



2016

# Semantic Reversal: Individual, Person, Individualism, INDIVIDUALIZATION, and Subject of Fundamental Rights

Brunela Viera de Vincenzi  
*Federal University of Espírito Santo*

Follow this and additional works at: <http://scholarworks.law.ubalt.edu/ubjil>



Part of the [International Law Commons](#)

## Recommended Citation

de Vincenzi, Brunela Viera (2016) "Semantic Reversal: Individual, Person, Individualism, INDIVIDUALIZATION, and Subject of Fundamental Rights," *University of Baltimore Journal of International Law*: Vol. 5 , Article 4.

Available at: <http://scholarworks.law.ubalt.edu/ubjil/vol5/iss1/4>

This Article is brought to you for free and open access by ScholarWorks@University of Baltimore School of Law. It has been accepted for inclusion in University of Baltimore Journal of International Law by an authorized editor of ScholarWorks@University of Baltimore School of Law. For more information, please contact [snolan@ubalt.edu](mailto:snolan@ubalt.edu).

# Semantic Reversal: Individual, Person, Individualism, INDIVIDUALIZATION, and Subject of Fundamental Rights

*Brunela Vieira De Vincenzi*<sup>1</sup>

## ABSTRACT

Based upon the theory of justice, founded on reciprocal and cooperative recognition, this study seeks to demonstrate that there are alternative means of dispute resolution within the spheres of family and work, which produce binding decisions that are accepted by the parties to the conflict as fair. At the same time, it also seeks to demonstrate that certain conflicts cannot be withdrawn from the purview and judgment of the State Judiciary System, with the goal of reestablishing the confidence that individuals have in the decision-making system of the state legal system.

## TABLE OF CONTENTS

I. Introduction: Clarifications and the Chosen Example.....	69
II. Semantic Reversal: Individual and Person.....	71
III. Paradoxes of Individualization: Individualism, Individualization, and Subject of rights .....	82

- 
1. Doctor in Civil Law, Constitutional Law, and Legal Philosophy by the Johann Wolfgang Goethe Universität – Frankfurt am Main. Master in Procedural Law by the University of São Paulo (Brazil). Graduated in Law at the Federal University of Espírito Santo (Brazil). Postdoctoral training at the Center for Violence Studies, University of São Paulo and the Institut für Sozialforschung in Frankfurt am Main, Germany. Referee of the Journal of Constitutional Theory Hermeneutics and Law Studies. Professor at the Graduation and Post-Graduation Law Courses of the Federal University of Espírito Santo (Brazil). Coordinator of the International Advocacy Training Group and of the Centre for Legal Practice at the Federal University of Espírito Santo (Brazil).

## I. Introduction: Clarifications and the Chosen Example

In 2003, the German Constitutional Court handed down a decision that changed the debate on the effects of constitutional guarantees on relationships between private right holders and the State, stimulating a democratic public debate concerning the effective exercise of fundamental rights.<sup>2</sup> The decision is about whether an Islamic teacher may wear her veil while teaching class.<sup>3</sup> The teacher in question was born in Afghanistan and lives in Germany.<sup>4</sup> After passing a difficult exam to begin her career as a teacher at a public school, she was asked to lecture at a school in the state of Baden-Württemberg.<sup>5</sup> Shortly thereafter, the same teacher was prohibited from continuing to teach if she continued to wear her veil during class.<sup>6</sup> This occurred because the religious manifestation that the veil represented was in conflict with the secular duty of a government employee.<sup>7</sup> The German Constitutional Court found, in this case, that the State Legislature, which would have the authority to legislate on this matter, should resolve the problem.<sup>8</sup>

As such, the Constitutional Court's decision is rather significant, since by failing to hand down a cogent enforceable ruling—through an order on constitutional appeal (Verfassungsbeschwerde) with valid support of German Fundamental Law (Grundgesetz) – it transfers (or returns) *authority for judgment* of a constitutional issue to the Legislature.<sup>9</sup> The argument used is that a decision with such serious reper-

---

2. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Sept. 24, 2003, 2 BvR 1436/02, 2003 (Ger.).

3. Christine Langenfeld & Sarah Mohsen, *Germany: The Teacher Head Scarf Case*, 3 INT'L J. OF CONST'L. LAW, Jan. 2005, at 86.

4. Mark Lander, *A German Court Accepts Teacher's Head Scarf*, N. Y. TIMES, Sept. 25, 2003, (last visited Nov. 4, 2016, 4:51 PM), <http://nytimes.com/2003/09/25/a-german-court-accepts-teacher-s-headscarf.html>.

5. *Discrimination in the Name of Neutrality*, HUM. RTS. WATCH (Feb. 6, 2009), <http://www.hrw.org/report/headscarf-bans-teachers-and-civil-servants-germany> (last visited Nov. 7, 2016).

6. *Id.*

7. *High Court Rules Headscarves Okay for Teachers*, DEUTSCHE WELLE (Sept. 24, 2003), <http://www.dw.com/en/high-courtrules-headscarvesokayforteachers/a-978043> (last visited Nov. 7, 2016).

8. Bundesverfassungsgericht, *supra* note 3, at 62.

9. Bundesverfassungsgericht, *supra* note 3, at 62.

cussions should not be made solely by the judiciary or by the executive, but rather by the representatives of the people employing a model of parliamentary political representation.<sup>10</sup>

Since then, in a notably democratic country, with a Judeo-Christian tradition of culture and philosophy, a piece of cloth has been causing a furor.<sup>11</sup> In addition to the aforementioned decision, other legal decisions<sup>12</sup> have caught the attention of public opinion concerning constitutional law, leading to a public debate on the political-legal discourse of religious freedom and its efficacy (as a fundamental right) in relationships in which the parties are people made of flesh and blood, private right holders.<sup>13</sup> A passage from the dissent offered during the handing down of the decision of the 2nd Senate of the Constitutional Court mentioned above, is the starting point that this text intends to analyze.<sup>14</sup> The particular impact refers to the suggestion made by the 2nd Senate that an individual should return to the site where claims for realization of their personality were appropriate, thus avoiding conflicts that could create obstacles to the materialization of the democratic will.<sup>15</sup>

Thus, the question is posed: is there truly *a place* where an individual can develop their personalities in the manners suggested by the Constitutional Court? Moreover, if these places do exist, what should the self-reflection process be like for the individual in this place and how do they assert their freedom in society? In the items below I will analyze the possibility of reflection by the individual in the societal environment based upon the theory of systems posed by Niklas Luhmann, indicating the weaknesses of this theory for the problem in

- 
10. Bundesverfassungsgericht, *supra* note 3, at 62.
  11. *Discrimination in the Name of Neutrality*, HUM. RTS. WATCH (Feb. 6, 2009), <http://www.hrw.org/report/headscarf-bans-teachers-and-civil-servants-germany> (last visited Nov. 7, 2016).
  12. *Discrimination in the Name of Neutrality*, HUM. RTS. WATCH (Feb 2009), [http://www.hrw.org/sites/default/files/reports/germany0209\\_webcover.pdf](http://www.hrw.org/sites/default/files/reports/germany0209_webcover.pdf); Monica-Elena Herghelieiu, *Germany's Encounter With Islam - Legal and Theological Issues*, 22 ISTANBUL UNIVERSITESI İLAHIYAT FAKÜLTESİ DERGİSİ 51, 67 (2010), <http://www.journals.istanbul.edu.tr/iuilah/article/viewFile/1023014567/1023013781>; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] July 30, 2003, 2 BvR 792/03, (1-27) 2003 (Ger.).
  13. Axel Frhr. Campenhausen, *The German Headscarf Debate*, 2004 BYU L. REV. 665, 666 (May 1, 2004), <http://digitalcommons.law.byu.edu/lawreview/vol2004/iss2/11>.
  14. Bundesverfassungsgericht, *supra* note 3, at 75-138.
  15. Bundesverfassungsgericht, *supra* note 3, at 79.

question, and will thus reach a diagnosis and proposal of solutions based upon Axel Honneth's theory of recognition.<sup>16</sup>

## II. Semantic Reversal: Individual and Person

The individual, as an autonomous Psychological System (or *Bewusstseinssystem*), is part of the environment of society, and when an individual acts in society, he or she uses the mask of a person, assuming various roles from that point on (teacher, jurist, economist, doctor, etc.).<sup>17</sup> That means that the *realization of the personality* takes place when the individual has their own space to freely develop their thoughts, and this takes place in the societal environment.<sup>18</sup> As such, it is decisive that the point of reference for the reflection passes from identity to difference;<sup>19</sup> which is to say, that the reflection presupposes the existence of systems that allow for self-observation and describe the difference between the system and the environment, so that social-structural and semantic individualization of this self-description takes place in the form of a pretension.<sup>20</sup> The individual *emerges* in society when they act, communicate, develop, and cultivate relationships with people in different social systems.<sup>21</sup>

- 
16. NIKLAS LUHMANN, INTRODUCTION TO SYSTEMS THEORY, (Peter Gilgen trans., Polity Press 2013 Eng. ed. 2013) (2002); AXEL HONNETH, THE STRUGGLE FOR RECOGNITION: THE MORAL GRAMMAR OF SOCIAL CONFLICTS (Joel Anderson trans., The MIT Press, 1996) (1995).
17. HANS RHEINFELDER, DAS WORT PERSONA [THE WORD PERSON] *reprinted in* BEIHEFTE ZUR ZEITSCHRIFT FÜR ROMANISCHE PHILOLOGIE, Vol. 77 (Halle: H. Neimeyer, 1928); HISTORISCHES WORTERBUCH DER PHILOSOPHIE [HISTORICAL DICTIONARY OF PHILOSOPHY] 269-338 (Joachim Ritter & Karlfried Gunder eds., Basel 1976).
18. Tina Bering Keiding, *Observing Participating Observation-A Re-description Based on Systems Theory*, F.: QUALITATIVE SOC. RES. (2010) Vol. 11, No. 3, Art. 11, Ch. 2.1, <http://www.qualitative-research.net>.
19. *Id.*
20. NIKLAS LUHMANN, DIE GESELLSCHAFTLICHE DIFFERENZIERUNG UND DAS INDIVIDUUM [THE DIFFERENTIATION BETWEEN SOCIETY AND THE INDIVIDUAL], in 6 SOZIOLOGISCHE AUFKLÄRUNG [ in 6 SOCIAL CLARIFICATIONS] 121, 129 (2d ed. Wiesbaden 2005).
21. NIKLAS LUHMANN, DIE FORM PERSON [THE FORM PERSON], in 6 SOZIOLOGISCHE AUFKLÄRUNG [ in 6 SOCIAL CLARIFICATIONS] 137 (2d ed. Wiesbaden 2005); Gunter Teubner, *Die Anonyme Matrix: Zu Menschenrechtsverletzungen durch 'Private' Transnationale Akteure* [The Anonymous Matrix: Human Rights Violations by 'Private' Transnational Actors], 69 MOD. L. REV. 327, (2006) <https://ssrn.com/abstract=893106>.

However, it is only through the claim that the difference built into the system is the difference between the system and the environment that an individual has the possibility of creating an autonomous identity for him or herself.<sup>22</sup> What individuals receive in feedback, as an individual in social systems is not what constitutes their identity;<sup>23</sup> rather it is much more of a confirmation, refusal, or indifference with respect to their pretension.

The pretension of being an individual is not just that of *differen-tia individualis* intellectually, much less the determination of the notion of *individual* from *human being* as the difference in relation to all the rest.<sup>24</sup> It is the pretention to have pretensions; it is the pretension of a principle generator through which one desires to conquer information, test the world, and at the same time, self-define.<sup>25</sup>

With the growing complexity of social rationalities, different individual pretensions collide with one another as well as with the rationalities of social systems.<sup>26</sup> These collisions are not just consequences of liberal and economic globalization, but also an expression of much deeper social contradictions in sectors of global society that collide with one another.<sup>27</sup>

However, one cannot fail to consider that it is specifically through these collisions (*or struggles*) that individuals collect their individual experiences that will help towards their later self-reflection.<sup>28</sup> Finally, the same process that is started based upon these collisions generates the rules for the resolution of these collisions. The experience either in the form of suffering, pain, or learning are acquired through these collisions and are important towards the development of an individual identity for each psychological system, and the structural regulation is relevant to social sub-systems.<sup>29</sup>

Society as a whole, represented by social systems, is contingent for the individuals, since its complexity “is merely the information

---

22. LUHMANN, *supra* note 24.

23. LUHMANN, *supra* note 24.

24. LUHMANN, *supra* note 24.

25. LUHMANN, *supra* note 23, at 129.

26. LUHMANN, *supra* note 23, at 129.

27. Andreas Fischer-Lescano & Gunther Teubner, Fragmentierung des Weltrechtes: Vernetzung globaler Regimes statt statistischer Rechtseinheit [Fragmentation of Global Law: Connection of Global Regimes Instead of a Unified Legal System] 4 (2007).

28. *Id.*

29. *Id.*

concerning the fact that the individual is lacking the information needed to understand everything.”<sup>30</sup> As such, rules that arise in this collision process will not be used and will not necessarily regulate a conflict-based legal relationship, but it will certainly allow rules created within the law (general clauses and fundamental rights) to be configured internally by the individuals themselves.<sup>31</sup> For this reason, it is impossible to want these rules to be in a hierarchy within the legal system through a simple comparison of values or weighing thereof.<sup>32</sup> They create mere normative compatibility, since they are individual rules.<sup>33</sup> Individual rules will only influence the law when they consciously reach the halls of justice; and initially they will be simple “instruments of collision management”<sup>34</sup> that try to minimize the damages caused during struggles and conflicts among individuals.

On this point, considering the fact that the society in which we live is highly differentiated and complex, it is important to analyze how individuals understand themselves and how they are understood in different social systems.<sup>35</sup> This is because people in current society no longer see themselves strongly connected to classes or families<sup>36</sup> and they may move flexibly among different systems. In our reflexive modern society, they have to conquer access to all functional social systems, in order to live as they see fit.<sup>37</sup> Individuals, psychological systems in the theory of systems, should try, through their inclusion in society, to be accepted as people within society. And this has to happen through the exercise of social norms such as freedom and equality, which are not determined by people, but symbolize much more: it is every person’s responsibility person to make these norms effective (for themselves).<sup>38</sup>

Therefore, although no regulation is developed for functional social systems, allowing symbiosis with its environment, the individual gains in experience, and thus, finds himself in a process of dynamic

---

30. LUHMANN, *supra* note 23, at 131.

31. LUHMANN, *supra* note 23, at 131.

32. LUHMANN, *supra* note 23, at 131.

33. LUHMANN, *supra* note 23, at 131.

34. FISCHER-LESCANO & TEUBNER, *supra* note 30, at 23.

35. FISCHER-LESCANO & TEUBNER, *supra* note 30, at 23.

36. See ULRICH BECK, *RISIKOGESELLSCHAFT: AUF DEM WEG IN EINE ANDERE MODERNE* [SOCIETY OF RISK: THE PATH TOWARDS ANOTHER MODERNITY] (1986).

37. LUHMANN, *supra* note 23, at 131.

38. LUHMANN, *supra* note 23, at 131.

learning for their own self-reference.<sup>39</sup> This can also take place, in the words of the theory of systems, through the re-entry of the *form person* in the consciousness of the individual.<sup>40</sup>

“It [a re-entry] allows the re-entry of one form into the form, therefore a difference in distinction; in the case of systems (and we are dealing with psychological systems), the re-entry of the difference from the environment in the system.”<sup>41</sup>

Please note that in this systematic view of society, everything is seen as self-reference: the system works as a closed operational system.<sup>42</sup> It can only be transformed by itself.<sup>43</sup> Thought itself alters nothing in the environment.<sup>44</sup> Only the environment can change itself.<sup>45</sup> Based upon this theoretical premise, the *form person* in and of itself is not a system, “the person is the designation of the logical *location* in which a social system creates ‘character masks,’ which refer to human and non-human processes in the environment [of society].”<sup>46</sup> The person, as they arise within the social system, is the most important instrument for communication between society and its environment.<sup>47</sup> Thus, for the theory of the systems, people “serve as points of reference within the social system and at the same time as definers of limits” between society and its environment.<sup>48</sup>

In the opinion of Niklas Luhmann, structural couplings (*strukturelle Kopplungen*) ensure the co-evolution of systems and their environment.<sup>49</sup> A closed operational self-production system is incapable of affecting the environment with its own operations, since the

---

39. LUHMANN, *supra* note 23, at 131.

40. LUHMANN, *supra* note 23, at 131.

41. LUHMANN, *supra* note 24, at 138.

42. LUHMANN, *supra* note 24, at 138.

43. LUHMANN, *supra* note 24, at 138.

44. LUHMANN, *supra* note 24, at 138.

45. LUHMANN, *supra* note 24, at 139.

46. Gunther Teubner, *Elektronische Agenten und große Menschenaffen: Zur Ausweitung des Akteurstatus in Recht und Politik [Electronic Agents and Large Anthropomorphs: Towards the Expansion of the Agent's Condition]* 1, 15 (2006).

47. *Id.*

48. Gunther Teubner, *Rights of Non-humans? Electronic Agents and Animals as New Actors in Politics and Law*, 33 J.L. SOC'Y 497, 514 (2006).

49. Andreas Fischer-Lescano and Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT'L L. 999, 1013 (2003-2004).

operations always remain within the limits (or: the form) of the system.<sup>50</sup> The system cannot operate in its environment, and thus, it cannot use its own operation to test the environment's resistance.<sup>51</sup> Here the connection between the individual and social systems becomes clear in its importance towards social development (of functional systems) through potential structural coupling.<sup>52</sup> Niklas Luhmann's theory, however, does not provide sufficient responses concerning the relationship between the individual and their person form or between the systems and the information that people accumulate through communicative actions within society; much less does it accept the existence of a connection between the individual and the system.<sup>53</sup>

In short, what I have tried to explain so far is that the place for an individual's self-reflection is the societal environment. However, following the entire theoretical framework of the theory of systems, it is not possible to understand which perceptions the individual obtains based upon acting as a person in social systems, and how this movement can contribute towards their process of self-reflection in the societal environment.

In order to contradict the understanding of the theory of systems, it is important to consider that for Jürgen Habermas, the human does not enter society as a mere organism (as a part that is osmotically different from the foreign exterior world).<sup>54</sup> For Habermas, the abstraction that intends to place subject and object face-to-face, internal and external, is an illusion, since a baby who has just been born only becomes a human being once it commences social interaction.<sup>55</sup> It becomes a human being when it enters the public sphere, the social world that is awaiting it with open arms.<sup>56</sup> Moreover, this opening of

---

50. Clemens Matthheis, *The System Theory of Niklas Luhmann and the Constitutionalization of the World Society*, 4 *GoJIL* 625, 629-30 (2012).

51. Luhmann, *Probleme mit operativer Schließung, Soziologische Aufklärung [Problems with Operational Closure, Social Clarifications]*, 6 2d. WIESBADEN 17 (2005).

52. Fischer-Lescano and Teubner, *supra* note 52, at 1013.

53. LUHMANN, *supra* note, 24 at 145.

54. Jürgen Habermas, *Between Naturalism and Religion: Philosophical Essays*, 14 (CIARAN CRONIN TRANS., POLITY PRESS ED., 2008).

55. *Id.* at 171.

56. *Id.*

the inhabited interior of our way of living is the same from an internal and external point of view.<sup>57</sup>

On this point, it could be said that there is a similarity between the *person form* of Niklas Luhmann and the individual in the Habermas theory, since for both theories (that of systems and that of communicative reason), the premise prevails that the person is the individual in communication within society.<sup>58</sup> The important difference for the theme covered herein, resides in the fact that for Habermas, the individual at the time of social communication may no longer return to the societal environment, since now they are already socialized.<sup>59</sup> The person is the one who expresses to the other in social communication.<sup>60</sup>

Thus, the person in a growth phase can only constitute what they express in social communication. The apparent particular consciousness, even if based upon manifestations of personal and intimate emotional perceptions of the flows of impacts absorbed from cultural networks of shared public thoughts in the form of symbolic and intersubjective expression.<sup>61</sup> Once an individual has entered society, they can no longer return to the environment, they become a person in society: from this person others expect an opinion, an action, skills, etc.,<sup>62</sup> the person acquires their identity in their discourse with the other:<sup>63</sup>

---

57. Jürgen Habermas, *Öffentlicher Raum und politische Öffentlichkeit-Lebensgeschichtliche Wurzeln von zwei Gedankenmotiven* [Public Space and the Political Public – Roots of a History of Life and Two Impacts] in *Habermas, Zwischen Naturalismus und Religion* [Habermas, Between Naturalism and Religion], FRANKFURT AM MAIN 18 (2005).

58. Precisely, it should have been stated that the key characteristic of a person is their responsibility or attribution of responsibility, which is to say, the capacity for self-criticism and self-correction that makes it possible for a subject to be held responsible for their statements and acts before others. Klaus Günther, *Welchen Personenbegriff braucht die Diskurstheorie des Rechts?* [What Concept of the Person Does the Law Require?] in Brukhorst, *Das Recht der Republik* [The Right of the Republic], FRANKFURT AM MAIN 84 (1999).

59. For Habermas, that would be a return to the primitive state, which after a person is socialized is impossible. See generally, *Faktizität und Geltung* [Facticity and Validity], FRANKFURT AM MAIN 120 (2005).

60. *Id.*

61. HABERMAS, *supra* note 58, at 18.

62. HABERMAS, *supra* note 58, at 18.

63. HABERMAS, *supra* note 58, at 18.

“Through your view, that of a second person who speaks to me in the first person, I become aware not just as a subject experiencing something, but at the same time as a conscious I. The subjective views of others possess an individualizing strength.”<sup>64</sup>

Even so, according to this differentiated line of reasoning, it is not possible to sufficiently respond to the question posed above, which is to say, which perceptions the individual obtains based upon communicative action within social systems, and how this may contribute towards their process of self-reflection in a specific site, as suggested by the German Constitutional Court.<sup>65</sup>

For Habermas, contrary to Luhmann, the individual is not capable of self-reflection based on the contact with the other in the societal environment, although they may verify a great deal about themselves based upon these contacts.<sup>66</sup> Here we lack the possibility of reflecting on the social experience in and of itself, without the influence of preexisting social rules and preconceptions.<sup>67</sup> What’s more, the individual lacks the opportunity to self-determine his or her own right in a reflection process, in the societal environment.<sup>68</sup>

The attempt at a type of internal acknowledgment may help resolve the problem stated above.<sup>69</sup> When the pretensions of an individual are refused by society, this individual understands the refusal as an affront, and through this negative experience, he believes that social recognition has been denied.<sup>70</sup> In Axel Honneth’s theory of recognition, as well as in the understanding of Habermas, the individual depends upon intersubjective acquiescence, and when social confirmation does not take place, a psychic gap rises in their personality.<sup>71</sup> For Honneth, the reason for this is the human’s fundamental dependence on experience: in order to achieve a successful self-

---

64. HABERMAS, *supra* note 58, at 19.

65. Gunther Teubner, *Autopoietic Law: A New Approach to Law and Society*, 254 (De Gruyter ed., reprint 2011) (1987).

66. HABERMAS, *supra* note 57, at 178.

67. HABERMAS, *supra* note 57, at 178.

68. HABERMAS, *supra* note 57, at 178.

69. HABERMAS, *supra* note 57, at 194.

70. Axel Honneth, *Kampf um Anerkennung. Zur moralischen Anerkennung sozialer Konflikte* [The Struggle for Recognition – The Moral Grammar of Social Conflicts] FRANKFURT AM MAIN 220 (1994).

71. *Id.* at 39.

relationship, he depends upon intersubjective recognition of his capacities and achievements.<sup>72</sup> Preceded by the fact is that the subject has already given himself a primary self-identification in order to require the recognition of others.<sup>73</sup> For Honneth, the process of recognition from another subject presupposes that the one who gives the recognition sees their recognition act as a limitation in and of itself, of their own self-esteem:<sup>74</sup>

In the recognizing subject, a decentralization takes place, once they grant value to another subject, which is the source of legitimate claims and that causes an interruption of their own self-love,<sup>75</sup> and this because a revocation can only take place when the subject in question, on the other hand, has already reached the pre-conclusion that he was recognized as an individual within a space-time system: you can only make affirmations about another person, look through them or ignore them, when they have previously attributed the capacity for a primary identification of themselves.<sup>76</sup>

Relevant for the understanding of what Honneth proposes, is the question that he himself asks when he analyzes the non-recognition, which is the fruit of social invisibility of the subjects.<sup>77</sup> He asks, “to what fact has the subject attributed their social invisibility, when they feel the non-recognition?”<sup>78</sup> Further, how can inter-subjectivity take place when it is not based upon pre-existing subjectivity?<sup>79</sup>

According to Honneth, from the point of view of the affected individual, the criteria based upon which he certifies his visibility, figuratively is the expression of certain reactions that are a signal, a manifestation of positive recognition. That is why the omission of these forms of expression is proof for others in this special social sig-

---

72. *Id.* at 97.

73. AXEL HONNETH, UNSICHTBARKEIT ÜBER DIE MORALISCHE EPISTEMOLOGIE VON ANERKENNUNG [INVISIBILITY – CONCERNING THE MORAL EPISTEMOLOGY OF RECOGNITION] (2003) *reprinted in* STATIONEN EINER THEOIE DER INTERSUBJEKTIVITÄT 13 (Frankfurt am Main, 2003).

74. *Id.*

75. *Id.* at 22.

76. *Id.* at 13.

77. *Id.*

78. *Id.* at 14.

79. CHARLES LARMORE, PERSON UND ANERKENNUNG [PERSON AND RECOGNITION] 459-60 (1998).

nificance we are not visible.<sup>80</sup> The response provokes an additional question concerning the impact of this experience: how does the individual internalize and reflect on this moment through which they comprehend or feel their lack of recognition?<sup>81</sup> Notably, for Honneth, the recognition of the human being as a person in society is more important than the recognition of the individual in their autonomous psychological system outside of society.<sup>82</sup> The existential mode he analyzes also only takes place when the individual has already been introduced into family life or society.<sup>83</sup>

For Robert Spaemann, the solution to this problem could be a change in perspective, in order to not consider recognition as a mere distinction in the social relationship, but as the admission of the other into the moral world.<sup>84</sup> Recognition as the introduction of the individual, as a person, into the world would correspond to their exclusion as an individual within society.<sup>85</sup> In this context, it can be taken back only and with the sole goal of understanding the movement of an individual's self-reflection and the place of this reflection, Luhmann's distinction: society, environment and individual self-reflection.<sup>86</sup>

However, the point is not as simple at all that. Since, in addition to non-recognition, the lack of self-reflection imposed by social systems causes individuals to become alienated from themselves,<sup>87</sup> since they commence permanent use of social masks. Thus, instead of considering the person as a conscious member of society, we may consider them as a cooperative being or member of a society.<sup>88</sup>

---

80. HONNETH, *supra* note 76, at 14.

81. *Id.*

82. *Id.*

83. AXEL HONNETH, VERDINGLICHUNG [REIFICATION] 60 n.19 (2005).

84. LARMORE, *supra* note 82, at 464; ROBERT SPAEMANN, PERSONEN. VERSUCHE ÜBER DE UNTERSCHIED ZWISCHEN "ETWAS" AND "JEMAND" [PEOPLE. ATTEMPT AT THE DIFFERENCE BETWEEN SOMETHING AND SOMEONE] (2d ed. 1998).

85. *Id.*

86. *Id.*

87. RAHEL JÄGGI, ENTFREMUNG (Frankfurt am Main 2005) *originally* GEORG LUKÁCS, GESCHICHTE UND KLASSENBEWUSSTSEIN [HISTORY AND CLASS CONSCIOUSNESS] (Neuwied/Berlin 1968); MARTN MORLOK, SELBSTVERTÄNDNIS ALS RECHTSKRITERIUM 28 (Tubingen 1993) (alienation in the relationship between the system of law and its environment).

88. Thorsten Jantschek, *Von Personen und Menschen* [On People and Human Beings] 46 DEUTSCHE ZEITSCHRIFT FÜR PHILOSOPHIE 465, 468 (1998).

Nevertheless, the fear of return of the metaphysical concept of a person by current social theories inhibits the observation of an acute and current problem:<sup>89</sup> the manipulation of the social role of the individual by the media, by the economy, by the educational system, and by the environmental protection movement, among others.<sup>90</sup> It is imposed upon the individual through this conscious and unconscious manipulation, how and in what manner he should be and how he should present himself.<sup>91</sup>

Society starts to be understood as a large pluralist stage, wherein the directors – the economy, media, law, sports and social movements – distribute scripts: “The show is not a set of images, but rather a social relationship among people generated by these images.”<sup>92</sup> This is why it is important to recognize that individuals should be granted the possibility of self-reflection concerning the use of social masks and concerning their acting out of social roles. Self-reflection, as a process of self-affirmation, could then be a solution for the problem, to the extent that it constitutes the individuals relationship with oneself, to thus register within a certain mental occurrence.<sup>93</sup> Please note that this relationship is not some type of discovery or an “act of recognition”<sup>94</sup> of the internal conscience, rather it is a reflection concerning the experiences held by each individual in society.<sup>95</sup> In fact, for Honneth, it is much more a type of *Expressionism*.<sup>96</sup>

“We do not distinguish our mental conditions as mere objects, nor do we constitute them through a declaration, but we articulate them in accordance with what is intimately familiar to us.”<sup>97</sup>

The internal reflection of each individual is the site of his or her original freedom.<sup>98</sup> Their vision of the world or his or her own reli-

---

89. *Id.*

90. *Id.*

91. *Id.*

92. GUY DEBORD, *DI GESELLESCHAFT DES SPEKTAKELS [THE SOCIETY OF THE SPECTACLE]* 14 (1996).

93. HONNETH, *supra* note 86, at 82.

94. *Id.* at 85.

95. *Id.*

96. DAVID H. FINKELSTEIN, *EXPRESSION AND THE INNER* 9-27 (2003) (Discusses Honneth’s conclusions on expressionism).

97. HONNETH, *supra* note 86, at 88.

98. HONNETH, *supra* note 86, at 88.

gion is reflected, is the place that should be protected by law.<sup>99</sup> The direct efficacy of fundamental rights allows each individual, as a person in society, to assert their rights, not just as a means of discourse of formal equality, but also as the solidification of their recently defined pretensions.<sup>100</sup> The theory defended herein accepts the metaphor of the theory of systems for the psychological system, but builds upon it and considers each individual as a subject capable of self-reflection in the societal environment, where there is the possibility of completing their own rights and defining their legal pretensions to be exercised within society.<sup>101</sup>

This theory should not be confused with the debate about communities and liberalism in political philosophy.<sup>102</sup> It is much more an attempt to justify the need for permanent self-reflection within the societal environment. The consequence is not a transformation of the citizen into an egotistical and alienated person,<sup>103</sup> but rather the possibility of exercising fundamental rights by all individuals, independent of the fact of whether they are part of the policy, economy, school, healthcare system, or religion.<sup>104</sup> This possibility, as stated previously, is based upon the premise that they have reflected as individuals outside of society based upon the parameters of their liberty, conscience or creed, and principally, that all of them have had equal chances to freely exercise this reflection.<sup>105</sup>

Based upon this new perspective, the crossroads resulting from the exercise of the right of religious freedom gains new contours, since the use of the fundamental freedom of religion makes it possible that the right to self-determination by the subject be inserted into the legal process. The subject of rights exposes to the Judiciary the result of their self-reflection, through witnesses, documents, or petitions. Once this is guaranteed, the law recognizes the individual's

---

99. HONNETH, *supra* note 86, at 88.

100. HONNETH, *supra* note 86, at 48.

101. HONNETH, *supra* note 86, at 49-50.

102. Cf., RAINER FORST, *Kontexte der Gerechtigkeit. Politische Philosophie jenseits von Liberalismus und Kommunitarismus* [Context of Justice. Political philosophy beyond liberalism and communitarianism] (1996) (debate between communitarianism and liberalism).

103. JÜRGEN HABERMAS, *Vorpolitische Grundlagen des Demokratischen Rechtsstaates?* [Pre-Political Foundations for the Democratic State of Law?] 112 (2005).

104. *Id.*

105. *Id.*

pretension as just and valid, which is to say, that it will be taken into consideration when reasoning a decision. The individual reflection then becomes an integral part of the judicial order. The psychological and pedagogical effect of this recognition, even for others subject to law, generated by communication of the State's decision, should not be underestimated.<sup>106</sup>

Contemporary society allows collisions of every kind, at any time, and attributes to the individual the right to insure their own freedom and self- realization.<sup>107</sup> The law, responsible for attributing responsibilities for damages resulting from collisions does not acknowledge the volume of work, since conflicts grow increasingly. The result is that the individual, a rights holder, without the possibility of exercising those rights, drawn down by moral rules that must be met without reflection, or that they simply do not meet, create financial and familial problems end up accumulating.<sup>108</sup>

### **III. Paradoxes of Individualization: Individualism, Individualization, and Subject of rights**

In an article concerning paradoxes associated with individualization, Axel Honneth established that the process of individualization is the “fundamental element for diagnosing modernity.”<sup>109</sup> First, it is important to stress that, in his opinion, this concept is highly ambivalent, since it represents on the one side an increase of characteristics and individual possibilities, and on the other side, it increases the weight of attributes imposed upon the subject.<sup>110</sup> This means that in current times we are seeing a new process of individualization, different from those observed in earlier modernity or classic modernity, with the industrial revolution, which in the tradition of Durkheim

---

106. See, Mauro Cappelletti, *Fundamental Guarantees of the Parties in Civil Proceedings*, in *FUNDAMENTAL GUARANTEES IN CIVIL LITIGATION* 661 (1973) (concerning the pedagogical function of the law, especially legal decisions).

107. *Id.*

108. *Id.*

109. Axel Honneth, *Organisierte Selbstverwirklichung – Paradoxien der Individualisierung [Organized Self-Development – Paradoxes of Individualization]*, in *BEFREIUNG DER MÜNDLICHKEIT – PARADOXIEN DES GEGENWÄRTIGEN KAPITALISMUS* 141 (2002).

110. *Id.* at 142.

means autonomy and liberty.<sup>111</sup> This new process of individualization reflects the other side of modern life.

Based upon the analysis of Georg Simmel, Honneth explains, that there is a fundamental difference between the mere increase of individual skills, the pluralization of lifestyles made possible by financial economy and the increase of personal autonomy.<sup>112</sup> It may even appear that with the anonymity afforded in social relations in large cities people no longer see themselves obliged to belong to groups, thus opening up the possibility of greater choices, which is far from meaning that individual liberty is also growing, since this requires the guaranteed support of other subjects.<sup>113</sup> Honneth at this point refers, probably, to the need for recognition from the other, for the total flowering of one's liberty in society.

In order to better understand this question, I would like to make the differentiation between quantitative individualism and qualitative individualism made by Georg Simmel and revisited by Honneth in his argument concerning the paradoxes of individualization.<sup>114</sup> Simmel differentiates individualism with the terminology pair liberty-equality in two different modes.

In the first mode, according to the conception of the romantic cultural circle, he defines as the end of a goal-oriented process of development of the internal liberty of the autonomous articulation of convictions and intentions, which in principle can divide all people. This reveals the individualism of equality, since it covers the possibility of an individual's capacity for reflection, which constitutes a characteristic of all humanity.<sup>115</sup>

In the second mode, Simmel no longer refers to equality among individuals, but the differentiation and autonomy of the individual, revealing a qualitative type of individualism, the goal of which is to increase personal freedom, the sole characteristic of the historical development of life as a means through which subjects differentiate themselves from one another.<sup>116</sup>

---

111. *Id.* at 141.

112. *Id.*

113. *Id.* at 142.

114. *Id.*

115. *Id.* at 143.

116. *Id.*

The differentiation between *quantitative and qualitative individualism* is of important relevance in Simmel's theory, as attested in the works of Honneth and Markus Schroer concerning the process of individualization.<sup>117</sup> Quantitative individualism is the individualism of the 18th Century, when the focus was on "freeing individuals from their political, religious, and economic ties, which had become unbearable."<sup>118</sup> Qualitative individualism is the individualism of the 19<sup>th</sup> Century, which is based upon the disparity and distinction among individuals.<sup>119</sup> The tendency in modernity, as Simmel is fond of emphasizing, is the union of these two types of individualism.<sup>120</sup> The individuals group together through similarities of styles of life or fashion, and within the groups they give up their individuality in the name of community, at the same time as they delineate limits around them in order to guarantee individuality, pushing away strangers that do not belong to the groups.<sup>121</sup>

As with Honneth, Markus Schroer in his work also demonstrates Simmel's ambivalence to individualism. Especially in the analysis that is made on the development of large cities in his book, *Philosophy of Money*, Simmel stresses the risks, but also the chances that a monetary society provides.<sup>122</sup> Schroer explains that for Simmel, the Individual can only develop based upon the delimitation of a collective reference point.<sup>123</sup> Thus, once compared with the community, the human learns to differentiate himself or herself as a concrete individual. For Simmel, the individual develops their individuality through contact with other different people.<sup>124</sup> Life in a society intensely marked by a monetary economy can be positive for the individual, if through autonomous relationships of economic content they can differentiate from the others.<sup>125</sup> This process serves towards the development of the individual himself and for the definition of their

---

117. MARKUS SCHROER, DAS INDIVIDUUM DER GESELLSCHAFT [THE INDIVIDUAL OF SOCIETY] 309 (2001).

118. *Id.* at 311.

119. *Id.* at 317.

120. GEORG SIMMEL, PHILOSOPHIE DES GELDES, [PHILOSOPHY OF MONEY] (Frankfurt am Main, 1989) 397 (1989).

121. SCHROER, *supra* note 121, at 319.

122. *Id.* at 287.

123. *Id.* at 303.

124. SIMMEL, *supra* note 124.

125. SIMMEL, *supra* note 124.

internal limits.<sup>126</sup> At this point, it is important to stress that “a monetary economy cannot be a guarantee of this development,”<sup>127</sup> it is just the means that makes individual development possible. The understanding of development of individuality itself depends upon the individual. The monetary economy system continues to function autonomously, free of the responsibility of aid by the individual to construct their individuality and to differentiate from one another. In this ideal circumstance, certainly it happens frequently that the individuals do not use the changes that are granted to them by systems for their own development. Not because they truly do not want to, but because they do not know how to exist with the excess freedom that this represents.

According to an analysis by Schroer of Simmel’s theory, this happens because individuals flee from the new freedoms conquered.<sup>128</sup> The new freedom does not promise eternal pleasure; rather it overloads the individual who has to assume social and economic responsibility for his or her own well-being. Within this context, Schroer explains Simmel’s ambivalence of individualism and the consequences for the individual: “Simmel always emphasizes the chances and risks that the institution of a modern monetary policy presents to the individual.<sup>129</sup> In the uncertainty imposed upon the individual with the goals of traditional social relations that not only represent a normative stricture, rather were principally what assured their sustainment, he sought the inevitable consequence, the inevitable burden that accompanies freedom.”<sup>130</sup>

In this analysis, Simmel’s theory is expanded to demonstrate:

[T]hat the pretensions of individual self-realization that increased as a result of the unique and historic confluence of rather divergent individualization processes that took place in Western society thirty, forty years ago, has over time become an institutionalized expectation of social reproduction, which lost its specific function, transforming into a form of legitimization within the system.”<sup>131</sup>

---

126. SIMMEL, *supra* note 124.

127. SCHROER, *supra* note 121, at 304.

128. Bundesverfassungsgericht, *supra* note 3.

129. SCHROER, *supra* note 121, at 304.

130. SCHROER, *supra* note 121, at 305.

131. HONNETH, *supra* note 112, at 146.

The consequence of this realization by Honneth is that the development of distinct individualization processes today allows us to speak of a new type of “Individualism.”<sup>132</sup> Irrespective of the initial moments of this type of development, one can state “that in just two decades the types of existence have individualized violently: members of Western societies were forced, compelled or stimulated, in the name of future chances, to become the center of their own plans and modes of conducting their life.”<sup>133</sup> This is a type of individualism is that in Simmel’s view, can be sought as “individualism of the qualitative type.”<sup>134</sup> Through this individualism subject live different types of existence, and thus, based upon the experiences may materialize at the core of their being, which is already a way of differentiating them from others.<sup>135</sup>

Honneth proposes that the paradox of individualization in society can be easily observed in the fact that autonomy and independence of individual subjects have become a sample of the institutionalized expectation of the social system.<sup>136</sup> Thus, it is the system itself when it imposes upon the subject the requirement to be authentic this overloads the subject. This paradoxical metamorphosis makes it so what was the process of personal realization through qualitative freedom, has become “an ideology of deinstitutionalization,”<sup>137</sup> which leads to the “rise of a large number of internal symptoms of internal emptiness, feelings of uselessness and a lack of determination.”<sup>138</sup>

In a subsequent text, published in conjunction with Martin Hartmann, Honneth resumes the analysis of individualism, making use of differentiation of the meaning of individualism in the “social-democratic era” and in the “neo-liberal revolution.”<sup>139</sup> In the social-democratic era, the individual found a special place in the systematic differentiation of society.

---

132. HONNETH, *supra* note 112, at 146.

133. HONNETH, *supra* note 112, at 148.

134. HONNETH, *supra* note 112, at 150.

135. HONNETH, *supra* note 112, at 148.

136. HONNETH, *supra* note 112, at 148.

137. HONNETH, *supra* note 112, at 146.

138. HONNETH, *supra* note 112, at 146.

139. Martin Hartmann & Axel Honneth, *Paradoxien des Kapitalismus, [Paradoxes of Capitalism]* 13/1 CONSTELLATIONS 2, 4 (2006).

According to the authors, under the combined influence of the processes of socio-economic transformation processes and cultural changes during the social-democratic era in Europe and especially in Germany, institutionalized individualism grew in the direction of an idea of experimental self-realization. The heart of which is the perception of life-long learning of new existential forms, which are always considered as authentic.<sup>140</sup> Up to that point individualism belonged solely to the upper classes, but in the new and expanded version of the social-democratic era, it embraces the social majority of the population.<sup>141</sup> This perception of individualism as well as the life expectation upon which it depended is being strongly substituted by the idea of “neo-liberalism,” since the start of the 1980’s.

The dynamic of the current capitalist model contributes to the fact that the progress achieved during the social-democratic era is now being incorporated into the system. Luc Boltanski and Ève Chiapello demonstrate that the capitalist system is highly flexible and capable of adaptation as well as to this social progress, having even, imperceptibly, incorporated the characteristics of social, environmental, and labor movements.<sup>142</sup>

In this altered model of capitalism, it is expected that the individual in their role of “labor owner”<sup>143</sup> or a mere human resource assume the responsibility for their work and quality of life. This peculiarity of individualism in late modernity removes from political and economic systems the responsibility they originally held towards politics and the economy themselves, and in the same fashion, leads to a breakdown of solidarity within human relations.<sup>144</sup> As one can observe, in light of the pressure for greater success, the institutionalized models: individuals, law, labor, and love, have transformed so much, that they can only be understood, at this point, to be paradoxical<sup>145</sup>

For Honneth and Hartmann the achievement of individualism obtained during the social-democratic era is one of the four spheres of normative recognition based upon the description of “Parsons’

---

140. *Id.*

141. *Id.* at 6.

142. LUC BOLTANSKI & ÈVE CHIAPELLO, DER NEUE GEIST DES KAPITALISMUS [THE NEW SPIRIT OF CAPITALISM] 68 (Konstanz, 2003).

143. HARTMANN & HONNETH, *supra* note 140, at 9.

144. HARTMANN & HONNETH, *supra* note 140, at 9.

145. HARTMANN & HONNETH, *supra* note 140, at 9.

evolution of modern society.<sup>146</sup> The two authors in the following fashion describe these four spheres: (a) the subjects are found in the first sphere, which may make use of the normative promises of institutionalized individualism.<sup>147</sup> This peculiarity of individualism in conjunction with (b) the ideal of equality in the modern legal system, (c) the normative implications of the principle of productivity; and (d) the moral promise of a romantic deal of love,<sup>148</sup> constitute the spheres of recognition that make it possible to uphold society through the rationale of recognition.<sup>149</sup>

Each modality of recognition takes place in a specific societal sphere (or for Parsons in a social subsystem). Love should regulate the inter-subjective recognition in the family sphere and within intimate relations. The law should guarantee the recognition of equality of subjects within inter-subjective relationships in the political model of the democratic state. In addition, solidarity is the example for the cohesion of society as a whole.<sup>150</sup> This text written in conjunction with Hartmann, includes the addition to the three spheres of recognition commonly distinguished by Honneth,<sup>151</sup> a fourth place of recognition is incorporated, called “institutionalized individualism.” Through which individuals may “experiment to make allusions to aspects of their autonomy or facets of their identity, which up until that point had no type of recognition in social culture.”<sup>152</sup>

Based upon these premises, Honneth and Hartmann demonstrate that the “new capitalism” of late modernity is structured in a contradictory fashion and transports these contradictions into non-economic spheres of action.<sup>153</sup> This is where the paradoxes arise, exactly when the subjects in these spheres of action continue seeing themselves in light of the rules determined for these spheres and this at the same

---

146. HARTMANN & HONNETH, *supra* note 140, at 5.

147. HARTMANN & HONNETH, *supra* note 140, at 5.

148. HARTMANN & HONNETH, *supra* note 140, at 5.

149. HARTMANN & HONNETH, *supra* note 140, at 5.

150. AXEL HONNETH, KAMPF UM ANERKENNUNG [STRUGGLE FOR RECOGNITION] ch. 2 (1975).

151. *Id.* at 107.

152. HARTMANN & HONNETH, *supra* note 140, at 5 (appearing that the authors are referring to the possibility of inclusion into society of people belonging to groups that are historically excluded, like women, homosexuals, and in Brazil, blacks and Indians).

153. HARTMANN & HONNETH, *supra* note 140, at 5.

time in which capitalism is normatively rendered flexible.<sup>154</sup> Thus, it is possible to observe that previously there was clearly there was an increase in the spectrum of individual autonomy, and this new type of capitalistic organization acquires contours of an imposition, discipline, or insecurity. Worse still, in addition to the pressure exerted through capitalist discourse, the rationality of other social systems exert strong influences on individuals.

The media, sports, and religion, among others, impose their various rationales on individuals, who grow increasingly overloaded, and are unable to decide what they really want, feel to be.<sup>155</sup> Thus, the individualism that during the social-democratic era meant the increase of biographical liberty after the neoliberal revolution and the restructuring of capitalism ended up transforming into quite the opposite.<sup>156</sup> It was not just individualism that moved dialectically, but also the rights that embody the individual's freedom.<sup>157</sup>

This is the paradox where freedom is transformed into control, equality into inequality, freedom of the press into the manipulation of public opinion, etc.<sup>158</sup> In this context, it is extremely relevant to point out that within the new capitalism "the frontiers between the private and public-professional spheres overlap."<sup>159</sup>

It is difficult to answer if in reality the frontiers between individuals or between social communication systems will disappear and if a counter-process will take place in the differentiation of society. The permanent irritation that the economic system exerts on its environment is however, a sign that the frontiers with the environment of the psychological system are overloaded.<sup>160</sup> Alone, this overload cannot lead to the direct extinction of the individual (not with their imminent death), but rather to a mental illness, and in its extreme case, giving up on one's self.<sup>161</sup> The individual may lose their grasp on reality and no longer recognize which *programs* should be used for certain moments throughout their life.<sup>162</sup> For example, in this process it may

---

154. HARTMANN & HONNETH, *supra* note 140, at 10.

155. HARTMANN & HONNETH, *supra* note 140, at 10.

156. HARTMANN & HONNETH, *supra* note 140, at 10.

157. HARTMANN & HONNETH, *supra* note 140, at 10.

158. HARTMANN & HONNETH, *supra* note 140, at 10.

159. HARTMANN & HONNETH, *supra* note 140, at 11.

160. HARTMANN & HONNETH, *supra* note 140, at 11.

161. HARTMANN & HONNETH, *supra* note 140, at 11.

162. HARTMANN & HONNETH, *supra* note 140, at 11.

happen that he is no longer able to differentiate between an intimate relationship and a professional relationship, and allows one, who holds the power, to take advantage of the inferior position that the other occupies in the workforce, all of which is a pathological confusion.<sup>163</sup>

Another consequence of new capitalism is the distant positioning of social responsibility, so that all citizens assimilate their achievements, successes, and failures totally individually, and it would be unthinkable to share them with the collective.<sup>164</sup> The consequence is growing individual responsibility (every man for himself!), which consequently leads to an escape in the whole left by individualism.<sup>165</sup>

In addition, here is where the paradox appears to lie, as Christine Hauskeller confirms through a brief analysis of the subject in Judith Butler and Foucault.<sup>166</sup> For Hauskeller, the place of the modern subject and what that represents can only be described as a paradox.<sup>167</sup> Since the concrete subject, is on one hand controlled by various distinct rationales, and on the other hand, is capable of opposing these foreign rationales and autonomously defining how they will act individually.<sup>168</sup>

Alain Ehrenberg demonstrates in his work on social motivations of depression, that “the dichotomy of *allowed – prohibited*, determining through the 1950’s and 1960’s of the last century has lost its effect.”<sup>169</sup> In current society, the notion of prohibition is relativized and thus is the “relationship” between the individual and society: “a person is no longer *moved* by an external order (or to conform to a law),

---

163. EVA ILLOUZ, *DER KONSUM DER ROMANTIK [THE CONSUMPTION OF LOVE]* (Frankfurt am Main 2004).

164. HARTMANN & HONNETH, *supra* note 140, at 13.

165. HARTMANN & HONNETH, *supra* note 140, at 13

166. HARTMANN & HONNETH, *supra* note 140, at 13

167. *See generally* CHRISTINE HAUSKELLER, *DAS PARADOXE SUBJECT: WIDERSTAND UND UNTERWERFUNG BEI JUDITH BUTLER UND MICHEL FOUCAULT [THE PARADOX SUBJECT: RESISTANCE AND EMERGENCY IN JUDITH BUTLER AND MICHEL FOUCAULT]* (Tübingen 2000).

168. *Id.* at 11.

169. ALAIN EHRENBURG, *THE WEARINESS OF THE SELF: DIAGNOSING THE HISTORY OF DEPRESSION IN THE CONTEMPORARY AGE 8* (Enrico Caouette, Jacob Homel, David Homel, Don Winkler trans., McGill-Queen’s Univ. Press 2010).

they have to support themselves on internal stimulus and support themselves on their intellectual capacity.”<sup>170</sup>

For Ehrenberg, these changes that arose during the social-democratic era are the social motives for the different types of depression that subjects present today. In his opinion,

Depression shows us the real experience of the person, since it is the illness of a society, whose rules of behavior are no longer based upon blame and discipline, but rather on responsibility and initiative. Previously, social rules demanded conformity in thought and mental capacities, if not behavioral automatism; today they foment initiative and intellectual qualifications. Depression is more an illness of insufficiency than of improper conduct, it belongs more to the kingdom of dysfunction than that of the law: The depressive is a person with a defect.<sup>171</sup>

A transcendental observation would allow the allocation of this problem and theme alongside an analysis of the law as proposed herein.<sup>172</sup> The depressed individual is the consequence of the strong irritation that is exerted on them by social communication systems. What social systems expect from them – as *homo economicus*, *homo juridicus*, and *homo technologicus* – allows for less creativity and freedom than under the idea of individualism in classic modernity. This is caused by a dynamic that attempts to justify that the individual has to be integrated and be a cog in the process of capital accumulation, since “capitalism is the system that *per se* supports individual liberties and principally policies.”<sup>173</sup> It is an “ideology that justifies the involvement in capitalism, making it appear that it is even something desirable.”<sup>174</sup> This discourse and justifications, because they represent an ideology that has only been in place for a short time, end up being criticized and even denounced by the popular press.<sup>175</sup> This is because the economy always needs a new format to justify the capitalistic spirit.

---

170. *Id.*

171. *Id.* at 9.

172. *Id.*

173. Luc Boltanski & Eve Chiapello, *Die Rolle der Kritik in der Dynamik des Kapitalismus und der normative Wandel* [The Role of Criticism in the Dynamism of Capitalism and Normative Change], 4 BERLINER J. FÜR SOZIOLOGIE, 459, 462 (2001).

174. *Id.* at 462.

175. *Id.*

A clear example of this dynamic is demonstrated by Boltanski and Chiapello in their book *The new spirit of capitalism*. “When capitalism is forced to respond to the problematic points alluded to by critics, it agrees with it to preserve the support of its troops who want to give credit to the accusations, then *it upends a part of the values for which it was criticized.*”<sup>176</sup> The dynamic effect of the criticism to the spirit of capitalism takes place in such a fashion as to strengthen its models of justification and the structures connected to it. Without in fact questioning the principle of accumulation or that of obligatory profits, the criticism is partially successful. It is through this process, which integrates within capitalism directives that correspond to those problematic points considered most inopportune by its critics.”<sup>177</sup> Thus, in response to criticisms unleashed at the start of the 1960’s against the capitalist model, the economy responded with support to mobility, teamwork, individual responsibility, and human resources.<sup>178</sup>

Additionally, important responsibilities were transferred by the State to private enterprise.<sup>179</sup> This transfer of responsibility was initially understood as freedom resulting from the entrepreneur’s right to free enterprise; however, today it is perceived to mean an extra burden on the individual. The alterations in our time motivated by the incorporation of criticism to capitalism have led to a serious increase in temporary employment contracts, which cause much of the active population to live an absolutely frightening and exhausting life.<sup>180</sup> Moreover, other social sub-systems incorporating into their programming the economic rational start to *run* with the same rules as the economic system.

For example, in religious systems, one is currently able to find that believers are again being encouraged to provide material proof of their faith, i.e. through financial support, political engagement, or by becoming martyrs.<sup>181</sup> As such, the individual, as a person in society, accepts in consideration for the freedom earned, at all times, this new

---

176. *Infra* note 178.

177. LUC BOLTANSKI & EVE CHIAPELLO, *THE NEW SPIRIT OF CAPITALISM* 70 (Gregory Elliott trans., Verso 2005).

178. *Id.* at 69.

179. BOLTANSKI & CHIAPELLO, *supra* note 183.

180. BOLTANSKI & CHIAPELLO, *supra* note 464.

181. BOLTANSKI & CHIAPELLO, *supra* note 464.

and additional responsibility, which previously belonged to the State, the church, the economy, the healthcare system, etc. An individual suffocated by this type of freedom is much more likely to suffer from psychological illnesses than before.<sup>182</sup> Depression is an “*illness of responsibility*,” whereby feelings of inferiority are predominant. A depressed person is never at their maximum capacity. They are exhausted by the effort of trying to be themselves.<sup>183</sup>

The line of reasoning set out in this article had the goal of demonstrating that an autonomous individual in the current societal environment is strongly irritated, influenced, and manipulated by various rationales of communication, which are generated by varying social systems and sub-systems, especially the economic system and sub-systems and regimes connected thereto. At times the manipulation passes unperceived; at others, without the power to react, the individually is strongly psychologically affected, which contributes on a larger scale towards psychological illnesses such as depression, panic attacks and uncontrollable fears.<sup>184</sup> This is why the function of fundamental rights is stressed as being essential for allowing individuals to reflect upon their own rights, and outside of society, to define their internal freedom for themselves.

Self-determination of internal freedom – for example, the free exercise of faith or conscience, not just through these constitutional guarantees, but also other guarantees of freedom for the individual – enables individuals to differentiate themselves in their social role. With this, they may determine the frontiers of their environment, thus allowing them to be capable of understanding the psychological burdens of modern society, seeking the assistance that they need or fighting for the recognition owed.

---

182. EHRENBERG, *supra* note 177, at 28.

183. EHRENBERG, *supra* note 177, at 4.

184. HONNETH, *supra* note 112, at 156.