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The "State" of Private Networks: The Emerging Legal Regime of Polycorporatism in Germany.

(In: Brigham Young University Law Review 1993, 553-575)

I. "Rainbow Coalition" - A Paradigmatic Case

In the elections for the work council of Daimler Benz AG, a large corporate group in Germany, the IG-Metall, a powerful industrial union, had problems with an internal opposition group. After a long fight between majority and minority, the union established an election list which excluded any candidate from the minority group. The minority group then formed a "rainbow" coalition uniting union members and non-members. Politically, it challenged the social partnership course of the union list and united radical social, feminist, anti-discriminatory and ecological movements. The rainbow-coalition won the majority in the elections. The union expelled their leading members. The union considered their candidacy on a competing election list as damaging the interest of the union.

This case is paradigmatic for some recent developments in the German law of private associations. Like in an amplifying lense, it bundles crucial legal issues:

1. Autonomy of labor unions and other intermediary associations against state and court interference?
2. Constitutional rights for organizations, especially in the field of collective bargaining (Art. 9 III GG; Art. 19 III GG)?
4. Right to access to intermediary associations, from any sector of society and for every member of this sector?
5. Judicial review of internal rule production within the intermediary association?
6. Protection of individual right of membership against the association, in particular protection against expulsion?
7. Internal democracy in intermediary associations: minimal requirements of law?
8. Public responsibility of private organizations (Gemeinwohlverpflichtung)?

My main argument is: The courts decide these questions according to a "theory

of associations" internal to the law. The legal discourse develops an internal theory about the position of private associations in politics and society. How the law regulates the internal affairs of associations depends on major historical shifts in the meaning of the public/private distinction. "Public" status of "private" associations means different things in different historical periods. In German post-war history, three ideal-typical configurations can be distinguished: pluralism, macrocorporatism, polycorporatism. Older "pluralist" and more recent "macrocorporatist" arrangements are going to be superseded, it seems today, by a new political arrangement between the state and a plurality of private associations - which I would call "polycorporatist". In particular, there is a correlation between the new poly-corporatist political arrangements, the legal perception of a public status of private associations, and the legal rules about their external status and internal structures. This has repercussions on all five legal issues that are emerging in the "rainbow-coalition" case.

II. From Hierarchy to Heterarchy

"Invoking civil society" is the suggestive title of an article by Charles Taylor (1990) in which he discusses the public status of intermediary associations. The ideas Taylor develops in the broader framework of political theory could be helpful in revising traditional legal perceptions of private associations. Taylor argues that a web of autonomous associations, independent of the state, is the core institution of "civil society". But it is not clear at all what we mean if we invoke civil society. There are two competing models. In the tradition of Montesquieu ("M-stream"), civil society means political society. Civil society develops within the political process, but it is crucial that it maintains its autonomy against state institutions. Of special importance is the autonomy of intermediary associations (Tocqueville, Lipset). Intermediary associations are constitutionally diverse, distributing power among many independent sources. The tradition of Locke ("L-stream") works on different assumptions. Civil society is pre-political society, an self-organizing extra-political reality. In civil society, the social defends its autonomy against the political (Adam Smith, Karl Marx). The civil society is not limited to the "economy" and extends especially to the "public" and more general to "civilization". Hegel attempted a synthesis integrating both L-stream and M-stream in the idea of the overarching State. But in retrospect, this turned out to be a great historical error. Which interpretation of civil society, Taylor asks, is valid under (post)modern conditions? In this context, he discusses neo-corporatist arrangements in Germany and Japan and their critique from the right and the left. Do we today experience a new dominance of the L-stream or can we foresee a new balance?

From this perspective, communitarianism versus individualism seems a misleading alternative. It presupposes a simplified image of society as a hierarchical relation between individuals and an overarching "state" with intermediary organization somewhere in between. They "mediate" vertically individual needs and collective goals. Their orientation oscillates between individualist and communitarian ideas. As suggestive this image might be, it would result in misleading policies and legal regulations. "Public status" of intermediary associations would then take on a rather impoverished meaning. It would characterize them as the main link between individual interests and the state's interest. And the concomitant idea of intra-organizational democracy would end in simple requests for more citizen participation in public affairs

within the associations.

Indeed, the contemporary discussion on intermediary associations has usually worked with these assumptions (Lipset, 1960; Marshall, 1964; Olsen, 1981). However if Taylor is right to view modern civil society as a new combination of L-stream and M-stream, then the hierarchical model is plainly inadequate. It cannot cope with the contemporary reality of a fragmented civil society. The differentiation of specialized discourses excludes a simple hierarchy of rulers and ruled. Politics itself has become decentred. It is no longer the central instance of society, but only one among many discourses. This is a point of convergence of different lines of thought about modern society. A general discourse on society is more than ever before confronted with a "dissociation of its rule systems" (Lyotard, 1987: 12), a multitude "of language-games" (Wittgenstein, 1989: 23f.), a plurality of "semiotic groups" (Jackson, 1988: 131ff.). Sociologists characterize modernity as the "separation of spheres" (Selznick, 1992: 4ff.), the differentiation of the "subsystems of society" (Parsons, 1971: 10), the "operational closure of autopoiesis" (Luhmann, 1984: passim), the plurality of "forms of discourse and negotiation" (Habermas, 1992: 196). In this view of modern society, the hierarchy state/individuals is irreversibly replaced by the heterarchy of different spheres of society.

Accordingly, in such a fragmented society, intermediary associations play a different role. Their main activity is not to mediate "vertically" between rulers and ruled comparable to the estates of the ancient regime. Rather, their new role is to mediate "horizontally" between the autonomous logics of different social discourses. Intermediary associations mediate politics with other specialized sectors of society. They participate simultaneously in the world of politics and in their special field of society. The result is multiple membership of associations in different worlds of meaning. Their internal grammar is reflecting the often contradictory claims of different discourses. Thus, legal rules on their "public status" as well as on "internal democracy" need to be reformulated in the light of these contradictory claims of different discourses and not only between their members and politics at large (Streeck & Schmitter, 1985: 22ff.).

How do intermediary organizations reflect Taylor's new balance between M-stream and L-stream? We need to distinguish between differentiation of society in general and internal differentiation of politics in particular. Then we can see "civil society" as a construct that combines elements of M-stream and L-stream. Social differentiation in general creates among others the hiatus between the political process and non-political spheres of society. In this perspective we recognize the L-stream. Now, "civil society" appears as a multitude of non-political self-regulating social discourses with their own codes and programmes, the economy just being one of them. Intermediary associations have the capacities of formal organizations to participate in both, politics and civil society. It is their organizational goal to mediate internally between demands of civil society and the requirements of the political process.

At the same time, the political process in particular is internally differentiated into diverse sub-discourses: party-politics, governmental institutions (parliament,

administration, courts), political public (media, associations). The "state" is no longer the organization of society as such, but merely a self-description of politics, personifying parts of the political process in the image of a collective actor (Luhmann, 1990: 117ff.). In this perspective, we recognize the M-stream. Now, a multitude of intermediary associations reappears within the political discourse as "mirroring", "representing", "mapping" civil society. They represent the plurality of social discourses within the political discourse. Their capacity as intermediaries depends on their relative autonomy within politics.

This double perspective allows us to distinguish three ideal-typical configurations of the relation between the modern state and interest groups. They should not to be understood as different historical phases of social differentiation in general, but of the internal differentiation of politics in particular. In this development, they represent three ways of conceiving the "public" role of "private" associations: pluralism, neo-corporatism, polycorporatism. These are specific representations of civil society within the political process, cognitive means of reconstructing social reality within politics.

If these theoretical arguments make sense, then practical policy and law considerations on intermediate associations need to be reoriented. The law regulating the external status and the internal structure of intermediary association should no longer be mainly concerned with the relation between associations and their individual members on the one side and between associations and the state on the other, as the dichotomy communitarianism/individualism does suggest. Rather, legal policy should focus on their role as mediators between different discourses in society and see its main task in dealing with the capacity of the political discourse to perceive (adequately) the plurality of social discourses.

III. Pluralism: the Law of Social Interest Representation

In post-war Germany, reconstructing intermediate associations turned out to be a difficult task. It had to take its distance from two opposite traditions. The main problem was to get rid of the authoritative state-corporatism of the fascist period with its compulsory associations that organized comprehensively whole sectors of society under the tight control of the political party (Vardaro, 1988). At the same time it was not conceivable to go back to liberal associationalism (Humboldt, 1792) in which associations with exclusively private status needed to be protected against state interference. In this situation, political pluralism was a convincing concept which allowed a new perception of political life and gave private associations a public role to play. Political pluralism forcefully advocated by American political scientists (e.g. Bentley, 1908; Truman, 1951; Lipset, Trow & Coleman, 1956; Lipset, 1960) gained strong influence in West Germany. Indeed, pluralism transformed the "private" status of associations into a new "public" status without, however, impairing their autonomy against the state. It was seen as their new role to aggregate private interests from different sectors of society into political interests, to represent these interests in politics, to serve as centers of political opposition and to produce a pool of alternative political elites (Lipset, Trow & Coleman, 1956: 85ff.).

The new West German law responded positively to the messages of political pluralism. Constitutional law as well as private law developed rules and principles that constituted a new public status for private associations.

The Grundgesetz (GG), West-Germany's new constitution, grants a mix of old and new guarantees to associations. Art. 9 GG guarantees freedom of association and freedom of collective bargaining. Art. 19 III GG gives constitutional rights to legal persons. Art. 21 II GG grants constitutional guarantees for political parties but requires at the same time a minimum amount of intra-party democracy. In the first post-war period, German courts and doctrine gave to these guarantees an explicit pluralist interpretation. As against the classical liberal "negative" freedom of association they elaborated "positive" constitutional guarantees for a pluralist system of interest mediation (Rinken in Wassermann, 1984: 797ff.) Its essential components were seen as organized in an unlimited number of multiple, different, voluntary, competing, non-hierarchical and autonomous groups. Apart from the general guarantees of the constitutions, these groups have no particular special state-licence, recognition or support. They are self-organizing and not formed upon state initiative. There is no state control regarding the recruitment of leaders or interest articulation. They have no representational monopoly within the social sector represented (Schmitter, 1974).

The Bürgerliche Gesetzbuch (BGB), the German civil code provides only minimal requirements in mandatory rules for their internal organization. In the pluralist period, the courts applied straightforwardly the classical principles of the law of private associations with only slight modifications. Of central importance is the legal mechanism of "exit control". Basic norm is § 39 BGB which guarantees the freedom to leave the association at any time. Contractual conceptions of internal relationships, permissivity in the internal provisions of associations, high internal autonomy organizations to "exit" control through the membership market (Hirschman, 1970) - these were the governing principles of an internal order of pluralist associations. Guiding idea was to maintain a free membership market in different spheres of society.

Similarly, the relationships of intermediary associations toward politics were supposed to be governed by market mechanisms. A pluralism of free associations is a guarantee for their competition for influence in the political market. Legally, this is supported by their incorporation as collective actors. The legal fiction of the legal person provides them with capacity for collective action on the political market. A second guarantee is the principle of private autonomy vis-à-vis the definition of the organization's goals. Finally, the rule system of normative conditions that regulates their recognition in practice comes close to the principle of free formation of bodies corporate which is necessary for the free interplay of political associations on the political market (Vormbaum, 1976).

After the war, the BGB still contained certain repressive tendencies which stemmed from the discrimination of the Kaiserreich of 1900 against political associations (political parties and labor unions). As a reaction, political parties and labor unions had traditionally refused to incorporate as rechtsfähige Vereine in order to avoid administrative pressures and controls. As a negative sanction, the BGB had

applied to them discriminatory rules. It had applied to them ill-suited rules from the law of partnerships and had imposed to them tough liability rules. Now, under the Grundgesetz, the courts in a whole series of decisions as well as legislation freed them totally from any discrimination (Bundesgerichtshof - BGHZ 13, 5, 10f., 42, 210, 215; 43, 245, 257; 50, 325, 331ff.; Parteiengesetz 24.7.1967, BGBl I 1537). Against the explicit wording of the BGB, the courts privileged associations with a "public status", particularly labor unions, and gave them full rights of legal persons without the normal procedures of incorporation. In this way, the courts translated the constitutional positive guarantees for intermediary organizations into new rules of private law.

However, under the regime of political pluralism, the recognition of their public status was limited, particularly in their relation to civil society. The courts refused to recognize any individual right to access (Aufnahmezwang) to private associations, even if they represented "intermediary organizations" like labor unions, professional organizations and political parties. The courts left it to the discretion of the organization to define criteria of membership and to accept or to refuse new members. A state-granted right to access, the courts argued, would violate constitutional guarantees of freedom of association (Art. 9 GG) and the freedom of political parties (Art. 21 I2 GG; BGHZ 101, 193ff. for political parties). According to the courts, freedom of association does not end as an individual right with the foundation of the association. It is continued as a collective right of "the legitimate organs of the association to decide in their own responsibility and without any state interference about the question who shall be accepted as a new member" (BGHZ 101, 193ff.). Under this pluralist regime, the mediation between politics and social discourses remained a matter of private initiative and was not regulated by the political process.

At the same time the courts upheld a high degree of group autonomy against any state and court interference into their internal affairs (since Reichsgericht - RGZ 49, 150). In this respect again, they considered public status as irrelevant. In these days, they explicitly refused to apply different rules for the associations which held a monopoly or a special position of social power (BGHZ 47, 381, 384f.). They recognized an "autonome Vereinsgewalt" not only for private clubs but also for intermediate organizations. Courts interfered with disciplinary action only in very narrow limits. Normative basis was § 826 BGB (violation of boni mores). Only when an association "acts against the law or against boni mores or violates blatantly equity" the courts would interfere with its internal affairs (BGHZ 13, 5, 10f.; 21, 370; 29, 354; 36, 109; 75, 158, 159; 87, 337, 343) Against a growing opposition of legal doctrine, German courts for many years refused to scrutinize cases of disciplinary action. Even in cases of expulsion of members, they were not willing to test the truth of their factual basis. They admitted judicial review only for two narrow questions: Does the expulsion have a formal basis in the constitution? Are some minimal requirements of due process met? (BGHZ 45, 314).

This type of organizational law may be termed neutral formal law, which ideally meets the conditions of privateness, conditionality, formality and generality (Habermas, 1976). State control is used in a very indirect sense, i.e. only to the extent that law attunes the organizational structures to coordination between political and social markets. The law in its social theory assumes contractual mechanisms that are

self-regulating. They are supposed to coordinate on the one hand the organizations' adaptation to the political market where interest groups compete for influence on policy issues. On the other hand, contractual mechanisms balance social interests via private definitions of purpose. This pluralist law is founded on private autonomy and purposive rationality. It acquires its rationality from the conceptual model of perfect competition on all markets. To be sure, it does take account of their public status, but only insofar as it guarantees access to the political market and grants them autonomy within the political process. All the rest, especially the scope of their mediation with different sectors of civil society and their internal adaptation to this mediation, is left to private self-organization.

This twofold contractual mechanisms (toward politics and toward civil society) creates an "elective affinity" of private organization law with the ideal type of a pluralist social structure. If pluralism is defined as transferring the liberal market model from individual actors to groups and organizations then associative organizations can be seen as competing on two markets. They act on the market for political influence vis-à-vis governmental bodies and political parties on the one hand, and on the market of different sectors of civil society who are competing for political representation on the other. Without exaggerating, it may be said that in this first phase of West-German law, the rules of private organization supply socially adequate legal structures for a social pluralism.

IV. Social Corporatism: Integrating Capital and Labor into the State Apparatus

What is of interest here is not the discrepancies between a pure pluralism model and the ugly reality of an "asymmetrical" pluralism with its consequences for organization law. Instead, it is to analyse the transformation from pluralist to neo-corporatist structures which occurred in West-Germany mainly in the 1960s and 1970s. This transformation is relevant not only for political science but also for law and legal policy. What doctrinal problems have ensued from such changes for social organizations, and how have legal policies concerning intermediary organizations responded?

There are a number of competing concepts of the neo-corporatist developmental trend. For the analytical model chosen here, a particularly suitable one would seem to be Philippe Schmitter's conception which splits the relationship between pluralism and corporatism into a number of dichotomies along different dimensions. "Social corporatism" is defined as a "system of interest representation whose essential components are organized in a limited number of individual compulsory associations, not competing with each other, with a hierarchical structure and demarcated from each other in functional respects. They have governmental recognition or permission, if not indeed set up on governmental initiatives. In the areas they represent, they are explicitly allowed monopoly of representation, in exchange for which they must observe particular conditions in selecting leading personnel and in articulating or supporting claims" (Schmitter, 1974: 94f.; Streeck & Schmitter, 1985: 8ff.).

For our question - the law of private organizations - this definition has to be

rethought in terms of the legal relationships between associations and sectors of civil society on the one hand, and between associations and the political system on the other. Processes of transition to neo-corporatist interest representation can then, generalizing, be described as loss of market mechanisms in both of the organization's relevant environments. This means on the one hand that competition between associations on the "market" for political influence is replaced by a new symbiosis between government agencies and big interest organizations, mainly capital and labour, which in part move directly into decision-making positions. On the other hand, there are repercussions on the "membership market" of civil society. Both changes translate directly into internal organizational structures. Governmental institutionalization, which make the organization relatively independent vis-à-vis the members, along with the production of "public benefits" which makes the incentive to join go down (Olson, 1965), make fundamental changes in the relationships between members and organizations. Under neo-corporatist conditions, internal structures are increasingly marked by the "logic of administration". In response to corporatist developments, free associations tend towards the type of the professionalized, centralized, functionally differentiated and "administratively rational" organization.

1. Shifts in the political market

Political pluralism had been characterized by a multiplicity of highly specialized interest organizations competing with each other. The aggregation of interests emerged as it were "externally" to the single association as the resultant of competitive processes on the political market for influence. Now, under neo-corporatist conditions, only a few umbrella associations with claims to wide-ranging representation and an institutionalized monopoly of representation arose. Now aggregation had to be accomplished "internally", i.e. within the large associations. The problem was then whether neo-corporatist equivalents for competition between associations could be found.

2. Shifts in civil society

In pluralistic associational systems the individual associations had still largely been dependent on the "membership markets" in different sectors of civil society. Entry and exit had been the main response mechanisms through which organizational control operated. Under neo-corporatist conditions, their relative weight became less as the associations were gradually integrated into governmental action. Since members' motives and the organization's goals became increasingly independent of each other, the subtle mechanisms of consensus and control based on the principle of free entry and free exit were partly deprived of their force. Intermediary associations gained a new independence against their membership which made their responsiveness to civil society questionable. Thus, the problem became whether neo-corporatist substitutes for pluralist organizational controls were available which would strengthen their intermediary position between politics and civil society.

3. Changing legitimation problems

The transition from pluralistic to neo-corporatist forms was motivated essentially

because the legitimation of politics versus civil society had become problematic. The new symbiosis of big interest organizations and governmental agencies unburdened the latter, since they could now count on the one hand on support from the organizations and on the other on enforcement of decisions internally in the organizations. But the outcome was merely a shift in the legitimation gap. Similar legitimation problems now emerged between associations with public status and civil society as a conflict between membership and leadership of the organization. The new challenge was that the legitimation effects of the membership market and also those of the influence market had now to be secured within the organization.

4. Increase in need for integration

The mediation of social demands with government policy in pluralism had brought about a "pressure politics" model. Organizations had been linked with decision-making bodies through channels of influence; because of their relative autonomy, organizations could "afford" to pursue the interests of the social sector involved rather ruthlessly. Mediations with other interests and with governmental viewpoints had been left up to the governmental decision-making bodies. This necessarily changed now, as neo-corporatist organizations became involved directly in political decisions. They now had to act "responsibly", i.e. to bring about a twofold integration by balancing organization policy with both governmental policies and social interests.

A parallel development could be seen in all four sets of problems: a shift from "external" coordination between the political and the social markets to "internal" political processes within the intermediary organizations. It was therefore not surprising if legal policy attention went particularly to political interest formation within organizations though often with confusing references to "organizational democracy" understood as membership participation.

In the German legal policy debate aiming at neo-corporatist legal regimes, the following public-law concepts have been proposed to be brought into these formerly private law areas: The actions of parties to collective bargaining should be tied to imperative guidelines laid down by government. The legal principles of the "beliehene Unternehmer" (= private enterprises with public tasks to which rules of public law are applied selectively) should be extended far beyond their original range of application. Associational action should be brought under government supervision. Checks on legality should be made through the administrative courts. Parliamentary controls and supervision through the courts of auditors ought to be introduced. By binding them to a public good clause or some other general clause, associations should be brought under judicial or parliamentary control. At the end of this scale lies the conversion of private organizations into public-law bodies corporate (see Teubner, 1979).

V. Polycorporatism: The "State" of Private Networks

The 1980s, however, have altered drastically the character of West German macro-corporatism. The world-wide revitalization of neo-liberal policies has also deeply affected the West German regime of trilateralism. While it is true that West German

corporatist regimes has not been destroyed by the wave of internationalization, deregulation and de-unionisation, the quality of the corporatist regime in Germany has undergone substantial change (Streeck, 1990: 134ff.). Political scientists observe tendencies toward a decentralization and pluralization of the centralized trilateral corporatist arrangement between state, labour unions and industrial associations.

"At least in some areas the stable bilateral or trilateral relations of neo-corporatism seem to be substituted ... by large interorganizational networks" (Mayntz, 1992: 32).

While the central importance of the German "iron triangle" has considerably decreased, increasingly, specialized political arenas have adopted corporatist arrangements (Flam, 1990; Döhler & Manow-Borgwardt, 1991). In Germany, there are now several policy fields in which corporatist arrangements have been firmly established. This is especially true for technical standardization, (Wolf, 1986; Falke, 1987) environmental policies (Voelzkow, Hilbert & Heinze, 1987), vocational training (Streeck, 1983; Hilbert, Weber & Südmersen, 1986), health sector (Gäfgen, 1988; Döhler, 1992), and social policy (Heinze & Olk, 1984).

Kenis & Schneider (1991: 34ff) attempt to give a broader interpretation to these developments. They argue that the tendencies toward a new "poly-corporatism" are fostered by the following underlying long-term trends which became highly visible in the 1980s:

1. strengthening of non-state formal organizations in different sectors of societies (Perrow, 1988: 3ff.)
2. radicalizing sectoralization and functional differentiation resulting in "overcrowded policy making (Richardson & Jordan, 1983: 247ff.)
3. increased scope of state policy making in diverse policy arenas without the concomitant growth of necessary control capacities (Brodkin, 1987: 571ff.)
4. decentralization and fragmentation of the state (Kenis, 1991)
5. blurring of the boundaries between the public and the private resulting in trends of informal administrative action (Hucke, 1982: 130ff.)

Political overload and "governance under pressure", they argue, are resulting from these trends. Increasingly unable to mobilize all necessary policy resources within their own realm, government consequently is becoming dependent upon the cooperation and joint resource mobilization of policy actors outside its hierarchical control. As a result, policy networks between state and interest associations gain in

importance. These policy networks should be understood as those webs of relatively stable and ongoing relationships which mobilize dispersed resources so that collective action can be orchestrated toward the solution of a common policy problem (Kenis & Schneider, 1991: 36).

In the move from centralized macro-corporatist arrangements to the more flexible decentralized and pluralized networks of poly-corporatism, the internal differentiation of politics seems to undergo a new change. Two contradictory tendencies are working at the same time. (1) Entstaatlichung of public policy: The state as collective actor is receding into the background. The experience of state-failure in welfarist policies and the wave of deregulation has led to a partial retreat of administrative bureaucracies. (2) Verstaatlichung of intermediary organizations: Their role no longer consists only in pluralist interest representation, but full-fledged participation in public policy, implementation of state decisions and even in an autonomous self-administration of public affairs.

Result is a new "state" of private networks. Against all observations to the contrary, the "state" as the self-description of politics does not shrink at all; rather, it expands its scope and includes new and different collective actors. Instead of being the collective personification of a centralized governmental hierarchy, the "state" now is being transformed into the self-description of a loose network of private and public actors. Governmental bureaucracies, political parties and autonomous social organizations form a loosely coupled configuration of cooperation which replaces the hierarchical unity of old state government (Scharpf, 1991).

Within this network, a new political division of power between governmental bureaucracies and private sectoral organizations is emerging. Governmental bureaucracies give up a part of their public competencies while private associations give up a part of their private autonomy (Streeck, 1987: 488). Associations take over governmental activities which in their view were not functioning well (Ronge, 1992: 59). But this requires a new orientation of their action. In their new public role the new objective for a legal constitutionalization of social organizations is to increase their responsiveness to general and public interests (Streeck & Schmitter, 1985: 21; Mayntz, 1992: 13). The new formula is "publicly responsible self-regulation in decentralized social systems" (Mayntz, 1992: 22).

Thus, the "state" of the private networks can only work if government is strong, not weak. Government in this regime is concerned with facilitating organizational development and institutionalizing public status of interest associations. If these associations are supposed to work as private government they need to be supplied with additional power and authority which they could not mobilize solely on a voluntary basis. At the same time, government does not restrict its role to delegate decision power to intermediary organizations. The new governmental role is to constantly monitor and re-design the self-regulation of intermediaries. Moreover, government is retaining considerable power of direct regulation, not only as a last resort but as a credible threat vis-à-vis the new private governments. It is only "by a combination of procedural, instead of substantive, regulation with a credible threat of direct intervention" that government can hold private governments at least partially

accountable to the public (Streeck & Schmitter, 1985: 26).

VI. Constitutionalizing Polycorporatist Associations

What are the consequences for the law of intermediate associations? What role are the courts playing in the new polycorporatist arrangements? Let us return to the rainbow-coalition, to our paradigmatic case in which union members were expelled because in the elections for work councils they had challenged their union with an alternative list of candidates. The courts in a whole series of decisions came up with a solution which totally reversed a traditional principles of the law of private associations. The courts usually nullified the expulsion and re-instated the political opposition in their former membership status. Our case illustrates how private law does react to changes from pluralist interest-mediation to neo-corporatist arrangements with recent tendencies toward poly-corporatism.

1. Autonomy of polycorporatist associations against court interference? Here, a dramatic change of the courts' policies did occur. 1983 was the landmark decision which finally abandoned the old tradition of associational autonomy (BGHZ 87, 338ff.). Now the courts scrutinize also the factual basis of an associational disciplinary action. Underlying motive for this turn is the new public status of private associations which moves the review of private associations very close to the judicial review of administrative decisions. Result is a pervasive judicial control of "administrative" decisions, with some secondary discretion areas. These, however, are narrowly interpreted.

2. Constitutional rights for organizations (Art. 9 III GG; Art. 19 III GG)? Here we find a similarly dramatic reinterpretation of the "negative" effects of rights in terms of institutional guarantees with procedural consequences.

In the work council election cases, unions claimed that their internal decision process was even stronger protected by the constitutional guarantees of Art. 9 III GG. If by law they have the institutional entitlement to participate in work council election then the constitution protects their right to influence their members in the election procedure. This protection covers also to set their members under obligation not to appear as candidates on competing election lists (Wendeling-Schröder, 1990: 110f.).

The courts, however, drew the consequence from the neo-corporatist incorporation of labor unions in the process of work council election within enterprises. They extended the institutional protection of the integrity of the voting procedures into the internal decision processes of the unions insofar as they are integral part of the election process. Thus, they applied § 20 II Betriebsverfassungsgesetz which prohibits "to influence the work council elections by threatening or inducing damages" even in relation to internal affairs of unions. They were confronted with the rule conflict between external principles of a free work council election and internal autonomy of labour unions. They gave priority to the integrity of the election procedure building on the neo-corporatist integration of unions which can no longer claim the autonomy of private associations.

3. To what extent are individual rights of membership re-interpreted under a polycorporatist regime? The courts protect sectors of civil society via granting individual rights against the association, including the right to access, judicial control of internal rule-making and protection against expulsion? Public status requires guaranteed access to social organization if they represent exclusively whole sectors of social life. Here we find the third decisive turn of the German judiciary (BGHZ 63, 282; 93, 151; 102, 265). Again, it is the historical shift in the external relations of private associations that motivates the courts to abandon the old principle of associational freedom in the selection of its members. Neo-corporatist associations have a monopoly of representation. The courts even extend their control beyond associations with a representative monopoly; it is sufficient if they exert to a considerable amount "social power". If associations exert a public role then the courts grant individuals the right to access to the association. The association has to demonstrate "substantive reasons" if it wants to refuse membership. And the courts reserve the right to review these reasons (Bartodziej, 1991: 517ff.).

By analogy, this judicial control of access to the association has been extended to the control of internal rule-making within the association. The internal law-making power of private associations has for a long time been the center of associational autonomy which had been respected by the courts. The German Federal Court does not any longer recognize this autonomy for association with a public status. Judicial control is necessary for those "associations that exert considerable power in the economic or social sector" (BGH NJW 1989, 1724). The courts are using the standard of "good faith" to review associational laws. Practically, they use the test of interest weighing between associations and members (Grunewald, 1987: 126ff.; Bunte, 1991: 317ff.)

Strong judicial protection of members in their micropolitical activities within the union against expulsion and other disciplinary matters follow directly from this new perception of private associations. This motive is especially relevant in our paradigmatic case of work council elections (BGHZ 45, 314ff.; 71, 126ff.; 87, 337ff.; 102, 265). The courts themselves define where the fine line is to be drawn between legitimate internal opposition and illegitimate activities which damage the association. Participation in a competing election list is still covered by the right to internal opposition. The limits are reached when the opposition works toward a "total confrontation". (cf. Zöllner, 1983; Wendeling-Schröder, 1990: 107ff.)

4. Internal democracy in quasi-public private associations: minimal requirements of law? In the work council cases, the courts went even beyond the mere protection of individual membership positions. They went so far to demand a minimal amount of associational democracy if the association has the institutionalized right to participate in work council elections. They made the right of the union to ask for election discipline dependent on the internal procedures how the union candidates were pre-selected (BGHZ 45, 314ff.; 71, 126ff.; 87, 337ff.; 102, 265). They did not require internal elections in the unions. Rather, we find a re-interpretation of direct and participatory democracy in terms of internal pluralism and public responsibility of private organizations.

(Gemeinwohlverpflichtung).

These developments in judge-made law can be understood as tendencies toward a new legal regime of polycorporatism. The key is a new concept of associational autonomy. Classical private autonomy shielded their activities against any judicial intervention and allowed judicial review only in the narrow cases of open abuse of power. Under conditions of polycorporatism this private autonomy tends to be replaced by a new social autonomy of quasi-public associations.

Taking autonomy seriously means to rely on self-determination and at the same time on unavoidable externalization (outside control), not understood as hetero-determination but as a potential outside support in situations of impossible self-help. It would be similar to therapeutical help and to supportive structures outside of the law (Wiethölter, 1988: 27f.).

The private law of polycorporatism is looking to a new balance of social autonomy of intermediary association on the side and their structural coupling to the legal system on the other. Intermediary associations take over important public power of decision making. The courts do not interfere with these powers, but set limits to the intermediaries' control of membership conditions and their rule-making power. Here, one might find elements of what Taylor calls the new balance between L-stream and M-stream. If the idea of social autonomy is applied not only to the economic sector but to a multiplicity of social discourses (Wiethölter, 1992) it may become a model for new ways in which law opens up to the dynamics of civil society.

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