Dust Cover Design: Rudolf Hübler, Berlin. — Setting: Satz-Rechen-Zentrum, Berlin
Printing: K. Gerike, Berlin
Binding: Verlagsbuchbinderei Dieter Mikolai, Berlin.
Printed in Germany

European University Institute, Florence · Series A: Law · 6

# Juridification of Social Spheres

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

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1987

Walter de Gruyter · Berlin · New York

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# Juridification
## Concepts, Aspects, Limits, Solutions

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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, *fiat justitia, pereat mundus*, at least had the heroic quality of a search for justice at all costs. Today we no longer fear 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 bureaucratization of the world (Jacoby, 1969; Bosetzky, 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, criteria

of rationality and forms of organization which are not appropriate to the "life-world" structures of the regulated social areas and which therefore either fail to achieve the desired results or do so 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 telling phrase "the colonialization of the life-world", which was coined by Habermas. Social modernization at the expense of subjection to the logic of the system and the destruction of intact social structures is the essence of this idea (Habermas, 1981: 522; 1985: 203).

Expressed in this extreme, dramatic form, juridification describes a reality which is not merely a problem of jurists, nor a national phenomenon. *Verrechtlichung* does not only spring from the well-known Teutonic tendency towards overregulation, so the discussion of the problem is not confined to German jurisprudence. Although national divergences exist (see Daintith 1987) the phenomenon is universal, and the debate international and interdisciplinary. In the United States in particular a lively debate is going on about the "legal explosion", the "regulatory crisis" and "delegalization" — a debate in which not only lawyers and jurists but sociologists and economists are particularly involved[1]. If one attempts — and this is the aim of this introductory essay — to bring together some of the different strands in this discussion, the results may be instructive for all who participate in the debate. National peculiarities will then be able to be seen in the light of their universal elements. Sociological generalizations can be corrected when viewed from within the laws if they are set against specific legal material. On the other hand a dynamization of the strictly juristic 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 too abstractly formulated for this and as such is 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 environment contingent and reversible or necessary and irreversible, 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 *definition of the problem* of juridification. In the current 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 scarcely illuminating to subsume all tendencies towards

[1] For previous discussion of "creeping legalism", cf. Fuller, 1969: 3; Shuklar, 1964; Nonet, 1969; Friedman, 1975; Galanter, 1980: 11, 1981: 147; Abel, 1980: 27, 1982; Mitnick, 1980; Wilson, 1980; Breyer, 1982; Stewart, 1985. Cf. the results of a German/American conference on regulatory control, Trubek, 1984.



proliferation of law or all legal evolution under the heading "juridification". In such a case one would have to be content with a mere stock-taking of contradictory and heterogeneous developments under the relatively arbitrary heading "Developments in Law in the World of Industry, Work and Social Solidarity". The phenomenon of juridification becomes a subject which is analyzable, interpretable and strategically appropriate only when — and this is the first proposition — it is identified with the type of modern "*regulatory law*" in which law, in a peculiar fashion, seems to be both politicized and socialized. This type of law must then be related to Max Weber's concept of "*materialization of formal law*". This will provide an analytical framework in which both naive delegalization recommendations of the "alternatives to law" movement and politically motivated "de-regulation" strategies can be adequately and critically assessed. Here the changes which law itself, in its function, legitimacy and structure, has undergone in the process of juridification also become clear.

The second complex of questions relates to limits to the growth of regulatory law. Is it possible to discern fundamental limits of juridification in so far as certain juridification processes prove inadequate in the face of regulated social structures and/or constitute an excessive strain on the internal capacities of law? The argument I would like to propose here is that this is not merely a problem of the implementation of law, nor of the use of state power, nor merely of the efficiency of law in terms of the appropriateness of means to ends, but it is a problem of the "*structural coupling*" of law with politics on the one hand and with the regulated social fields on the other. Once the limits of this structural coupling have been overstepped, law is caught up in an inevitable situation which I propose to examine more closely under the heading "*regulatory trilemma*".

If, thus, the "regulatory crisis" is adequately interpreted, the third question that arises is how to assess the various proposed therapies and alternative strategies. Are there alternatives to juridification which at the same time do justice to the social guidance requirements of politics, the special properties of the respective social areas and the inner capacities of law? The proposition I would like to put forward here is that neither the various suggestions on improvements in the implementation of law nor the numerous recommendations on delegalization take adequate account of the problem of structural coupling. Intellectual attention and institutional energies should be concentrated on a series of conceptions which go beyond materialization and reformalization and amount to more abstract, more indirect control by law. What these conceptions have in common is that they look for models of "socialization of law". Among the relevant terms here are: "semi-autonomous social fields" (Moore, 1973: 719), "negotiated regulation" (Harter, 1982: 1), "officially sponsored indigenous law" (Galanter, 1980: 26), "proceduralisation of law" (Wiethölter, 1982a: 38, 1982b: 7; 1985), "ecological law" (Ladeur, 1984), "reflexive law" (Teubner, 1983: 239ff., 1985: 299ff., 1986b), and "relationing programmes" (Willke, 1983a: 62); in short: *legal control of self-regulation* (Teubner, 1983: 239ff.). This term refers to different legal

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 juridification, 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 juridification. Furthermore, when we are using a term as polemical as juridification 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; Rottleuthner, 1985: 9ff.). Notions of juridification 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 juridification is described primarily as a growth phenomenon[2]. Fear-laden terms such as "flood of norms" or "legal explosion" (Barton, 1975: 567) underline the disquieting effect 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, antitrust 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 overtaxed. The enforcement of law is damaged, credibility suffers and a high level of dogmatic mastering of legal material becomes impossible (Heldrich, 1981: 814). 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 doctrine — is giving way to a new mode of thinking — "case-law-positivism" as Zoellner polemically terms it. This style of legal thinking is content to analyse developments in judicial decisions and to produce ad-hoc criticism of their "policies". As an observer from outside has noted: "The disastrous state of modern positive law lies in the incoherence of large numbers of norms which are produced procedurally in response to a particular situation and are

[2] Berner, 1978: 617; Boerlin *et al.*, 1978: 295; Hillermeier, 1978: 321; Weiss, 1978: 601; Vogel, 1979: 321; Starck, 1979: 209; Sendler, 1979, 227; Barton, 1975: 567.



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

Of course with a term like juridification, if it is geared towards a crisis of growth, the therapy is implicitly contained in the term itself. Growth itself must be combatted. The prescription reads as follows: rationalize legislation, reduce the number of regulations, thin out the stock of laws — in short, simplify the law[3]. 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-boosting hormone injections". The experiment has already been tried with weeds: acceleration of growth beyound an optimum level is a sure means of extermination (Luhmann, 1981: 73).

Yet it still seems too narrow an approach to concentrate on the expansion of legal material, on the extension and intensification of law. The current criticism of juridification 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 combatted by technical improvements in legislation. In fact, qualitative aspects are more important: what changes in the content of legal structures has the (alleged?) crisis of juridification 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 intricacy (Nörr, 1974). Juridification processes should in fact be analysed 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 juridification 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 juridification processes and the problems which result from them.

### 2.2 Expropriation of Conflict

If one attempts to correct the myopia of the legal perspective by means of the optics of legal sociology juridification suddenly appears in a quite different light. The "politics of informal justice" in the U.S. and its European equivalent, "alternatives to law", come to the fore while problems of growth recede into the background (Abel, 1980: 27; Blankenburg *et al.*, 1980). Sociologists of law describe juridification as a process in which human conflicts are torn through formalization out of their living context and distorted by being subjected to

[3] Ehrlich, 1976: note 1. Cf. the references in note 2 supra.

legal processes. Juridification, as it were, is the expropriation of conflict. Christie (1976: 12) even uses the expression "conflict as property". This is certainly an extreme formulation, but it clearly indicates the direction of the analysis. Doubt is cast on whether law can fulfil what is generally regarded as its major 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 cost of proceedings as well as processual inequality of chances of success" (Hegenbarth, 1980: 48). In this view juridification does not solve conflicts but alienates them. It mutilates 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 delegalization movement is: expropriation of the expropriators[4]. 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 illusory world of legal concepts and procedures.

Institutional proposals and experiments (see Blankenburg, Gottwald, Strempel, 1982) range from reinforcement of the arbitration element in court proceedings[5] to the extension of out-of-court proceedings[6], to the establishment of "community courts" in big city neighbourhoods (Danzig, 1973: 1). Comparative legal and anthropological studies of Kbelle palavers in Africa, of arbitration phenomena in Japan and of social courts under real socialism are the inspiration behind these "alternatives to law".

These ideas of "communal law", as Galanter rightly terms it (Galanter, 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, 1980; Luhmann, 1985). To put it briefly — a return to "informal justice" means, under today's conditions, surrendering conflict to the existing power constellations. Secondly, "alternatives to law" ignore crucial factors in dealing with conflict under modern conditions of role separation. Thirdly, they underestimate an indispensable function of law in functionally differentiated societies — which is to use the possibility of conflict in order to generalize 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 interpreting juridification and for

[4] A valuable analysis of the different directions in which the movements towards delegalisation is going is offered by Röhl, 1982: 15.

[5] E.g., active role of the judge, settlements, negotiations aimed at reaching an amicable agreement: see Giese, 1978: 117; Röhl, 1980: 279.

[6] E.g., arbitration courts, courts within companies and associations: see Bender, 1976: 193; Bierbrauer *et al.*, 1978: 141.



developing alternatives to dejuridification. This is ultimately because the current discussion in legal sociology has confined itself to the classical 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 unsatisfactory 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 the judicial system in face of the far more disquieting tendencies of a politically 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, and 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, 1933: 79). According to Fraenkel, juridification of labor relations means to "petrify" the political dynamics of the working class movement (Fraenkel, 1932: 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 action (Hoffmann, 1968: 92; Däubler, 1976: 29; von Beyme, 1977: 198; Erd, 1978; Voigt, 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 "cooperative" trade union policies, just as it is reinforced by them. This interaction of course occurs at the expense of "conflictive" trade union policy (Erd, 1978: 19).

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

liticization, has certainly pinpointed one of the most important consequences of juridification processes.

Nonetheless, it is in several respects an over-simplification. Simitis has pointed out the, as it were, "voluntaristic" nature of this concept of juridification (Simitis, infra: 134 ff.). The key role of the "conflictive/cooperative" alternative implies that the dynamics of juridification are primarily a strategy problem of the labor unions: the concept is restricted to the politics of organised labor. Yet it is also necessary to point out a national limitation in this concept. Because tendencies of "cooperative" trade union policy are highly marked, especially in Germany, it is tempting to regard "juridification" as a "German speciality" (Unterseher, 1972: 190; v. Beyme, 1977: 198). This is a deficit in comparative legal terms, and it shows that the theoretical connection between "cooperative trade union policy" and juridification is far more relative than it appeared to be. The limitations of this perspective lead finally to a theoretical deficit. The attempt to explain juridification in terms of intra-union preconditions and the collusion between decision-making groups in trade unions with legislation and judiciary (Erd, 1978: 19; Moritz, 1980: 171) can perhaps be accepted as a particular explanation of interests and influences operating in this area, but cannot be regarded as a class theoretical analysis, let alone as a component in a social theory of juridification phenomena[7]. This concept of juridification hardly seems inappropriate, not so much because it is normatively limited to particular social interests but because it is limited to the labor union perspective and abstains from socio-structural explanations.

### 2.4 Materialization

We have examined and found wanting the juristic view of juridification as a "flood of norms", the concept of conflict expropriation propounded by sociologists of law and the political science perspective which sees juridification as restricting the room for manœuvre of social movements and interest groups. So to arrive at an adequate formulation of this problem we will have to go beyond those disciplines and draw on the great theories of legal evolution in the tradition of Marx, Maine, Durkheim and Max Weber, as continued by Parsons, Unger, Nonet and Selznick in the U.S. and by Habermas and Luhmann in Europe[8]. Of course we cannot even begin here to distangle the complexities of legal evolution. On the contrary, we will merely attempt to

[7] This is not meant as an overall criticism of the very useful analyses of Erd. It simply seems noteworthy that Erd firstly makes a vehement criticism of the limited nature of rival explanations, and then for his part produces a very limited explanation. Interesting nuances of his explanation are found recently in Erd, 1984.

[8] With respect of Parsons' theory of norms, which can only be reconstructed from scattered fragments, cf. Damm, 1976. For more recent theories of legal development in the U.S., see Unger, 1976; Nonet and Selznick, 1978; Habermas, 1976: 9, 1981: 322, 522, 1985: 203; Luhmann, 1972; 1981a. For a discussion of theories of evolution of law, see Rottleuthner, 1985.



take up a few strands from the tangle of theory and to combine them in such a way as to further our comprehension of juridification. And here the distinction introduced by Max Weber between "formal and material qualities of modern law" will play a crucial role (Weber, 1978: 644ff.).

Firstly, the wider historical context of juridification becomes clear, the context of the development of the modern welfare state. Habermas' analysis (1981: 522; 1985: 203) in particular shows how in the modern era law has responded to global social developments with various thrusts of juridification which in turn have influenced the developments to which they responded. Habermas distinguishes "in a rough fashion" between four epoch-making thrusts of juridification. The first thrust led to the bourgeois state, which in West Europe developed in the form of absolutism. Law reacted to the differentiation of the two great subsystems — economy and politics — and safeguarded their new autonomy in legal form. Here the modern formal system of civil law originated and formed the common starting point for the later differentiation between "materialized" areas of civil law such as labor law, antitrust law, company law and social security law. The classical system of civil law was "tailored to strategically acting legal persons who enter into contracts with one another ... This legal order bears the features of positivity, generality and formality, and is constructed on the basis of the modern concept of statutory law as well as the concept of the legal person, as one who can enter into contracts, acquire, dispose and bequeath property. The legal order has to guarantee the liberty and property of the private person, the certainty of the law (*Rechtssicherheit*) and the formal equality of all legal subjects before the law, and thereby the calculability of all legal-normed action" (Habermas, 1985: 205). The three thrusts of juridification which followed, of which the last is of particular interest for us, are described by Habermas as historical counter-movements to the differentiation of the economic and political system, more precisely as their legal, democratic and social constitutionalization. In Habermas's words this is to be understood as follows: "a life-world which was at first placed at the disposal of the market and absolutist rule little by little makes good its claims" (Habermas, 1985: 206). In the first thrust of legal constitutionalization the system of civil law was so coordinated with the exercise of power that the principle of the legality of administration could be interpreted in terms of the "rule of law". In a further thrust the democratization of the constitutionalized power of the state was introduced by law. Universal and equal franchise and freedom of organization for political associations and parties legalized the political process. The last thrust of juridification, that which occurred in the social state, is of crucial importance to our subject. There, the juridification of the modern world of industry and labor, the line of freedom-guaranteeing juridification was continued. Juridification in the social state means "constitutionalization" of the economic system. The social state controls the economic system in a similar fashion to that in which the two previous thrusts of juridification controlled the political system (Habermas, 1985: 208). The collective bargaining system, norms of employee protection, the complicated network of social security

protection, the intensification of company constitutions as well as antitrust law interventions in the market are all part of this latest epoch-making thrust of juridification in which the intervening social state uses 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 problem of juridification should concentrate on the thrust of juridification in the social state[9]. Juridification cannot be usefully analysed as a universal historical phenomenon. Rather the task must be to analyse a specific form of juridification, which can only be understood in its proper historical context (see especially Clark and Wedderburn, infra). The most pressing problem at the moment is how to cope with the typical thrust of juridification which occurs in the welfare state, one in which law is used as a control 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 juridification discussed above appear either too abstract in their approach or as only partial aspects of a wider problem. The proliferation of law, for example, is not a phenomenon which can be analysed or even combatted as such but one 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 interventionist state. Conflict expropriation by law does not come within the framework of analysis chosen here in so far as classical justice is concerned, but it becomes relevant again in so far as these are triggered by typical forms of welfare state intervention. Finally, the restriction of autonomous social groups is reduced to the status of one of several problems of juridification 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 — delegalization cannot be seriously considered as a counter-strategy (Hopt, infra). If it is correct that juridification in the welfare state is part of an epoch-making thrust of development then it cannot be reversed by mere political decision, let alone by an isolated decision about more law or less law. The "flood of laws" cannot be stemmed by dykes and dams; at best it can be channelled. Nor can juridification processes in industrial relations be reversed, and certainly not by a shift of trade union policy from cooperative to conflictive strategies. And in the larger perspective of development any delegalization of conflicts is likely to be merely marginal. The already completed functional differentiation of societies with welfare state structures does not permit "alternatives to law"; at best it permits alternatives within law.

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

[9] Similar definitions are given in Voigt, 1984: 17; Dreier, 1980; 1983: 101; Ronge, 1984; Werle, 1982: 1; Simitis, infra: 113 f.



the juridification thrust within welfare states as a historical fact but also resolutely confronts its dysfunctional consequences. Certainly the problematic results of juridification in welfare states are far clearer to us today than they were when the process began. But this should not blind us to the freedom-guaranteeing function of juridification processes in the intervention state (Voigt, 1980: 15; Habermas, 1981: 530, 1985: 208; Heldrich, 1981: 824; Zacher, infra). Even from a normative perspective juridification in welfare states should be accepted as such and reforming attention should be directed to compensating for negative side-effects, although of course every compensation inevitably brings dysfunctional results in its train which in turn require correction, and so on and so on (Simitis, infra; Partington, infra).

## 3. Aspects

In order to examine more closely how law transforms itself in the thrust of juridification in welfare states, it is helpful to take up Max Weber's famous distinction (1978: 653ff.) between formal and material legal rationality. It makes clear what effects are produced when the rule-of-law orientation of classical law is overlaid by a welfare state orientation (1978: 868ff.).

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 to a lesser extent Anglo-American law, as formal-rational. The formalization of law is part of the great rationalization process of the modern era analysed by Weber, which developed parallel to the differentiation of economics, politics and science as spheres of action. The legal system is one of formal rationality to the extent that professionally trained lawyers orientate themselves by universal norms, or more concretely, to the extent that in legal procedures, "in both substantive and procedural matters, only unambiguous general characteristics of the facts of the case are taken into account" (Weber, 1978: 656). In modern legal formalism 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 interests so influenced the law as to transform its orientation from the primarily material ethical, to the formal conceptually abstract and procedurally rationalized orientation.

Yet at the same time Max Weber also emphasised certain anti-formal elements in modern legal development. In the law of contract for example such rematerialization manifested itself in "an increasing particularization of law" and an increasing legislative and judicial control of the content of contracts. For Weber this meant a threat to formal rationality by norms of different quality: "the norms to which substantive rationality accords predominance include ethical imperatives, utilitarian and other expediential 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: 894).

Weber traced this recent particularization of law to various causes. At force here were the "social demands of democracy" (1978: 886) 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 "by new demands for a 'social law' to be based upon such emotionally colored ethical postulates as 'justice' or 'human dignity'" (Weber, 1978: 886).

However compared with the extremely powerful processes of the formal rationality of law, Max Weber regarded 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[10]. The trend towards juridification 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 (Hart, 1983: 10) in the world of industry and labor. The main reasons for intervention — and this applies to labor law as well as to company, antitrust and social security law — are the appearance of phenomena of economic power and/or a societal need for social protection. Juridification in welfare states can be further defined in terms of three processes of change with regard to formal law: change in the function of law, in its legitimation and in its norm structure[11].

### 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 tailored only to the normative requirements of conflict resolution but 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 externalization and internalization. Here the internalized changes, in which classical formal law is itself transformed for social purposes, are highly instructive. The same applies

[10] Eder, 1978: 247. For materialization trends in American law, cf. Unger, 1976: 192; Trubek, 1972: 11; Turkel, 1980-81: 41. For German analyses of processes of materialization, see Wieacker, 1967: 514; Wiethölter, 1982a, 1985; Assmann *et al.*, 1980.

[11] For these dimensions and their application to a third type of law i.e. reflexive law, cf. Teubner, 1983: 252, 1985: 305ff.



to individual and to collective labor law, both of which for reasons of social protection were brought into the sphere of political responsibility (Simitis, infra: 121 ff.). Both company law and antitrust law must be seen in more relative terms. Cartel law of course, is also conceived as a state institution to ensure that genuine competition is maintained. The "visible hand" of the state intervenes in the operations of the market to break up existent market power, to limit market power and to exclude the abuse of market power. But its complete political instrumentalization beyond its function of guaranteeing competition is problematic and in any case controversial (Hopt, infra: 298 ff.). Interventionist instrumentalization seems not very clearly marked in the field of company law either; however, in certain areas such as the legal definition of corporate social responsibility, the norms on publicity and in particular the rules of codetermination and company constitution, the "activist state" intervenes massively in structures of company law (see Kübler, Buxbaum, Corsi infra). Perhaps the US-American development of corporation law following four stages of legal evolution — (1) facilitative rules; (2) fiduciary duties; (3) "soundness" rules; (4) "consumer protection" (see Clark, 1981 and Buxbaum 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 a new inner legitimation from this new function. Whereas formal law clearly viewed itself to be confined to the delimitation of abstract spheres for private-autonomous action[12] material law legitimates itself by the social results it achieves by regulation. "La justice légaliste-libérale" is replaced by "la justice normative-technocratique" (Ost, 1984: 46). The legitimation shifts from autonomy to regulation. Even in the still more formally oriented areas of company and antitrust law, the rhetorics of direct regulation are breaking through. In company law an if anything obfuscating "ethicization" can be observed which basically amounts to regulations for the protection of shareholders and minorities (Wiedemann, 1980b: 147). The regulatory intention is far clearer in the case of regulations on codetermination on 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 (Hopt, infra: 298 ff.; Markovits, infra: 345 ff.).

### 3.3 Structure

This transformation of function and legitimation triggered by juridification processes in social states clearly also affects the norm structure and inner order of the law itself. The effects range from a weakening of the idea of generality to changes in methods of interpretation (see Wiethölter, 1985). In labor law,

[12] Kennedy, 1973: 351, 1976: 1685; Unger, 1976: 166; Heller, 1979.

the tendency towards particularization was observable at an early stage (Simitis, infra: 119 ff.). Classical formal law, in using the concept of the legal person, abstracted from socially relevant features and was therefore accused 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 legally relevant features through its definitions of the employer and employee (Rottleuthner, 1985). Labor law thus made formal law material in the sense that it internalized features that were previously extralegal. This transposition of law from general norms to specific positional roles is probably one of the most significant changes in the course of modern juridification (Rehbinder, 1967: 197; Teubner, 1980: 50; Koendgen, 1981: 192). Here, too, labor and social security law are centrally affected, while the changes in company law and antitrust law are less striking. The counterpart to particularization in antitrust law is the process of gearing to specific market structures in which the same behavior may be judged differently depending on the market situation (Hopt, infra: 312 ff.). In company law too a growth in positionally specific thinking has been noted under the heading of "role and law" (Lutter, 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 teleological method was not included in Savigny's canon of methods: yet its domination over other methods is more or less generally recognized today[13]. Indeed the term "legal policies" goes even further and legitimates in Continental law too the policy thinking which is so popular in the U.S. (Steindorff, 1973: 217; 1979). Cartel law and company law may 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 codetermination law and traditional company law in Germany (Wiedemann, 1980a: 607; Kübler, 1981: 367) and the conflict between the civil law and the antitrust law concept of contract (Hopt, infra: 297 ff.).

As a general rule it can be said that the predominant rule 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 (Nonet and Selznick, 1978: 78). Instead of strictly 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 doctrine are far from being adequately worked out, let alone solved (Luhmann, 1974, 1987; Teubner, 1975: 179; Unger 1976: 193ff.; Rottleuthner, 1979: 97; Lübbe-Wolff, 1981).

[13] For a comparative law study of evolution of methods, cf. Fikentscher, 1975; Krawietz, 1978: 86. For the French situation, see Ewald, infra: 104 ff.



Result orientation leads us to a final consequence of juridification which has been noted with interest and disquiet 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 law[14]. 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 (protection of freedom or economic results) (Reich, 1977: 29; Möschel, 1983: § 3), the issue of whether antitrust law can be instrumentalized for different economic ends, or the solution of technical problems relating to "as-if" competition in § 22 German Antitrust Statute (Klauss, 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 constitution *(Wirtschaftsverfassung)* 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 organization"[15], whether efficiency prognoses are made disguised as constitutional law (Badura *et al.* 1977: 123; Kübler *et al.*, 1978: 145, 197), or whether company law, in apparently strict dogmatic style, is rethought in terms of basic concepts such as "organization" and "group" (Flume 1977: §§ 1, 4, 7) — theories of the interrelation between organization 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 Buxbaum 1984a, 1984b, 1986 for a critique). The everywhere evident opening of legal practice and doctrine to ideas from economics, sociology and political science cannot simply be dismissed as a passing fashion of the unruly sixties and seventies. Of course yesterday critical theory, system theory and "law and society" were the height of fashion, whereas today the trend is towards economic analysis of law, "property rights" and "public choice"[16]. Of course these are fashions, but the

[14] An example is provided by the discussion between Gotthold, 1981: 286 and Möschel, 1981a: 590; as an example in this volume see Markovits, infra: 345 ff.

[15] For the German discussion, see Raiser, 1969, 1980: 206. Even the critics cannot help basing themselves on extra-legal theories, cf. for example, Wiedemann, 1980a: 307. For the French discussion, see Farjat, 1986; for the American discussion, see Buxbaum, infra.

[16] As a more recent thorough survey , cf. the introductory essay by Walz, 1983: 1ff.; cf. as well, the various approaches of social science to legal analysis in Daintith and Teubner, 1986.

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 not regarded as significant. Classical formal law saw itself as having to provide only a formal framework within which social autonomy could develop, and no particular control effects were thereby intended. The tenacious survival of 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 it 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 conception of its identity. It is in terms of this internal model of formal law that Windscheid's confident dictum of the "lawyer as such" who is "not concerned with ethical, political or economic considerations" (Windscheid, 1904: 101) becomes plausible — a view that today appears arrogant or unwordly 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 its 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 extent of so-called sociologization of law cannot therefore be arbitrarily modified by lawyers according to intellectual 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 interventionist social state produces a new 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[17]. Regulatory law "coercively specifies conduct

[17] With some slight differences, this concept of regulatory control of the social state is at the basis of many of the contributions in these volumes. For example, Simitis, infra: 119, 121 ff. puts greater emphasis on the control of the social state, whether in the form of direct regulation or in other legal forms, while Kübler, infra: 219 ff., emphasizes rather the aspect of mandatory law with direct regulatory action. In my opinion, only the combination of both elements can make something of the difficult problem of regulatory control, i.e. if law is subjected to the combined requirements of political objectives and direct social regulation.



in order to achieve particular substantive ends" (Stewart, 1986). 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 legitimation the social results of its controlling and compensating regulations are predominant. In its structure it tends to be particularistic, purpose oriented and dependent on assistance 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 then are the dysfunctional problems resulting from juridification? With such an abstract formulation of the question 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 important problems resulting from juridification under headings such as proliferation of law, conflict expropriation and depoliticization — the list could be increased at will. In contrast to these partial aspects of the problem, the fundamental question is this: are there any signs that regulatory law has reached insurmountable limits of effectiveness? Has juridification today 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, but this time we will examine them from a different angle. Weber (1978: 641ff.) described two conflicting developmental tendencies. On the one hand the legal system increases its "formal" specialization, professionalization and internal systematization; 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 expectations in which it then specializes more and more, and the regulatory *performance* which the social environment demands from law[18].

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 partakes of the functional differentiation of society and develops its autonomy to a point which sociologists today refer to as autopoietic self-refer-

[18] For the distinction between function and performance in law, see Teubner, 1983: 272.

ence[19]. 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 validity has definitively freed itself from all extralegal connections — politics, morality, science — as well as from justifications in terms of natural law. Law can therefore only reproduce itself intra-legally (Luhmann, 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 and refines norms and procedures which can be used for future oriented behavior control. This can only be formulated in the following paradoxical terms: *law, by being posited 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: autonomous, positive, highly formalized and professionalized law, when instrumentalized for purposes of political control, is exposed to specified 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 juridification. The problem lies precisely in the "contradiction" between increasing autonomy and simultaneously increasing dependence. When 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 simple causal 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 environmental 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 "screens" of legal reality constructions. Conversely, legal regulations are accepted by environmental systems only as external triggers for internal developments which are no longer controllable by law.

[19] The terms self-reference/autopoiesis are used in biology as well as in the social sciences in order to identify a system which produces and reproduces the elements of which it is made. See in general, Maturana *et al.* 1980; Varela, 1979. For an application in the social sciences, cf. Hejl, 1982a, 1982b; Luhmann, 1984. For the legal system, see Luhmann, 1983; 1985; 1987; Teubner 1984, 1987.



One is therefore forced to abandon ideas 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 in far more modest terms as the mere *triggering of self-regulatory processes*, the direction and effect of which can scarcely be predicted. Beer (1975) puts it well, 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 (Glanville, 1979: 35). External influence on areas of social life is possible but — and this is crucial — only within the paths and the limits of the respective self-reproduction. These are described by the *regulatory trilemma: Every regulatory intervention which goes beyond these limits is either irrelevant or produces disintegrating effects on the social area of life or else disintegrating effects on regulatory law itself* (Teubner, 1985).

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 invariably 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. This they can only do if they respect the limits of their respective self-regulation. If we adopt this perspective and regard juridification processes as complex relations between three 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*[20].

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 trilemma mentioned above. We can now see more clearly that this trilemma 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 process of social implementation. First, the guidance decision is "legalized" in the political process, i.e., politics is translated into law. This first phase of juridification is itself problematic, for it must on the one hand satisfy the relevance criteria of law but on the other

[20] On the difficult concept of the structural coupling of autopoetic systems, see the introduction in Maturana, 1982: 20ff. See also Hejl, 1982: 63

must not interfere with the conditions of self-regulation either of law or of politics itself. In the second phase of "juridification" the social area of life is "legalized" by regulatory law. Here law must cross social relevance thresholds but must not cross the limits of its own self-regulation nor those of social self-regulation. In other words, the regulatory trilemma exists on both frontiers of the law, that which borders on politics and that which borders on the area of social life. The trilemma exists in three forms: first, as a problem of mutual indifference; second, as a problem of social disintegration through law; and third, as a problem of legal disintegration through society.

### 4.2 Mutual Indifference

Robert Fischer, president of the Cartel Senate of the Federal Supreme Court, has criticized the amendment practice of the German Antitrust Statute, arguing that the Law on Restraints of Competition is no longer a law but a novel, that paragraphs covering three pages are not litigable, that political compromises have left the application of law without bearings and that constant amendments have made doctrinal analyses of law obsolete (Fischer, 1978: 6). Fischer's criticisms are a drastic example of how politics can fail to achieve the relevance criteria of law. Hopt describes these normative guidelines of competition policy as one of the major reasons for the growth crisis in antitrust law (Hopt, infra: 315; for counter-arguments see Markovits, infra: 366). The reaction of law to this is an increasing indifference to political guidelines of this kind. The legislature is constantly producing amendments to indicate changes of direction. However, these signals no longer appear on the internal screen of the legal system; they vanish without trace. This indifference of law to politics is not confined to antitrust law. Precisely in the case of other laws designed to control the economy it has been noted that the inadequate litigability of modern legislative decisions on the micro and macro level make traditional legal control and regulation problematic (Brüggemeier, 1980: 80). This is an inevitable conflict in the structure of politics and law as systems with different self-reference. According to Luhmann "the political selection of legal decision-making premises by parliamentary legislatures is a permanent problem for legal systems" (Luhmann, 1981a: 45).

There are, however, two sides to this indifference. Not only must politics attune its decisions to legal relevance criteria; law too can and must change its relevance criteria with respect to politics. The increasing use of the method of "interest weighing" and the increasing policy orientation of legal decisions indicate such changes of direction in law itself. Accordingly, in some cases where politics seems to come up against legal indifference it has in fact merely reached relative limits of the coupling of politics and law. Law can change its concrete structures without affecting its self-reproductive organization (for this distinction in general see Maturana and Varela, 1980: 137 f.).

In the case of Germany, the conflicts between classical company law and the current laws on codetermination provide a good example of this situation (Wiedemann, 1980a: 607). In the literature it is said that company law has



primacy over the codetermination law (Martens, 1976: 114). This would therefore be a case of such indifference of law to politically motivated change. The pioneering rulings on codetermination, particularly of the Federal Constitutional Court but to a lesser extent of the Federal Supreme Court as well (Bundesverfassungsgericht (BVerfGE) § 50: 290; Bundesgerichtshof Neue Juristische Wochenschrift (BGH NJW) , 1982: 525), show that relative limits as opposed to absolute limits of legal relevance are involved here. The codetermination law is a classical case of manifold political compromises which can however be productively legally processed — as the Federal Constitutional Court decisions demonstrate. Mutual indifference necessarily occurs only when the adjustment limits of law have actually been reached. In theory this point can be clearly defined: it is the point at which not mere structures but the self-reproductive organization itself is affected. Mutual indifference represents an important case of the application of the "symbolic use" of politics (Edelmann, 1964). In politics great reforms are introduced which never reach society because they disappear when they are translated into law.

Indifference may not occur until the second state of the juridification process in cases where policies have been translated into applicable law but legal norms then come up against an area of life whose structures simply prove resistant to legal change. It is the achievement of Philip Selznick to have pointed to the important connection between the "conceptual readiness" of the legal system and the "opportunity structure" of the social area (Selznick, 1968: 55ff). He illustrates this connection in the field of labor law and company constitution. In "Law, Society and Industrial Justice", (1969) Selznick demonstrates in detail that protection of basic rights and constitutional safeguards in the industrial sphere could only be successfully implemented because the internal bureaucratic decision-making structures of companies opened themselves, as it were, to external legal regulation (Ott, 1972: 372). In the special social area there must be what can be termed an order of relevance which is sufficiently receptive to legal signals. Law in turn must select control signals on a certain wave-length and these must be received and acted on in the area of regulation. Here, too, antitrust law provides examples of structurally related legal resistance. It is no coincidence that the Law on Restraints of Competition was once polemically described as a paper tiger (Wiethölter, 1968: 259), an image which underlines 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 Office or the equivalent regulatory agency when compared with the considerable power and financial resources of companies. Such asymmetries can only be tackled by reinforcing state control resources. Yet the obvious question of power should not blind us to the deeper structural problem, which is that areas of regulation react with indifference when regulatory law fails to achieve the relevance criteria of the social mechanism. If one reacts to this by increasing power resources, one can break the indifference 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, one misunderstanding must be cleared up first (Macaulay, 1983: 114; Reich, 1983). If the present article stresses self-reproduction and self-regulation of social spheres, to which regulatory legal interventions can only remain external, this should not be regarded as taking sides against political instrumentalization of antitrust law and in favor of a position such as that of Hayek, who views competition as a noncontrollable process of discovery which should on no account be interfered with by interventionist constructivism. On the contrary, the purpose is to underline the contradictory nature of juridification, (the fact that in many fields of politics juridification must cope with both the political instrumentalization of law and the resistence of self-regulating social systems at the same time); and to show that the essential task is to discover the limits of this improbable combination, with a view to defining the conditions of compatibility, of "structural coupling".

### 4.3 Social Disintegration through Law

"Colonialization of the life-world" — this was the dramatic heading under which Jürgen Habermas (1985: 203) analyzed the dilemma of juridification in welfare states. We have already looked at Habermas' analysis of juridification in social states — he sees it as the political-legal constitutionalization of the economic system. Regulatory law, by delimiting class conflicts and shaping the social state, has a freedom-guaranteeing character. Yet at the same time juridification reveals a dilemma. Tendencies to destroy life-world structures emanate 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 traditional 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 environment. The alien "if. . .. then" structure of conditional law programs cannot react adequately, let alone preventively, to the causation of the facts requiring compensation. Legal subsumption and bureaucratic procedures subject the concrete life-problem to "violent abstraction" (Habermas, 1981a: 530-532; 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 (Tennstedt, 1976: 139; Pitschas, 1980: 50; Habermas, 1981: 540; 1985: 210). Even at the risk of falling short of Habermas' normative intention, we are obliged to pursue the abstraction even further. Dangers to self-organization and self-reproduction from regulatory interventions of law are not confined to the sphere of the "life-world". These disintegrating consequences of juridification are also observable in other self-regulating social areas which Habermas classifies as belonging to the "system". Fraenkel, for example, wrote that the price of juridification of labor relations would be a "petrification" of the political class conflict (Fraenkel, 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 legalized 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. Simitis has pointed to the dilemmatic structure of norms in juridification on health and safety at work: under the German Work 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 revelation of his personal life area just as he is obliged to accept the consequences for his life style of measures introduced for his safety (Simitis, 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 creating of stereotypes which in turn force employees to conform (Simitis, infra: 133 f.).



### 4.4 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 "creeping legalism". The juridification of society can have disastrous repercussions on law itself (Zacher, infra: 410 f.). Political and social demands for regulation push law to the limits of its effectiveness (Mitnick, 1983). 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 control that have repercussions on the internal structure of law, repercussions with which law may no longer be able to cope. Law is so to speak sandwiched — on one side by social state policy, which calls for legal enforcement and thus for 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 with which law must become involved if it is to be successfully implemented. These double demands on law can go so far as to endanger its own self-reproductive organization.

Niklas Luhmann (1985: 111) recently analyzed the paradoxical danger which juridification poses for law in its relation to the political system. He distinguishes between *normative* elements in law as representatives of the self-

reference of law in which legal decisions are produced, and *cognitive* elements as representatives of the openness of law, in which law adapts to its environment. Both elements are necessary but they stand in precariously tense relation to one another. Now when law is enlisted for regulatory tasks in the social state, this precarious relation becomes so strained as to endanger the self-referential structure of law. In particular, Luhmann quotes two major instances of political overtaxing of law: the rapidity of change in political decisions on regulation, which do not allow case law and dogmatics sufficient time to develop independently, and the result orientation of political guidance, which burdens law with the problem of controlling its own results. Although one may disagree with Luhmann about whether these are absolute limits of strain or only relative limits — in which case law could adjust more, particularly with regard to result-orientation — one must in principle agree 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 are signs that 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 enforced adjustment of law to the autonomous logic of the regulated social areas. Once more German antitrust law provides a good example. In his study of the control of abuses in § 22 of the Law on Restraints of Competition, Möschel has shown how the law on competition, for conceptual and practical reasons, has reached its limits (Möschel, 1981b: § 22,4). How is law to maintain its normativity and at the same time become involved in a structure of regulations whose elements are so interdependent 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 solid legal subsumption? (Möschel, 1974: 166, 171).

Of course to a certain extent economic analyses may be of assistance here. Cartel law, as already stated, provides a spectacular example of the inroads made by the social sciences into law (see Markovits infra). The phenomenon applies to a wide range of areas. "Norm area analyses", to use the term coined by Friedrich Mueller (1966: 168), are required in many areas in order to achieve the regulatory intention. But this "economization" and "sociologization" of law also has its limits (see Daintith and Teubner, 1986). In the case of economic analysis of law fears have been expressed that this "economization" of law could endanger its characteristic feature: its very normativity (Assmann, 1980b: 305). Yet precisely as a partisan of "sociological jurisprudence" one must examine closely such limits of law, in order to realistically estimate



the opportunities and dangers of the opening of law towards the social sciences.

We can now formulate a *second interim finding*: juridification raises many problems, such as inadequate effectiveness of regulation and unintended side-effects, whether in the regulation area or in other social sectors. But these are, so to speak, only the "everyday" problems of the phenomenon. To find out whether fundamental limits of effectiveness have been reached, one must concentrate on the problem of structural coupling of law with social state policies as well as with various social life areas. The deeper reason for this problem lies in the autonomy of social subsystems, which is so highly developed that as self-referential systems they cannot directly influence one another but can only affect self-regulatory processes that are uncontrollable from outside. The fundamental limits of structural coupling are reached either when relevance criteria are not met or when the conditions of self-reproductive organization are endangered. When juridification processes overstep the limits of structural coupling, law inevitably becomes caught up in a regulatory trilemma. This means: either law, politics and/or the social area of life will be mutually indifferent, or juridification will have disintegrating effects on politics and/or social sectors concerned, or, finally, law itself will be exposed to the disintegrating pressures to conform of politics and/or social sectors.

## 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 delegalization 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 trilemma by taking the problem of the structural coupling of law, politics and the area of regulation implicitly or explicitly into account.

### 5.1 Implementation

Partisans of comprehensive regulation through law will concentrate on the effectiveness of juridification. Their view of the problem has been most clearly formulated in a branch of socio-legal and political research known as "implementation" research (Mayntz, 1977: 51, 1980, 1983; Windhoff-Heritier, 1980, Sabatier and Mazmanian, 1980: 538). It takes as its starting point an "enforcement deficit" of regulatory law which is diagnosed again and again, in 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 out and compensating for false developments, particularly in economic life.

The problem of structural coupling is then reduced to a problem of technical effectiveness. If political regulation fails, then power resources and funds must be increased 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" (Tolchin and Tolchin, 1983). According to this view, the crisis 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 power resources so that law in fact will fulfil its regulatory functions. Thus legal dogmatics will have to shift even more from a primarily law-applying to a legal-political orientation, even in their conceptuality (Nonet and Selznick, 1978). Jurisprudence 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 socio-technics (Podgorecki, 1974). In the attempt to achieve greater efficiency, economic and sociological analyses will have to be drawn on. This means in particular that law will have to take into consideration both its own implementation and its social consequences (Luhmann, 1974; Teubner, 1975: 179; Rottleuthner, 1979: 97; Lübbe-Wolff, 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 clearly 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 goal determines the program; the program determines the behavior of the implementors 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 the hopes pinned on it cannot be fulfilled and argues that corrections must be made in its 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 up testable causal hypotheses and developing an axiomatized theory can only be partially realized in implementation research. Instead one must be content with far more modest 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 prognoses on the model of Hayek's pattern predictions, i.e., the mere prediction of general structural patterns. These deficiencies are all explained in terms of the great complexity implementation research faces.

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 surprizing. If it is correct that social regulation, because of the autonomy of social systems, can do nothing but trigger uncontrollable self-regulation processes, then simple causal models are inadequate as a 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 restraint here also mean abandonment of the claim?

The various solutions which Mayntz herself proposes are interesting. Pattern predictions allow only prognoses of very general constellations. 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 scarcely appropriate, ought to be replaced by incentive programs and persuasive strategies. Finally, hopes are pinned on the granting of calculated autonomy to implementors and target groups alike. She argues for a specific type of "procedural regulation" as an intraorganizational and interorganizational device.

### 5.2 Deregulation

Is deregulation then the solution? If an 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 juridification 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. Mitnick, 1980; Breyer, 1981). We must differentiate between at least three different strands of criticism: 1) cost-benefit analyses, (2) economic versions of "capture theories", and (3) political criticisms of "constructive interventionism".

In the U.S. in particular the regulatory agencies, such as the Securities 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 verdicts on this kind of juridification are frank: "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 often absurd" (Coase, 1964: 194). Economic cost-benefit analyses have shown the costs of regulation in many cases to be horrendous: the estimated negative balance of the regulation of inshore water pollution in the U.S. from 1972 to 2000: 107 billion dollars; the regulation of transport goods: 4 to 8 billion dollars per annum; the regulation of medical drugs: 350 million dollars per annum (McCraw, 1975: 172; Feick, 1980: 51). Weidenbaum (1980) estimated that the annual costs 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 juridification should take place. But of course economic cost-benefit analyses must be treated with caution and used only as one criterion among others. Economic burdens 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. Stewart (1986), for example, lists six principles which go beyond considerations of economic efficiency: (1) moral condemnation, (2) distributional equity, (3) noncommodity values, (4) assuming control over outcomes, (5) access to judicial remedies, (6) honoring expectations created by past regulation.

The second strand of arguments for deregulation is found in economic versions of the so-called "capture theories". Bernstein (1955), the best known representative of the political "capture theory", put forward the proposition that regulatory agencies are subject to a typical "life cycle". In the first stage of juridification, it is argued, they tackle their regulatory task with public support actively, if not aggressively; in the next phase, however, they degenerate into tired, inert organizations that can be easily captured by the economic interests they are regulating (hence the term "capture theories"). This thesis, which has been taken up and further developed by political-economic authors such as Kolko (1965), McConell (1966) and Lowi (1969), was surprizingly given further support by leading representatives of the Chicago School (Stigler, 1971: 3, 1972: 207, 1975). Stigler, for example, comes to the



pointed conclusion that "regulation is acquired by the industry and is designed and operated primarily for its benefits" (Stigler, 1975: 114). Juridification is regarded as a resource supplied by politics and demanded by the regulated industry. In return for political support, industries interested in regulatory policies can receive the form of juridification which corresponds to their interests. Deregulation strategies based on such analyses do not appear at all unreasonable; they concentrate on dysfunctional consequences of juridification. However they hardly affect the fundamental limits of juridification with which we are concerned.

These limits are more likely to be touched on by a politically motivated deregulation strategy. Here, too, Chicago stands in the front line (e.g. Posner 1974; Stigler, 1976: 17; McCormick and Tollison, 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 striven for here is a high degree of self-organization in society through markets. Milton Friedman says he would most like to see a "completely anarchic world" but he is content with "completely untrammelled capitalism" (Milton Friedman in *Der Spiegel*, No. 48, 1970: 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.

Von Hayek and his school propose a more sophisticated line of argument (v. Hayek, 1972, 1973-1979). Social state intervention through juridification 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 (Hoppmann, 1972). This school holds that the connections which interventionists claim exist 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 simple models of causal relations between a few variables, one that is bound to lead to false economic policies. Hayek's school argues that the regulation of market results by interventions in market structures is fundamentally impossible and leads to arbitrary economic interventionism. Instead, the conception of "competition as a process of discovery" is advocated. Social structures and processes are interpreted as complex phenomena which cannot be reduced to simple so-called economic laws. The market is regarded as a complex, cybernetic system, the elements of which are individuals and companies, which interact spontaneously on the basis of general rules of behavior. The nature of the system is self-regulating, environmentally open and evolutionary.

This means that competition is a dynamic process which cannot be captured in static models. The data and information which go into this process cannot be grasped or pinpointed, so scientifically sound predictions can relate only to the emergence of a general structure but never to specific market results. This need not be a disadvantage, however, because the social institution of competition is consciously brought into play as a process of information,

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 institutional preconditions 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 this is a remarkable attempt to tackle the central problem of juridification, that of the structural coupling of juridification 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 juridification: interventionist interference in self-regulating systems cannot in principle be controlled from outside. At the same time an attempt is made to formulate 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 (Gotthold, 1984b).

However, the manner in which this theory hypostatizes sectoral economic rationality is unacceptable. The absolute primacy of freedom of competition over other economic, social and political goals is normatively postulated. According to this view, the sole function 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 in terms of "practical concordance" — a method which allows greater legislative scope.

For social theory this position is again unacceptable because it hypostatizes the sectoral rationality of the economic system — market and competition — for the whole and refuses to see that it is precisely the task of juridification in welfare states to bring the rationality of other social subsystems into play against the economy (Habermas, 1981: 530; 1985: 209; Willke, 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 one another (Teubner, 1983: 273). This function does not become redundant because self-regulatory systems defy direct control. It remains necessary — but is incomparably more difficult.

Our discussion has now reached a point at which the most interesting alternatives to juridification appear. Solutions to the problem of juridification 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 politico-legal control of social self-regulation?

### 5.3 Control of Self-regulation

As alternative solutions 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 burdened with the control of self-regulating processes (Bohnert and Klitzsch, 1980: 200; Ronge, 1984).

The crisis of regulatory law is here diagnosed as a social immune reaction to legal interventions. The problems of juridification show that different social 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 areas. 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 Wiethölter, 1985; Buxbaum infra). Normatively, 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 they all have one problem in common. Is normative integration still possible in a society characterised by inner contradictions, by distintegrating, indeed disruptive conflicts between the specific logic of highly specialized sub-systems? (Habermas, 1981: 334; Luhmann, 1975: 51). 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 "constitutive strategies of law" (Stewart, 1986), i.e., to introduce structural legal frameworks for social self-regulation. The term "proceduralization", for instance, is used as an overall heading for this function of law, which is to encourage "social systems capable of learning" (Wiethölter, 1982a, 1982b, 1984, 1985). Essentially three matters are concerned here: 1) the safeguarding of social autonomy by an "external constitution" (Habermas, 1981: 544f.; 1985: 218f.), a legal guarantee for "semi-autonomous social fields" (Moore, 1973; Galanter, 1980; 1981); 2) structural frameworks for effective self-regulation, for instance along the lines of "external decentralization" of public tasks or in terms of internal reflexion of social effects (Lehner, 1979: 178; Teubner, 1983: 273; 1987; Hart, 1983; Gotthold, 1984a: 249; Buxbaum, infra); 3) the canalization of conflicts between systems by "relational programmes"

(Willke, 1983a: 62ff., 145) or neo-corporatist mediation mechanisms of "procedural regulation" (Mayntz, 1983; Streeck and Schmitter, 1985), by "negotiated regulations" (Harter, 1982; Reich, 1983), by semi-formal modes of procedure in the so-called "discovery process of practice" (Joerges, 1981: 111), or by legal coordination of different system rationalities (Scharpf, 1979; Assmann, 1980a: 324; 1980b; Ladeur, 1982a: 391; 1982b: 74; 1983: 102; 1984). In short: instead of directly regulating social behavior, law confines itself to the regulation of organization, procedures and the redistribution of competences.

What does this mean in concrete terms? "Negotiated regulation" is one heading under which such indirect regulations through law are discussed today (Harter, 1982; Reich, 1983). It includes "dependent bargaining" as well as "constitutive bargaining" (Stewart, 1986). Antitrust law, for example, contains a wealth of material to illustrate regulation through negotiation, in which solutions are reached through negotiation under the pressure of legal sanctions (Hopt, 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 proposals are worked out cooperatively.

"Bargaining in the shadow of law" describes a mechanism which has been demonstrated in many areas of law (Mnookin and Kornhauser, 1979: 950; Galanter, 1980). The mere existence of substantive law with its threat of sanctions creates negotiating positions for the parties — whether private individuals, organizations or state institutions — which ultimately affect the result of negotiations — an effect which would not have been achieved had the law not existed. The advantages here are clear to see: this method is more likely to lead to flexible, cooperative solutions geared to specific situations 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 decree changes of behavior recedes into the background, whereas its latent function, which is to regulate systems of negotiation becomes crucial.

Numerous studies have analysed how widespread this phenomenon has become (e.g. Treiber, 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 deficits appear which oblige the parties 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 tacitly reinterpreted as a kind of procedural law. The threat potential of legal sanctions is not used. It is not so to say "liquidated", but in fact survives as a legally guaranteed power of negotiation within the self-regulating system of negotiation. Indeed there are even interpretations of regulatory law which warn against taking the implementation of law too seriously. "Strict enforcement by the book" often appears unreasonable and endangers the precarious regulation situation (Bardach and Kagan, 1982).



A critical point is reached when not only the parties concerned reinterpret regulatory law more or less openly and more or less legitimately as 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 (Simitis, infra; Wiethölter, 1985: 239; Mückenberger, 1980: 241). State legislation on safety at work and the mere regulation of free 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 control state law here tends to regulate collective agreements only indirectly — by making legal recognition of negotiating parties dependent on certain structural conditions, by devising procedural norms for the system of negotiation and for 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 action is being considered, is more likely to be achieved by institutional influencing of the size of organizations and their internal structures. Comparative empirical studies 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 (Streeck *et al.* 1978; Streeck 1979: 206, Groser, 1979: 258). Although here too one should be wary of generalizations, procedural law does show a certain superiority over material law (cf. Giugni, infra). As Simitis puts it: "Procedural rules are almost always symptomatic of a phase of juridification in which regulation by material rules is no longer sufficient, if only because of their fundamentally selective approach and their limited adaptability to changing social and economic conditions" (Simitis, 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 development, especially in the field of consumer law (Hart and Joerges, 1980; Joerges, 1981: 52).

In the U.S. proposals for "negotiated regulation" have aroused considerable interest (Harter, 1982). As a means of preventing excessive "lawyering", which only intensifies conflicts, it is proposed that the groups concerned hold negotiations on regulation, to be presided over by a convenor who would

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 law arbitration. Similar proposals have been made in France in connection with problems of rent and consumer law (Reich, 1983: 28). This generally amounts to the state-directed organization of a system of negotiation in which all the relevant interest groups participate. It is intended to lead to "accords negociés collectivement". The problematic of the parallel to collective labor law is evident: the organizational capacity 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 "external decentralization" fails when social power and information asymmetries reduce legal control of self-regulating processes to a farce. The inevitable consequence is therefore specific legal reinforcement 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 "Stiftung Warentest", of consumer centres, state-funded representation of consumers) (Joerges, 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 norms, the law forces highly specialized, unilaterally oriented organizations to take the conflicting demands of their social environment into account when making decisions. (The consequence of this perspective in consumer law, which could overcome the weaknesses of direct legal interventionism is described by Joerges, 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 regulation of behavior to a more indirect regulation of procedures [21]. The social contract is merely a special case of the many "neocorporatist arrangements" which are attracting increasing interest internationally[22]. Unlike the pluralistic mediation of interests, in which social groups bring their interests to bear only in the forecourt of state power, the neocorporatist syndrome amounts to a form of voluntary cooperation between the state and social interests, and in particular to a decision-making symbiosis between the state, trade unions and industrial associations. The reasons for this development are essentially found in the increase of power and rationality of sectoral social systems, in the face of which classical legal forms of state regulation break down (Schmitter, 1977: 7; Winkler, 1976: 100). This "disenchantment of the state" (Willke, 1983a) leads to new forms

[21] For the emergence of different forms of "Social Contract" see Simitis, Giugni, Clark and Wedderburn, infra.

[22] See as an informative introduction, Alemann and Heinze, 1979; Alemann, 1981. For recent proposals in the U.S., see Industrial Policy Study Group, 1984.



of juridification, to "new legal forms of the intertwining of the state and the economy" (Gessner and Winter, 1982). According to Winter, 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 rationality in private organizations, of the repetition of social conflicts in the sectoral system itself and of the private "occupation" of state organizations. The concomitant loss of demarcation 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 identity (Winter, 1982: 28).

The term "relational program" has been introduced into the discussion to describe the new role of law in such neocorporatist arrangements (Willke, 1983a: 10; Teubner and Willke, 1984). It differs from the conditional program of classical formal law and the purpose program of social state regulatory law by being oriented towards organization and procedures for coordinating different rationalities of social sub-systems. It is no longer the classical forms of law — prohibitions and incentives — which predominate, but "procedural regulations" (Mayntz, 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 steered into new channels. As Streeck and Schmitter (1985: 25f.) 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 Simitis (infra: 143) talks of a "second generation of employee protection rules" — but it is a phenomenon which is generalizable beyond this: the internal organizational consequences 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 juridification which affects the internal organization of trade unions and other organizations representing employees, which have hitherto been regarded as autonomous (see, e.g., Summers, 1977: 251). Even in Great Britain, Clark and Wedderburn (infra: 182) observe, in regard to the internal conduct of trade union affairs, "an unambiguous increase in state intervention in areas which were previously left to autonomous regulation". The phenomenon is generalizable 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 negotiation) are shifted to the inside of the organization itself. This means a shift from "external" market coordination to "internal" political processes of organizations. The

internal structure of the organization thus becomes the "Achilles' heel of corporatism"[23]. 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 Buxbaum, Kübler and Corsi (infra) have demonstrated, there is a tendency in company law towards a materialization of previously neutral formal law. However, state regulation and judicial control here seem to reach the limits of their control capacity, not only because of superficial changes in political trends but for structural reasons as well (Mayntz, 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 strengthen the development of "reflection structures" within the economic industry. "Company constitution" and "neocorporatist systems of negotiation" are the relevant terms here (see Hopt and Teubner, 1985). 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 economic system or 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. Is it completely inconceivable that they could change again so as to include problems of ecological balance in their set 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 "reflexive" control of economic behavior, which is capable of transforming external social "troubles" into internal organizational "issues" for the micro-policies of the company? Buxbaum (infra: 264 ff.) points out rightly that the success of such a legal strategy depends mainly on the "institutional setting" of adequate judicial and bureaucratic structures.

The main goal is not the reduction of power, nor an increase in individual participation in the emphatic sense of "participatory democracy" but the well-considered design of internal organizational structures which make the 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 reflexive internal structures would be to replace interventionist state control by effective internal control. The creation of structural conditions for an "organizational conscience" which would reflect the balance between function and performance of the social system — this, in our definition, would be the integrative role of reflexive law.

[23] A discussion of the relationship of neo-corporatist structures and the internal structures of organization is found in Teubner, 1978b: 545, 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 autopoietic 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 interaction of communication systems with equal status. This refers legal intervention to the indirect method of "decentral context regulation" (Teubner and Willke, 1984: 4). This form of regulation is made necessary and possible by the high degree of autonomy of social subsystems: regulation impulses are only possible in the form of context conditions, which as observable differences constitute the information basis for the respective basal circularity.

And this means more than regulation in the classical liberal sense of residual context 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 reflection processes. The possibility that this would overtax 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 context regulation consists of fully accepting the closure and intransparence of complex social systems as "black boxes" and concentrating legal regulation solely on the external relations, the interactive relations between 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 phenomenon of self-reference and self-reproduction is the adjustment of legal theory and legal practice to such concepts.

However, exaggerated hopes must be warned against[24]. It must be assumed that the move from direct legal control to indirect regulation of self-regulation would bring new, serious problems in its wake. "Inexactness" of legal regulation and increased coordination costs would almost inevitably be side-effects of a "proceduralization" of law (Kübler, infra: 134 ff.). Finally it

[24] Blankenburg, 1984, expends a great amount of energy in destroying illusions about "proceduralized" law, which in fact no one ever had in this form.

must be emphasized that the issue is not one of totally adjusting law to new forms of regulation. Just as classical formal law is not replaced, but at most overlaid, by materialization processes, here too it is only a matter of relative dominance. The most that can be expected is a shift of emphasis in legal regulation towards more flexible strategies. These strategies will not solve all the problems of juridification, nor will they 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]

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