification (A1) takes place when a legal order is established.

Kenneth W. Abbott et al. describe this process in relation to the development of

¹² Juridification here means what J. Habermas refers to as *Verrechtsstaatlichung* (constitutionalization of the state) in *The Theory of Communicative Action*, Vol 2, Boston: Beacon Press, 1987, p. 359. See also “Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?”, in *Der gespaltene Westen*, Frankfurt am Main: Suhrkamp, 2004, s. 113-192, where Habermas applies this concept of juridification to international relations. Dieter Grimm uses *Verrechtlichung* in much the same way, “Braucht Europa eine Verfassung?”, *JuristenZeitung*, 50. Jahrgang, 16. Juni, 1995, p. 582-85. In the English version of Grimm's article *Verrechtlichung* is, however, translated as “legalization”, *European Law Journal*, Vol. 1, No. 3, November 1995. Juridification in this sense roughly relates to what Hart refers to as secondary rules: “primary rules are concerned with the actions that individuals must or must not do”; secondary rules “are concerned with the primary rules themselves. They specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined”. See H.L.A. Hart, *The Concept of Law*, Oxford: Oxford University Press, 1972 (1961), p. 92. See also J.H.H. Weiler and Joel P. Trachtman who note that juridification (and legalization) is sometimes used to describe a process of constitutionalization, “European Constitutionalism and Its Discontents”, *Northwestern Journal of International Law and Business*, 1996-97, pp. 354-397.

international law.¹³ The authors define legalization as a possible property of institutions. Legalization of an institution takes place along three dimensions, obligation, precision and delegation. A highly legalized institution would be one that is obliged to follow certain rules that are precisely stated and where the final judgement is being made by a third party. Legalization in terms of obligation, delegation and precision, is derived from a basic definition of a legal rule¹⁴, and as such may describe the establishment of what may be termed a legal order, but not its further development. According to the classification the EU, for example, scores high on all three dimensions presumably exhausting any possibility for further legalization. The EU has passed the threshold of legalization where it is appropriate to speak of a legal order, but to describe its further development a different conceptualization is needed.

The establishment of a formal constitution is the most evident case of the further development of juridification A (A2). Still, constitutive norms may be articulated both

¹³ They are using the alternative concept of legalization. See Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter, and Duncan Snidal, "The Concept of Legalization", *International Organization* 54, 3, Summer 2000, pp. 401-419. For a related analysis, distinguishing between juridification of "rule application", "rule enforcement" and "rule making", see Bernhard Zangl and Michel Zürn, "Make Law not War: Internationale und transnationale Verrechtlichung als Bausteine für Global Governance", in Zürn/Zangl (Hg.), *Verrechtlichung – Bausteine für Global Governance*, Bonn: Dietz, 2004.

¹⁴ See for example Friedrich V. Kratochwil, *Rules, Norms and Decisions*, Cambridge: Cambridge University Press, 1989, ch. 7.

inside and outside a formal constitution in the form of legal doctrines¹⁵, legal or jurisprudential regimes¹⁶ or legal paradigms¹⁷, to mention some of the concepts used to depict relatively stable systemic fundamentals that structure legal decision making. Some of these, for example deference doctrines¹⁸, may change quite a bit over relatively short periods of time. Informed by public debate, doctrines may change either through political intervention, or through interpretations or adaptations made by the legal system itself¹⁹. Sometimes the two are combined when existing legal doctrines are formally constitutionalized. The ECJ referred to the EC treaty as “the basic constitutional charter” as early as 1986²⁰ and the current process of constitutionalization may in the words of Jo

¹⁵ Michelman states that “Every incomplete constitution is in that way always on the road to completion. (Every mature legal system is ‘thick’ with doctrine.)” (p. 13). Frank Michelman, “Constitutional Legitimation for Political Acts”, *Modern Law Review*, Volume 66 (2003), Issue 1, pp. 1-15. Such change, to the degree that it defines the competencies of the legal system, may either imply juridification A, when it adds to the competencies of the judiciary, or dejuridification A, when it infringes on these competencies.

¹⁶ See Mark J. Richards and Herbert M. Kritzer, who sums up the literature relative to the concept of regime; “the Court not only functions within constitutional regimes but also is central in creating those regimes”, “Jurisprudential Regimes in Supreme Court Decision Making”, *American Political Science Review*, Vol. 96 (2002), No. 2. See also note 10, p. 305: “Jurisprudential Regimes structure Supreme Court Decision making by establishing which case factors are relevant for decision making and /or by setting the level of scrutiny or balancing the justice are to employ in assessing case factors”.

¹⁷ Jürgen Habermas, *Between Facts and Norms*, Cambridge, Mass.: MIT Press, 1996, Chap. 9. Jean Cohen, in line with Habermas, defines a paradigm of law as “an integrated set of cognitive and normative background assumptions about the relationship the law should establish between the state and society, and the form legal regulation must take”, *Regulating Intimacy*, p. 143.

¹⁸ Tolley, M. C., “Judicial Review of Agency Interpretation of Statutes: Deference Doctrines in Comparative Perspective”, *The Policy Studies Journal*, Vol. 31 (2003), No. 3.

¹⁹ Weiler for example writes of the European Court of Justice: “The Court on this reading is rightly perceived of as at least partially constitutive, and thus the creator of the legal order which it then applies.” J.H.H. Weiler, “A Quiet Revolution, the European Court of Justice and its Interlocutors”, in *Comparative Political Studies*, Vol. 26 No. 4, 1994, p. 512.

²⁰ Case 294/83, Parti Ecologist “Les Verts” v. Parliament [1986] ECR 1339, at 1365.

Hunt²¹ be seen as “attempts to formalize and concretize certain constitutional doctrines which formerly existed in the Court’s jurisprudence ... and which had never, as such, been held up to a binary accept/reject determination on part of Member State governments”. Such formal constitutionalization is juridification (A) according to our definition only to the extent that it adds something new to the competencies of the legal system.

Changing the constitutive norms may imply juridification as well as dejuridification.²² Judicial review is a case in point. First, judicial review of legislative acts may be expanded, as seems to have been the case in most European countries, not least as a result of the success of the European Court of Justice (ECJ), implying juridification A. Still, establishing principles limiting the courts competencies in interpreting legislative acts relative to constitutional provisions may reverse the process.²³ Second, the vast expansion of the administrative state has implied that the legislature has conferred decision-making authority to the administration, making judicial review of administrative acts necessary in order to decide the limits of administrative discretion (juridification A). In general these

²¹ Hunt, J., “Legal developments”, in *Journal of Common Market Studies*, Volume 41 (2003), pp. 79-95.

²² Dejuridification A takes place when constitutive rules and principles in some way limit the former competencies of the legal system.

²³ Keih E. Whittington, for example, talks about the “road not taken” in his discussion of the case of *Dred Scott*, referring to the dissenting views of Associate Justice Benjamin Curtis, that “laid out the argument that some constitutional questions were best left unanswered by the Court.” See “The Road Not Taken: Dred Scott, Judicial Authority, and Political Questions”, *The Journal of Politics*, Vol. 63 (2001), No. 2, pp. 365-381, here 366.

limits have been fairly wide, based on the premise that specialized agencies are better equipped to interpret regulatory ambiguities, or for sheer efficiency reasons. Thus one may establish constitutive rules limiting the competencies of the judiciary relative to the administration. For example, according to one possible doctrine, a Court would be reluctant to take on cases involving regulations securing social rights, but find it appropriate to take on cases where civil rights are involved.²⁴

One may also distinguish between formal constitutive provisions and the actual use of those provisions. One-hundred and fifty years after the Danish constitution was signed the Supreme Court for the first time struck down a law passed by parliament. The question is if the Court then did something principally new and thereby established a new constitutive principle. Since it is sometimes difficult to interpret what competencies legal systems actually have, the concept of juridification as understood here may well apply to such cases. The more unclear the relationship between established practices and a new decision the more reason to speak of juridification in this regard. The ECJ decided to take on the *Costa v. ENEL* and thereby established the principle that the ECJ competencies cover cases where EC law and member state law might be in conflict. They might have

²⁴ See Michael C. Tolley, "Judicial Review of Agency Interpretation of Statutes: Deference Doctrines in Comparative Perspective", *The Policy Studies Journal*, Vol. 31 (2003), No. 3.

argued that this is a matter for the member states to decide, since any clear reference to this were lacking in the treaties.²⁵ Thus the court expanded its competencies by interpreting the treaty in a certain way (informally it has established its own “Kompetenz -Kompetenz”, the competence to “determine which norms come within the sphere of application of Community law”²⁶). The court then went on to “make law” (the doctrine of supremacy). This increased the competencies of the ECJ not only relative to the other EU institutions, but also relative to the national courts as interpreter of national legislation and the national legislatures in their capacity of both lawmakers and constitution makers.

As already indicated legal systems do not necessarily seek to expand their competencies. There are many examples of how courts not only turn down an opportunity²⁷, but also make decisions that imply a process of dejuridification. An interesting EU case is the *Jérigo-Quééré* judgement, where the Court of First Instance (CFI)

²⁵ Teleological reasoning on part of the Court is provided for in the Treaty relative to attaining the objectives of the treaty. For a thorough discussion, see for example Stefan Enchelmaier’s critical review of Karen J. Alter. Enchelmaier states, “mere silence on part of the Treaty does not mean anything in particular” and “the intentions of the founder Member States of the Community are revealed, and sufficiently so, in the Treaty itself” (p. 289). Stefan Enchelmaier, “Supremacy and Direct Effect of European Community Law Reconsidered, or the Use and Abuse of Political Science for Jurisprudence”, *Oxford Journal of Legal Studies*, Vol. 23 (2003), No. 2, pp. 288-289. Karen J. Alter, *Establishing the Supremacy of European Law*, Oxford: Oxford University Press, 2001.

²⁶ J.H.H. Weiler, “A Quiet Revolution, the European Court of Justice and its Intellocutors” in *Comparative Political Studies*, Vol. 26 (1994), No. 4, p. 514.

²⁷ For example the Courts cautious approach to the principle of subsidiarity, be it for strategic integrationalist or technical legal reasons (the difficulty of making sense of the principle in legal terms). For a discussion see Phil Syrpis, “In Defence of Subsidiarity”, *Oxford Journal of Legal Studies*, Vol. 24 (2004), No. 2, pp. 323-334, p. 326

ruled according to a new and less restrictive test inspired by recommendations made by the Advocate General Jacobs, in relation to the possibility to get cases tried in court at the European level.²⁸ The ECJ, however, in a subsequent case held back, arguing that the question of a more liberalized test was for the Member States to decide by way of treaty amendments. The CFI in subsequent cases has made no reference to the Jérgo-Quéré decision.

2. Juridification as law's expansion and differentiation (B)

A different conception is that of juridification as the process by which an activity becomes subjected to legal regulation or more detailed legal regulation.²⁹ We will make a distinction between two aspects of juridification B, law's horizontal and vertical expansion (B1), and law's horizontal and vertical differentiation (B2). Law's expansion is the core element in

²⁸ For a more detailed account see Jo Hunt, "Legal Developments" (see n. 21), pp. 85-86.

²⁹ See Rüdiger Voigt, "Verrechtlichung in Staat und Gesellschaft", in *Verrechtlichung. Analysen zu Funktion und Wirkung von Parlamentarisierung, Bürokratisierung und Justizialisierung sozialer, politischer und ökonomischer Prozesse*, Königstein: Athenäum, 1980, and "Gegentendenzen zur Verrechtlichung", in *Jahrbuch für Rechtssoziologie und Rechtstheorie*, Band 9, Opladen:Westdeutscher Verlag, 1983. Voigt defines *Verrechtlichung* in the later article as "Der Prozess der Verrechtlichung, d.h. die Ausdehnung des Rechts zulasten rechtlich bisher nicht erfasster Bereiche einerseits und die Detalierung und Spezialisierung des Rechts andererseits" (p. 17, see p. 16 in the former article for a similar definition). Referring to Voigt, Habermas gives the following definition of "juridification" in *The Theory of Communicative Action*, Vol. 2, Boston: Beacon Press, 1987, p. 359: "The expression 'juridification' [*Verrechtlichung*] refers quite generally to the tendency towards an increase in formal (or positive, written) law that can be observed in modern society. We can distinguish here between the *expansion* of law, that is the legal regulation of new, hitherto informally regulated social matters, from the *increasing density* of law, that is, the specialized breakdown of global statements of the legally relevant facts [*Rechtstatbestände*] into more detailed statements".

juridification as defined above, when law conquers fertile ground so to speak. Law's horizontal differentiation means that one law is divided into two or more laws. Law's vertical differentiation means that a law is specified in order to differentiate between an increasing number of cases. Since differentiation may answer to considerations concerning substantial justice and not only to the lack of clarity, differentiation does not necessarily imply that law becomes less open to interpretation. "You shall not kill" is an unconditional norm. When cases where the killing is accidental or done in self-defence, are singled out the norm becomes more differentiated yet harder to interpret. One conspicuous development of modern law, in particular materialized welfare state law, is the expansion of law with high vertical differentiation, or in the words of Jean Cohen; "The type of law it uses is thus more particularistic than classical formal law, yet often involves vague and open ended directives."³⁰ The quantitative imagery of a flood of norms tends to conceal the

³⁰ Jean Cohen, *Regulating Intimacy*, p. 152. For statements to the same effect see Ingeborg Maus, "Verrechtlichung, Entrechtlichung unter der Funktionswandel von Institutionen", in Maus, *Rechtstheorie und politische Theorie im Industriekapitalismus*, Wilhelm Fink Verlag: Munich, 1986, pp. 277-323. The thematization of the distinction between equality before the law and substantial equality, mark the transition from a liberal legal paradigm to a welfare state paradigm of law. "The welfare paradigm (of law) deploys a particular form of law; substantive, purposive, goal oriented, and implemented through regulations, standards, and rules. This materialized law aims at achieving specific goals in concrete situations." See also J. Habermas, *Between Facts and Norms*, pp. 392-409. Teubner's main thesis is that juridification "does not merely mean proliferation of law", but "signifies a process in which the interventionist social state produces a new type of law, regulatory law ... characterized by material rationality as opposed to formal rationality" ("Juridification. Concepts, Aspects, Limits, Solutions", in Teubner, G. (ed), *Juridification of Social Spheres. A Comparative Analysis in the Areas of Labor, Corporate, Antitrust and Social Welfare Law*, Berlin/New York: Walter de Gruyter, 1987, pp. 18-19).

ensuing qualitative changes in the structure of law where law's expansion means that more discretionary power comes to be vested in the legal and the administrative system.

Examples of law's expansion may be cases where law is applied in new areas; family law³¹, labour law³², environmental law³³, laws regulating intimacy³⁴, and so on.

Law's expansion should also include instances where an activity that is not legally regulated within a legally regulated area becomes regulated. In cases where a governmental activity is subjected to "local" standardized rules, law's expansion may also mean that legal rules established at a higher level are imposed on a lower level, examples being central government imposing legal norms on local government³⁵, the EU imposing legal norms on national government³⁶, or the UK government imposing legal norms on the military³⁷.

³¹ Habermas with reference to S. Simitis and G. Zenz in *TCA*, Vol. 2, n. 36 p. 432.

³² According to Voigt and Habermas (see n. 29) *Verrechtlichung* was first introduced into German academic discussion in the late 1920s by Otto Kirchheimer with reference to labour law.

³³ See Eric W. Orts, "Reflexive Environmental Law", *Northwestern University Law Review*, Vol. 89 (1994-95), No 4: "juridification applies more broadly to any area of social life that the regulatory impulse of modern states deems worthy of 'controlling' through enactment of highly technical and specific laws. Increasingly, juridification extends to the natural environment, a phenomenon some commentators refer to ironically as 'legal pollution.'" (p. 1239 and n. 47).

³⁴ Jean Cohen, *Regulating intimacy. A New legal Paradigm*.

³⁵ Barbara Mauthe, "The Notion of Rules and Rule-Making in the Central Local Government Relationship", *Anglo American Law Review*, Vol. XX (2000), p. 317: "The process of 'legalization' represents a 'transformation' in the 'control' of local authority decision-making. The control alters from a basis of 'authority' to control based on the exercise of a 'power', specifically legal powers."

³⁶ For a recent account see for example Stefan Enchelmaier, "Supremacy and Direct Effect of European Community Law Reconsidered, or the Use and Abuse of Political Science for Jurisprudence", *Oxford Journal of Legal Studies*, Vol. 23 (2003), No. 2.

³⁷ The military has always been governed by strict rules, but these have gradually been subjected, first by the autonomous adaptation of rules guiding the legal system, and second by juridification where "external legal norms were Ö being imposed on the armed forces in situations where such legal norms had hitherto been absent". G. R. Rubin, "United Kingdom Military Law: Autonomy, Civilianisation, Juridification", *The*

Accordingly, even juridification as law's expansion may be said to have a vertical as well as a horizontal dimension.

No doubt a process of juridification B has dominated the development of the welfare state and it is easy to overlook the parallel process of dejuridification B that has taken place in some areas. For instance when it comes to regulating intimacy, juridification and dejuridification (B) have gone hand in hand. In relation to the EU, “negative integration”, the obligation on part of member states to remove national legal obstacles to integration, amount to dejuridification, paralleled by juridification B, “positive integration”, through the development of law at the European level³⁸. Juridification B within the EU has taken place not only through continuous expansion, but also through differentiation. As Karen J. Alter writes, “many European rules are extremely specific, unambiguously defining how states must comply with their European obligations. She adds that “when there is doubt, the ECJ is there to give a precise meaning to the rules” indicating the “lawmaking” role of the ECJ (in our terms juridification D).

Modern Law Review, Vol. 65 (2002), No. 1, January, p. 37.

³⁸ See for example Stone Sweet, *Governing with Judges*, Oxford: Oxford University Press, 2000, p. 157.

3. Juridification as increased conflict solving by reference to law (C)³⁹

In a third sense juridification means that conflicts in a society increasingly are solved by reference to law. Roughly one may distinguish between judicial conflict solving (C1), legal conflict solving (C2), and lay conflict solving (C3) with reference to law. Judicial conflict solving involves a highly specialized and standardized form of legal reasoning involving the judiciary. Legal conflict solving involves the use of legal reasoning outside the judiciary. Lay conflict solving may involve legal reasoning but the expectation would be that it is less stringent and may even involve what from a judicial point of view would be considered mistakes, misunderstandings and misinterpretations. This implies that even reference to a law that does not actually exist may be seen as a form of juridification.⁴⁰ A society may be highly juridified in this sense even if legal expertise is not always directly involved in conflict solving and the legal reasoning involved is less than perfect. Even if a conflict does not end up in court, for example, reference to law (even if sometimes mistaken) may be a way of solving conflicts. Moreover mistaken references to law may

³⁹ We may distinguish between problem and conflict solving to indicate that law has increasingly become instrumentalised in the sense that it is not only used to solve conflicts between interests, but also to attain collective goals.

⁴⁰ This is not necessarily irrational. When unsure about the law and its interpretation it may be prudent to act as if a certain law exists or a particular interpretation is valid (given for example the cost of legal advice, and potentially a lawsuit).

exist parallel to law, be reduced by law or inspire the establishment of new law (juridification B). Judicial as well as non-judicial juridification C may also be institutionalized in different ways as proposed by the reflexive procedural legal paradigm.⁴¹

This means that we do not link juridification to the spread of legal reasoning as such. Even if a family for example, may use a kind of legal reasoning to solve internal conflicts we will not consider this juridification if it is without reference to positive law.

Examples of dejuridification C are cases where a particular law becomes irrelevant or “goes out of fashion” so to speak. Laws regulating soft drugs throughout Europe, have over time been interpreted less restrictively, and for the police to pick up a drug addict with a needle in his arm, on a regular base, is hardly a relevant option anymore. Laws are interpreted within socially constructed contexts, and as these contexts change, the application of law may change, sometimes resulting in dejuridification C, at other times juridification C. This is not the place to discuss the complicated relationship between juridification B and C, suffice to suggest that legal regulation (juridification B) at some point may reach a point where dejuridification C would be a likely outcome, be it for efficiency reasons or out of reasoned contempt. The critique leveled at the EU for excessive

⁴¹ For example: lay conflict solving, public conflict solving, professional legal conflict solving, administrative conflict solving or conflict solving by committees. The reflexive procedural legal paradigm on this account refers to institutionalized non-judicial conflict solving. See Jean Cohen, *Regulating intimacy*.

regulation may be a case in point.

When it comes to international law the lack of juridification C is a main problem, a problem the EU seems to have solved. Within the EU, the degree of compliance with EC law by member states; efforts by individual EU citizens, corporations or civil society organizations more generally to get their cases heard at the EU level; and the increased tendency by national courts to refer cases to the ECJ⁴², can be seen as examples of juridification C.

4. Juridification as increased judicial power (D)

A fourth meaning of juridification refers to increased judicial power. Given certain judicial competencies the main sources of this power are law's indeterminacy and/or lack of transparency. Indeterminacy generally means that it is difficult to determine the state of the law relevant to a particular case, from the point of view of the jurisprudential community.

Transparency generally refers to the degree of openness and intelligibility of law, from the citizens' point of view. The most extreme case of "judicial" power is where there are no

⁴² See Stone Sweet and Thomas Brunell, "The European Court and Integration", in Martin Shapiro and Alec Stone Sweet, *On Law, Politics and Judicialization*, Oxford: Oxford University Press, 2002, pp. 258-291. See also Karen J. Alter, "The European Union's Legal System and Domestic Policy: Spillover or Backlash?", *International Organization*, Vol. 54 (2000), Issue 3, p. 2000: "with individual litigants raising cases and national courts sending these cases to the ECJ, states are less able to exploit legal lacunae and interpret their way out of compliance with European law", p. 492, which in our language would mean that juridification A and C at the EU level leads to dejuridification D at the national level.

common legal rules and a third party has absolute competency to judge in cases of conflict.

Indeterminacy arises when it is unclear what rules to apply to a certain case or how a certain rule is to be interpreted. In short, the more indeterminacy concerning the application of rules to specific cases, the more discretionary power the legal system may be said to have. Both indeterminacy and lack of transparency increase the power of the judiciary (and the experts inside or outside the legal system). When transparency decreases, it increases the power of those that master the difficulties relative to those that do not. For the jurisprudential community, decreased transparency may not be too difficult to handle and will tend to increase its power. Thus indeterminacy and lack of transparency increase the importance and dependence on legal advice and in-court settlement.

When juridification is discussed in terms of judicial power the concept of judicialization is frequently used.⁴³ This often involves different combinations of what we refer to as juridification A, B, C and D. According to our definition of judicial power (juridification D) juridification A, B and C may yield judicial power in so far as this

⁴³ See for example C. Neal Tate and Tobjörn Vallinder (1995) (see n. 6), Alec Stone Sweet (2002) (see n. 5) and Joachim Nergelius, “North and South: Can the Nordic States and the European Continent Find Each Other in the Constitutional Area—or are They too Different?”, in Scheinin, Martin (ed.), *Welfare State and Constitutionalism—Nordic Perspectives*, Nordic Council of Ministers, Copenhagen, 2001. According to Nergelius “Judicialisation... refers to judicial power in general” (p. 79) and it “may be seen as symptomatic for judicialisation that courts get more powers at the expense of political institutions” (p. 83). See even Habermas *TCA* (p. 370) where he speaks of the “paradoxical proposal to dejudicialize juridified family conflict” referring in normative terms to a possible solution to the problems that arise when communicatively structured areas of action are taken over by a judiciary with far-reaching interpretative discretion.

increases indeterminacy or reduces transparency. More generally speaking judicial power stems from lack of transparency and indeterminacy when it comes to the legal doctrines involved, the interpretive operations involved and the application of law.⁴⁴

Most would accept that the law should live up to some standards of transparency and determinacy, and most would agree that some level of indeterminacy and lack of transparency is a fact of law. The main disagreement concerns to what degree this amounts to judicial power in the sense of juridification D, and what the limits to the exercise of this power are while still holding on to a concept of rule of law. Much of the disagreement hinges on what properly belongs to the class of legal reasons.

This all means that we have to make a distinction between potential judicial power and judicial power in action. Judicial power when used may increase or decrease both indeterminacy and transparency. This means that there is or might be a somewhat paradoxical property to juridification D. The way the legal system operates; interpretations made are established as doctrines or law,⁴⁵ meaning on the one hand that the more

⁴⁴ See Brian Leiter (1994) "Determinacy, Objectivity and Authority", *University of Pennsylvania Law Review*, Vol. 142, pp. 549-637 esp. 559-567 and Morten Kinander, *The View From Within*, Fagbokforlaget, Bergen 2004, Chap. 4.

⁴⁵ This implies juridification A or B, and may be affected by juridification C. Juridification D relates to A when interpretive power is used to establish or change constitutive rules and principles. Juridification D relates to juridification B when interpretative power is used to refine a particular law. Juridification D relates to juridification C when interpretative power is used to reject a case.

interpretations made the less room there is for further interpretation, given that there is a limit to the number of interpretations that may be made.⁴⁶ Thus making use of the interpretative power may limit the possibility for further interpretation leading to dejuridification D. On the other hand the use of judicial power may increase this power such as when a new doctrine is established that gives the courts additional power. In general terms “local” processes of juridification and dejuridification D may alternate depending on factors such as the determinacy of new doctrines and laws, the tendency on part of the judiciary to make new and possibly innovative interpretations and the number of interpretations actually carried out.

The often told story of the important role played by the ECJ in the development of European cooperation, be it as hero or villain, may partly be analyzed from juridification D and at the same time illustrate the elusive character of this form of juridification, in particular when it comes to international law. Both the indeterminacy of law and lack of transparency have played center stage in discussions over the legal development of

⁴⁶ This in line with Kenneth A. Armstrong’s more elaborate institutional argument: “while ECJ possesses agency, nonetheless, over time as processes of institutionalization within law becomes pervasive, the action of the ECJ (together with those of other actors seeking to steer law) are themselves structured by law. Importantly, path-dependencies are created which both limit and facilitate action. Past action may create unintended or undesirable consequences which frame the possibility for future institution building and future intermediation by the ECJ between law and its environment” (“Legal Integration: Theorizing the Legal Dimension of European Integration”, in *Journal of Common Law Review*, Vol. 36 (1998), No. 2, p. 156.) See also Mark J. Richards and Herbert M. Kritzer, “Jurisprudential Regimes in Supreme Court Decision Making”, *American Political Science Review*, Vol. 96 (2002), No. 2.

European law. The mandate given to the ECJ⁴⁷ (juridification A), the continuous expansion and differentiation of European law (juridification B), and the increased tendency to use Community law (juridification C), all may be said to increase the power of the ECJ. It is however hard to assess and even harder to predict the interpretive and expert power of the ECJ since the court itself has played a major role in deciding this. This holds true whether we look at the ECJ as an interpreter of a constitutional text, as a vehicle of integration or, with Kenneth A. Armstrong (inspired by Habermas), as a mediator between law and its environment. With the constitutional treaty process still undecided, the meandering integration processes and most importantly, the coming of age of law's environment in a European context⁴⁸, none of these visions are very helpful, for the time being, in estimating the current or future state of affairs.

The efforts to simplify European law, during the negotiations over the Amsterdam Treaty, give ample illustration of the complexities involved.⁴⁹ Within the scope of this paper the efforts may be seen as trying to achieve dejuridification D without changing

⁴⁷ Supported by the institutional voting rules that made it difficult for member states to formally change or clarify this mandate.

⁴⁸ By this, we mean the heightened awareness of the important role played by the legal system within the EU in particular with reference to the social subsystems. See Kenneth A. Armstrong, "Legal Integration" (see n. 46).

⁴⁹ Just the renumbering of articles, according to Nigel Foster, has "considerably complicated the discussion of EU law", Nigel Foster, Legal Developments, *Journal of Common Market Studies*, Vol. 38, Annual Review, 2000, p. 82.

anything else, that is without juridification (or dejuridification) A or B. Since this is difficult to achieve in practice, issues of substance and simplification have formally been kept apart and special provisions have been made to secure the *de lege lata*, one example being the Article 10 of the Amsterdam Treaty. The “community preference” principle was initially established on the basis of an article (44, par. 2) that referred only to agricultural policy and only applied to a transition period (expiring 31.12.69). The general principle then was derived from an article that was not in use other than as a reference for the general principle. In order to secure the continuation of the general principle even after the suppression of the article a declaration was made to this effect.⁵⁰

5. Juridification as legal framing (E)

The most elusive dimension of juridification is no doubt what we refer to as legal framing (E): the increased tendency to understand self and others, and the relationship between self and others, in light of a common legal order. Juridification is the process by which people increasingly tend to think of themselves and others as legal persons and attach meaning to the particular social practice called law. This meaning in turn is constitutive of a society

⁵⁰ See Roland Bieber and Cesla Amarelle, “Simplification of European Law” in F. Snyder (ed.), *The Europeanization of Law*, Oxford: Hart, 2002, Chap. 13, pp. 219-241.

based on the rule of law.⁵¹ Thus juridification E implies that individuals will increasingly tend to see themselves as belonging to a community of legal subjects with equal legal rights and duties. This understanding is basically normative and relates both to the people as authors and addressees of law.

Following Jellineck's influential theory of status⁵², we may distinguish between four aspects of juridification as legal framing related to the passive, the negative, the positive and the active status of a legal person. The first three refer to people as addressees (E1). First, juridification takes place when the subjection under a state and the acceptance of legal duties replaces other allegiances and loyalties. Second, juridification takes place when individuals increasingly understand themselves as persons entitled to do what is not forbidden, and entrust the protection of this personal freedom to the legal system. Third, juridification takes place when individual and social well-being is thought of in terms of legally based provisions, and not for example in terms of private obligations, charity or political decision-making. Finally, juridification takes place when democratic participation increasingly is thought of in legal terms, not for example in terms of civic virtues. Only this

⁵¹ See Ulrich Haltern, "Pathos and Patina: The Failure and Promise of Constitutionalism in the European Imagination", *European Law Journal*, Vol. 9 (2003), No. 1, pp. 14-44.

⁵² Georg Jellinek, *System der subjektiven öffentlichen Rechte*, 2. Aufl. Tübingen, 1905. See Robert Alexy, *Theorie der Grundrechte*, Frankfurt am Main: Suhrkamp, 1986, pp. 229-243.

last aspect of juridification as legal framing refers to people as the authors of law (E2).

Thus juridification E means that a society develops a legal culture that extends beyond or even replaces other background cultures. An individual is increasingly part of a society by virtue of accepting law as the basic frame of reference. The status as citizen is more than a formal matter. It implies the internalization of a legal culture symbolized by the formal status as citizen. The legal framework in this sense is not only accepted because it satisfies certain legal standards, but also because it is the expression of a particular form of life⁵³. Without this dimension of juridification E, disagreement on legal matters would tend towards disagreement on the standing of the legal order and as such may threaten its stability. One would expect that as the complexity of law increases, without juridification E, the threat to stability increases.

From the point of view of juridification E the basic question concerning the EU is to what degree individual citizens do in fact think of themselves as legal subjects and bearers of rights under a European legal order. Do Europeans see themselves as consociates under law? Whether the question is framed in terms of a common European legal culture or constitutional patriotism, the decision to establish a European charter of rights; the ideal of

⁵³ See Jürgen Habermas, “Struggles for Recognition in the Democratic State”, in *The Inclusion of the Other*, Ciaran Cronin and Pablo De Greiff (eds), Cambridge, Mass.: MIT Press, 1998, pp. 215-220.

openness and transparency sought in the process, and the way the EU has presented and tried to make people aware of this event, clearly indicate that the EU considers juridification E important. The ensuing constitutional process and the way it has been carried out, speak to the same conclusion. Procedures that simply treat citizens as mere subjects under law are not a conceivable option are we to believe the current rhetoric. Still one may question how far juridification E has developed on the European level.

According to the conception of juridification E presented here, to be French, for example, means to hold French citizenship, not to be born in France, speak French, or feel French. Not everyone would recognize that, but if more people recognize it, it would mean juridification E has taken place. Contrast this to being European, where one may argue that the fact that you are born in Europe, speak a European language and feel European are better indicators of whether people will consider you a European than the status as a citizen of the EU. To speak of a “Eurounian” makes no sense for the time being. Accordingly, if saying that you are a European citizen has no deeper meaning, it is not because you do not feel European, but because you do not feel like a European citizen belonging to a community of other European citizens accepting the same legal order as their own. While having a double cultural identity, e.g. French and European, sounds plausible, having two legal identities seems more difficult, since a cultural identity as a European arguably is not

supported by any institutionalized coercive force that may infringe on the national identity, while a European legal identity is. According to this interpretation, if Turkish citizens become more European by entering the EU and awarded EU citizenship, it would be because juridification E is weakly developed at the national level.

Models of juridification

The number of implied or more developed models of juridification in the literature is substantial and furthermore in much of the literature on juridification the relationship between the different dimensions presented is often taken more or less for granted. To take but one example, law's expansion and differentiation (B) is often seen to increase the interpretive power of the legal system (D) at the expense of democracy in general and the legislature in particular. This may be correct but then again it does not have to. Sometimes laws are made or specified in order to make less room for interpretation, thus juridification D may induce juridification B that again leads to dejuridification D.

To drive the point home we will make two propositions: First, the different dimensions of juridification are not necessarily linked, meaning that a link has to be substantiated empirically. We argue that, although it is almost inconceivable to imagine a society based on law where some juridification have not taken place on all five dimensions,

they are distinct in the sense that one type of juridification may gather speed, halt or be turned around without a parallel effect on the others. Second, the relationships between the different dimensions of juridification may be linked in any which way, positively or negatively, meaning that any model has to be substantiated empirically.

Relating to this second proposition a likely model would be that there is a positive relationship between the dimensions of juridification, e.g. in the following way: $(B \rightarrow C \rightarrow D \rightarrow A) \rightarrow E$.⁵⁴ This simple model suggests that law's expansion and differentiation (B), makes for more conflict solving with reference to law (C), which again gives the judiciary more power (D). This development in turn triggers the establishment of new constitutive principles (A) in order to cope with the new complexity. As a consequence of these juridification processes one may expect that people in general will have an increased tendency to understand themselves and others in legal terms (E).

What we on principle argue is, for example, that law's expansion does not necessarily lead to more problem or conflict solving with reference to law, and that the relationship may be turned around. C may positively affect B if we presume that negative experience with C (unsatisfying legal conflict solving) trigger B in an effort to alleviate the

⁵⁴ The arrow means "lead to" and denotes a positive relationship. A negative relationship will be indicated by a – sign in front of the letter referring to a specific form of juridification (e.g. –A).

negative effects of C. If conflicts are increasingly being solved through the legal system this may trigger legislative initiatives to expand and refine laws in order to reduce indeterminacy. This again may give the courts less interpretive power. Similarly constitutive principles may be established to keep some issues off the agenda of the courts. Thus A may lead to more or less legal conflict solving depending on whether a legal system, for example, limits the possibilities for judicial review or opens up for this possibility. Furthermore, if juridification A, B, C and D were to take place it does not follow that we would also get juridification E. On the contrary heavy juridification ABCD may trigger a countermovement where claims making based on law, together with the ubiquitous use of law, may be scolded with reference to ethical, moral or instrumental standards, leading to a reaction against framing every issue in legal terms and thinking of oneself and others in such terms.

One may go on like this, and even if some combinations seem less likely than others, there are few (we have found) that may be ruled out completely while still keeping an open mind. Consequently, rather than a simple cause-effect relationship, we would expect a dynamic and complex relationship among the five dimensions of juridification, where one form may or may not affect changes in the others. Lacking empirical support it is not possible to say anything about these relationships other than in hypothetical form,

and even then it would be difficult to establish any general trends.⁵⁵

If the two propositions presented are accepted it means that the number of logically possible models of juridification is enormous. If we limit ourselves to linear models (e.g. $A \rightarrow B \rightarrow C \rightarrow D \rightarrow E$) where all the dimensions of juridification are included and the dimensions of juridification can be either positively or negatively related, the numbers of possible models are 1,920.⁵⁶ If we, based on our first proposition include models where some subsequent elements may be unrelated, the number of models, increases to 9,720, and if we include models of the type $(A+B) \rightarrow (C+D) \rightarrow E$, the number explodes. If the five basic dimensions of juridification covers the dimensions presented in the juridification literature, and if our two propositions are loosely right, it is no wonder that the literature seems chaotic without further formalization.

If we are right in claiming that our five dimensions are at least the most important basic dimensions of juridification we may at least start to compare the different proposals presented. If this way of conceptualizing juridification has any merit it should be able to

⁵⁵ Thus our way of thinking has a lot in common with Jon Elsters view on mechanisms in social science. See Elster, "A Plea for Mechanisms", in P. Hedström and R. Swedberg (eds.), *Social Mechanisms. An Analytical Approach to Social Theory*, Cambridge: Cambridge University Press, 1998.

⁵⁶ Given n distinct elements, there are $n!$ distinct sequences (e.g., ABCDE, ABCED, etc.). (For example, the factorial of 6, written symbolically $6!$, is $6 \times 5 \times 4 \times 3 \times 2 = 720$.) Each pair of subsequent elements can be related positively or negatively, which gives, for each sequence, 2^{n-1} possible distributions of influences +/- (e.g., $A+B+C+D+E$, $A+B+C+D-E$, etc.) Totally, this gives $n! \times 2^{n-1}$ possibilities which, for $n=5$, yields $1,920$ ($2 \times 3 \times 4 \times 5 \times 2^{5-1} = 1,920$).

catch the essence of most arguments about juridification and specify to what degree different dimensions of juridification are involved. We will try to indicate the usefulness of the approach by briefly examining three prominent examples from the literature on juridification. The examples are meant as illustrations that of necessity involve a fair amount simplification.

a) One influential account of juridification is presented by Habermas as “an example of the evidence by which the thesis of internal colonization (of the lifeworld) can be tested: the juridification of communicatively structured areas of action”.⁵⁷ Habermas gives a definition of juridification that falls within our juridification B: the expansion of law and the increasing density of law. He distinguishes between four epochal waves of juridification from the bourgeois state, through the bourgeois constitutional state and the democratic constitutional state to the democratic welfare state. These waves of juridification are all “freedom-guaranteeing”, but in the fourth this is less certain; from the beginning the “ambivalence of guaranteeing freedom and taking it away has attached to the policies of the welfare state”. Habermas ascribes this ambivalence to the “form of juridification itself”: the structure of formal law “dictates the formulation of welfare-state

⁵⁷ Jürgen Habermas, *The Theory of Communicative Action*, Vol. 2, pp. 356-363.

guarantees as *individual* entitlements under precisely *specified* general legal conditions”.

The result is that the situation to be regulated “has to be subjected to violent abstraction, not merely because it has to be subsumed under the law, but so that it can be dealt with administratively”.

As Ingeborg Mauss has pointed out, the if-so-structure of formal law dominates only in parts of the welfare system, while in other parts the legal norms are “weak”, and the “weaker” the legal norms, the more extensive is the “administrative penetration of the lifeworld”.⁵⁸ Our primary concern here is, however, not Habermas' diagnosis of the reifying effects of the fourth wave of juridification, but how his account of juridification is related to the dimensions we have tried to work out.

He defines juridification in terms of B with reference to the welfare state, while his analysis of the waves of juridification seems to be in terms of juridification or dejuridification A. It appears as if Habermas' historical account is based on a reconstruction of the legal principles at work, and the relationship between juridification A and B is an integral part of this — he sees them as closely interlinked, they develop hand in hand, so to speak. The increased expansion and density of law (B) affects constitutive juridification (A)

⁵⁸ Ingeborg Maus, “Verrechtlichung, Entrechtlichung und der Funktionswandel von Institutionen”, in Maus, *Rechtstheorie und politische Theorie im Industriekapitalismus*, Munich, 1986, p. 306.

and the other way around. It is not the constitution as a written document that constitutes the legal order, but the constitutive principles (juridification A) that may be reconstructed by closely examining law as it has been written down (juridification B); and actually used in judicial and non-judicial conflict and problem solving (juridification C), one may add with reference to Habermas' discussion of the development of family and school law. Juridification as increased judicial power (D) is not a chief concern to Habermas although he cites examples to the effect that judges should be given as little discretion as possible relating to children's rights (p. 370). Concerning juridification as legal framing (E), however, Habermas talks in rather emphatic terms. Framing, as a result of A and B in the form of materialized law, is given an almost literal meaning.⁵⁹ Habermas' reflections on juridification may then be summarized in the model $(A \leftrightarrow B) \rightarrow E$ where the relationship between A and B is unclear and where C and D is indicated, but not fully spelled out.

This brief interpretation of Habermas' statement on juridification in *The Theory of Communicative Action* makes sense in relation to his later theory of law, where juridification C and D is crucial and where constitutive juridification (A) is seen as the

⁵⁹ "The lifeworld is assimilated to juridified, formally organized domains of action and simultaneously cut off from the influx of an intact cultural tradition. In the deformations of everyday practice, symptoms of rigidification combine with symptoms of desolation" (*The Theory of Communicative Action*, Vol. 2, p. 327).

solution in the form of a new legal paradigm⁶⁰. In this procedural paradigm Habermas keeps with the reciprocal relationship of A and B, stating that “each legal act should at the same time be understood as a contribution to the politically autonomous elaboration of basic rights, and thus as an ongoing process of constitution making”.⁶¹

b) In another influential work⁶², partly inspired by Habermas, Günther Teubner starts out by stating that “a precise use of terms, and definitions is necessary, especially in the case of juridification” (p. 6). After presenting and critically rejecting three different ways in which the term may be used he ends up with a less ambitious formulation; “we will merely attempt to take up a few strands from the tangle of the theory and to combine them in such a way as to further our comprehension of juridification” (p. 11). Teubner does not as far as we can see present a clear definition of juridification, but in the same way as Habermas, Teubner seems to start out with a definition of juridification as law's expansion and differentiation (B). Inspired by Weber he makes a distinction between formal law and instrumental, result oriented, substantial or materialized law. Juridification B implies increased non-judicial conflict solving and legal experts tend to “administer ill-defined

⁶⁰ Habermas, J, *Between Facts and Norms*.

⁶¹ Habermas, J, “Paradigms of Law”, in *Cardozo Law Review*, Vol. 17 (1995-96), p. 778.

⁶² Teubner, G, “Juridification. Concepts, Aspects, Limits, Solutions”, in Teubner (ed), *Juridification of Social Spheres* (see n. 30).

standards and vague general clauses” (p. 16). This transition triggers what Teubner calls a “dramatic shift in the mode of legal thinking“ (p. 16) that clearly has consequences for how the legal system is constituted (juridification A). It is unclear, however, if this means juridification A or dejuridification A. The change, in one interpretation, involves the function of law (from conflict resolution to an additional instrumental problem-solving function) and legitimation of law (from guaranteeing private autonomy in addition to realizing socially desirable results). This may give the legal system additional competencies. On the other hand, according to Teubner, the new functions and the new legitimacy seem to be realized by the administrative and not by the legal system. Thus, in a different interpretation the legal system is dejuridified (-A) in the sense that its competencies become less relevant with the growing dependence on external expertise and non-judicial conflict and problem solving (C2 and C3).

It has been argued, however, that Teubner exaggerates the anachronistic character of formal law in a present day setting, and in depicting a necessary development towards reflexive law, obscures the persisting relevance of “core rule of law virtues”.⁶³ What he describes as a decline of the legal system, penetrated by economic and social science

⁶³ William E. Scheuerman, “Reflexive Law and the Challenges of Globalization”, *The Journal of Political Philosophy*, Vol. 9, (2001), No. 1.

thinking on the one hand and administrative legal decision-making on the other, may at some time be met by a countermovement where the legal system strikes back by establishing principles to clarify the proper role of law in the new situation. This may be seen as a combination of juridification A where the courts expand their competencies and dejuridification A where the courts try to avoid responsibility for decisions that clearly cannot be solved within a logic of formal legal reasoning. In so doing the legal system may try to define its proper role in relation to the political and administrative system. In this interpretation formal legal thinking, spurred by public resentment, may partly have caught up with the fussy consequences of materialized law, by taking it seriously in legal terms and rejecting what cannot be taken seriously in such terms. Teubner is aware of, but thrusts aside this possibility: “Even if law, by developing its own stop-rules of result control and by more abstract dogmatic concept formulation, can increase its adjustment and learning capacities—and there are signs that this is happening—it will at some stage come up against absolute limits at which normativity as such is in danger” (p. 26). The question is if these absolute limits have been reached or if they by necessity will be reached if we presume that the administrative, the legal and the political system, with the help of common standards particular to well functioning democracies, reciprocally are able to adjust.

c) In his book, *Governing With Judges*⁶⁴, Alec Stone Sweet defines judicialization as “the process through which: (1) a TDR mechanism develops authority over the normative structure in place in any given community; and (2) the third party’s decisions—what I will call triadic rulemaking—come to shape how individuals interact with one another.” The first part of this definition may include roughly what we have defined as juridification A and B, and the second part may roughly include what we have defined as juridification C and E. Juridification D however, is not part of the definition as it appears here. As we understand it, a basic point is that this judicialization implies or will lead to judicial power. The section in which the definition appears is called “The Construction of Judicial Power” and elsewhere Stone Sweet equates judicialization with the construction of judicial power⁶⁵. Thus Stone Sweet’s model in our terms may be presented as (A+B) + (C+E)→ D, but D seems to refer to both formal authority and power. Later on in the same book, Stone Sweet discusses judicialization of lawmaking. He states, “By judicialization, I mean (a) the production, by constitutional judges, of a formal normative discourse that serves to clarify, on an ongoing basis, the constitutional rules governing the exercise of

⁶⁴ Alec Stone Sweet, *Governing With Judges, Constitutional Politics in Europe*, Oxford: Oxford University Press, 2000, p. 13. TDR means Triadic Dispute Resolution, “a triad which is comprised of the two parties to the conflict and the dispute resolver” (p. 12).

⁶⁵ In Martin Shapiro and Stone Sweet, *On Law Politics and Judicialization*, p. 71.

legislative power, and (b) the reception of these rules, and the terms of this discourse, by legislators.” This is included in what we define as juridification A.

Stone Sweet then exemplifies, with these three different (not necessarily incompatible) definitions of judicialization, the conceptual confusion we generally find in some of the literature. Much of this may be explained if we include *what* Stone Sweet argues is being judicialized, be it “dispute resolution”, “politics” or “law making”. The definition of judicialization here, as seems to be the case in much of the literature, appears as generalizations of empirical conclusions and this may explain the different definitions. To the degree that these different definitions are merged the complexity increases, but the result in conceptual terms becomes increasingly difficult to understand. As in Bonini’s paradox, as models approach “reality” they become difficult to grasp.⁶⁶

Conclusion

The need for clarification regarding the normative meaning of juridification is no less than clarification concerning what kind of practice juridification refers to. The question is, however, far more difficult to answer and this is not the place to elaborate on this, but we

⁶⁶ “... Bonini’s paradox—the more realistic and detailed one’s model, the more the model resembles the modeled organization, including resemblance in the directions of incomprehensibility and indescribability.” Starbuck, W.H, “Organizations and Their Environments”, in M.D. Dunnette (ed.), *Handbook of Industrial and Organizational Psychology*, Chicago: Rand, 1976, p. 1101.

believe our descriptive concept may make it somewhat easier to address, be it in terms of arguments from efficiency, the rule of law, democracy, civil society or combinations of these.

As indicated juridification ABCDE can be seen as a precondition for constitutional democracy. On the other hand juridification carried too far may move the very same political order towards total legal domination. At a certain level juridification may indeed turn ugly as Teubner claims.⁶⁷ Saying that too little is as bad as too much, is not exactly a ground-breaking statement, but we may at least postulate a breaking point, or maybe rather a breaking zone, that a society enters at a certain level of juridification. Such a zone may be seen as delimited by a point beyond which the benefits of further juridification is questionable or indeterminate and a further point where juridification is carried so far that the effects are clearly detrimental from any independent standard. Even though different strains of political and legal theory would define this zone differently, they would all assert that the modern West is now squarely occupying it, with little hope in the near future slipping away. The increased and widespread scholarly interest in law and legal theory may be seen a symptomatic of this state of mind.

⁶⁷ Teubner, "Juridification", p. 4 (see n. 30).

At the same time it is difficult, based on our conceptualization, to establish an ideal model of juridification. The closest we can get at this stage is to argue that the dimensions of juridification defined here will have to balance each other off. We can establish some rules of thumb, some “stop and think” signs of the type; if juridification B without juridification C something is wrong; or if juridification D without juridification A+B something is dead wrong; or juridification ABCD without juridification E, of which the EU may be seen as an example, something has to change or something is going to break, to use but a few possible examples.

We argue then that different dimensions of juridification will have to develop hand in hand, but this alone is not sufficient. There is not only a tension between the different dimensions of juridification, but also an inner tension within each. The logical endpoint of juridification A for example, is a society run by the judiciary. At some point in moving towards such circumstances, the existing self-understanding and legitimacy base of the legal system would be undermined. In the same way juridification B carried too far would undermine the very freedoms law is supposed to protect. Juridification C may in the end internalize moral, ethical and instrumental concerns to a degree where the responsibility for solving political disputes becomes indistinguishable from the application of law. With juridification D, the legal system is dependent on a the continued construction of a

relatively coherent working legal order, a coherence that will be increasingly difficult to sustain as the scope of interpretation and the degree of complexity increases, not least with the development of international law. Finally, juridification E may proceed at the expense of or subsuming other conceptions of self and others, conceptions which the status as a legal person presupposes and is meant to protect.