Juridification of Social Spheres
A Comparative Analysis in the Areas of Labor, Corporate, Antitrust and Social Welfare Law

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Juridification

Concepts, Aspects, Limits, Solutions

GENEVIÈVE TESSIER, Berkeley, France

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1. Introduction

Juridification is an ugly word — as ugly as the reality which it describes. The old formula used to describe the excess of laws, flat usitate, perpeet mundor, is at least had the heroic quality of a search for justice at all costs. Today we no longer feel that the proliferation of laws will bring about the end of the world but we do fear “legal pollution” (Ehrlich, 1976). The bureaucratic sound and aura of the word juridification indicate what kind of pollution is primarily meant; the bureaucratisation of the world (Jacoby, 1969; Boretsky, 1978: 52). To put it in the language of sociology: law, when used as a control medium of the welfare state, has at its disposal modes of functioning, others
of rationality and forms of organization which are not appropriate to the
"life-world" structures of the regulated social areas and which therefore
certain fall to achieve their intended results at the cost of destroying these
structures. The ambivalence of juridification, the ambivalence of a guarantee
of freedom that is at the same time a deprivation of freedom, is made clear in
the following phrase: "the life-world", which was coined by Husserl. Business
modernization at the expense of subjection to the logic of the system and the
standardization of social structures is the essence of this idea (Habermas, 1981: 522; 1985: 202).

Expressed in this extreme, drastic form, juridification describes a "story"
which is not merely a problem of norms, nor a national phenomenon. The
"story" unfolding does not spring from the well-known Teutonic

tendency towards over-legalization, for the root of the problem is not confined to
German juridification. Although national divergences exist (see Daintith
1967) the phenomenon is universal, and the debate international and
interdisciplinary. In the United States in particular a lively debate goes on about the
"legal explosion", the "regulatory crisis" and "delegitimization" — a
debate in which not only lawyers and judges but sociologists and economists
are particularly involved. If our attempts — and this is the aim of this intro-
duction essay — to bring together some of the different strands in this discus-
sion, the result may be attractive for all who participate in the debate.
National peculiarities will deserve to be seen in the light of their universal

endings. Sociological generalizations can be corrected when viewed from
within the laws if they are not specific national legal material. On the other hand

a dynamization of the perspective could be hoped for if extralegal modes of interpretation are actually taken up and not simply
dismissed. However, one must remain sceptical about the possibility that such
learning processes will actually lead to perspectives for solutions. The
problem of "juridification" is not abstractly formulated for this and such as
perhaps even insoluble. What can be achieved is tentative answers to three
questions: How and to what extent is the expansion of law into the social envi-
rionment contingent and inseparable and inescapable, and how is it
connected to wider societal developments? How and where are the limits of legal
growth becoming apparent? And can guidelines for a kind of legal

growth which is less damaging to the social environment be given? For each of these

complexes of questions a proposition can be elaborated. The first

complex concerns the expansion of the problem of juridification. In the present
debate, the term has come to designate so many diverse phenomena that it
must be carefully delimited before any sensible pronouncements can be made
about it at all. It is scarily illuminating to subsume all tendencies towards

1 For the previous discussion of "growing legalism", cf. Fuller, 1969: 3; Sklare,
Wilson, 1960; Wilson, 1965; Breyer, 1982; Star, 1985. Cf. the results of a

German-American conference on regulatory control, Tübingen, 1984.
programs which, sometimes more, sometimes less explicitly, define structural coupling as "legal self-restraint" and which, therefore, are appropriate as a means of reducing legal pollution.

2. Concepts

A precise use of terms and definitions is necessary, especially in the case of jurisdiction, not just for the sake of terminological clarity but, as already indicated, to create a working framework in which to examine the complex phenomenon of jurisdiction. Furthermore, when we are using a term as a potential as jurisdiction it becomes clear that the term not only enables us to make definitions but also provides options. Options are empirical analyses of the historical situation on the basis of which evaluative assessments are made, strategies chosen and decisions taken (Luhmann, 1981: 118; Reidelreuther, 1985: 99 f.). Notices of jurisdiction always contain a theory of the conditions in which it developed, an evaluation of its consequences and a strategy for dealing with it. A clarification of the term would therefore have to lay bare these three elements in the different ways in which the term is used. At the same time it would have to state the reasons why one of the options is finally chosen.

2.1 Legal Explosion

In legal discussion jurisdiction is described primarily as a growth phenomenon. Fear-laden terms such as "flood of norms" or "legal explosion" (Barouš, 1975: 367) underlie the descriptively effective which the rapid expansion of law has had on the legal profession and the general public alike. Especially in those areas of the law which cover the world of industry, labor and social solidarity — labor law, company law, consumer law and social security law — the enormous quantitative growth of norms and standards is noted and criticized. From a certain threshold onwards, those involved are overtaken. The enforcement of law is damaged, credibility suffers and a high level of dogmatic mastering of legal material becomes impossible (Hofrichter, 1981: 85). In all four areas of law it can be observed from a comparative perspective that consistency control of norm and decision making material as well as the construction of conceptual structures — the two classical tasks of legal discipline — is given way to a new mode of thinking — "case-law-positional" in Zeinlere plainly terms it is. This style of legal thinking is content to analyze developments in judicial decisions and to produce ad-hoc criticism of their "politics". As an observer from outside has noted: "The disastrous state of modern positive law lies in the insufficiency of large numbers of norms which are produced procedurally in response to a particular situation and are

then lumped together in disordered heaps. No adequate means of coping with this material intellectually has been developed" (Luhmann, 1972: 331; cf. also Hofrichter, 1983: 67).

Of course with a term like jurisdiction, if it is geared towards a crisis of growth, the therapy is implicitly contained in the term itself. Growth itself must be combated. The presupposition reads as follows: rationalization legitimation, reduce the number of regulations, thin out the stock of laws — in short, simplify the law. However, scepticism based on historical experience with such appeals is not unjustified, and perhaps makes one more receptive to the cynical proposal to try the exact opposite remedy: "growth-boosing hormone injections". The experiment has already been tried with weed; accelerate growth beyond an optimum level is a sure means of extermination (Luhmann, 1981: 75).

Yet it still seems too narrow an approach to concentrate on the expansion of legal material, on the expansion and intensification of law. The current criticism of jurisdiction processes under the general heading "flood of norms" scarcely seems an appropriate starting point because it limits the discussion in several respects: the term "flood of norms" merely stresses the quantitative aspect of the increase in legal material — a problem which could certainly be combated by technical improvements in legislation. In fact, qualitative aspects are more important: what changes in the content of legal structures have the (alleged) crisis of jurisdiction brought about? The term "flood of norms" is also historically unspecific — throughout the centuries complaints have been made about the proliferation of laws and their incoherence (Norie, 1974). Jurisdiction processes should in fact be analyzed in terms of the specific conditions of the modern social state, "the interventionist state". This at the same time excludes the law-centered and lawyer-centered perspective of the "flood of norms" school, which concentrates exclusively on the legal material as such. The problem to be addressed is broader in scope: the political and social appropriateness of jurisdiction processes in various social areas (labor, market, company, and social security law). Finally, an attempt should be made to abstract from the national peculiarities of the flood of norms and, adopting a comparative perspective, to bring out the universal features of jurisdiction processes and the problems which result from them.

2.2 Expropriation of Conflict

If one attempts to cure the myopia of the legal perspective by means of the optics of legal sociology jurisdiction suddenly appears in a quite different light. The "politics of informal justice" in the U.S. and the European equivalent, "Alternatives to law", came to the fore while problems of growth reared into the background (Abel, 1980: 37; Blankenagel et al., 1982). Sociologists of law describe the types of law as a process in which human conflicts are iron through formalization out of their living context and distorted by being subjected to

legal processes. Juridification, as it were, is the expropriation of conflict. Chantre (1976: 12) even uses the expression "conflict as property". This is certainly an extreme formulation, but it clearly indicates the direction of the analysis. Double is cast on whether law can fulfill what is generally regarded as its main function, the resolution of conflicts. Numerous socio-legal studies have pinpointed factors which constitute "obstacles to the adequate conflict resolution through law: barriers to access, fear of going to court, the length and colossal impingement of the chances of success" (Hegenbarth, 1982: 48). In this view juridification does not solve conflicts but alienates them. It merely resocializes the social conflict, reducing it to a legal case and thereby excludes the possibility of an adequate future-oriented, socially rewarding resolution.

If conflicts are thus expropriated by juridification, the slogan of the delegelatization movement is: expropriation of the expropriators! As "alternatives to law", informal modes of dealing with conflicts are sought, modes which will take conflicts out of the hands of lawyers and give them back to the people. Certainly, the people will achieve a solution to the conflicts in the real social world, not only in the illusionary world of legal concepts and procedures.

Institutional proposals and experiments (see Blanckenburg, Gerwani, Stumpel, 1982) range from reinforcement of the arbitration element in "court proceeding" to the extension of out-of-court proceedings, to the establishment of "community courts" in big city neighborhoods (Dawise, 1973: 1). Comparative legal and anthropological studies of kithle palavers in Africa, of arbitration phenomena in Japan and of social courts under real socialists are the foundation between "alternative to law".

Three ideas of "community law", as Galamer rightly terms it (Galamer, 1980), have been severely criticized in the socio-legal discussion. Abel provided the ideology-critical, Hegenbarth the conflict-theoretical and Luhmann the social-theoretical variants of this criticism (Abel, 1980; Hegenbarth, 1982; Luhmann, 1985). To put it briefly — a return to "traditional justice" means, under today's conditions, surrendering conflict to the existing power constellations. Secondly, "alternative to law" ignores crucial factors in dealing with conflict under modern conditions of role separation. Thirdly, they interaction of law in functionally differentiated societies — which is to use the possibility of conflicts in order to generate congruent expectations throughout society. They may, of course, be able to formulate useful reform proposals which could certainly increase social potential for satisfactory conflict resolution, but they are scarcely appropriate as a general perspective for interspersing juridification and for developing alternatives to dejuridification. This is ultimately because the current discussion in legal sociology has confined itself to the technical tasks of law (conflict regulation) and has only marginally concerned itself with the really explosive aspects of modern juridification (social regulation). Sociologists of law have concentrated their attacks on the unassailable consequences for a continuation of harmonious social relations when human conflicts are delivered up to the court system. But how relevant is this criticism of our judicial system in face of the far more disquieting tendencies of a political, instrumentalized law, which threatens profoundly to change entire social spheres through its regulatory interventions. In comparison the legal-sociological formulation of the question seems somewhat harmless, almost provincial.

2.3 Depoliticization

In view of these belittling definitions it is perhaps as well to look at the historical origins of the term. The word "Verrechtlichung" (juridification) was first employed as a polemic term in the debate on labor law in the Weimar Republic. Kirchheimer used it to criticize the legal formalization of labor relations, which neutralized genuine political class conflicts (Kirchheimer, 1934: 79). According to Frankel, juridification of labor relations means to "purify" the political dynamics of the working class movement (Frankel, 1931: 255). Critical labor lawyers in West Germany have recently renewed this line of argument. The ambivalence of juridification — the guarantee and the simultaneous deprivation of freedom — is clearly worked out with examples from industrial relations law, codetermination, strikes and lockouts. On the one hand labor law protects and guarantees certain interests of employees and ensures that labor unions have scope for action. Yet on the other, the repressive character of juridification tends to depoliticize social conflicts by drastically limiting the labor unions' possibilities of militant actions (Hoffmann, 1968: 90; Däuble, 1976: 29; von Beyme, 1977: 198; Erd, 1978; Vogt, 1980: 170). This kind of ambivalent juridification and its acceptance by labor unions is explained in terms of the interaction of the interests of specific trade union groups with state control interests: juridification reinforces "cooper-ative" trade union policies, just as it is reinforced by them. This interaction of course occurs at the expense of "conflictive" trade union policies (Erd, 1978: 190).

Here too, the counter-strategy is implied. Only when labor union policy changed to "conflictive" strategies and strove autonomous representation of interests could juridification processes be restricted and labor conflicts repoliticized (Erd, 1978: 26, 251; Rosenbaum, 1982: 392). In fact the inter-pretation of the term has clear advantages over the lawyer-centered and judiciary-critical formulation of juridification. It takes account of the effects of the proliferation of laws on regulatory areas, stress qualitatively as well as quantitatively aspects of change brought about by law, provides differentiated analyses of the ambivalence of the phenomenon and, with its concept of depol-
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Vi

ludification, has, certainly, pinpointed one of the most important consequences of judicidation processes. Nonetheless, it is in several respects an over-simplification. Simeon has pointed out, and it were, "volumetric" nature of this concept of judicidation (Simeon, infra, 134 ff.). The key role of the "conflict/collective" alternative implies that the dynamics of judicidation are precisely a strategy problem of the labor unions: the concept is restricted to the politics of organized labor to point out a national limitation in this concept. Because tendencies of "collective" trade union policy are highly pressed, especially in Germany, it is tempting to regard "judicidation" as German. Yet, persons Rhen (1972) 190; c. Rymme, 1977: 189. This is a defect in comparative legal text, and it shows that the theoretical "trade union policy" and "judicidation" is far more relative than it appeared to be. The limitations of this perspective lead finally to a thoroughgoing defect. The attempts to explain judicidation in terms of intra-union preconditions and the definition between decision-making groups in trade unions with legislation and judiciary (Erd, 1979: 19; Miron, 1980: 171) can perhaps be perceived as a particular explanation of interests and influences operating in this area, but cannot be regarded as a clear analytical task, as alone alone as a component in a social theory of judicidation phenomena. 1 The concept of judicidation hardly seems inappropriate, not so much because it is normatively limited to particular social forces but because it is limited to the labor union perspective and abstract from socio-structural explanations.

2.4 Materialisation

We have examined and found wanting the juridical view of judicidation as a "fluid of norms", the concept of conflict/collective proposed by sociologists of law and the political science perspective which sees judicidation as restricting the room for maneuver of social movements and interest groups. So as to arrive at an adequate formulation of this problem we will have to go beyond those critical views. For the great多数s of legal evolution in the tradition of Marx, Marx, Durkheim and Max Weber, as continued by Parsons, Unger, Noret and Selznick in the U.S. and by Habermas and Lukes in Europe 2 of course cannot even begin here to discharge the complexities of legal evolution. On the contrary, we will merely attempt to take up a few strands from the tangle of theory and to combine them in such a way as to further our comprehension of judicidation. And here the distinction introduced by Max Weber between "formal and material qualities of modern law" will play a crucial role (Weber, 1973: 644).

1 This is not meant as an exact criticism of the very useful analyses of Rymme. It simply seems noteworthy that Frantl very much echoes a criticism of the limited nature of civil organization, and then he has not produced a very limited explanation. Interpreting motives of his explanation we found recently in Erd, 1984.

protection, the institutionalization of company constitutions as well as some other law interventions in the market are all part of this latest epoch-making thrust of jurisdiction in which the interesting world state use law as a means of control to constitutionalize the economy.

If this analysis is basically correct then two important conclusions may be drawn. First, our analysis of the forms of jurisdiction should concentrate on the thrust of jurisdiction in the social state. Jurisdiction cannot be uniquely understood as a unique historical phenomenon. Rather the task must be to analyze a specific form of jurisdiction, which can only be understood in its proper historical context (see especially Clark and Weidenhe, infra). The most pressing problem at the moment is how to cope with the typical thrust of jurisdiction which occurs in the welfare state, one in which law is used as a central medium for state intervention and compensation. The problem becomes one of the "legitimacy and desirability of state intervention" (Partington, infra). In this view, concepts of jurisdiction discussed above appear either too abstract in three approaches or as only partial aspects of a wider problem. The proliferation of law, for example, is not a phenomenon which can be analyzed or even combated at such one but which can only be understood in the context of social guidance in the social state. The "flood of norms" is not primarily a problem for law as such, but one for the intervention state. Conflict expropriation by law does not come within the framework of analysis chosen here so far as classical justice is concerned, but it becomes relevant again as far as these are triggered by typical forms of welfare state intervention. Finally, the restriction of autonomous social groups is in several problems of jurisdiction in the welfare state in which the ambivalence of the guarantee of freedom and the deprivation of freedom is expressed.

The second conclusion to be drawn is that—despite political formulae such as deregulation—delegatization cannot be seriously considered as a counterstrategy (Jope, infra). It is unclear that jurisdiction in the welfare state is part of an epoch-making thrust of development and cannot be reversed by more political formulae. It would be an absurd decision about more law as less law. The "flood of laws" cannot be stopped by storks and dams; at least it cannot be channeled. Nor can jurisdiction processes be influenced by minimal relations be reversed, and certainly not by a shift of trade union policy from cooperation to conflictive strategies. And in the larger perspective of development any delegatization of conflicts is likely to be merely marginal. The already completed functional differentiation of societies with welfare state structures does not permit "alternative law," least to permit alternatives within law.

Radical demands for delegatization—which suggest that the jurisdiction process as such could be reversed—are simply illusory. Indeed the jurisdiction vecor versus deligation alternative should be abandoned completely and replaced by a formulation of the problem which recognizes


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3. Aspects

In order to examine more closely how law transforms itself in the thrusts of jurisdiction in welfare states, it is helpful to take up Max Weber's famous distinction (1978: 65ff.) between formal and material legal rationality. It makes clear what effects are produced when the role of law—as a major function of classical law is overlaid by a welfare state orientation (1978: 64ff.).

More than half a century ago, Max Weber, whose main sociological interest was the tension between material and formal rationality in the most diverse areas of life, described modern European law, and so a layer exists Anglo-American law, in formal-rational. The formalization of law is part of the great rationalization process of the modern era analyzed by Weber, which developed parallel the differentiation of economics, politics and science as spheres of action. The legal system is one of formal rationality to the extent that professional lawyers orientate themselves on universal norms, or more correctly, to the extent that in legal procedures, "in both substantive and procedural matters, only unambiguous general characteristics of the facts are taken into account" (Weber, 1978: 468). In modern legal formulation a conceptually "increasingly logical sublimation and deductive rigor of law" is paralleled by a procedural element, "an increasingly rational technique in procedure" (Weber, 1978: 882). Weber analyzed certain processes of legal development in which powerful social actors to influence the law to transform its orientation from the primarily material relational, to the formal conceptually abstract and procedurally rationalized orientation.

Yet at the same time Max Weber also emphasized certain anti-legal elements in modern legal development. In the law of contract for example such commercialization manifested itself in an "increasing formalization of law" and an increasing legislative and judicial control of the process of contract. For Weber this meant a threat to formal rationality by norms of different quality; "the norms to which substantive rationality acquires predominance include ethical imperatives, utilitarian and other existential rules, and political maxims, all of which diverge from the formalism of the 'external characteristics' variety as well as from that which uses logical abstraction."
According to Weber, the inner quality of highly developed legal culture would be damaged; "the juristic precision of judicial opinions will be seriously impaired if sociological, economic, or ethical argument were to take the place of legal concepts" (1978, 394).

Weber traced this recent particularization of law to various causes. As force here were the "social demands of democracy" (1978, 386) for interventions of the welfare state. Material demands are made on law by interest groups, especially labor unions. Other interests in industry also bring about different materializations of formal law. And finally lawyers themselves bring about change; "new demands for a 'social law' are heard upon such emotionally colored ethical postulates as 'justice' or 'human dignity.'" (1978, 386-387).

However, contrary to the extremely powerful processes of the formal rationality of law, Max Weber observed that these material tendencies as all in all only marginal. In modern theories of development these tendencies are assessed very differently. "Materialization of formal law" today appears as the dominant development trend and evolutionary approaches are brought into play to explain it. The trend toward materialization in welfare states, which expresses itself in the materialization of formal law characterizes large numbers of legal control interventions in areas classically regarded as self-regulating (Hans, 1983, 15) in the world of industry and labor. The main reasons for intervention — and this applies to law as well as to company, administrative, and social security law — are the appearance of phenomena of economic power and/or a societal need for social protection. Justification in welfare issues can be further defined in terms of more processes of change with regard to formal law; change in the function of law, in its legitimation and in its norm structure. 3.1 Function

Compared with classical formal law, materialized law in the industrial world has taken on a new social function. It is no longer inclined only to the normative requirements of conflict resolution but also to the political intervention requirements of the modern welfare state. It can be instrumentalized for the purposes of the political system which now takes on responsibility for social processes — and this means the definition of goals, the choice of normative means, the ordering of concrete behavioral programs and the implementation of norms. Instrumentalization is most evident in social security law, in the two dimensions for which Zacher (infra, 379 ff.) uses the terms excentration and internalization. Here the intensified changes, in which classical formal law itself is transformed for social purposes, are highly instructive. The state applies to individual and to collective labor law, both of which for reasons of social protection were brought into the sphere of political responsibility (Simiun, infra, 121 f.). Both company law and antitrust law must be seen in more relative terms. Criminal law of course, is also conceived as a state instrument to ensure that genuine competition is maintained. The "visible hand" of the state intervenes in the operations of the market to break up excess market power, to limit market power and to exclude the abuse of market power. But its competencies in political instrumentalization beyond its function of guaranteeing competition is problematic and in any case controversial (Hops, infra, 298 ff.). Divergence in instrumentalization seems not very clearly marked in the fields of company law other; however, in certain areas such as the legal definitions, corporate social responsibility, the norms on publicity and in particular the rules of codetermination and company constitution, the "autonom state" intervenes massively in the structure of company law (see Kübler, Busch, Carlim, infra). Perhaps the US American development of corporation law following four stages of legal evolution — I) facilitative rules; II) regulatory taxes; III) "soundness" rules; IV) "consumer protection" (see Clark, 1981, and Moutinho, infra) — provides the clearest example of the increasing role of massive public intervention in capitalist activities. 3.2 Legitimation

Materialized law at the same time derives its new legitimation from this new function. Whereas formal law clearly viewed itself to be confined to the delimitation of abstract spheres for private-autonomous action, material law legitimizes itself by the social results it achieves by regulation. "La justice libérale" is replaced by "la justice normative-sécurisatrice" (Ora, 1984, 46). The legitimation shifts from autonomy to regulation. Even in the still more formally oriented areas of company and antitrust law, the rhetoric of direct regulation are breaking through. In company law if anything obscuring "ethicization" can be observed which basically amounts to regulations for the protection of shareholders and minorities (Wiedmann, 1980-1984). The regulatory intention is far clearer in the case of the regulations on codetermination in the supervisory boards (Kübler, infra). In antitrust law, legitimation is sought in the area of indirect rather than direct control of economic behavior. Yet here, too, regulations on market behavior and the abuse of market power are clearly phenomena of result-oriented direct control (Hops, infra, 298 ff., Markovits, infra, 343 ff.).

3.3 Structure

The transformation of function and legitimation triggered by justification processes in social states clearly also affects the normstructure and inner order of the law itself. The effects range from a weakening of the idea of generality to changes in models of interpretation (see Witteläpp, 1985). In labor law,
the tendency towards particularization was observable at an early stage (Ste- 
mitz, infra: 119 ff.). Classical formal law, in using the concepts of the legal per- 
son, abstracted from socially relevant features and was therefore secured of 
covering up real power positions or indeed helping to force them through by 
this means. In contrast modern labor law deliberately extended the class of 
legal subjectivities of the employer and employee (Rothermel, 1985). Labor law 
thus defined formal legal material in the sense that it internalized features that were previously exorcised. This transposition of

law from general norms to specific positions is probably one of the most signi
ingicant turning points in the course of modern juridification (Kellius- 

social security law are centrally affected, while the changes in company law 
and antitrust law may be judged differently depending on the market situation (Hoep 
infra: 312 ff.). In company law too a growth in position specific 

thinking has been noted under the heading of "role and law" (Laster, 1982: 565).

A further structural feature of juridification in social states is the 

unstoppable rise of "purpose in law". It is no accident that the ideological 

methodology was not included in Savigny's canon of methods; yet its domination 

over other methodologies is more or less generally recognized today13. Indeed the 

term "legal policies" goes even further and legitimizes in constitutional law in 
the policy thinking which is so popular in the U.S. (Steindorff, 1973: 217; 
1979). It can be considered two classical areas of the conflict between two modes of legal thinking. In both areas, policy 

oriented legal thinking is penetrating into areas of classical formal law and 
leading to difficult problems, such as the relation between constitutions 

law and traditional company law in Germany (Wiedemann, 1982a: 627; 
Kühl, 1981: 367) and the conflict between the civil law and the antitrust law 
concept of contract (Hoep, infra: 207 ff.).

At a general level it can be said that the predominance role orientation is being 

increasingly overlaid by an instrumental orientation. According to Selznick, 

"sovereignty of purpose" is the main feature of a responsive law which can only 

develop in the context of the social state (Nenot and Selznick, 1978: 78). Instead of uniquely applying precisely defined legal norms (conditional programs), legal experts now tend to administer ill-defined standards and 

vague general clauses (purpose programs). This is causing a dramatic shift in 

the mode of legal thinking, a shift which can be adequately defined by the 

term "result orientation". However, the consequences of this shift for legal 

decision making far from being adequately worked out, let alone solved (Lah- 

mann, 1974, 1967; Teubner, 1975: 171; Unger 1976: 193f; Röthleuther, 

13 For a comparative law study of evolution of methods, cf. Eichenrcher, 1975; Kra- 

wies, 1978: 86. For the French context, see Ewald, infra: 141 ff.

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Results orientation leads us to a final corollary of juridification which has been 

noted with interest and disgust in recent years. Social science thinking in 

the widest sense has been observed to exert increasing influence on the 

formation of legal concepts and on practical decision making in the courts. 

This is especially true for antitrust law14. This applies not only to academic 

discussion but also deeply affects the decision-making practices of the 

regulatory agencies and the courts. Legal argumentation is heavily subsidized 

by the language of economics, whether the issue is the major ideological 

question of the function of competition (promotion of freedom or economic 

results) (Keil, 1977: 29f; Möscher, 1983: 3). The issue of whether antitrust 

law can be instrumentalized for different economic ends, or the solution of 

technical problems relating to so-called " parasit" competition in § 22 German 

Antitrust Statute (Klausa, 1975) and to the definition of market power: Indeed this 

could scarcely be otherwise, for how could antitrust law credibly demonstrate 

that it was seeking the maintenance or restoration of competition over and 

above the concrete case at hand if it disregarded available social science 

knowledge on the regulatory control of markets?

The situation is the same in the area of company law. In Germany, the great 

legal-political debates on corporate governance (Unternehmensverfassung) 

in the context of the larger political and economic context (Wirtschaftsrechts- 

system) simply could not be conducted without the aid of social sciences. 

Whether explicit borrowings are made from organization theory as with 

terms such as "the company as organisation"15, whether efficiency approaches 

are made disgrace as constitutional law (Budra et al. 1977: 123: Kühler et al. 
1978: 165, 197) or whether company law, in apparently strict dogmatic 

style, is rethought in terms of basic concepts such as "organisation" and 

"group" (Hume 1977: 3; 4, 7) — theories of the interaction between 

organisation and market, politics and law, will always be needed. In the U.S., 

the influence of social science thinking, especially of economic analysis of 

law, can hardly be over-estimated (see Busch, 1984a, 1985, [1986 for a 

critique). The everywhere evident opening of legal practice and doctrine to 

ideas from economics, sociology and political science cannot simply be 

disenaged as a passing fashion of the uneasy sixties and seventies. Of course 

yesterday critical theory, systems theory and "law and society" were the height 

of public fashions, whereas today the trend is towards economic analysis of law, 

"property rights" and "public choice"16. Of course these are fashions, but the
reasons for them lie deeper: the opening to the social sciences is closely connected with the phenomenon of juridification itself. For regulatory law regards itself as instrumental law, as a means of social guidance which aims to bring about certain social changes and therefore needs social knowledge.

In the self-image of classical formal law, on the other hand, particular effects were of secondary importance. Classical formal law saw itself as having to provide only a formal framework, within which social autonomy could develop. In this way, particular legal effects were thereby intended. The tension between formal law can be explained in particular by the fact that it makes itself independent of particular effects on society and if it has any aim at all is to bring about a state of universal freedom. The crisis of formal law cannot therefore be understood as a crisis of effect. In practice it has functioned splendidly according to its own conceptions of its identity. It is in terms of this internal model of formal law that Wendel's clear definition of the "Theorists as such" who is "not concerned with ethical, political or economic considerations" (Wendel, 1904: 121) becomes plausible — a view that today appears arrogant or unusually to us. As Max Weber showed, it was only by indirect means, through politics, which developed welfare state conceptions in response to the pressure of social problems and class movements, that formal law began to suffer from a crisis of identity. It was the conflict between political demands for compensation for the results of industrialization and the structures of classical formal law that triggered the crisis of formal law, to which law has responded with materialization tendencies. In contrast, materialized law as an instrument of political guidance regards itself as designed to produce social effects. If these effects are not achieved, this directly affects in legitimacy. Accordingly, material law is forced to enlist the aid of implementation analyses. Social sciences therefore become directly relevant in that analyses of effects can shed light on the effectiveness of law. The concept of so-called sociologization of law cannot therefore be arbitrarily modified by lawyers according to mental fashion, on the contrary, it is connected with the transformations of law in the welfare state itself.

At this stage we may formulate a first interim finding: juridification does not merely mean proliferation of law; it signifies a process in which the interventive social function of an already given type of law, regulatory law. Only when both elements — materialization and the intention of the social state — are taken together can we understand the precise nature of the contemporary phenomenon of "juridification". Regulatory law "correctively specifies conduct in order to achieve particular substantive ends" (Stewart, 1968). Regulatory law, which is characterized by material rationality as opposed to formal rationality, may be defined in terms of the following aspects. In its function it is geared to the guidance requirements of the social state, in its legitimization the social results of its controlling and compensating regulations are predomi-

in its structure it needs to be particularistic, purpose oriented and dependent on assuredness from the social sciences. As part of a greater historical process juridification cannot be reversed by political decision. The only approach worthy of serious discussion is that which seeks to mitigate dysfunctional problems resulting from juridification.

4. Limits

4.1 Regulatory Trilemma

What are the dysfunctional problems resulting from juridification? With such an abstract formulation of the questions we will have to concentrate on questions of principle — islands of safety where we can escape drowning in the flood of norms. Above, we have already discussed implicit problems resulting from juridification under headings such as proliferation of law, conflict expression and depoliticization — the list could be increased at will. In contrast to these partial aspects of the problem, the fundamental question is: are there any signs that regulatory law has reached innumera-

ble limits of effectiveness? Has juridification already reached its

"limits of growth"?

In order to find our theoretical bearings, we will again draw on Max Weber's concepts of formal and material rationality of law, for this time we will examine them from a different angle. Weber (1978: 641 ff.) described two conflicting developmental tendencies. On the one hand the legal system increases its "formal" specialization, professionalization and internal systemat-

ization; on the other hand it is exposed to increasing "material" demands from social interests, to the welfare-state demands of democracy etc. From the viewpoint of system theory this is to be reformulated as a conflict between the social function of law, namely to produce from conflicts social expecta-

tions in which it then specializes more and more, and the regulatory perform-

ance with which the social environment demands from law. 19

This indicates that the materialization of formal law should be reinterpreted as a process in which two conflicting trends are intensified simultaneously. On the one hand the "formalization" of law is intensified in the sense that law parallels of the functional differentiation of society and develops its autonomy to a point which sociologists today refer to as an opposite, self-refer-

19 For the distinction between function and performance in law, see Teubner, 1963: 272.
ence". This concept cannot here be analysed in all its ramifications; a rough explanation will have to suffice. The official definition is: An autopoietic system of this kind in all its operations always refers to itself and produces its elements from the relations between its elements. In the field of law autopoietic self-reference means that its validity is based solely on legal normativity and that legal values are self-reproduced and thus effectively freed itself from all extralegal connections — politics, morality, science — as well as from justifications in terms of ends of life. Law, therefore, only reproduces itself intra-legally (Lohmann, 1985).

On the other hand, "materialization" of law increases with, and is indeed caused by, the increase in formalization. The more the legal system specializes in its function of creating expectations by conflict regulation, the more it develops norms and rules on which decisions which can be used for future oriented behavior control. This can only be formulated in the following parametrical terms: law, by being set aside as autonomous in its function — formality — becomes increasingly dependent on the demands for performance from its social environment — materiality. And in today's conditions this means: autonomously, postively, highly formalized and professionalized law, when instrumentalized for purposes of political control, is exposed to specific demands of politics on the one hand and of regulated areas of life on the other.

This tension between increasing autonomy and increasing interdependence explains the necessity and the problem of modern justification. The problem lies precisely in the "contradiction" between increasing autonomy and simultaneously increasing interdependence: in certain sectors of society such as economy, politics, law, culture and science become so autonomous that they not only program themselves, but exclusively react to themselves, they are no longer directly accessible to one another. Within its own power cycle, politics produces binding decisions; law reproduces its normativity in the decision-rule cycle and the economy is, so to speak, short-circuited in the money cycle. Reciprocal influences do, of course, occur permanently but they do not operate according to a simplistic scheme. External demands are not directly translated into internal effects according to the stimulus-response scheme. They are filtered according to specific selection criteria into the respective system structures and adapted into the autonomous logic of the system. In terms of external influences on law, this means that even the most powerful social and political pressures are only perceived and processed in the legal system to the extent that they appear on the inner "scene" of legal reality consciousness. Conversely, legal regulations are accepted by environment systems only as external triggers for internal developments which are no longer controllable by law.

One is therefore forced to abandon views of effective outside regulation, the notion that law or politics could have a direct goal oriented controlling influence on sectors of society. The effect of regulatory law must be described as far more modest terms as the mere triggering of self-regulatory processes, the direction and effect of which can scarcely be predicted (Beer 1975 p. 76). Moreover, saying that legal regulations do not change social institutions at all, they only offer a new challenge for their autopoietic adaptation. Cyberneticians use the term "black box" to describe this phenomenon (Gleick, 1979: 33).

External influence on areas of social life is possible but this is crucial — only within the paths and the limits of the respective self-reproduction. These are described by the regulatory triad: Every regulatory intervention which goes beyond these limits is either irrelevant or produces distorting effects on the social area of life or else distorting effects on regulatory law itself (Teubner, 1978).

The matter is further complicated by the political instrumentalization of law. In the activist state legal regulation involves not only the legal system and the respective social area of life but inevitably also the political system. However, the legal system and the political system in turn are autonomous self-referential social systems which cannot directly influence each other but can only reciprocally trigger self-regulating processes. They can only do so if they respect the limits of their respective self-regulation. If we adopt this perspective and regard justification processes as complex relations between these self-regulating social systems, we begin to grasp why "regulatory failures" must in fact be the rule rather than the exception and that this is not merely a problem of human inadequacy or social power structures but above all one of inadequate structural coupling of politics, law and the area of social life.

The unlikely event of a successful structural coupling of political decision-making, legal norm-making and social guidance can only occur if relevance thresholds are successfully crossed and if the respective limits of self-reproduction are observed. If this structural coupling is not achieved, then law inevitably gets caught up in the regulatory dilemma mentioned above. We can now see more clearly that the framework of law applies both to the regulated area of life and to politics. For law must first pass through a complicated series of phases, beginning with the build-up of political power and the political guidance decision, moving on to legal norm-making and application and finally to the powers of social implementation. First, the guidance decision is "legalized" in the political process, i.e., politics is translated into law. This first place of justification is itself problematic, for it must on the one hand satisfy the relevance criteria of law but on the other...
must not interfere with the conditions of self-regulation either of law or of politics itself. In the second place of "constitutionalization" the social area of law is "legislative" by regular law. Here law must exert social influence through its limits but not through the limits of its own self-regulation, nor that of social self-regulation. In other words, the regulatory tensions exist on both branches of the law, which either apply to politics and which are bound by the area of social life. The tensions exist in three forms: first, as a problem of mutual interference; second, as a problem of self-inference at social dimensions through law; and third, as a problem of legal disintegration through society.

4 Mutual Indulgence

Robert Fischer in his "Constitutional Law and the Establishment" of the German Democratic State, having noted the Jones v. Rankin of the Supreme Court of the Federal States, has criticized the approach of politics of the German Administrative State, arguing that the Law for the Protection of the Constitution is no longer a law but a novel, that paragraphs covering three pages are not illegal, that political compromises have left the application of law without meaning and that cultural differences have become legal differences (Jones, 1973: 46). Fischer's criticisms are similar to the picture of how politics can fail to achieve the valid criteria of law. He does not discuss the mechanisms of the self-regulation of comparison but as the main reason for the growth of this sorts of law (Jones, 1973: 313). For example, arguments against Mattair, infra. Now. The reaction to this is to increase indulgence to political regulations of this law. The legality is constantly producing intentions to. Indulgence can be seen as the answer to the internal sphere of the social system, they vanish without trace. This is the second law of politics is not confined to continue law. Indulgence is the core of all the laws designed to control the economy in the way that has been noted that the inadequate adequacy of modern legislative decisions are the micro and macro level after the traditional legal control and recognition problems (Beilinberg, 1982: 45). This is an inherent conflict in the structure of politics and law as systems with different structures. According to Lichtenstein, "the legal selection of legal decision-making processes by parliamentary legislatures is a permanent problem for "legal systems" (Lichtenstein, 1979: 48).

There are, however, two sides to this indulgence. Not only must politics grant its decisions to legal decision-makers; law too can and must change its relevance criteria. The increasing use of the method of "interest weighing" and the increasing power of political decision-makers in all cases. Accordingly, in some cases, this political setting is not seen as legal indulgence but it is in fact merely reached through the lack of consistency of politics and law. Law can change in concrete structures without affecting its self-regulatory order (for this distinction see Gurrey and Vassil, 1978: 127.).

In the case of Germany, the complexity between political and economic law and the current laws on corporate law provide a good example of this situation (Vassil, 1980: 467). The inactivity in it is said that corporate law has power over the codification law (Maksimov, 1976: 114). This would therefore be a case of such indulgence of law to politically motivated change. The most striking cases on codification, particularly of the Federal Constitutional Court but also to a lesser extent of the Federal Supreme Court as well (Bundesverwaltungsgericht c. 50: 286, Bundesgerichtshof, Nace Garrettson, Wackenroeder (RGH NSR), 1982: 323), show that relative limits are opposed to absolute limits of legal relevance are involved here. This codification, law is a classical case of manifest political compromises which can however be produced legally processed — as the Federal Constitutional Court decisions demonstrate. Mutual indulgence necessarily occurs only when the adjudication limits of law have actually been reached. In theory this point can be clearly defined: it is the point at which none structures but the self-regulative self-organization itself is suffered. Mutual indulgence represents an important site of the application of the "symbolic use" of politics (Ehrenberg, 1964). In politics great efforts are introduced which never reach society because they disappear when they are translated into law.

Indulgence may not occur until the second state of the indulgence process in cases where policies have been translated into applicable law but legal norms then come into play on the area of life whose structures simply prove resistant to legal change. It is the ascendency of Philip Selznick to law pointed to the important connection between the "consequential readiness" of the legal system and the "opportunity structure" of the social area (Selznick, 1959: 510). He discusses this connection in the field of labor law and company constitution. In "Law, Society and Industrial Justice," (1969) Selznick demonstrates in detail that protections of basic rights and constitutional safeguards in the industrial sphere could only be successfully implemented because the internal bureaucratic decision-making aversions of companies operated themselves, not as to, external legal regulation (Otn. 1972: 372). In the special case area their manner in which he can be turned to an order of relevance is that they comply with legal laws. This is the relevance for Philip Selznick to law pointed. In certain areas, the law provides examples of structurally related legal resistance. It's no coincidence that the Law on Coercion of Competition, a law specifically designed as a paper tiger (Wittkamp, 1959: 259), an image which underestimates the merely symbolic use of law. Yet at the same time this image implies that only problems of power are concerned here. Of course problems of implementation arise from asymmetries of power, such as inadequate political and financial resources on the part of the Cartel Offices or the equivalent regulatory agencies, and methods against which are considered power and financial (resources). Such asymmetries can only be tackled by reordering state control resources. Yet the obvious question of power should not blind us to the deeper structural problems, which is that area of regulation react with indulgence when regulatory law fails to achieve the relevant criteria of the social mechanism. If our react to this by increasing power resources, one can break the indulgence but this does not necessarily lead to the desired structural
coupling; indeed the result may be a partial disintegration of self-reproduction.

This much criticized effect of juridification will be examined later in greater
detail. However, our misunderstanding must be cleared up first (Macaulay, 1981; 144; Rich, 1983). At present article stresses self-reproduction and self-regulation of social sphere. In which regulatory legal interventions can
cili remain external, this should not be regarded as taking sides against political instruments, on contrary, it is a part of law, in favor of a position such as that of Hayek, who views competition as a noncontrollable process of discovery which should not account be interfered with by interventionist constriction. On the contrary, the purpose is to underline the contradictory
nature of juridification, (the fact that in many fields of politics juridification must exist with a realization of law and the setting of self-regulating social systems at the same time); and to show that the
essential task is to discover the limits of this inoperable combination, with a
view to defining the conditions of compatibility, of "structural coupling."

4.2 Social Disintegration through Law

"Colonization of the life-world"—this was the dramatic heading under which Habermas (1985: 223) analyzed the dilemma of juridification in welfare cases. We have already looked at Habermas's analysis of juridification is social states—he sees it as the political legal constitution,
ization of the economic system. Regulatory law, by delimiting class conflicts and
disregarding the social state, has a freedom-guaranteeing character. Yet at the
same time juridification reveals a dilemma. Tendencies to destroy life-world
structures emerge from the very character of juridification itself in the
welfare state and cannot be regarded only as undesirable side-effects of this
process. Social security law itself is the most important instance of this dilemma. Modern social security certainly represents an improvement on tradi-
tional measures for care of the poor, yet bureaucratic procedures and the cash
payment of legal entitlements have damaging effects on the social situation,
on the self-image of those affected, and on their relations to their social envi-
ronment. The alien "di..." structure of conditional law programs cannot
recte adequately, let alone preventively, so the causation of the facts requiring compen-
sation. lettuce provision and bureaucratic procedures subject the concretelife-problem to "abstract abstraction" (Habermas, 1988a: 555-552; 1985: 209-210).

If one attempts to fit this example into our general framework, then the
following limit of juridification becomes clear: law intervenes in
self-regulating situations in a way which endangers the conditions of self-
reproduction. Habermas views this as a general dilemma of juridification in
the social state. In social law, family law and educational law it can be
observed that juridification endangers the self-reproductive spheres of the life-world, i.e. the areas of socialization, social integration and cultural reproduction in their own conditions of self-reproduction (Tannaher, 1976: 139; Pinchas,

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1982: 50) (Habermas, 1981: 545; 1985: 210). Even at the risk of falling short of
Habermas's normative intention, we are obliged to pursue the abstraction even
further. Duties to self-organization and self-reproduction from regulatory
interventions of law are not confined to the sphere of the "life-world". Their
degrading consequences of juridification are also observable in other self-
regulating social areas which Habermas classifies as belonging to the "sys-
tem". For example, we note that the price of juridification of labor rela-
tions would be a "precondition" of the political class conflict (Frankfurt, 1932).
In fact, the above mentioned depoliticization argument leads to the limits of
the juridification of politics. Of course, in the modern social state in particular political
processes are legitimated to a considerable extent, but in such a
way that they make possible the build-up of power to produce binding decisions
and are not replaced by legally specific criteria of right and wrong. The same
applies to the areas of labor and industry. Simons has pointed to the
dilemmatic structure of norms in juridification on health and safety at work:
under the German "Wish Safety Law and under the American Occupational Safety and Health Act the worker gains increased protection of his health and safety, but he also has to accept the increasing restriction of his personal life
area just as he is obliged to accept the consequences for his life style of
measures introduced for his safety (Simons, infra: 132). The same applies to
the extension of constitutional safeguards in the field of labor. If in the case
of dismissals, transfers and appointments employers are to be constitutionally
bound to objective, verifiable criteria, this can lead to the creation of stereo-
types which in turn force employees to conform (Simons, infra: 133 f.).

4.3 Legal Disintegration through Society

A third limit of juridification is reached when regulatory law is itself exposed to
the disintegrating demands of politics and society. This equally important
phenomenon is often overlooked in the course of the debate on juridification,
which has concentrated on the social effects of "deepening legitimation". The jurid-
ification of society can have disastrous repercussions on law itself (Schleier, infra: 410 f.). Political and social demands for regulation push law to the limits of
its effectiveness (Mitch, 1989). This does not mean that the
implementation of law is inadequate, quite the contrary. It is the successful
attempts to increase the effectiveness of legal counsel that have repercussions
on the internal structure of law, repercussions win which law may no longer
be able to cope. Law is so to speak sandwiched—in one side by social wants
policy, which calls for legal endorsement and thus far the adjustment of law to
the logic of political guidance and on the other by the regulated areas of social
life, with their autonomous logic which law must become involved if it is to
be successfully implemented. These double demand law can go so far as
to endanger its own self-reproductive organization.

Nobas Lohmann (1985: 111) recently analyzed the paradoxical dangers
which juridification poses for law in its relation to the societal system. He
distinguishs between normative elements in law as representatives of the self-

reference of law in which legal decisions are produced, and cognitive elements as representations of the openness of law, in which law adapts to its environment. Both elements are necessary but they stand in precisely opposite relation to one another. Now when law is elaborated for regulatory rules in the social state, this precarious relation becomes so strained as to endanger the self-regulatory. Luban quotes two major instances of political overtaxing of law: the rapidity of change in political decisions on regulation, which do not allow the law and dogmatists sufficient time to develop independently, and the resultant orientation of political ideology, which hinders law with the problem of controlling its own results. Although one may question whether there are absolute limits of strain or only relative limits — in which case law could adjust more, particularly accommodation — one must in principle argue with his analysis. Even if law, by developing its own stop rules of result control and by more abstract dogmatic concept formulation, can increase its adjustment and learning capacities — and there is no doubt this is happening — it will at some stage come up against absolute limits at which normativity as such is in danger. Here too, a clear distinction must be made between structural changes within the framework of self-reproductive organization and changes in this organization itself, although this does not necessarily mean that the structural scope of self-reproductive organization can be defined in advance.

Yet this is only one side of the self-endangerment of law by juridification, that is, the enforced inclusion of political criteria in law. The normativity of law is equally strained by the inclusion of social criteria, by the so-called adjustment of law to the autonomous logic of the regulated social areas. Once more German antidote law provides a good example. In his study of the control of abuses in § 22 of the Law on Restraints of Competition, Mischel has shown how the law on competition, for conceptual and practical reasons, has reached its limits (Mischel, 1962: 198; ib. § 22.4). How is it to maintain its normativity and at the same time become involved in a structure of regulations whose elementary rule of law concept that they become, as it were, “moving targets” when they are defined as aspects of the relevant market, of market power and of abuse, with the result that they completely defy any valid legal subsumption? (Mischel, 1974: 166, 171).

Of course to a certain extent economic analytical may be of assistance here. Carrel law, as already stated, provides a spectacular example of the morals made by the social sciences into law (see Mackenzie infra). The phenomenon applies to a wide range of areas. “Norm area analyses”, to use the term coined by Friedrich Miroll (1966: 168), are required in many areas in order to achieve the regulatory intention. But this “ecomomization” and “socialization” of law leads to different and unexpected results that might be perceived as relevant. In the discussion which follows we will take as an criterion how far the various approaches seem capable of avoiding the regulatory dilemma by taking the problem of the structural coupling of law, politics and the area of regulation implicitly or explicitly into account.

5. Solutions

There is no “solution” of the regulatory trilemma in sight. As already stated, the phenomenon of juridification as such is a partial aspect of societal evolution and cannot therefore be effectively reversed by delegitimation strategies. The only approaches which can be taken seriously are those which seek to deal with the dysfunctional consequences resulting from juridification. The solutions proposed are very different, depending on whether juridification processes are regarded as positive or negative and on which problems are perceived as relevant. In the discussion which follows we will take as our criterion how far the various approaches seem capable of avoiding the regulatory dilemma by taking the problem of the structural coupling of law, politics and the area of regulation implicitly or explicitly into account.

5.1 Implementation

Partisan of comprehensive regulation through law will concentrate on the effectivness of juridification. Their view of the problem has been nicely formulated in a branch of socie-political and political research known as “implementication” research (Maynez, 1977: 51, 1982, 1984; Windhofer Herbst, 1982; Sahib and Mazumman, 1980: 538). It aims at its starting point as an "enforcement deficit" of regulatory law which is diagnosed again and again in the environmental, consumer protection, and other policy fields. Implementation research aims to pinpoint the causes of this enforcement deficit and to
produce political recommendations on how to overcome them. The background theories here are frequently theories of political guidance of society, including guidance through law. The political system takes on overall responsibility for social processes and in particular is responsible for balancing cost and compensating for false developments, particularly in economic life.

The problem is reduced to a problem of technical effectiveness. If political regulation fails, then power resources and funds must be accentuated and the means of regulation refined to a point that will ensure the desired effects. In the U.S., this view is strongly supported by a new movement for "re-regulation" (Tochilin and Tochilin, 1983). According to this view, the control of regulatory law can only be overcome if the instrumental effectiveness of law is increased. Accordingly the task, then, is to reinforce cognitive, organizational and political resources so that law in fact will fulfill its regulatory functions. Thus legal dogmatics will have to shift even more from a primarily legal-philosophical orientation, even to their conceptuality (Nissen and Selzgin, 1978). Juridocriticism will definitively come to see itself as one of those social sciences which produce knowledge about social guidance (Ziegert, 1975). Law will then primarily be a matter of social-technical (Podgoreci, 1974). In the attempt to achieve greater efficiency, economic and sociological analyses will have to drawn on. This means in particular that law will have to take into consideration both its own implementation and its social consequences (Lohmann, 1974; Trubner, 1975; Theubner, 1975: 179; Huseleunde, 1979-87; Lühbe-Wolf, 1981).

The boom in implementation research in recent years can be explained precisely in these terms: as the expression of an attempt to respond to the crisis of regulatory law by drawing increasingly on social science methods. Implementation research is based on a clear instrumental notion of law which sees law as a means of social engineering designed to produce certain social changes. In political processes a goal is defined and translated into a legal program which in turn is meant to bring about changes in behavior among those whom it affects. Implementation research works with a relatively simple causal model: the program determines the behavior of the implementers and target groups; this in turn produces the required effect. Implementation research concentrates especially on the last links in this chain and attempts to find out why certain enforcement deficits occur, why certain programs do not result in the desired behavioral changes and the desired changes in the social situation. The major objective here is to increase the effectiveness of regulatory law by clarifying the causal connections in the implementation field, thus making them accessible to social engineering.

Renate Mayntz recently published a first appraisal of the achievements of implementation research in which she points out that "empirical analysis cannot be fulfilled and argues that corrections must be made in his basic approach (Mayntz, 1983: 7). These corrections point precisely in the direction of our notion of "structural coupling". This relates both to the theoretical and practical mastery of causal connections. Mayntz concludes that the scientific ideal of setting upatable causal hypotheses and developing an atomized theory can only be partially realized in implementation research. Instead one must content with far more modern results: 1) conceptual identification of phenomena and the establishment of categories and typologies; 2) the use of the case-study method, which allows only very guarded generalizations; 3) the taking back of precise individual projections on the model of Hayek's pattern predictions, i.e., the mere prediction of special structural patterns. These deficiencies are all explained in terms of the great complexity of implementation research.

This means quite simply that the most ambitious attempt so far to cope with the crisis of regulatory law by means of social science research on its effects will apparently fail because of the complexity of the subject which it is analyzing. Here again — this time on the basis of practical research experience — the limits of regulatory law become apparent. Social science is not yet capable, and is perhaps fundamentally incapable, of developing sufficiently complex models of reality to check and control in the necessary detail the probable effectiveness of regulatory law in the implementation field. From the standpoint of our approach, this is hardly surprising: It is correct that social regulation, because of the autonomy of social systems, can do nothing but trigger uncontrollable self-regulation processes, that simple causal models are inadequate as means of analyzing and checking the results of legal regulations. In this case both the regulatory claim of law and the analytical claim of the social sciences must be restrained: But does this here also mean abandonment of the claim? The various solutions which Mayntz herself proposes are interesting. Pattern predictions allow only projections of very general formulations. In the scientific study of implementation, causal models, it is argued, should be replaced by so-called congruence models. Public policy effectiveness would depend on a "congruent" relationship between structural properties ("the problem to be solved") on the one hand and contextual variables ("program characteristics") on the other. Regulatory law, in the narrower sense of direct regulation which is described as "needly appropriable" ought to be realized by incentive programs and persuasive strategies. Finally, hopes are pinned on the granting of calculated autonomy to implementers and target groups alike. She argues for a specific type of "procedural regulation" as an interorganizational and interorganizational device.

5.2 Deregulation
Is deregulation then the solution? Have implementation expert such as Renate Mayntz, who is not in principle opposed to state intervention, is fascinated by Hayek's "pattern predictions", then we are not far from the normative consequence that deregulation should be cut back to the classical framework for competition — a self-regulating process of discovery. However, careful distinctions are required if the "deregulation" movement's criticisms of juridification processes are to be adequately judged and institutional conclusions
drawn from them (cf. Mitsch, 1980; Boyer, 1981). We must differentiate between at least three different strands of criticism: 1) cost-benefit analyses, 2) economic evaluation of "capstone theories," and 3) political criticisms of "constructive interventionism." In the U.S. in particular, the regulatory agencies, such as the Securities and Exchange Commission, which tackles problems of company law, the Federal Trade Commission which handles questions of antitrust law and the National Labor Relations Board, which deals with problems of labor law, have all been subjected to detailed cost-benefit analyses by economists (McCraw, 1975: 159). The merits on this kind of justification are facts. What the regulatory commissions are trying to do is difficult to discover; what effect these commissions have is, to a large extent, unknown; when it can be discovered, it is difficult. McCraw (1975: 159) estimates that the cost of administering federal regulatory programs in the U.S. amounted to 6 billion dollars and the cost of compliance amounted to 120 billion dollars. These cost-benefit analyses are undoubtedly useful and their results should certainly be considered in the debate over the extent to which and the way in which regulatory justification should take place. But of course economic cost-benefit analyses must be treated with caution and not automatically accepted by all economists. Economic hurdles in the form of costs are relatively easy to measure, whereas the social benefits of regulation are often difficult, if not impossible, to quantify. One must be very wary of allowing economic criteria of efficiency to completely replace the legal or political weighing up of interests and values—a method which is usually more complex. Sturgeon (1986), for example, lists six principles which go beyond considerations of economic efficiency: (1) moral consideration, (2) distribution, (3) citizens' values, (4) assuming control over outcomes, (5) access to judicial remedies, and (6) honoring expectations created by past regulations.

The second strand of arguments for deregulation is found in economic versions of the so-called "capstone theorems." Bernstein (1955), the best known supporter of the political "capture theory," put forward the proposition that regulatory agencies are subject to a typical "life cycle." In the first stage of regulation, it is assumed, they have regulatory task with public support actively, if not aggressively. In the next phase, however, they degenerate into their status as a non-profit organization which can be easily captured by the economic interests they are regulating (hence the term "capture theory"). This thesis, which has been taken up and further developed by political-econo- mists such as Field (1966) and Low (1969), was surprisingly given further support by leading representatives of the Chicago School (Stigler, 1971: 3, 1972: 237, 1978). Stigler, for example, came to the

pointed conclusion that "regulation is caused by the industry and is designed and operated primarily for its benefit" (Stigler, 1975: 114). Justifi- cation is regarded as a resource supplied by politics and demanded by the regu- lated industry. In return for political supports, industries interested in regulatory policies can receive the form of justification which corresponds to their interests. Deregulation strategies based on such analyses do not appear as ill-reasonable; they concentrate on dysfunctional consequences of jurisdic- tion. However they hardly affect the fundamental limits of justification with which we are concerned.

These limits are more likely to be reached by a politically motivated deregulation strategy. Here, too, Chicago stands in the front line (e.g. Posner 1974, Stigler, 1976: 17; McCunnick and Tolman, 1981). Regulatory state intervention is described as the "visible paw" of state economic policy, which prevents the invisible hand of market competition from developing its beneficial effects. The goal strives for here is a high degree of self-organization in society through markets. Milton Friedman says he would have to see a "completely anarchic world" but he is content with "com- pletely unregulated capitalism" (Milton Friedman in der Spiegel, No. 48, 1992: 153). Even clearly recognized deficiencies in the market are preferable to state intervention. The consequence of this philosophy is the demand for complete economic deregulation.

Karl Hayek and his school propose a more sophisticated line of argument (v. Hayek, 1972, 1973-1979). Social state intervention through jurisdiction is criticized as "interventionist constructivism." The criticism has been applied in particular to antitrust law but can also be generalized to cover every area of economic regulation (Hopmann, 1972). This school holds that the correction which interventionism claims exists between market structures, market behavior and market results are based on inadequate theoretical premises and are not empirically testable. They work from the unrealistic assumption that complicated market processes can be depicted in single models of causal relations between a few variables, one that is bound to lead to false economic policies. Hayek's thesis argues that the regulation of market processes, (5) access to judicial remedies, (6) honoring expectations created by past regulations.

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seeking and learning. Competition as a process of discovery is beyond the reach of any scientific method of discovery. It is therefore nonsensical to attempt to define the statistical parameters of competition on the basis of its results, of the so-called economic competitive functions. The only sensible course is to introduce a system of general rules to guarantee the basic conditions of freedom of competition.

In my view the result of a remarkable attempt to enable the central problem of justification, that is the structural coupling of justification and the area of regulation — a remarkable attempt, but one which discredits itself in advance by its normative hypostatization. It is remarkable because it aims to define the absolute limits of effectiveness of justification; interpretivist interference in self-regulating systems cannot in principle be controlled from outside. At the same time, the attempt is made to formalize the conditions of the structural coupling of law and competition in the concept of "pattern predictions" and of law as a system of general rules of the game. Thus, we have the possibility of acting in the political and legal spheres despite the limitations of human knowledge about complex self-regulatory processes. This is also the reason why the concept of pattern predictions is so attractive for implementation research, which has reached its cognitive and organizational limits. This concept of competition as a process of discovery could also be usefully applied to other self-regulating systems which are exposed to legal intervention (Geert Liddell, 1964).

However, the manner in which this theory hypostatizes sectoral economic rationality is unacceptable. The absolute primacy of freedom of competition over other social goals is normatively imposed. According to this view, the role of legal rules concerning the economy would be to safeguard freedom of competition. This is unacceptable to jurists on constitutional grounds alone. In terms of constitutional law it can be said that goal conflicts cannot be resolved by the absolute primacy of freedom of competition over other economic and social goals. On the contrary, the constitutional method normally used seems more practicable: the mediation of goals is termed "practical conciliation" — a method which allows greater legislative scope.

For social theory the position is again unacceptable because it hypostatizes the sectoral rationality of the economic system — market and competition — for the whole and reduces to see it as the precisely the task of justification in welfare systems to bring about "social subsystems into play against the economy" (Habermas, 1961: 332; 1983: 209; Wilke, 1983b). The function of law cannot be reduced to the mere preservation of self-regulating structures. On the contrary, the fact must be acknowledged that one important function of law is precisely to coordinate the sectoral rationalities of different self-regulating systems with each other (Gellner, 1963: 279). The function does not become redundant because self-regulatory systems defy direct control. It remains necessary — but it is incomparably more difficult.

Our discussion has now reached a point at which the most interesting alternative to justification appears. Solutions to the problem of justification are sought which assume both the necessity of the socio-political instrumentalization of law and the necessity of structural coupling with self-regulating areas of life. The problem can be formulated as follows: are there ways and means by which law can change from direct regulatory intervention to more indirect, more abstract forms of social regulation, i.e. to the political legal control of self-regulation?

5.3 Control of Self-regulation

As an alternative solution going beyond the formalization and materialization of law, strategies are today being discussed which tend towards more abstract, indirect regulation by law. Law is relieved of its task of regulating social areas and is instead bound by the control of self-regulating processes (Bolnert and Kletzly, 1962: 102; Roome, 1964).

The crisis of regulatory law is here diagnosed as a social immune reaction to legal interventions. The problems of justification above that differentiate self-regulating systems operate according to their own inner logic, which cannot easily be harmonized with the logic of other systems. Material legal programs have at their disposal modes of functioning, criteria of rationality and organizational patterns which are not necessarily adequate to the regulated area. The background theories on which such ideas are based are frequently macro-theories of society and law, usually variants of system functionalism or critical theory or manifold attempts to combine the two (see Wilmke, 1965; Borkum infra). Notably, these approaches have highly different perspectives, from the emancipation of man to smoothly functioning system technology, depending on the theoretical context and normative preferences. Yet all the approaches have one problem in common. In normative integration still possible in a society characterized by inner contradictions, by disengagement, indeed disruptive conflicts between the specific logic of highly specialized sub-systems? (Habermas, 1961: 334; Luhmann, 1970: 55). They all assume that neither the state nor law is capable of achieving this integration — as Durkheim perhaps envisaged in his notion of organic solidarity. However, politics and law have to bring about important structural preconditions for a new type of decentralized integration of society.

The proposed solution is to move to "coextensive modes of law" (Geertz, 1986), i.e.; to introduce structural legal frameworks for social self-regulation. The term "proprostitution", for instance, is used as an overall heading for this function of law, which is to encourage "social systems capable of learning" (Wilmke, 1982a; 1982b; 1984; 1985). Essentially these manners are conceived here: 1) the safeguarding of social autonomy by an "external constitution" (Habermas, 1981: 124: 1985: 218f), a legal guarantee for "semi-autonomous social fields" (Moore, 1973; Galanter, 1982; 1983); 2) structural frameworks for effective self-regulation, for instance along the lines of "external decentralization" of public tasks or in terms of internal reflection of social effects (Lehne, 1979: 178; Tronsor, 1983: 275; 1987; Hart, 1983; Gotthilf, 1984a: 249; Borkum, infra), 3) the centralization of conflicts between by "relational programmes"
A critical point is reached when not only the parties concerned enter into a cooperative regulatory law more or less openly and more or less legitimated as a negotiation regulating law, but law itself abandons direct regulation to concentrate instead on structuring negotiation systems. Of course labor law provides the historical paradigm here (Simons, infra). When the parties are left to themselves, collective bargaining are, within certain limits, functional equivalents of the goals of employee protection. In many cases indirect regulation of the system of free collective bargaining has been preferred to substantive-regulation because of the obvious advantages it brings. Without placing the emphasis on concrete substantive content state law here tends to regulate collective agree-

ments only indirectly — by making legal recognition of negotiating parties dependent on certain structural conditions, by deriving procedural norms for the system of negotiation and or disputes, and by extending or restricting the competences of the collective parties. In fact the attempt here is merely to control indirectly the quality of the negotiation results through a balancing of negotiating power. More important than rearrangements of social power by means of law are legal strategies designed to increase the “public responsibility” of parties involved in industrial disputes. Here I do not mean the rather naive attempts to impose public accountability on both sides of industry through a “public interest” clause. The development of reflection structures in the system of industrial conflicts, i.e. of structures in which the external social results are taken into account when actions are being considered, is more likely to be achieved by institutional influencing of the size of organi-

zations and their internal structures. Comparative empirical studies no to a certain extent support the hypothesis that the overall social impact tends to be reflected more within the decision-making processes of the system of collective bargaining when collective labor law systematically favors a centralized “industrial trade union” as opposed to a decentralized system of shop stewards with professionally oriented trade unions (Streek et al. 1979; Streek 1979: 206; Gross, 1979: 254). Although here too one should be wary of generalizations, procedural law does show a certain spectrum over material law (cf. Groting, infra). As Simons puts it: “Procedural rules are almost always symptomatic of a phase of jurisdiction in which regulation by material rules is no longer sufficient, if only because of the fundamentally different approach and their limited adaptability to changing social and economic conditions” (Simons, 1984: 102).

Of course, the model of collective labor law cannot be universally applied throughout the world of industry and labor. Similar attempts in other areas to establish a system of negotiation based on countervailing power have proved only partially capable of developing, especially in the field of consumer law (Hart and Jorgens, 1968; Jorgens, 1981: 52). In the U.S. proposals for “negotiated regulation” have aroused considerable interest (Harries, 1982). As a means of preventing excessive “lawyering,” which only intensifies conflicts, it is proposed that the government-concerned hold negotiations on regulation, to be presided over by a convenor who would

(Wilke, 1983: 483-484) or re-interpretation mediatory mechanisms of “pro-

cedural regulation” (Mayntz, 1983; Streek and Schmitter, 1985), by “negot-

iated regulation” (Harries, 1982; Reich, 1983), by semi-formal modes of

procedure in the so-called “discovery process of practice” (Jorgens, 1981:

111), or by legal coordination of different system rationalities (Schaprio,


1984). In short, instead of directly regulating social behavior, law confines itself to the regulation of organization, procedures and the redetermination of competences.

What does this mean in concrete terms? “Negotiated regulation” is one

leading interpretation of law as procedure through law are discussed

today (Harries, 1982; Reich, 1983). It includes “dependent bargaining” as well as “exclusive bargaining” (Stewart, 1986). Antitrust law, for example, contains a wealth of material to illustrate regulation through negotiations, in which solutions are reached through negotiations under the pressure of legal sanctions (Hopf, infra). The control of company mergers is an important example. Here, with the threat of a ban on the contemplated merger looming in the background, modifications of the merger proposal are worked out cooperatively.

“Bargaining is the shadow of law” describes a mechanism which has been

demonstrated in many areas of law (Moo ink and Kronhauser, 1979: 902; Glatzer, 1980). The mere existence of substantive law with its threat of sanc-
tions creates organizational structures which are regulated and monitored by the parties — whether private individu-

als, organizations or state institutions — which ultimately affect the results of negotiations that have been achieved by the law now.

The advantages here are clear to see: this method is more likely to lead to feasible, cooperative solutions geared to specific circumstances as opposed to rigid, approximative and authoritative solutions. The problem of structural coupling is tackled in such a way that the official function of law, which is to deviate changes of behavior explicitly from the background, is to a lesser function, which is to regulate systems of negotiation becomes crucial.

Numerous studies have analyzed how widespread this phenomenon has

become (e.g. Treber, 1983). Events regularly take the following course: First, law is primarily used to bring about a certain kind of behavior by the threat of negative sanctions. However, enforcement defies appear which oblige the parts concerned to transform the enforcement systems into negotiation systems. One can interpret this by arguing that in this case regulatory law is subject to a latent change of function. As direct regulation of human behavior it soon reaches its limits and is slowly superseded by a kind of procedural law. The threat potential of legal sanctions is consumed. In turn this means that the "legal" interpretation of law which warning against the implementation of law too severely is often termed "law" often appears unreasonable and endangers the precarious regulation situation (Bardach and Augus, 1982).
mediate between the parties and be vested with certain legal powers. The intention here is clearly to draw on the experience gained in American labor arbitration. Similar proposals have been made in France in connection with problems of rent and consumer law (Roux, 1947: 28). This generally amounts to the state-directed organization of a system of negotiation in which all the relevant interests of the parties are involved. It is intended to lead to "accords négoces collectifs". The problematic of the parallel to collective labor law (a word used here) — the organization of interest of consumer associations are not even remotely comparable with those of trade unions.

Consumer law, in particular, but other areas of contract law as well, show that "extrajudicial decentralization" fails when social power and informational asymmetries reduce legal control of self-regulating processes to a farce. The inevitable contrast in power here is the legal enforcement of negotiating power in order to counteract these asymmetries — but the likelihood of this achieving the desired effects must be regarded with scepticism. Functional equivalents, however, may be established if autonomous public institutions are "artificially" created with state aid — to provide consumer information or to organize effective representation of consumer interests (e.g. the creation of the "Selbstverwaltungs" of consumer centers, state-funded representation of consumers) (Jengras, 1981: 133). Here, too, the role of state law would consist not of the material regulation of market processes but of procedural and organizational pre-structuring of "autonomous" social processes. Through the ordering of organizational means, the law forces highly special-
ized, unilaterally oriented organizations to take the conflicting demands of their social constituencies into account when making decisions. (The conse-
quence of this perspective in consumer law, which could overcome the weakness of direct legal interventionism is described by Jengras, 1983: 57; 65.)

"Social contract" is the term used to define a trend in which the role of law is transformed from one of direct regulations of behavior to a more indirect regulative of procedures (15). The social contract is merely a special case of the many "contracts of autonomy" which are attracting increasing interest internationally (16). Unlike the pluralistic mediation of interests, in which social groups bring their interests to bear only in the forecourt of state power, the "operating paper" is a form of voluntary cooperation between the state and social interests, and in particular to a decision-making symphony between public trade unions and industrial associations. The reasons for this development are essentially found in the increased power and rationality of the political system, in the face of which classical legal forms of state regulation break down (Schmiedt, 1977: 7; Winkler, 1976: 120). This "disenchanting of the state" (Wilke, 1983a) leads to new forms of juridification, to "new legal forms of the intertwining of the state and the economy" (Geisler and Winter, 1982). According to Winkler, the crucial feature here is the "avoidance of imperative intervention" through temporary cooperation in which the state gives up part of its domination and industry gives up part of its freedom. This takes the form of the permanent installation of state institution in private organizations, of the repetition of social conflicts in the sectorial system itself and of the private "occupation" of state organiza-
tions. The concurrent loss of delegation and generalization of the state apparatus can even lead to a form of intertwining in which the two parties are no longer distinguishable as organizations with structural and functional limits but which instead form a single entity (Winter, 1982: 28).

The term "relational program" has been introduced into the discussion to describe the new role of law in such neocorporatist arrangements (Wilke, 1983a: 10; Teubner and Wilke, 1984). It differs from the conditional programs of classical formal law and the purpose program of state regulatory law by being oriented towards organization and procedures for coordinating different rationalities of social sub-systems. It no longer the classical forms of law — prohibitions and incentives — which predominate, but "procedural regulations" (Maynez, 1983) in which the state involves social interests in procedures of program formulation, decision-making and implementation. The juridification process is not stopped by such trends towards the reduction of direct state influence but merely directed into new channels. As Sterzcek and Schmiedt (1983: 230) explain "it is true that an associative social order implies a devolution of state functions to interest intermediaries. But this has to be accompanied by a simultaneous acquisition by the state of a capacity to design, monitor, and keep in check the new self-regulating systems." ("procedural corporatism"). There is another phenomenon worth noting here, as well, in connection with which Simms (infra 144) talks of a "second generation of employer protection rules" — but it is a phenomenon which is generalizable beyond this: the internal organizational conse-
quences of neocorporatism. In the development of American labor law the duty to bargain has been supplemented by the duty of fair representation. The employer's duty to negotiate implies the duty of the trade unions to defend the interests of all their members. This was the starting point for a wave of juridi-
cations which affects the internal organization of trade unions and other orga-
nizations representing employees, which have been hitherto been regarded as autono-
ously (see, e.g., Summers, 1977: 231). Even in Great Britain, Clark and Wedderburn (infra 182) observe, in regard to the internal conduct of trade unions, "an ambigious increase in state intervention in areas which were previously left to autonomous regulation". The phenomenon is general-
izable from trade unions to all organized interests which are bound into neocorporatist negotiation systems. As a result of this binding a large number of social problems (the coordination of interests, the build-up of legitimation, the implementation of the policies worked out in negotiations) are shifted to the inside of the organization itself. This means a shift from "external" market coordination to "internal" political processes of organizations.
internal structure of the organization thus becomes the " Achilles' heel of corporatism". Thus the internal constitution of private organizations becomes a central regulatory problem of state law.

This leads directly to the last complex of problems: the role of law in relation to large private organizations. As Buchhau, Kühler and Corni (infra) have demonstrated, in company law towards a materialization of previously neutral formal law. However, state regulation and judicial control here requires not only because of superficial changes in political trends but for structural reasons as well (Mayne, 1979: 55). Our approach would not necessarily lead to a reinforcement of state power resources but rather to a shift towards more abstract guidance mechanisms: i.e. towards the design of legal norms which would systematically facilitate the development of "reflective structures" within the economic industry. "Company constitution" and "neocorporatist systems of negotiations" are the relevant terms here (see Hopf and Teubner, 1983). The question which remains unanswered is whether such control mechanisms can be directed in such a way that they will function effectively as a "corporate conscience", in other words, force the systemic dynamics of the company to "internalize" external social conflicts, and do so in such a way that internal decision-making processes also take into account non-economic interests of employees, consumers and the general public. Within the past decades, economic goal structures within companies have undergone considerable changes, from profit orientation to growth orientation. It is completely incoherent that they could change again so as to include social conflict and the search of goals. Does this have to be, as Christopher Stone (1975) puts it, the point "where the law ends"? Is it not rather precisely the point at which law receives its institutional opportunity: to bring about the "reflective" control of economic behavior, which is capable of transforming external social "troubles" into internal organizational "issues" for the inner-policies of the company? Buchhau, Kühler and Corni (infra: 264 f.) point out rightly that the success of such a legal strategy depends mainly on the "institutional setting" of a societal and economic structure.

The main goal is not the reduction of power, nor an increase in individual participation in the emplaced sense of "participatory democracy" but the well-considered design of internal organizational structures which make institutions concerned — companies, public associations, trade unions, mass media and educational institutions — sensitive to the social effects which their strategies for the maximization of their specific rationality trigger. The major function of such "reflective" control internal structures would be to regulate intervention state control by effective internal control. The creation of structural conditions for an "organizational conscience" which would reflect the balance between function performance of the social system — that is, in our definition, would be the integrative role of reflexive law.

36 A discussion of the relationship of neocorporatist structures and the internal structure of organizations is found in Teubner, 1979a: 343, 1979: 487.

These various approaches and development trends appear at first sight to be extremely varied. What they have in common is that they tackle, though in very different ways, the problem of the structural coupling of law, politics, and the regulated areas. "Structural coupling" is a term which could open up further perspectives for future theoretical and practical legal attempts to grasp the phenomenon of juridification. It seems essential for an adequate understanding of the relationship between law and society to draw conclusions from the social autonomy discussed above, or more precisely, from the autonomy of the organization of social subsystems. Politico-legal intervention in complex self-reproducing systems would then have to abandon the model of hierarchic control relations and adapt itself to reticular interactions of communication systems with equal status. This refers legal intervention to the indirect method of "decentralized control regulation" (Teubner and Wilke, 1984: 4). This form of regulation is made necessary and possible by the high degree of autonomy of social subsystems: regulation impurities are only possible in the form of consent conditions, which as observable differences constitute the information basis for the respective social circuits.

And this means more than regulation in the classical liberal sense of residual control regulation which provides the social subsystems with the basic framework for their freedom of self-organization. What is required is an internal legal modelling of the autopoietic organization of social subsystems, with the goal of identifying strategic variables in order to change them and, by influencing them, to institutionalize environmentally appropriate regulation processes. The possibility that this would overtake the internal capabilities of law cannot be ruled out. However, theoretical considerations do not in principle invalidate this form of regulation; on the contrary they support it.

A second possibility of decentral control regulation consists of fully accepting the closure and independence of complex social systems as "black boxes" and concentrating legal regulation solely on the external relations, the interactive relations of the subsystems. The chances of legal effectiveness would then lie in the fact that law would not have to impose its mode of operation on other areas but could confine itself to the norming of the independent interaction systems. In this case no isomorphism of modes of operation would be required but only their "structural coupling". The necessary consequence of the social phenomena of self-reference and self-reproduction is the adjustment of legal theory and legal practice to such processes.

However, exaggerated hopes must be warned against. It must be assumed that such reforms from direct legal control to indirect regulation of self-regulation would bring new, serious problems in its wake. "Senslessness" of legal regulation and increased coordination costs would almost inevitably be side-effects of a "proceduralism" of law (Kühler, infra: 134 f.). Finally it
must be emphasized that the issue is not one of totally adjusting law to new forms of regulation. Just as conceptual legal law is not replaced, but is most overlaid, by privatization processes, here too it is only a matter of relative dominance. The note that can be expected is a shift of emphasis in legal regulation towards more flexible strategies. These strategies will not solve all the problems, but they will reverse the process of juridification as such. On the contrary, the legal regulation of self-regulation can itself be seen as a continuation of the juridification trend, but — and this would be the crucial step forward — it would help steer the process into more socially compatible channels.

(Translated from the German by Paul Knight)

References


