a binary code and that the decisions regarding validity/non-validity are ultimately the crucial operations. On the one hand, the masterly achievement of legal craft is constituted by the production of texts from texts, by interpretation and by argumentation, and this is also the case where facts and questions of evidence, etc. are concerned. On the other hand, lawyers lose half their cases after argumentation from both sides. Just as there are always some patients who die in the health system while others survive, and in this lies the risk for the medical profession, lawyers must live with the fact that their argumentation, even if it has been most carefully thought through, does not always determine the final, all-deciding decision. Therefore there can, at times, be observed in lawyers' attitudes a certain ironic distance from legal ideas and means of argumentation, coupled with an alertness to what ultimately carries the decision (for example, court conventions and tradition). The ultimate reasons are always only penultimate reasons.

9 Politics and Law

I

Systems theorists generally assume that a distinction must be made between the legal system and the political system.[1] These systems are seen as different sub-systems of society. This is especially true if we embrace the concept of autopoiesis and insist upon the autonomy and historical individuality of all social systems. However, most other social theorists reject this viewpoint because of the close and obvious relationship between politics and law.

A theory of the autopoietic, operatively closed legal system envisages that this system is able to draw a distinction between itself and other functioning systems. Hence if any external observer of the system wants to observe and describe it appropriately, he will eventually confront this distinction, which is produced in the system itself. Even if this is plausible on the whole, it creates a problem regarding the relationship between politics and law. A long tradition, going back to early modern times, makes us inclined to see only a unified politico-legal system. This is evoked to a large extent by the concept of the state, which is at the same time legal and political.[2] Since the writings of Francisco Suárez, Thomas Hobbes, and Samuel Pufendorf, this view has also been adopted by the theory of natural law. On the other hand, as we have seen in the chapter on the function of law, we must distinguish between the functions of politics and law as well as their modes of actualization.

One peculiar feature of European development is the emphasis given to the legal preconditions of social life derived from Roman civil law and its basis in natural law. In medieval times, this excluded the idea of a unity of law and politics. Without these foundations the revolution of the church, organized around the pope against the empire, with its tendency towards theocracy, could not have happened and the binding legal character of a 'constitutional state' could not have been invented.[3] The law was already

[1] See, for example, Jay A. Sigler, *An Introduction to the Legal System* (Homewood, Ill., 1968), 42 (but in contradiction at p. 150: 'The legal system, which is a subsystem of the political system is typically used as an output channel for the political system'). See also, following Parsons, William M. Evan, *Social Structure and Law: Theoretical and Empirical Perspectives* (Newbury Park, 1990), 219. However, see a different view in several publications—for example, Glendon Schubert, in *Judicial Policy Making*, 2nd edn. (Glenview, 1974).

[2] For more recent literature on the history of the idea and reality of the 'state' see, for example, Perry Anderson, *Die Entstehung des absolutistischen Staates* (Frankfurt, 1979); Gianfranco Poggi, *The State: Its Nature, Development and Prospects* (Cambridge, 1990); Michael Stolleis, *Staat und Staatsräson in der frühen Neuzeit: Studien zur Geschichte des öffentlichen Rechts* (Frankfurt, 1990). However, this literature does not see a problem in the unity, which is promoted in this way by the concept of 'state'.

[3] See on this point, for example, Brian M. Downing, 'Medieval Origins of Constitutional Government in the West', *Theory and Society* 18 (1989), 212–47.

there when the modern state began to consolidate itself politically, partly in the form of local customs and partly as a formally elaborated law which was differentiated into many legal institutions, laid down in writing, and capable of being taught and learned. There was feudal, urban, and regal law, and, since the High Middle Ages, the separation of canon law and secular civil law, which was reflected in differentiated jurisdictions. From a juridical point of view, there was no 'public law' until the sixteenth century and no unifying legal concept (*dominium, imperium, iurisdictio*) that could represent the intended unity of territorial authority. On the other hand, one could not separate *iurisdictio* and *imperium*, for that would have meant, in the concrete way of thinking of those times, an *imperium* in a space devoid of law and a *iurisdictio* without the capability of enforcement. At the same time, the extensive penetration of social issues by law reduced the importance of this distinction. The concept of *potestas* bridged the divide further without, however, being able to permeate legal instruments in detail. The same applies to the new understanding of 'sovereignty'.

Then, and later to a far greater extent, legal regimes in different parts of Europe differed depending on whether legal development was primarily linked to legal practice in courts, to the erudition of legal academics, or to the legal advice given to legislators; that is, whether it was judge-made law or the law of law professors or codified law. There may have been more or less direct reasons for these different options in an otherwise similar simultaneous political evolution. But law's own dynamics and the specificity of the set of problems with which it has to deal, prevent political ideas of order from being copied directly into law.[4] Of course politics influences individual decisions but it appears that it has its structural effect in the preference for certain types of legal roles with the help of which the legal system stimulates itself.

In the face of rapidly increasing complexity and ensuing legal uncertainty, the early modern territorial state initially saw its mission in the unification of valid law within its territorial boundaries. Accordingly, the organization of the administration of justice and the centralization of control serve the purpose of its own unity.[5] This constituted the state's understanding of

[4] See for more detail on this point, R. C. van Caenegem, *Judges, Legislators, and Professors, Chapters in European Legal History* (Cambridge, 1987).

[5] On the issue of the territorial states of the (German) empire see Dietmar Willoweit, *Rechtsgrundlagen der Territorialgewalt: Landesobrigkeit, Herrschaftsrecht und Territorium in der Rechtswissenschaft* (Vienna, 1975). There were functional equivalents for territorial consolidation but they too depended considerably on law. This applies above all to political promotions to aristocracy and thence to the juridification of a recognition of the aristocracy in the context of exemptions from tax: see, for instance (using the example of Savoy), Claudio Donati, *L'idea di nobiltà in Italia: Secoli XIV–XVIII* (Rome and Bari, 1988), 177. This procedure is particularly interesting because it allowed for a temporary compromise with the still existing stratified differentiation and for a downward inclusion of aristocracy, a new aristocratization of the aristocracy as

sovereignty (in contrast to the understanding in early medieval times) and its political consolidation. The concepts of sovereignty and of sovereign power (*potestas*) concealed two rather different ideas of political power that were in play: first, the idea of a *generalized* capacity to secure obedience to commands; secondly, the idea of legal force, which reflected the fact that power presented itself and was enforced in the form of law, that is, in a form which was always already *specified*. The combination of both aspects of power was indispensable because courts operated principally at the level of local administration. Hence since the second half of the sixteenth century, sovereignty meant in practical terms the centralized political control of the courts and the removal of feudal rights, church law, other corporative laws, or, at any rate, of all courts based on any particularistic rights. Sovereignty meant the recording and unification of special regional laws aided by publication; it meant reception of the language and the conceptual achievements of Roman civil law—at least as a basis for legal erudition, if not as a basis for valid law. And it meant an increasing legal competence to enact laws.[6] Hence one can talk, in Franz Neumann's words, of a 'political concept of law',[7] and see in that idea a kind of relay between political reason and legal validity. From the second half of the sixteenth century onwards at the latest, with Bodin, Suárez, Pufendorf, and others, theorists assumed there was a unity of politics and law in natural law.[8] This belief was based on the assumption that only through this unity could the individual be constituted as a subject of law, and as such it was a precondition for the development of an economy based on contract and the division of labour. Hobbes provided arguably the strongest formulation of this belief. Individuals, until then only bodies which could kill and be killed and act in that way with forethought because they were equipped with reason, became individuals in the sense of a second, artificial nature, by 'authorizing' the sovereign to

it were. But how would that have been possible without a realistic-practical motive of a clarification of the status of aristocrats: the tax privilege?

[6] See in this context the impressive implementation of political sovereignty as legal sovereignty in France and Philippe Sueur, *Histoire du droit public français XVe–XVIIIe siècle*, vol. 2 (Paris, 1989), 29 (in relation to the editing of *coutumes*), 164 (in relation to the control of the legal authority of landlords), and 56 (in relation to legislation).

[7] See in: *Die Herrschaft des Gesetzes* (1936; Frankfurt 1980), in relation to Bodin and Pufendorf.

[8] There are also many authors who are no longer known who supported this idea of the unity of politics and law on the basis of religious law (intended by God) and natural law (the logic of facts, as it were). For examples see François Grimaudet, *Les opuscules politiques* (Paris, 1580), esp. opuscule I: De la Loy. Laws are the 'souveraine raison, empreinte par Dieu, qui command les choses qui sont à faire, & deffend le contraire faicte, & publiee pa celuy qui a puissance de commander'; 'Car la Loy est l'oeuvre du Princc'; and 'La fin de la loy es le bien public & salut des hommes en general'. This has to be clearly distinguished from the good of individuals, including the prince himself. All quotes from fol. I.

enact law at will. Only through this could the link between rights and duties be established. Accordingly, the individual owes his civil identity to the unity of law and politics, and this unity is, therefore, irretrievably tied to the individuality of individuals. At the end of this organizational and semantic movement, which integrated politics and law, we find the great codifications of the eighteenth and nineteenth centuries and finally the idea that the function of the state is to guarantee freedom in terms of, that is, within the boundaries of, the law.

The crucial motive for the union of politics and law was the problem of the right *of resistance*, which flung Europe into a century of civil war. No one portrayed this more clearly than Hobbes.[9] His insight was that peace could not be secured just by law itself, deploying the resources of an unwritten tradition, of the 'artificial reason' of lawyers and the justification of what individuals put forward as their rights. If everybody could refer to their natural reason and find justifications in legal materials that were widely disseminated in print, law would destroy the precondition for its own existence, namely peace. This observation gained added force given the decline of the structural and social ability of the aristocracy to make its own decisions about what was lawful or not on the basis of its (armed) households. And this observation applied all the more as religion, law, and morals were not rigidly separated in late medieval thought but were integrated in one context of meaning, so that issues of religion and morality could immediately become issues of law and be fought over in the legal domain.[10] A fortiori, a right of resistance was implied if the available theoretical concepts could be deployed—that is, if it could be said that the prince was only a *civis* too and as such subject to law, or if a distinction could be made between *rex* and *tyrannus* and it could be left to the balance of power among the aristocracy to decide which of the two applied. Was there a solution to these obvious problems other than the unity of politics and law, other than the founding of the validity of law on politically implemented force, which then adopted the name of 'auctoritas' for legal purposes?[11] And how else could law have

[9] Apart from *Leviathan* see also: *A Dialogue between a Philosopher and a Student of the Common Law* (quoted from the edition Chicago, 1971); and *Behemoth, or the Long Parliament* (quoted from the edition by Ferdinand Tönnies, London, 1889; new edition by Stephen Holmes, Chicago, 1990).

[10] See Quentin Skinner, *The Foundations of Modern Political Thought*, vol. 2: *The Age of Reformation* (Cambridge, 1978); Richard Saage, *Herrschaft, Toleranz, Widerstand: Studien zur politischen Theorie der niederländischen und englischen Revolution* (Frankfurt, 1981); Diethelm Böttcher, *Ungehorsam oder Widerstand? Zum Fortleben des mittelalterlichen Widerstandsrechts in der Reformationszeit (1529–1530)* (Berlin, 1991).

[11] However, authority—and this is new in Hobbes's argument—is not a natural superior ability or even less an aristocratic competence. It is based on 'authorization'. In the text of the Covenant in *Leviathan* II at 17, Everyman's Library (London, 1953), 89, one can read: 'I Authorise . . .'. However, the argument based on authorization replaces the reference to nature with a circle; authorization assumes a validity of law, which has yet to be justified by authorization itself.

worked through these conflicts if not with self-controlled action backed by the politically assured validity of law?

Even later criticism of the circular argumentation for the construction of a social contract could not avoid reviving the right of resistance. David Hume, for instance, based the commitment of governments on promises which were valid by convention but which, for their own part, were based on human nature.[12] The argument shifted into the domain of economic property interests. But a government that does not represent and protect these interests, which are the foundation of society itself, can expect resistance. As before, the argument is based on the old formula of virtue and corruption, but it no longer drew conclusions in terms of positive law but in terms of political consequences.[13] At the same time, there emerged a tendency to describe 'corrupt' practices as 'unconstitutional', albeit initially without foundation in a text.[14]

As long as there is no constitution in the modern sense of the term, the problem of resistance remains the core problem of the modern state, the point where law is in conflict with politics. Here lies the hidden motif of all theories built on the unity of politics and law. In other words, the difference between the legal system and the political system can be understood, under the prevailing premises, as legitimate resistance to the political exercise of power.

Apart from the practical, political purpose of eliminating the right of resistance, the unity of politics and law also met the demand for the self-correction of law, either through the old distinction between law and equity,[15] or through its general capacity for legitimizing deviations from the law in the form of dispensations, privileges, and even self-tolerated breaches of the law.[16]

[12] See David Hume, *A Treatise of Human Nature*, Book III, Part II, Sect. IX, Everyman's Library (London, 1956), vol. 2, p. 250.

[13] On this point see David Lieberman (following Pocock), *The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain* (Cambridge, 1989), 7.

[14] See Niklas Luhmann, 'Verfassung als evolutionäre Errungenschaft', *Rechtshistorisches Journal* 9 (1990), 176–220, at 188.

[15] Here the English jurisdiction of equity in the Court of Chancery is famous and influential. For originally parallel-running considerations in France see Grimaudet, *Opuscules politiques*, opuscule II, fol. I IV ff. or François de Lalouette (L'Alouette), *Des affaires d'Etat, des Finances, du Prince et de la Noblesse* (Mets, 1597), 88. This developed in France more in the direction of the competence of interpretation of the legislator (*référé législatif*), whenever cases occurred in decision-making, which had not yet been decided by the legislator.

[16] See with its comprehensive material Francisco Suárez, *Tractatus de legibus ac Deo legislatore* (Lyons, 1619), vol. II, cap. XIV and XV, p. 91, for dispensations from natural law and vol. VI, p. 368 for dispensations from positive law, or Scipio Ammirato, *Discorsi Sopra Cornelio Tacito* (Florence, 1598), 223, in the context of a very circumspect treatment of the topic of the reason of state. Frequently the possibility to derogate from natural law was contested. However, whenever this is the case one can typically find the opposite opinion in the same

Formulated more generally, one can say that the paradox of the self-constituting difference between legal and illegal was not simply externalized with respect to the given power relations but shifted to a superior unity of law and politics, embodied in the 'person' of the sovereign. This, however, remained a precarious solution. Its success depended on the sovereign being what he was supposed to be: pious, reasonable, and open to what law itself inspired in him.

The operative differences between political and legal communication could not really be integrated in this way. Seen from the perspective of the right of resistance, the modern political system of the territorial state could not accept that subjects intervene in politics through recourse to law, and thereby disturb the peace. The political system had to claim closure, that is, closure in relation to everything that had to be defined as political in relation to the code and the function of politics. Exactly the same applies also to the legal system. The legal system cannot tolerate any exceptions either. This was the issue in the dispute between the parliament in London, as articulated by Coke, and the Stuarts. If there were only one tribunal or authority, which decided upon life and limb and property independently of the law, there would be no law because all legal certainty would be destroyed. This is the argument which lies at the genesis of the origins of civil rights under the common law and is yet another instance of the operative closure of a functioning system.

Thus one demand for, or attempt at, closure opposes another. At the same time, crucial points of view are exposed by this confrontation. The understanding of the relationship between politics and law attained in this way was consolidated and apparently overcome with the schema of the *Rechtsstaat* (rule of law). In this schema the context of conditions for the relationship between law and freedom, and thus also the strengthening of both, was preserved and so made available for communication.[17] With

text. See, for example, Jeremy Taylor, *Ductor Dubitantium, or, the Rule of Conscience in all her General Measures* (1660), quoted from *The Whole Works*, vols. IX and X (London, 1851/52; reprint Hildesheim, 1970), vol. II. I, Vol IX at 333 and especially at 347 as to dispensations from natural law only by God and not 'by any human power'. See, however: 'The exactness of natural law is capable of interpretation, and may be allayed by equity, and piety, and necessity'. The problem could be avoided if one understood the maintenance of authority itself that is the *ratio status* as the only binding natural law, which made all other laws possible in the first instance. For then one could argue that any deviation from that would be self-destructive. See, for example, Ciro Spontone, *Dodici libri del Governo di Stato* (Verona, 1599), 122.

[17] The concept of 'schema' can be used here quite explicitly as a form for the preservation of a higher-order arrangement of contingency, or, in the words of Novalis, as a self-referential reciprocal action. Novalis talks about the 'all-inclusive unity of the schema. Free can only be determined, that is, necessary, and necessary can only be determined, that is, free.' Or: 'The schema is related to itself by reciprocal action. Each thing in its place is only what is determined by other things'. Both quotations from Philosophische Studien 1795/96, quoted from *Werke, Tagebücher und Briefe Friedrich von Hardenbergs*, ed. Hans-Joachim Mahl and Richard Samuel (Darmstadt, 1978), vol. 2, p. 14.

it came a reaction against the historical situation of the social system (specifically: the time after the French Revolution), in which it had become abundantly clear that there was no consensus over the criteria of reason and morality. In their place we find a difference between necessity and freedom and various resulting combinatory possibilities—partly in the schema education (as the task of the state) and partly in the schema *Rechtsstaat*.[18] As a *Rechtsstaat* the state was, at the same time, an institution of the law and an example of the political accountability of law, that is, of the implementation and development of law as it adjusted to changing social conditions and goals which could be implemented politically.

This model for describing a legal and political system became democratic in hardly noticeable transitions, marked only by the 'constitutional question'. The forms of inclusion of 'the citizen' in legal and political contexts started to diverge—precisely because system-specific terms such as juristic capacity, citizenship, and the right to vote became available.[19] Political and juridical controversies relating to this process recurred throughout the nineteenth century. They referred to the legal forms for political influence on law, but also to the legal protection of the citizen against state authority no matter how it was politically practised. Initially these controversies did not deal with the premiss of state characteristics of law and politics but rather they were derived from it. Since the nineteenth century, the concept of the political has been understood almost exclusively as referring to the state. This has made possible the development of organized parties which, delineated by membership, have provided access to state offices for the implementation of political goals. At the same time, the law has offered an area for political creativity. Together with the budget, financed by taxes and stamp duties, the law has become the principal instrument for the implementation of political goals. This has been reflected in the idea of a hierarchical order of legislation and dispensation of justice.[20] The result has been a massive increase in normative material. Legal norms have become the sediment of past politics and it has become increasingly difficult to reactivate them for new political ambitions. Valid law is now no longer the result of conflicts for which generalizable rules must be found in order to

[18] This parallel problem will not be dealt with further here. See instead Heinrich Stephani, *Grundriß der Staatserziehungswissenschaft* (Weißenfels and Leipzig, 1797); id., *System der öffentlichen Erziehung* (Berlin, 1805); Christian Daniel Voß, *Versuch über die Erziehung für den Staat, als Bedürfnis unserer Zeit, zur Beförderung des Bürgerwohls und der Regenten-Sicherheit* (Halle, 1799); Karl Salomo Zachariae, *Über die Erziehung des Menschengeschlechts durch den Staat* (Leipzig, 1802). It is evident that these were attempts at reform were triggered off by the French Revolution.

[19] See in this context, especially in relation to the problem of legal protection against state actions, Regina Ogorek, 'Individueller Rechtsschutz gegenüber der Staatsgewalt: Zur Entwicklung der Verwaltungsgerichtsbarkeit im 19. Jahrhundert', in Jürgen Kocka (ed.), *Bürgertum im 19. Jahrhundert: Deutschland im europäischen Vergleich* (Munich, 1988), 372–405.

[20] We already discussed and rejected this model in Ch. 7.

come to a decision. Rather, by its attempts to realize political goals, law creates the conflicts that it is then called upon to solve. Since the capacity for activating politics in order to change law is continuously reproduced by communication in society and since law legitimizes itself by legalizing parliamentary democracy, legal practice must keep distinguishing between introducing legal change through an 'activist' interpretation of law and waiting for change in political and public opinion. Overall, the positivization of law and the democratization of politics support each other reciprocally and they have left a significant mark on both the political system and the legal system of today. Therefore, it is difficult to imagine two different systems, and in particular two systems that are operatively closed and non-congruent with these movements. But it is precisely the democratization of politics which calls for much more legal protection for the individual, especially in regard to his constitutional rights.

As a matter of fact, the thesis of the unity of the two systems has never been pushed to the point where it has been postulated that what is legally permissible in politics is decided by politics on exclusively political terms. Nor has there been any serious suggestion that law is merely the inbuilt inertia in politics, which prevents it from giving in too easily to all sorts of whims. In view of the traditions of the common law and Roman law and the awareness that their historical structures were built on the testing of legal ideas, the proposition that all those legal ideas were just the politics of yesteryear would have been misconceived. However, how should the legal restraint of politics in a single system be understood if not in this way? The *Rechtsstaat* formula has obviously concealed the problem. And this ambiguity may also have contributed more than anything else to keeping the idea of natural law alive, at least to impress on those who could no longer subscribe to this idea the demand for legitimacy of the political regime. Nevertheless, these kinds of ideas can no longer be supported by any convincing arguments. They can be discarded or reformulated, if politics and law are seen as two separate functioning systems.

Hence our point of departure in this chapter and the following one goes against the plausibility of those arguments, which come from a long tradition. Our proposition will be that there is not one system under the heading of the concept of the state but that there are two different systems, both being operatively closed, having different functions, different codes, and different code-dependent programmes. The unitary view, which is based on the concept of the state and especially on the schema of the *Rechtsstaat*, is understandable in a historical perspective. It is more or less adequate for a phase in which the positivization of law had to be implemented in the legal system with the help of a doctrine of the sources of law which referred to the (political) state and in which the political system had to stake out a domain and enforce it against the established structures (above all, class

structures), so that politics could become a practice of continuously processing collectively binding decisions. The more this is achieved, however, the more the concept of unity loses its plausibility. The legal system can do without a sovereign, even in the form of the *Rechtsstaat*. It does not have a place for nor does it need a sovereign, because it dissolves its paradoxes in a different way.[21] But it has to make decisions on demand. The paradoxes of the political system culminate in the formula of the sovereign, or, finally, of the sovereignty of the people. This concept, however, implies that the sovereign does not need to decide: the sovereign is sovereign even when it comes to the question of deciding or not deciding. The concept of the sovereignty of the people shifts the paradox onto a sovereign who cannot decide at all. Whether or not and how decisions are made are political issues. The concept of the state becomes an artificial device for holding together what has emerged as the self-reinforcing dynamics in the political system and the legal system. It is wholly impossible to see politics as an ongoing interpretation of the legally fixed constitution, no matter how much political goals may aim at, among other things, producing 'talk' and making topics available for further 'talk'[22] in the form of sections of the constitution (for instance, the protection of the environment as a task for the state). Similarly, an adequate theory of the legal system cannot be constructed if its factual operations are defined as the implementation of political programmes, no matter how much legal decision may be guided by politically desirable consequences. Even when it comes to the political appointment or election of judges, only suitable candidates are considered. All efforts to steer courts onto a politically desirable course must confront the internal workings of courts. Most of the time they founder on the internal culture, the mode of argument operating within the legal system.[23] Even if we find here too a relatively conservative approach, which is oriented by redundancies, and a relatively progressive approach, which is

[21] For instance, in the form of procedures, or in the form of subjective law, see above Ch. 4.VI and Ch. 6.V.

[22] In the sense of Nils Brunsson, *The Organization of Hypocrisy: Talk, Decisions and Actions in Organizations* (Chichester, 1989).

[23] See, for example, Jessie Bernard, 'Dimensions and Axes of Supreme Court Decisions: A Study in the Sociology of Conflict', *Social Forces* 34 (1955), 19–27; Eloise C. Snyder, 'The Supreme Court as a Small Group', *Social Forces* 36 (1958), 232–8. The famous example to the contrary is in fact only a single case, in which Roosevelt's judicial appointment stopped the frequent use of judicial review by the Supreme Court against social legislation and forced the court back to the conservatism of the nineteenth century. See on this case, from the perspective of political science, C. Hermann Pritchett, *The Roosevelt Court: A Study in Judicial Politics and Values 1937–1947* (New York, 1948). On the methodological problems and ambiguities in relation to empirical findings in the 'Bermuda Triangle' of ideological controversies (political and economic 'liberalism'), psychological variables ('attitudes'), and juridical categorizations of respective decisions, see Glendon Schubert, *The Judicial Mind: The Attitudes and Ideologies of Supreme Court Judges 1946–1963* (Evanston, 1965).

guided by variety, this has very little to do with ongoing politics and the spectrum of parties and pressure groups.

At any event it is completely impossible to put political questions—for instance, the timing and conditions for the reunification of Germany, the homogenization of living conditions in different areas, etc.—to the legal system and expect a decision. The same applies for marital conflict, academic or religious controversies, economic investments, etc. To quote from article III of the American Constitution, the legal system accepts only 'cases and controversies' for decision-making. Problems must be turned into a justiciable form to have access to law. This means that they can be defined recursively in relation to the historical condition of the legal system and the validity of law. The law cannot be used as a machine for the investigation of truths, or for the discovery of intelligent solutions to problems. If, for example, the spelling of one particular dictionary is to apply throughout the texts of a country, this must be stipulated in the publisher's contract. Another typical restriction is that a request for a legal decision must be articulated in the form of the violation of a subjective right.[24] It is undeniable that state administration is programmed in the form of law, for instance in the legislation of the state budget, but here, too, law is actively involved only if 'cases and controversies' arise from this.

The idea has long been abandoned that the legally sovereign state constitutes the individual's legal subjectivity, so creating the foundations for division of labour and the market-orientation of the economy. Following the ideas of Hayek and Simon, one can see the problem of the economy as lying in the processing of information or the analysis of the contingency and transaction costs within an organization. It is, at any rate, a problem specific to the economy and cannot be deduced from constituting the legal capacity of individuals, even if this evidently remains a condition which must be met by the performance of another functioning system.

It was precisely the implementation of 'legislative positivism' in the nineteenth century and the rapid growth of new legislation—at first sight, indicators of the political system's increasing domination of the legal system—which led to developments which raised awareness that the legal and political systems were, in fact, separate. Parallel to this, there grew up awareness, both in the common law with respect to statutes, and in Europe, that the freedom of a judge to interpret and even make law cannot be avoided. It became evident that, even if only in relation to the interpretation of statutes, it is not just a matter of re-engaging in political controversies in court after they have been resolved in parliament by a decision resulting in a legislative text. Nor

[24] At least possibilities to overcome such restrictions while keeping within constitutional law are the subject of discussion; see, for example, Dieter Grimm, *Die Zukunft der Verfassung* (Frankfurt, 1991), esp. 408. It is, then, particularly impressive how circumspective lawyers are when it comes to the connectivity of law.

is it a matter of having judges investigate and clarify political motives in doubtful cases.[25] The nature of compromise and the 'contractualization'[26] of political opinion on the one hand, and the political conditions of neo-corporatism on the other, make it impossible to look for a juridically useful 'intention of the legislator'.[27] Instead, the legal system develops its own internal theories of interpretation, in which legislative intent plays only a minor role but one that is constructed strictly on the basis of a text.

The separation of the two functioning systems is particularly evident in their different coding. Even if the implementation of law is still believed to depend on a political-hierarchical coding of power through the organization of state facilities, and both law and politics find their freedom in the form of the state, it is evident today that, in the legal system, there is no equivalent to the democratic coding of power in the form of government and opposition.[28] In the political system, ideas arise about alternative decisions as soon as the system observes itself in relation to collectively binding decisions, which become condensed in the form of opposition as soon as such counter-positions can be carried over from decision to decision. This can be easily observed in the highly personal-interactive factions of regal court politics in the period of the absolutist state and particularly clearly in the seating arrangements of a parliamentary democracy. Once the organization of political parties is consolidated, there is an organizational guarantee that no matter what the issue to be decided is, there will always be an opposition. The opposition is no longer disciplined by different alternative decisions but by the prospect of taking over government and of having to present a programme (which is feasible or, at least, acceptable and which could find sufficient political support). The schema government/opposition becomes the 'form', the 'code' of the political system in the sense that the form has an internal side and the code has a positive, connective side, 'where the action is'. But the inner side of the form is only what it is because there is the other side where alternatives are available. The legal system handles alternatives quite differently. They are and they remain scattered and dependent on individual cases and rules, and there is not the slightest hint of any 'consolidated opposition'. And even if it did exist, it would not be recognized as a form of law but as a form of politics.

[25] There are, however, grey areas and new controversies; see, for example, F. James Davis et al., *Society and the Law: New Meanings for an Old Profession* (New York, 1962), 162.

[26] In the sense of Charles-Albert Morand, 'La contractualisation du droit dans l'état providence', in François Chazel and Jacques Commaille (eds.), *Normes juridiques et régulation sociale* (Paris, 1991), 139–58.

[27] If there is anything at all like such an intention, most of the time it will consist of trying to save what can be saved after much argument.

[28] See on this point Niklas Luhmann, 'Theorie der politischen Opposition', *Zeitschrift für Politik* 36 (1989), 13–26.

It goes without saying that the separation of the systems does not mean that intensive causal links between them do not exist. In fact, such causal links can be found only if distinctions can be made between the systems (and, let us add, this is possible in reality only if the systems can distinguish themselves). The hypothesis of the separation of the systems provides a better explanation for the finding that systems are dependent on each other in their 'structural drift' and structural development. This will be discussed under the heading of structural coupling in the next chapter.

II

Now we must take a closer look at the connecting concept of the *Rechtsstaat*.[29] This concept functions as a schema which makes it possible to define two *reverse* perspectives as a *unity* and to celebrate it as an achievement of civilization: the juridical shackling of political force and the political exploitation of law.

Seen from the perspective of law and its function, there can be no areas without law, no forms of conduct that cannot be subject to legal regulation, no enclaves of unregulated arbitrariness and violence. The common law calls this the 'rule of law';[30] as Herman Finer puts it, 'the law and the rule [of law, N.L.] cover the same ground'.[31] If legal indeterminacy is to be at all acceptable, it must be legally qualified. This is done by declaring such indeterminacy to be the freedom given by law—be this the freedom of economic enterprise (the right of property use, freedom of contract), or the freedom of political decision, for instance in the form of the 'political questions' doctrine,[32] or, finally, the freedom of the law to deal with itself, namely with the decision whether to litigate or not. Seen from the perspective of law, the *Rechtsstaat* is the consequence of the universal relevance of law for society (or to put it another way: of the autonomy of law, of the differentiation of the legal system). Accordingly, there is a juridical 'framing' of state-issued decisions and finally a juridical concept of the state as a point of reference for all decisions that are supposed to be collectively binding from the perspective of the political system. Seen from the perspective of the legal system, decisions have this effect only if they are lawful and not in contravention of law.

The German doctrine of *Rechtsstaat*, especially, has rarely dealt with politics in the original meaning of the word or with the problems associated with the constitutional democratization of politics. Instead, it has stressed the protection of individual rights and the legal binding of the executive. Hence we find in one leading textbook (and this is the only place where the topic is discussed according to the index): 'A state in which the competences of the executive are legally bound and can only be exercised according to statute is defined as a *Rechtsstaat*.'[33] Consequently, the German understanding of the *Rechtsstaat* has been said to be academic and out of touch with political power, to think in narrow confines, and even to show little concern for the democratization of the political system.[34] This may be related to the necessity in the nineteenth century of making the idea of the *Rechtsstaat* acceptable to conservative circles.[35] With hindsight this remarkable political abstinence in dealing with the concept of the state could also be interpreted as the legal system simply elaborating further its own point of view.

The political system operates on an altogether different terrain. It tries to bring together opinions in such a way that collectively binding decisions can be made. It searches in the medium of the politically possible for political criteria of a form through which politics can solve problems, and that means, get the problems out of the system. Thanks to its equation of positivity with changeability, law provides a possibility for legal form-fixing and depoliticizing problems. It ensures that matters continue to be handled under specific legal criteria, even if politics has in the meantime moved on to other issues. According to accepted opinion, this shift takes place in parliament. However, it also takes place with local government ordinances and, increasingly importantly, in international public law which binds domestic law. In all these cases, it does not follow from the political function of collectively binding decision-making that the decisions are lawful and not illegal. This can be tested in advance and, in fact, this is increasingly being done. Such a test is, however, an internal operation of the legal

[29] See also Niklas Luhmann, 'Zwei Seiten des Rechtsstaates', in *Conflict and Integration—Comparative Law in the World Today: the 40th Anniversary of The Institute of Comparative Law in Japan Chuo University 1988* (Tokyo, 1989), 493–506.

[30] See most importantly A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th edn. (London, 1968), 182, with a rather more national interpretation 'peculiar to England, or to some countries which like the United States of America have inherited English traditions'.

[31] See *The Theory and Practice of Modern Government*, rev. edn. (New York, 1949), 922.

[32] First quoted in Marbury vs. Madison I. Cranch (1803), Supreme Court (USA), pp. 137–80. See also Fritz W. Scharpf, *Grenzen der richterlichen Verantwortung. Die Political Questions Doktrin in der Rechtsprechung des amerikanischen Supreme Court* (Karlsruhe, 1965); 'Judicial Review and the Political Question: A Functional Analysis', *Yale Law Review* 75 (1966), 517–97.

[33] See Georg Meyer, *Lehrbuch des deutschen Staatsrechts*, 6th edn., ed. Gerhard Anschütz (Leipzig, 1905), 27. In a note we find the comment with references: 'This is the meaning of the word as it is used in modern times'. It appears that the great debate on the rule of law in the nineteenth century was only concerned with the question whether the review of the activities of the executive should be delegated to the ordinary courts or to special administrative courts.

[34] See Ulrich Scheuner, 'Begriff und Entwicklung des Rechtsstaates', in Hans Dombois and Erwin Wilkens (eds.), *Macht und Recht: Beiträge zur lutherischen Staatslehre der Gegenwart* (Berlin, 1956), 76–88, esp. p. 80, in contrast to the legal traditions of England, France, and Switzerland.

[35] See Dieter Grimm, *Recht und Staat in der bürgerlichen Gesellschaft* (Frankfurt, 1987), 298.

system, no matter in which institutional or organizational framework it is executed. And it is fair to assume that the political system mistakenly makes illegal decisions or that it—as is frequently the case—takes legal risks. Risk-taking is, however, a good indicator of the fact that system boundaries are being crossed.

Seen from the perspective of the legal system, the *Rechtsstaat* formula is a grandiose tautology (to quote again: 'the law and the rule cover the same ground'), albeit a tautology defiantly directed at political transgressions. Seen from the perspective of the political system, law is an instrument for the facilitation and realization of political goals.[36] The terms 'facilitation' and 'realization' indicate that the political system would not exist in its known form, if the legal system did not offer a difference between medium and form, in which prevailing legal forms can be established and changed on the basis of political initiative. Even though law functions autonomously in this respect and does what it does by itself, it is still the most important imaginable precondition for the making of politics, apart from money coming from the economy. Making politics means deciding politically which law is to be valid law (or, parallel to this, how to spend politically allocated funds). Without this, politics as a system would collapse. It would not be worth building up a massive apparatus of political parties and pressure groups if the only decisions that mattered were how and for what purpose to use physical force. Politics owes the vast expansion of its field of possibilities to law and money. Even the self-representation of politics, political rhetoric, the portrayal of good intentions and the opposition's bad deeds, are all born of the same source.

The *Rechtsstaat* formula is used by the legal system to describe only itself. Therefore it is a fitting description. The reference to the state in the concept of *Rechtsstaat* indicates that the law (especially private law), can develop only if peace is secured politically, that is, if violence can be prevented. There is a good reason to point this out now in view of the situation in many parts of the world and especially in the big cities of the American continent. There is also another, contradictory context in which breaches of law and political corruption can maintain social order, albeit at a reduced level.

For the political system, which defines itself as the state, the *Rechtsstaat* formula expresses a further precondition for increasing complexity. Law, as the enforcement of politics, is only available if and in so far as the political

[36] This is, on the one hand, the subject of so-called implementation research and, on the other hand, with a somewhat broader perspective, the subject of a discipline which calls itself 'legal politology'. See, for example, Rüdiger Voigt (ed.), *Recht als Instrument der Politik* (Opladen, 1986), and the Yearbook of Legal Politology since 1987 (Jahresschrift für Rechtspolitologie). Currently the discussion seems to be bogged down in conceptual ambiguities, which relate to the concept of 'steering' (political guidance).

system lets law be law and defers to it, and does not apply force illegally. Consequently, the *Rechtsstaat* formula means different things, depending on which system is using it. However, it expresses these different aspects in one formula, or—as it can then be said—in one schema and by that it enables its definition. Hence it is possible to assert that the political and the legal systems would not be what they are without each other.

To sum up, one might say that the *Rechtsstaat* formula expresses a reciprocal and parasitical relationship between law and politics. The political system benefits from the difference between legal and illegal being coded and administered elsewhere, namely in the legal system. Conversely the legal system benefits from having peace, a clear differentiation of authority, and with it the enforceability of decisions, secured elsewhere, namely in the political system. In this context parasitical, then, merely means the possibility of growing out of an external difference.[37]

III

Functional differentiation frees up functioning systems to determine their own conditions and structures. This also means that system-specific time frames develop. The question of what is recalled or anticipated and in what time period varies from system to system. The same applies to the expected speed of linking communication to communication and to the corresponding distinction of urgent and less urgent. These differences are identifiable where communications are organized. They occur as well, rather drastically, in time frames that cross organizations. The speed with which the economy reacts to price changes with more price changes is in remarkable contrast to the slowness with which science puts forward new research findings—the latter being an area in which interplay between the long-term and the surprise event tend to dominate the orientation.

This general problem of temporal disharmony in modern society is of particular significance for the relationship between law and politics. In the modern political system politics are under considerable time pressure—and this applies to an almost unlimited range of objective topics (but limited by politics itself). Politics reacts with acceleration and delay, by managing this difference with the insider knowledge of it and its dependence on power. In contrast, the legal system is very slow, as far as its jurisdiction is concerned, being held back by the need to demonstrate accuracy and substantiation. This applies not only to decision-making but also, above all, to structural consequences, to the changing of law through judicial activity. Building up through experience concepts and rules that are available for transmission takes centuries. The range of topics here is

[37] See Michael Serres, *Der Parasit* (Frankfurt, 1981).

equally broad, and the repetition of similar cases decreases with increasing complexity. If a comparison had to be made between the self-inspiration of politics, accelerated by the mass media, and the development of judge-made law, the time discrepancies would be huge. Contact between the systems would cease for reasons of time alone.

This is, of course, not permitted when the law is one of the most important, formative elements of politics and, at the same time, other functioning systems constantly confront the political system with new situations, which require speedy decisions. This is the situation in which legislation comes to the rescue as an important mechanism for balancing societal time-differences. Given sufficient political pressure, legislation can be initiated and completed relatively quickly. As far as the political system is concerned, the passing of a statute (that is, the activation of the legal system in a politically desired direction) is a symbol of the success of one or other dominating faction. The legal system can mobilize little resistance to new statutes. They are new law and it is not a question of dealing with law's own experiences or of transforming law that has proven the test of time. The acceleration device of using legislation (that is, its use or non-use) obviously depends on not knowing and not being in a position to know what will happen to the statute in legal practice.[38] The legislature has its own ideas about the 'outcomes' of a statute; but these are ideas and not information. The basic condition behind all acceleration applies here too, namely that the future cannot be known.[39]

The factor of time guides and falsifies the observation and description of systems to a high degree. There is, especially in the age of mass media, a preference for attention to be focused on novelty. Everyday life is not being reported. Hence we do not know anything about the effects of statutes after they have been passed (unless special studies have been carried out or we have some specific knowledge of local milieux). Nor do we know who does not use the creative potential of a new statute. We are constantly hearing of new statutes. Therefore we cannot be blamed for perceiving the legal system

[38] The same applies *mutatis mutandis* to leading decisions in higher courts. These decisions, too, are mobilized by the lack of information about what the actual outcomes will be—and become the object of 'impact studies'. See Stephen Wasby, *The Impact of the United States Supreme Court: Some Perspectives* (Homewood, 1970), and also the examples discussed by Robert L. Kidder, *Connecting Law and Society: An Introduction to Research and Theory* (Englewood Cliffs, 1983), 112. For a case study see Gordon Partic, 'The Impact of a Court Decision: Aftermath of the McCollin Case', *Journal of Public Law* 6 (1957), 455–64 (concerning scripture classes in public schools), or James Croyle, 'The Impact of Judge-Made Policies: An Analysis of Research Strategies and an Application to Products Liability Doctrine', *Law and Society Review* 13 (1979), 949–67.

[39] This observation leads to the assumption, which can only be noted here, that modern society's relationship with its future has a lot to do with the increase and acceleration of structural changes that are visible to this society itself.

principally from the viewpoint of legislation or even assuming a hierarchical relation between legislation and judicial decision-making.[40] This in turn has led to there still being 'optical' difficulties in seeing the political system and the legal system as separate systems. It could be one of the tasks of the sociology of law to correct this optical illusion. This would not mean denying the interdependence between the systems or dismissing them as unimportant. On the contrary, more specific forms of a description must be found, which express much more clearly how and why politics and law are so well attuned to each other in modern society, therefore triggering structural drifts in both systems (although in very different forms). Here it may be helpful to put forward the thesis that legislation, as the place for the transformation of politics into law and for the control of politics by law, has assumed the important function of balancing the different time frames for society.

This view from the top down can be complemented by a view from the bottom up.[41] Even what is perceived from a juridical perspective as the application of statutes is practised by the administration more as goal-oriented, problem-solving behaviour.[42] Especially since the massive expansion of public administration to cover social welfare tasks and, more recently, ecological tasks, it is decreasingly a question of legal problems occurring from case to case, and increasingly one of conditions which are the subject of attempted influence or change. Such conditions include the cleanliness of water and air, industrial development, truancy and alcoholism, traffic control or its reduction. If we observe these conditions from a legal perspective, the issue is not individual breaches of law but a permanent deviance, as it were, or conditions under which breaches of law are repeated on a daily basis. Time is relevant here, too, and in a way for which the legal system has no equivalent categories.

Hence public administration's contacts with persons who are concerned, whose behaviour is supposed to be influenced, develop their own criteria for measuring success or failure. Such contacts are established in order to be repeated. In the process, moral criteria emerge for what can be demanded and for mutual respect, for the conditions and limits of cooperation, and for the extent of mutual understanding. Only when tensions or cracks occur in the network of this reasonable cooperation is resort had to law, to explicit instructions concerning what can be legally enforced or not. Here, like everywhere else, law serves as a safety net in the event of the

[40] We pre-empted the criticism of such an assumption above in Ch. 7.

[41] This is a demand made by studies in the sociology of organizations which are oriented towards the processes of decision-making; see, for example, Colin S. Diver, 'A Theory of Regulatory Enforcement', *Public Policy* (1980), 247–99.

[42] See, for excellent socio-legal analyses Keith Hawkins, *Environment and Enforcement: Regulation and the Social Definition of Pollution* (Oxford, 1984).

breakdown of primary relations. The transformation may occur for reasons that appear to be quite irrelevant juridically, and often with motives that cannot be revealed—for instance, because of a lack of mutual respect (the status differences between bureaucrats and their clients can especially aggravate sensibilities). But motives are not arguments. They remain latent before and after juridification and can be understood, at best, by a sociological analysis.

Moreover, bureaucracies are largely aware of the fact that law enforcement can have far-reaching political repercussions if it is directed at interests that can be represented politically. Local industry or farmers, wine-producers or fishermen, can demand consideration for their equally demonstrable interests even after the legislator has made a decision, the consequences of which are unpredictable. And government is well advised to develop sensitivity for such situations, especially in cases in which the connection between a violation of the law and harm cannot be ascertained immediately or only with the help of artificial tests. Hence there exists a kind of secondary chain of command for the lowest tiers of bureaucracy, 'street level bureaucracy'. This operates through the media or influential stakeholders, and protective strategies must be developed in the form, above all, of written reports or paperwork, which may ensure that nothing happens if something happens.[43] While juridically a tight connection, dealing only with issues of evidence and interpretation, is forged between legislation and law enforcement, politically the horizons between these two levels of decision-making are wide open.

In view of this state of affairs it would obviously be missing the point if the essence of administration were thought to reside in the application of laws. We no longer live in early modern times when all administrative matters were in the hands of local courts. The binding of government by law, the result of nineteenth-century developments, is not at issue, even though it could only offer the possibility of resorting to law if difficulties arose. Even modern analyses which research the 'implementation' of formally enacted programmes and lament their deficiencies or find typically flawed, bureaucratic behaviour are often guided by the prejudice that statutes must be 'implemented'. Government and public administration, however, is from top to bottom an organization of the political system. It realizes politics, not law—even though the question may be asked at any time whether

[43] This is documented particularly well by police studies, see, for example, Jonathan Rubinstein, *City Police* (New York, 1974); Michael S. Brown, *Working the Street: Police Discretion and the Dilemmas of Reform* (New York, 1981); David E. Aaronson, C. Thomas Dienes, and Michael C. Musheno, *Public Policy and Police Discretion: Processes of Decriminalization* (New York, 1984). See for other areas also Richard McClary, *Dangerous Men: The Sociology of Parole* (Beverly Hills, 1978), esp. 145, or Jeffrey M. Prottas, *People-Processing: The Street-Level Bureaucrats in Public Service Bureaucracies* (Lexington, 1978).

this is lawful or unlawful. With this question, however, communication changes its system reference.

IV

We could test theses on the separation, on the one hand, and intensification, on the other, of contacts between the political system and the legal system empirically by examining the political influence of lawyers. Any such studies would, however, have to be carefully guided by theory and would, above all, have to be advanced on the operative level and not only on the personal level. There is a difference between whether lawyers are particularly suited to political careers by virtue of their legal education and legal practice, and whether they can then actually operate as lawyers in political contexts, that is, observe the attribution of decisions to the values of legal and illegal.

There is a widespread assumption, but not much hard evidence, that politics is practically the domain of lawyers. People point to the so called 'lawyers' monopoly' in careers in government administration or to the fact that influential lobbyists in Washington are represented by (influential) legal firms.[44] This still does not explain, however, on which type of skills this influence is based and on which functioning system it impacts. It is recognizable that lawyers, who are used to adversarial negotiations based on (professional) recognition of the opposite party, have a more open relationship with politics than other professionals.[45] Still, that does not necessarily mean that their possible influence on politics is based on a legal leverage over political issues. It may be that, as in other management positions or in the preference of certain businesses for certain lawyers or law firms, social skills, the capacity to stand one's ground in face-to-face interaction or on the phone, local knowledge, organizational skills—including being known in the right places—are more important than legal knowledge itself. It may be and certainly often is the case that legal issues project the claims of the politically possible and that one needs legal expertise for argumentation and decision-making if one ventures across its boundaries. However, even then it is still a political question what legal risks one is prepared to take.[46] We should note that lawyers can use their ability to talk and

[44] See, for example, the report of one such lawyer, Charles Horsky, *The Washington Lawyer* (Boston, 1952). See also Heinz Eulau and John D. Sprague, *Lawyers in Politics: A Study in Professional Convergence* (Indianapolis, 1964).

[45] See Elmar Lange and Niklas Luhmann, 'Juristen—Berufswahl und Karrieren', *Verwaltungsarchiv* 65 (1974), 113–63, at 156.

[46] The report of the German commission for the reform of public service law (*Studienkommision für die Reform des öffentlichen Dienstrechts* (Baden-Baden, 1973), with 11 volumes of appendices) could provide good material for a case study. In keeping with the name of the commission, it was concerned with legal issues and, indeed, a great number of reports by legal

communicate about legal and political issues in a succinct and competent manner and that they can prevent politics from getting bogged down needlessly in such issues. But we should also note that something entirely different is actually involved here.

Research into legal firms in Washington shows that their influence on politics is overestimated.[47] Wealthy clients can undoubtedly seek the services of 'better' law firms, but it remains to be seen whether their influence is based on their legal argumentational skills (if the case proceeds that far) or to the political importance of the client.[48] This also indicates that the use of lawyers for political contacts is connected to the political system rather than to the legal system and does not, at any event, require any particular legal expertise. Empirical studies demonstrate a considerable discrepancy between professional self-description and the actual operation of networks of contacts.[49] This should not, however, lead us to conclude that lawyers cannot distinguish between political and legal issues. With analyses of networks of contacts, obvious political one-sidedness can also be seen, which cannot be the result of pursuing legal matters but demonstrates non-juridical self-selection, so contradicting the image of the impartial lawyer.[50] Hence the mere status of a lawyer is not a reliable indicator of whether a communication is operating more in the political system than in the legal system. In any event, no lawyer could operate successfully in this domain if she were not able to distinguish between legal and political issues or if she relied on the misconception that political problems could be solved as legal problems.

Another possible way to test the hypothesis of the separation of the systems empirically would be to analyse important doctrinal inventions and to ask whether and in what circumstances they could have even appeared on the political agenda in the party-political system. Take, for instance, agency by estoppel, which is based on someone giving the appearance, or tolerating,

experts were commissioned in order to explore the constitutional scope for reforms (institutional guarantees for career public servants, etc.). However, the appointment of the commissioners was politically pre-selected, and the commission's recommendations were almost exclusively concerned with structural and organizational issues.

[47] See Robert L. Nelson and John P. Heinz, 'Lawyers and the Structure of Influence in Washington', *Law and Society Review* 22 (1988), 237–300. The summary notes: 'the findings indicate that lawyers occupy a relatively specialized niche in the system of interest representation, one that allows them to command substantial economic rewards and to maintain a measure of independence and autonomy in their work, but that limits their influence in policy formation.'

[48] See Robert L. Nelson et al., 'Private Representation in Washington: Surveying the Structure of Influence', *American Bar Foundation Research Journal* 1 (1987), 141–200.

[49] See Edward O. Laumann and John P. Heinz et al., 'Washington Lawyers and Others: The Structure of Washington Representation', *Stanford Law Review* 37 (1985), 465–502.

[50] See Nelson and Heinz, 'Lawyers', 290.

or not recognizing (three variants!), that someone else is authorized. Or take *culpa in contrahendo*, which makes litigation possible even when the agreed contents of a contract rule this out. It is highly unlikely that problems of this kind can be successfully turned into political problems at the moment of their discovery. It is likewise highly unlikely that the courts will desist from making their own law in these cases and refer them to the politically inspired legislator.

Despite everything that may be assumed by the image of a common state, there are so many differences on the operative level that the assumption of the operative closure of two separate systems is the better option. If one finds individual connections, one can explain them as coincidences of the internal modes of selection of two systems and, as such, as coincidental ones (regardless of how frequently they occur). However, this explanation must be factually supported by an internal analysis of the system; it cannot be included without being tested. Otherwise the theoretical concept would involve the counter-indicated case, namely its self-refutation.

V

After all, the irrefutable density of the contacts between politics and law does not allow us to talk of only one system. On the contrary, it can be assumed that any appropriate description requires references to two different systems.

This does not (and cannot) exclude individual operations from having both a political and a legal meaning for an observer. Passing a law in parliament can be counted as a political success, as it marks the end to lengthy efforts to achieve a consensus. At the same time it changes the state of validity of the law and serves as an instruction to courts and, beyond that, to everyone who wants to know what is legal and what is illegal in the appropriate context. The fact that an observer might recognize such an event as a unity says nothing about the unity of systems. As soon as one considers the recursive networking of operations with other operations, the unity of the individual act disappears. It is only a fictitious unity which disregards time, for the political history of the statute is entirely different from the legal situation on which the statute impacts and which has anticipated the possibility of such a change of law. Politically this is a history of 'talk',[51] of strategic positioning, of operations under the schema of government and opposition, of negotiations, of public declarations of intention and the secondary intention of testing public opinion, etc. Politically the matter comes to rest with a symbolic act of legislation and the possibility of a mention in the success stories of the party or government. This occurs, however,

[51] Again, as used by Brunsson, *The Organization of Hypocrisy*.

quite independently of the legal or actual effects of the legislation mediated by law.[52] Moreover, one has to consider the political relevance of the failure of a planned or proposed change of law, for which there is no equivalent in the legal system.

This non-identity of systems cannot be affected by the legal regulation of legislative procedure, even if it is carried out in a most detailed manner by either the legislators themselves or constitutional courts.[53] As legal regulation, it remains a structure of the legal system. It may stimulate or irritate political communication and be referred to as legal advice. But the possible exploitation of ambiguities in the law for political reasons remains a political risk, and a potential illegality is not relevant in itself, but is relevant only if it is, at the same time, an indication of political failure and point-scoring for the political opposition. The reason for the difference between the systems is their autopoiesis, that is, the fact that each system defines the elements that are allowed to operate within a network of operations, by the network of its *own* operations. If the classic doctrine of the state and its sovereignty takes a different form in law from the corresponding form expressed as a theory of politically based legislative positivism, each view must be observed as itself by observers of the systems and those views questioned—historically, for instance, in relation to the social system which lent at that specific time plausibility to such compact descriptions. The separation of systems is, however, irrefutable, if the description of systems theory as a theory of operatively closed systems is accepted.

System operations are identified separately because systems reproduce themselves and in so doing decide on their own boundaries. This occurs with the help of their own codes. In the political system, this is achieved by the distinction between superior power (authority) and those subordinate (the governing/the governed) and by the coding of authority by the schema government/opposition. In the legal system, coding is based on the quite different kind of distinction between legal and illegal. Accordingly,

[52] See, for example, the case study by Vilhelm Aubert, 'Einige soziale Funktionen der Gesetzgebung', in Ernst E. Hirsch and Manfred Rehbinder (eds.), *Studien und Materialien zur Rechtssoziologie*, Special Issue 11 of *Kölner Zeitschrift für Soziologie und Sozialpsychologie* (Cologne, 1967), 284–309. The study concerns the Norwegian legislation on housemaids, which brought political controversies to an end by its enactment, without having ascertained beforehand whether housemaids were indeed still employed in sizeable numbers and how, if there were any, they could be informed of their rights. For another case with politically in-built self-blocking of new law see Leon H. Mayhew, *Law and Equal Opportunity: A Study of the Massachusetts Commission Against Discrimination* (Cambridge, 1968). See also Niklas Luhmann, *Reform des öffentlichen Dienstes: Ein Beispiel für Schwierigkeiten der Verwaltungsreform* (1974), quoted from the reprint in: Andreas Renner (ed.), *Verwaltungsführung* (Berlin, 1982), 319–39.

[53] See Charles-Albert Morand, 'Les exigences de la méthode législative et du droit constitutionel portant sur la formation de la législation', *Droit et Société* 10 (1988), 391–406, with further references to literature on this topic.

the programmes which regulate the attribution of negative and positive values diverge. Correspondingly, the conditions for the recognition of belonging to the system within each system diverge as well, as do the connectivity within the same system and the identification of what is system and what is environment. If this ability to distinguish and refer to systems in this way did not exist, chaos and extreme simplification would result. Each legal decision, each conclusion of a contract would be a political action, just as, conversely, a politician could interpret and change the law by his communications alone and would therefore have to conduct himself with corresponding care.

The internal use of symbols for the unity of the system, within each system, differs as well. If belonging to the legal system is to be symbolized—even if, and especially if, changes to the law are concerned—reference is made to 'valid' law. We discussed this above (Chapter 2.VIII). Where the political system is concerned, the formula for identification is called the 'state'.[54] This also becomes particularly relevant if one wants to channel concerns for change in the direction of systems. This does not mean that the concept of state is not also a concept of valid law. However, if judges and police officers, teachers and medical officers are considered public servants, reference is made not only to the statutes which regulate the circumstances of their existence but also to the fact that their conduct can be made a political topic—in contrast to private medical practitioners or private 'bodyguards' scandals can only, if at all, lead to the political call for legal regulation, which has to be addressed, of course, to the state as well.

Looking back from this position to the traditional semantics of the state, the respective fissures between politics and law can be recognized, especially in the case of avoiding public unrest and turbulence, in which the internal peace of the country consists. Already the older doctrines of the state conceded to the prince that he could break the law or ignore breaches of the law in the interest of maintaining his power (and so the existing peace), and that meant breaking the law but without incrimination.[55] The doctrine was embedded in a context of ethical-natural law, in which the maintenance of peace (under the given circumstances) ranked highly, and even higher than occasional violations of the law. Even after the breakdown of such comprehensively legitimating semantics at the end of the eighteenth century the problem resurfaced. Already David Hume had commented: 'A single act of justice is frequently contrary to public interest; and were it to stand alone, without being followed by other acts, may, in itself,

[54] See Niklas Luhmann, 'Staat und Politik: Zur Semantik der Selbstbeschreibung politischer Systeme', in id., *Soziologische Aufklärung*, vol. 4 (Opladen, 1987), 74–103.

[55] See on this point Niklas Luhmann, 'Staat und Staatsräson im Übergang von traditionaler Herrschaft zu moderner Politik', in id., *Gesellschaftsstruktur und Semantik*, vol. 3 (Frankfurt, 1990), 65–148.

be very prejudicial to society.'[56] The absolute insistence on one's own rights is seen, if not as injustice, yet as a disturbance of the peace with horrible consequences—for instance, as demonstrated in the Kleist novella *Michael Kohlhaas*.[57] And in Friedrich Schlegel's 'Signatur des Zeitalters' (Signature of the Era) one can read: 'no form of peace which is based on continuous independence . . . can be imagined without a mutual give and take in the absolute demand of law.'[58] What was combined in the old moderate concept of justice had already fallen apart in the medieval early modern formula of *pax et iustitia*. Any remaining reference to unity was lost with the collapse of ethical-natural law argumentation and the development of monarchical autocracy to which it was addressed. The 'contradictions' established themselves as such, no matter how much the romantic period tried to avert this. The abduction of Erich Honecker in a Soviet military plane, in order to remove him from German justice, and the understandable protest from the German side (in March 1991) show that the problem has lost nothing of its relevance.[59]

This need not mean that the existence of contradictions is necessarily the last word on this issue. Switching from goals such as peace and justice to systems analysis, a far richer range of combined possibilities can be attained. The separation of systems can be seen as the precondition for the increase of interdependence, and society itself as a system as the precondition for the possibility of this. The democratization of the political system and the positivization of the legal system have only been able to develop by conditioning and stimulating each other. We will see in the next chapter that this cannot happen without both the separation of systems and a mechanism for their structural coupling.

[56] *A Treatise*, vol. 2, p. 201. One can easily understand this as a contradiction on the level of individual results while being compatible with recursively operating systems. For Hume, however, this meant only that the use of property had to be secured even if it contravened the public interest in individual cases.

[57] Kleist describes the hero of his novella in its first sentence as 'the most righteous and at the same time the most awful human being of his time'. On the romantic context and its relation with a forced new European schema law/non-law see Regina Ogorek, 'Adam Müllers Gegensatzphilosophie und die Rechtssauschweifungen des Michael Kohlhaas', *Kleist-Jahrbuch 1988/89*, 96–125.

[58] Quoted from the edition Friedrich Schlegel, *Dichtungen und Aufsätze* (Munich, 1984), 593–728, at 700. And ibid.: 'if there was an absolute insistence on law, each war would necessarily be a war of life and death'.

[59] Honecker was the last General Secretary of the (East German) Communist Party (Sozialistische Einheitspartei [SED]) before reforms were initiated under pressure of the Soviet Union in 1989, leading to German unification (note by the translator).

10 Structural Couplings

I

The more systems theory stresses the operative closure of autopoietic systems, the greater the need to establish how the relations between the system and its environment are shaped. Neither reality nor the causal relevance of the environment is denied (otherwise one could not even talk about difference, differentiation, etc.). Operative closure means only that the autopoiesis of the system can be performed only with its own operations. Hence the unity of the system can be reproduced only with the system's own operations. Conversely, the system cannot operate in its environment and hence cannot communicate with the environment by using the system's operations.

The advantage of this starting-point for theory construction is that it demands an unusual, as yet underdeveloped, amount of precision in propositions about the 'relations between system and environment'.[1] The response to this demand lies in the concept of structural coupling.[2] It is called this in contrast to operative couplings (couplings of operations with operations) and in order to distinguish it from the ongoing causalities that (and it can be put like this) ignore or disregard the boundaries of the system.

There are two variants for operative couplings. One is called autopoiesis. It involves the production of operations of the system by the operations of the system. The other is based on a synchronicity of the system and the environment, which must be presumed at all times. It allows an instantaneous coupling of the operations of the system with operations that the system attributes to the environment, for instance, with the possibility of fulfilling a legal obligation by making a payment or symbolizing political dissent or consensus by passing a law. However, operative couplings between the system and the environment brought about by such identifications are possible only for the duration of the event. They do not last and they depend on a certain ambiguity in their identification. The identity of such individual events is, in fact, always created in the recursive network of the individual system. The economic aspect of a payment, which relates to the reuse of money, is quite different from the legal aspect, which relates to the change in the legal situation induced by the payment.

[1] This is meant in a conceptual sense. What can be achieved by mathematics is an entirely different issue and presupposes the conceptual clarifications attempted here.

[2] See for this concept at the level of organic systems (cells and organisms) Humberto R. Maturana, *Erkennen: Die Organisation und Verkörperung von Wirklichkeit: Ausgewählte Arbeiten zur biologischen Epistemologie* (Braunschweig, 1982), 150 and 251; id. and Francisco J. Varela, *Der Baum der Erkenntnis: Die biologischen Wurzeln des menschlichen Erkennens* (Munich, 1987), esp. 85 and 251.