

Articles

Empiricism and Legal Practice

By Volkmar Gessner & Gerd Winter*

Empirical research had already lost the possibility of a naive claim to objectivity when empirical legal sociology began work in post-war Germany. From the mid-1960s general sociology was involved in the "Positivismusstreit" and was discussing the influence of preconceived interests of perception, commonplace theories and social interaction on empirical observation.¹ Social scientists widely accepted the view that social reality does not exist objectively, but emerges intersubjectively. Science also shapes social reality. For sociology there is nothing which can simply be counted and measured.

But counting and measuring continued; are they all constructions – the empirical types of private limited company, the practice of tribunals in the business sector, the investment of trust money by guardians for their wards, the general terms and conditions of banking business as de facto legislation?² Is there nothing "out there" outside our own minds?

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¹ See: T.W. ADORNO *et al.*, *DER POSITIVISMUSSTREIT IN DER DEUTSCHEN SOZIOLOGIE* (1969).

² Such were the subjects of some of the volumes that appeared in the *SCHRIFTENREIHE FÜR RECHTSOZIOLOGIE UND RECHTSTATSACHENFORSCHUNG*, a series of publications that pioneered empirical legal sociology after the Second World War.

At that time even the hermeneutics did not go so far as to assume this. It is only now, paradoxically at a time when catastrophes are multiplying (but the media are stronger), that any are of this opinion. But even modern constructivism, foster-mother of the autopoiesis concepts applied to the social system,³ concedes that after all "reality" can irritate the constructive consciousness, for which it is a kind of radio crackle towards which it repeated/ attempts to direct the aerial until it is – still not comprehended – tuned out.⁴

Irritation and crackling are metaphors, and one would like to know whether empiricism can be counted among them or whether it is also mere construction. When it constructs completely, it does it in a way that differs significantly both from law with its would be image, and theory with its abstract image of reality. Even if everything were constructed – and we cannot know whether this is the case – this difference would still be reason enough to ask what it exactly consists of. We wish to do this, and will concentrate on the relationship between empiricism and legal practice.

A. "Rechtstatsachenforschung"

In West Germany post war empirical legal sociology began as "Rechtstatsachenforschung"⁵. Whereas jurisprudence both structures and reshapes the world of norms, Rechtstatsachenforschung investigates the social field in which the norms originate and operate. Both of these, social field and norm alike, however, remained beside one another but separate. Causes and effects were hardly regarded. In addition, empirical findings were not explained sociologically or evaluated in regard to legal policy.

B. Critical Empiricism I

This changed at the end of the 1960s, when a wave of social reform movements arose and encouraged critical social theory. Empirical legal research "from the left", where it emerged in spite of the period's preoccupation with theory, now concerned itself on the one hand with processing the discovered results theoretically, on the other with directing them towards political reform plans and evaluating them appropriately.⁶

³ N. LUHMANN, NEUERE ENTWICKLUNGEN DER SYSTEMTHEORIE, 292 (1988)

⁴ v. Glaserfeld, in DIE ERFUNDENE WIRKLICHKEIT, 16 (P. Watzlawik ed., 1971)

⁵ See, *supra*, note 2. The founding fathers were Ernst E. Hirsch and Manfred Rehbinder.

⁶ The Journals KRITISCHE JUSTIZ (since 1968) and DEMOKRATIE UND RECHT (since 1972) were the most important fora for the new debate.

I.

For a long time German legal sociology made efforts only to cross the threshold of legal doctrine, *i.e.*, the interpretation and application of valid law. Presumably the reason for this was that the law faculties were preoccupied with "leges latae" and not with "leges ferendae", and legal sociologists, who had mostly had legal training, aspired after these faculties. On the other hand the sociology faculties did not specifically concern themselves with legal policy.

A first success was a methodological one. Legal doctrine, it is true, first erected a barrier with the theory that recognition and evaluation should be strictly separated. Value judgments, it was said, should not be drawn from cognitive statements, at least not such as were legally binding. Many, though by no means all, let themselves be persuaded that the program of law is frequently vague, that in this way latitude remains for differing interpretations, that in the choice of the finally accepted variant additional reasons could be drawn from an analysis of the prospective consequences of the variant, and that these consequences were accessible to sociological re-search.⁷ This relevance of cognitive statements for value judgments accorded also with the intuitive self-experiencing of the judge. Practical adjudication certainly regards the consequences of its own decisions, at least insofar as its own institutional interests are concerned. The much debated "Einbeziehbarkeit" (incorporability) of sociology into doctrine appeared even clearer where laws through their program pointed explicitly to reality, as, for instance, in the law concerning unfair competition, the concept of misleading advertising.

The group of those who accepted the new doctrine was large enough to open up in legal sociology an enormous sphere of activity which could hardly be coped with and in addition always led to (genuine or gloating) disappointment of those who might possibly have applied the sociological recognitions, in finding that so few sociological recognitions were in fact available. In any case empirical legal sociology was not only noticed by legal doctrine but asked after and conceived of together with legal sociologists. It was empirical (not theoretical) legal sociologists who were taken into some law faculties and legal research institutes, and many textbooks (including legal sociological textbooks written by lawyers)⁸ were based, insofar as they argued sociologically, on empirical research results.

This cooperation was however not equally balanced and also not without its effect on legal sociology. It was legal doctrine which selectively chose the empirical information. The legal sociologists were already in an organisationally dependent position (as doctorands,

⁷ See *e.g.* TH. WÄLDE, JURISTISCHE FOLGENORIENTIERUNG (1979); R LAUTMANN, SOZIOLOGIE VOR DEN TOREN DER JURISPRUDENZ (1971).

⁸ TH. RAISER, RECHTSZOLOGIE (1987); K.F. RÖHL, RECHTSZOLOGIE (1987)

assistants, candidates for lectureships or as individuals engaged in single combat in the law faculties and institutes), and they were defeated in the struggle for the "valid" understanding of reality. In view of the incipient different methods of legal doctrine and sociology, this competition could not be carried out academically but was decided according to power relationships.

Empirical sociology had to look on as its results were torn out of the context it had chosen for them, pulled apart and selectively applied in the perspective of legal doctrine.⁹

For instance, in the 1970s various studies were carried out on the non-enforcement of environmental law. This began with a radical approach. A case study showed the avoidance strategies employed by industrial concerns towards environmental administration and derived from this doubts as to the ability of law to carry out protection of the environment against massive economic interests.¹⁰ Further more widely undertaken investigations altered the perspective. These researched the interaction between administration and enterprise under the aspect of informal cooperation in the shadow of the law and deduced that such negotiation – with exceptions – is more flexible than enforcement according to the letter of the law.¹¹

These results were then widely discussed in legal doctrine. The yardstick mainly applied was that of lawful/unlawful. The variants of bargaining were subsequently sorted to see whether they offended against the law or moved within the legally established discretionary limits. For example, so-called offset agreements on the permitting of air-polluting installations in non-attainment zones contravened the law even if a *quid pro quo* – namely the closure of an old plant – more than compensated for the emission of the new one.¹² Also, in some cases new legal concepts were thought up in order to rescue from the verdict of illegality for those practices which were in fact not provided for in law but which the authors considered useful. For instance, the concept of "Duldung" (toleration) was suggested. This prevents the administration from stepping in when an unlawful practice has been tolerated for a long time.¹³ Under certain circumstances the so-called "Vorabbindung" (previous commitment), *i.e.* an agreement in which a community

⁹ E. Blankenburg, *Die Praxisrelevanz einer Nicht-Disziplin: der Fall (der) Rechtssoziologie*, in *SOZIOLOGIE UND PRAXIS*, 214 (U. Beck ed., 1982)

¹⁰ G. WINTER, *DAS VOLLZUGSDEFIZIT IM WASSERRECHT. EIN BEITRAG ZUR SOZIOLOGIE DES ÖFFENTLICHEN RECHTS* (1975)

¹¹ R. MAYNTZ, E. BOHNE, B. HESSE, J. HUCKE, A. MÜLLER, *VOLLZUGSPROBLEME DER UMWELTPOLITIK* (1978); for an American parallel, see: E. BARDACH, RA. KAGAN, *GOING BY THE BOOK* (1982)

¹² E. BOHNE, *DER INFORMALE RECHTSSTAAT* (1982)

¹³ A. RANDELZHOFFER, D. WILKE, *DIE DULDUNG ALS FORM FLEXIBLEN VERWALTUNGSHANDELNS* (1981)

promises a firm which wishes to move in to draw up a construction plan, was accepted by the courts although this prejudices the outcome of formal planning procedures.¹⁴

Legal doctrine thus takes cognisance of what is for it a new phenomenon and processes it by subjecting it as far as possible to valid law; where valid law is insufficient, *i.e.* where the interdiction of informal agreements would be all too contrafactual, the law is adjusted. Legal doctrine thus learns from new empirical findings, but continues to follow its own logic, namely the attempt to make as far as possible all phenomena able to be subsumed into the law as it stands or as it is modified.

This effort – it must be said against the theory of the autopoietic legal system – not only serves the end in itself. Rather, imperatives of the general societal system are accepted and legalized by adaptation of the law, as for instance in the "Vorabbindung" of the economic imperative that investments must be administratively secured in good time and cannot wait upon political legitimation. In this lies a "substantive" service of the legal system for the benefit of the general system, and of which the legal system is certainly conscious.

The logic of the legal system however differs from that of the social scientists who carry out the empirical investigations. In our example, the progressive strand of scholars had in mind an increased flexibility of environmental administration in the interest of better environmental protection, which would have required an open evaluation of the various strategies under the aspect of effective achievement of such protection. This evaluation was rejected by the legal system. Legal doctrine was prepared to adapt its concepts to prevailing economic interests, thereby legitimizing them. The other more theoretical strand, on the other hand, did not aim at a particular evaluation but at proving a more general theory, namely that neither better law nor better administrative strategies promise success, but that a change in structure at the economic and political levels is necessary. It is conceivable that legal doctrine had even less interest in this.

In view of the hegemony of legal doctrine, empirical legal sociology was confronted with the choice between annihilation and therapy.¹⁵ Most empirical legal sociologists underwent a therapy directed towards recognition of this power of definition and took increasingly up only such research topics as were asked for by (liberal) legal doctrine.

An example: Settlements in civil proceedings can be investigated from two aspects. An approach can be made "from within", from the institutional interests of justice, and ask which factors (type of conflict, type of parties, clarity of the law, negotiation strategy of the

¹⁴ Decisions of the Federal Administrative Court [Bundesverwaltungsgericht], 45 BVERWGE 309.

¹⁵ See: P.L. BERGER, TH. LUCKMANN, THE SOCIAL CONSTRUCTION OF REALITY (1967).

lawyers and judge) increase or decrease the chances that a settlement will emerge instead of a judgment; the results are then applicable when a court considers raising the settlement ratio to lower the workload.

The approach can however also be made "from without", from society, and ask how the settlement will affect the social conflict and what characterises it in comparison with other forms of conflict mediation or reconciliation.

Both approaches were frequently discussed theoretically in West Germany at the end of the 1970s.¹⁶ Most empirical investigations however took the first approach¹⁷ or shortened the exterior perspective to merely a quantitative establishing of how frequently the settlement led to a continuation of the social relationship (and that it seldom did).¹⁸

II.

The difficulty of refuting the powerful legal doctrine perspective by propagating theory-building and evaluation of conclusions caused legal sociology to try another way and bypass legal doctrine by exerting direct influence on legal policy.

Investigations were undertaken for ministries, public authorities and legislative commissions. Legal sociologists appeared as expert witnesses before parliamentary hearings. Finally there emerged a whole new empirical research field with a clear legal policy aim, that of implementation research.

In this context theoretical legal sociology had no public, whereas there was great interest in empiricism. But even then its critical potential remained to a great extent unexploited, since the legal policy agents, practised in dealing with interest groups, would not accept evaluation and therefore preferred only to take notice of simple descriptions, wherever possible quantified ones. Theoretical processing of the empirical results was also mainly ignored, since this refers to causes the changing of which is not at the disposal of the subsequent decision-makers. The disappointment of the legal sociologists lay not so much in the disinterest in "soziologische Aufklärung" (sociological enlightenment), for their own

¹⁶ E. Blankenburg, E. Klaus & H. Rottleuthner (eds.), *ALTERNATIVE RECHTSFORMEN UND ALTERNATIVEN ZUM RECHT*, 61 *JAHRBUCH FÜR RECHTSZOLOGIE UND RECHTSTHEORIE* (1980)

¹⁷ K.F. RÖHL, *DER VERGLEICH IM ZIVILPROZESS* (1983)

¹⁸ H. Rottleuthner, *Der arbeitsgerichtliche Kündigungsschutz*, in *KÜNDIGUNGSPRAXIS, KÜNDIGUNGSSCHUTZ UND PROBLEME DER ARBEITSGERICHTSBARKEIT*, 85 (R. Ellermann-Witt, H. Rottleuthner & H. Russig eds., 1983); J. Falke, A. Höland, B. Rhode, G. Zimmermann, *KÜNDIGUNGSPRAXIS UND KÜNDIGUNGSSCHUTZ IN DER BRD*, (Bundesminister für Arbeit und Sozialordnung ed., 1980). The perspective "from without" is taken by: S. SCHÖNHOLZ, *ALTERNATIVEN IM GERICHTSVERFAHREN*, 1984

claims to objectivity had long been reduced to a minimum through the internal sociological discussions, but rather in the absence of a rational discourse with social groups interested in another picture of reality, and above all with civil servants and politicians who often possess a notably complex professional knowledge (the "Dienstwissen" in Weberian terms) and would therefore have been able to act as critical and stimulating interpreters.¹⁹

On the contrary, empirical legal sociology was fairly often forced into a role in which it was supposed to provide a scientific cloak for what had previously been decided as a desired content of political evaluation and the result of political power conditions.

An example: Comprehensive investigations into compensation schemes for workers affected by the bankruptcy of their employers had shown that the amount of compensation for loss of the workplace differed very greatly and was adjusted to the individual economic possibilities in the bankrupt firm.²⁰ The legislation shaped out of the data submitted an average value and prescribed it for all future settlement models.²¹ This turns upside down the rationality of previous practice. Incidentally, there remain completely excluded the far more important result of the empirical study, namely that only 8% of those affected by bankruptcies received settlements. This must inevitably have led to more radical legislative reactions, namely an extension of the obligation to set up compensation settlements.

Legal sociology was "functionalized" not only because legal policy, as described, obtained for itself the appearance of having a scientific basis, but also because empirical results were applied not as arguments but strategically. One such strategy consists of pointing out more or less privately to the opponents of reform that such reform will basically change nothing in the status quo. Here too an example. At the end of the 1960s and beginning of the 1970s there was a great debate in West Germany on whether the equal co-determination of employees, which had been practised since 1951 in the coal and steel industry, could be generally applied to major enterprises. An expert commission was called to study the experience of co-determination in coal and steel and to draw up proposals. The commission came to the conclusion, on the basis of a questioning of 1081 chairmen of boards of directors, management boards and works councils, as well as labour-relations directors (representing a returns rate of the questionnaire of 80.8%), that co-determination had caused practically no changes in the attitudes of the firms. The commission established that co-determination had led "to no essential changes of content in the enterprises' investment policy", and that "it had sometimes led to delays in decision-

¹⁹ V. Gessner, *Rechtssoziologie und Rechtspraxis – Zur Rezeption empirischer Rechtsforschung*, in *EMPIRISCHE RECHTSFORSCHUNG ZWISCHEN WISSENSCHAFT UND POLITIK*, 69 (K. Plett & K.A. Ziegert eds., 1984)

²⁰ V. GESSNER, K PLETT, *DER SOZIALPLAN IM KONKURSUNTERNEHMEN* (1982)

²¹ See: M. BALZ, *DAS NEUE GESETZ ÜBER DEN SOZIALPLAN IM KONKURS- UND VERGLEICHsverfahren*, 17 (1985).

making processes concerning reductions in capacity and shutdowns, but not to a final rejection of the proposals and aims of the top management", and that the unions, since they were better informed through their presence on the board, were "more likely in tense economic situations to be ready to consider the actual economic position of the firm."²²

This very meagre result for the interests of the employees could have led to the strengthening of co-determination, for instance by the introduction of an overparity of employees' representatives within the board of directors, or alternatively its complete cancellation, since it did not result in more but rather – through an inclusion strategy – in less realization of interests. Instead a model was taken up by the law which lagged behind the coal and steel model in that it gave the casting vote to the chairman of the board, who was to be elected by the capital side. Throughout all the legislative process right up to proceedings before the Federal Constitutional Court, where the constitutionality of the law was confirmed, the empirical investigation was constantly cited as evidence "that the ability to function of the firm" was not impaired by co-determination, and therefore if not by a model with equal representation then certainly not by one with under-representation.²³ As those advocating co-determination were led by normative rather than analytical arguments, it was unlikely that the discouraging results of the empirical research carried out could have much bearing on their demands. To opponents, who as capitalists were used to calculating the future, they could in contrast be interpreted as that finally not much would be changed in the status quo.

III.

Experience with the filtering of empirical results not only through legal doctrine but also through legal policy caused many sociologists to by-pass this filter too and to exert influence on policy outside legal doctrine as well as legal policy. Expert opinions were produced for interest groups (trade unions, consumer associations) and social movements (environmental groups, self-help groups in the sphere of alternative economy). Legal sociologists cooperated in Citizens' initiatives and helped in actions against extortionate bank credits. Here again theoretical knowledge was less required than empiricism, for legal sociology's role in policy disputes was expected to be revealing and proving patterns of

²² MITBESTIMMUNG IM UNTERNEHMEN. BERICHT DER SACHVERSTÄNDIGENKOMMISSION ZUR AUSWERTUNG DER BISHERIGEN ERFÄHRUNGEN BEI DER MITBESTIMMUNG (1970)

²³ See the motives of the Bill in: Federal Bulletin [*Bundestagsdrucksache*] 7/2172,16 and Decisions of the Federal Constitutional Court [*Bundesverfassungsgericht*] 50 BVERGE 334.

social discrimination. The aim was to produce expert counter-opinion,²⁴ the rationalization of partisanship.²⁵

The filter for these contacts was of course that of political agreement. Conservative groups did not co-opt leftist legal sociologists. These new contacts permitted the participating sociologists to introduce for the first time their own view of reality, unhindered by competitive (legal) models of society, and to realise them in policy in limited areas. Also informative were experiences with the retransmission of sociological insights into everyday knowledge and language, and their interpretation on the lay level. But the loss of academic complexity was greater than this gain, and it was a loss which led to sanctions within their own professional society and therefore could not be consistently borne for long. Some colleagues however left the university and took up positions within the political organisations for which they had worked.

C. Critical Empiricism II

Theoretical processing of empirical findings, no matter whether it claims to be system-theoretical or materialistic or whatever, is ignored just as much as well-founded evaluations; only data are required, and those requiring them (whether for legal doctrine or legal policy) want to determine how they should be used. Under these conditions, should the guild of legal sociologists not join together to make demands?

We believe that this would be hopeless. Practical people cannot be turned into theoreticians, and they themselves know what they value and why. If critical empiricism means explaining empirical results theoretically, and evaluating them through argumentation, then critical empiricism will never have teeth. This incidentally applies both to interactionist and interpretist empiricism, even when this "stresses deviationist ideologies".²⁶

In spite of that, we do not want to discourage such theoretically and normatively inspired empiricism. It might one day happen that a practice is found which acknowledges the need for theory and opens itself to rational evaluation. But we must not cherish false hopes; neither theoretical explanations nor evaluations can of necessity be derived from empirical results. Theories of a high rate of abstraction can be illustrated empirically, at best made

²⁴ B. Badura, *Gegenexpertise als wissenschaftssoziologisches und wissenschaftspolitisches Problem*, *SOZIALE WELT*, 459 (1980)

²⁵ U. Beck, *Die Vertreibung aus dem Elfenbeinturm*, *SOZIALE WELT*, 415 (1980)

²⁶ On these two strands and their critical thrust, see: D. Trubek, *Where the Action is: Critical Legal Studies and Empiricism*, 36 *STANFORD LAW REVIEW* (STANF. L. REV.) 575 (1984).

plausible, but not proved, and value judgments can be empirically more precisely specified, at best enriched with arguments, but not derived.

We can imagine a second variant of empiricism which can be called critical. It is characterised neither by its methodics or theory, nor by its normative conclusions, but by the choice of its subject of research. It investigates those hypotheses which are essential for the legal system and stabilize and legitimize its very existence. What is in fact essential is hard to be decided on the sociological level but is often indicated on the metasociological level. Casting doubts on the rightness of hypotheses which are central for a system causes reaction by the system, such as deliberate ignoring, applying sanctions, not checking and criticising. According to this, "critical" empiricism is (as far as possible) value-free on the academic level and is only critical insofar as it provokes reactions on the metasociological level, which indicates that it has touched upon essential theories. It checks the theories and asks why they are necessary to the legal system.

Such an essential hypothesis is that of the social "Wirksamkeit" (effectiveness) of law. Legal doctrine and legal policy have to rely on the basic assumption that law matters, since the normative postulate of the completeness of the program and of the total "Geltung" (validity) which is integral to law, cannot be left unsupported by actual effectiveness without fading and disappearing. If the program no longer contains substance and merely requires balancing of pros and cons, it is regarded sociologically as empty, and then those applying law are in danger of being exposed as purely politicians, even if they make immense efforts to declare their decisions as an interpretation of norms. But who goes to law to obtain political decisions? And if the program is not executed, its claim to full validity will no longer be accepted, even if it is emphatically declared to be normative and therefore necessarily contrafactual. If only one out of a thousand offenders is proceeded against, it is hard to argue that this is no unequal treatment.

For these reasons the legal system cannot be content with the juridical validity of law, but must also be interested in the effectiveness of law. It must assume that law is not only *valid* for every case, but that it is also in most cases *effective*. It can only bear information about loopholes in effectiveness if these show that full effectivity has "not yet" been achieved. Empiricism (or theory) which puts in doubt its effective ability cannot be accepted.

Up to now jurisprudence has hardly been seriously challenged in its conviction of the effectiveness of law. For many centuries not only jurisprudence but also sociology and political science could not imagine a harmonious human society without a normative guidance of behaviour. Hobbes repudiated the idea that individual calculation of usefulness would guarantee social order. Not agreement secured by contract, which could of course be broken, but general norms enforced by a central decision-making power, were apt to stabilize social expectations. T. Parsons has built up an impressive theoretical

program upon this paradigm.²⁷ An order which governs all social life can only arise when the spheres of self-interest and categorical duty interpenetrate.²⁸ In the German tradition of theory, Max Weber in particular follows the normative paradigm. He too recognises other (utilitarian) activity orientations, but explains all socializing processes through the existence of (legitimate and illegitimate) order.²⁹ Arnold Gehlen (1940)³⁰ and Helmut Schelsky (1970)³¹ subsequently complemented this model by linking individual actions and society through "institutions", that is, norm complexes for certain concrete areas of life.

The empirical doubts about the effectiveness paradigm which emerged only in recent decades are especially elaborated in approaches of conflict theory, legal anthropology and interpretative sociology. Conflict theory does not deny the existence of general norms, but emphasises their continual alteration, so that society is not lastingly structured by them.³² In contrast, legal anthropology emphasises the particularity and informality of norm systems and is less interested in the process of change.³³ Interpretative sociology most radically denies the existence of general patterns of action and normative orientations and emphasises what arises in the given situation and on the spur of the moment in social interaction.³⁴

Seen positively, these approaches point to the social potential of spontaneous self-organisation. Why should the interaction of universal values (morals) with particular norms not suffice as a retarding, structuring and orientating influence in everyday life of the social-political conflict of interests? Certainly the fundamental direction of this self-organisation can get into deficit, since structurally rooted factors such as the pursuit of profit or power persist. But those who advocate protective legislation (for employees, for women, consumers, the environment, etc.) must bear in mind that the best protective legislation can as well fail in implementation because of the pursuit of profit or power. The

²⁷ T. PARSONS, *THE SOCIAL SYSTEM*, 111 (1951); T. Parsons and E.A. Shils (eds.), *TOWARD A GENERAL THEORY OF ACTION* (1951)

²⁸ R. MÜNCH, *THEORIE DES HANDELNS*, 38, 44 (1982)

²⁹ M. WEBER, *WIRTSCHAFT UND GESELLSCHAFT*, 159, 691 (1964)

³⁰ A. GEHLEN, *URMENSCH UND SPÄTKULTUR*, (1956)

³¹ H. Schelsky, *Zur soziologischen Theorie der Institution*, in *ZUR THEORIE DER INSTITUTION*, 9 (H. Schelsky, 1970)

³² R. Dahrendorf, *GESELLSCHAFT UND FREIHEIT*, 85, 112 (1961)

³³ *Anthropologie Juridique*, in *DICTIONNAIRE ENCYCLOPÉDIQUE DE THÉORIE ET SOCIOLOGIE DU DROIT* (1988); *DAS RECHT IM BLICKPUNKT DER ANTHROPOLOGIE*, unpublished papers of a colloquium, on file with author (1988)

³⁴ TP. Wilson, *Theorien der Interaktion und Modelle soziologischer Erklärung*, in *ALLTAGSWISSEN, INTERAKTION UND GESELLSCHAFTLICHE WIRKLICHKEIT*, 58 (Arbeitsgruppe Bielefelder Soziologen ed., 1977)

potential for self-organisation steps in such that non-enforcement of regulations does not leave a vacuum behind it, but that life continues as usual.

If the conflict-theory, legal-anthropological and interpretative researches are taken together and both the materialist view of law as a super-structure and the system-theory view of the law as a closed system are also taken into account, there is good reason to begin with a Cartesian doubt and to regard the ineffectiveness of the law as normality and the effectiveness as improbable exception. In the following we would like to present some empirical results which support this view. A second look will however show that there are in fact side-effects, and a third will show that there is even one sphere of law which functions relatively unproblematically.

1. A First Look: Ineffectiveness

Research into the "application" of administrative law has discovered that practice is characterised by negotiation processes. The formal legal program recedes into the background in comparison with the informal level.

Environmental protection administration has frequently been investigated under this aspect.³⁵ In interaction with firms producing emissions both the question of whether a situation exists which needs to be changed and also the question of what change has to be undertaken are negotiated. The legal syllogism ("If A, then B. A is given. Therefore measure B must be undertaken") has no real meaning. What is regarded as pollution of a watercourse is by no means a fact which will be established by comparing a measurement of pollutants with a given standard, but is a construct of complex interaction between the authorities, the firm and the public. The "objectively" harmless colouring of a river is for instance often regarded as a more dramatic pollution than a dangerous but hidden rise in the concentration of heavy metals. The same quantity of emission of pollutants into clear water is regarded as more polluting than into an already heavily polluted stretch of water. Further factors which concern the seriousness of the pollution but also increase the choice of measures to be applied, are in particular the technical and economic feasibility of improvements, independent of whether the legal program accepts these measures or not. In addition, certain strategies belong to the negotiation of measures, the choice of which is greatly influenced by whether the administrative officer perceives his counterpart as in principle willing and cooperative or as evasive and obstructive. A cooperative partner is more easily granted greater latitude. Firms can also sometimes pretend to play the role of a cooperative partner for their own advantage. Their repertoire of influence, as is repeatedly revealed in the press, certainly includes bribes, a circumstance which is of course hardly accessible to empirical research.

³⁵ See e.g. K. HAWKINS, ENVIRONMENT AND ENFORCEMENT (1984); for examples in zoning and construction licensing, see: E. SCHARMER, H. WOLLMANN & M. ARGAST, RECHTSTATSACHENFORSCHUNG ZUR BAUGENEHMIGUNGSPRAXIS, 66 (1985)

The causes of the ineffectiveness of law in the sphere of administrative enforcement are certainly opposing power and the technical complexity of the problem to be solved. One cause in other fields is the fact that those who profit from a norm are dependent upon those who are supposed to grant the advantage. In this lies the explanation of why, as was mentioned above, equal co-determination has hardly any influence on the decisions of management. A cause in yet another field is prejudice about those groups who are regarded to threaten vested positions. Time and again it has been proven that affirmative action legislation does not substantially reduce discrimination of women or blacks as long as the prejudice (and its material basis) persist.³⁶

Where law is not rendered powerless by a mighty opposition, by complexity, dependence, or defensive prejudice it can itself be designed for inertia when what it is attempting is in fact not wished for. A frequent case of this inertisation is benefit rights of the welfare state. They are armed such that their full exploitation does not strain the public purse. When for example in the right of social welfare the law grants, instead of a claim to a lump sum, individual partial claims depending on the specific life conditions of the beneficiary, it requires of the applicant a certain professionalism in the description of his own needs and exposes him to repeated degradation ceremonies. In addition there is the "passive institutionalisation" of the administration, which does not actively inform those with entitlement of their rights and encourage them to apply. These and other filters³⁷ ensure that the demand for welfare benefits remains within limits. One side-effect is "creaming the poor"³⁸, which appears to be accompanied by "creaming the politically discontented"³⁹. Thus those strata of the population are satisfied who would, if they were sent empty away, be most likely to express themselves politically. At the same time living on social benefits is made so unpleasant that the willingness to register at the job centre is not lost.⁴⁰ "Creaming the poor" can go so far that a relatively better-off group of the population is protected against worse-off "problem groups", although the legal program is intended to favour the latter. This can be seen in social housing. Private landlords (local authorities less often) sort out the applicants for social housing to exclude those who would be considered as a disturbing factor by relatively better off low income tenants, e.g. foreigners, the single homeless, ex-prisoners, former drug addicts, those on welfare, and large families. This is possible because the legal criteria for urgent cases are so widely

³⁶ See e.g. H. PFARR, QUOTEN UND GRUNDGESETZ, 121 (1988) for non-effects of German sex-antidiscrimination labor legislation.

³⁷ St. Leibfried, *Armutspotential und Sozialhilfe in der Bundesrepublik*, KRITISCHE JUSTIZ, 377 (1976)

³⁸ S.M. Miller, P. Roby & A. de Vos von Stenwijk, *Creaming the Poor*, 8 TRANSACTION 38 (1970)

³⁹ Leibfried, *supra*, note 37, 384

⁴⁰ F.F. PIVEN & R.A. CLOWARD, REGULATING THE POOR, 147 (1971)

formulated that less urgent cases can be included together with the urgent ones and can then displace the latter.⁴¹

As far as economic regulation is concerned the methods most frequently used for inertisation of the law are not to provide for sanctions in cases of violations or to economise enforcement personnel. A widely cited example is the Norwegian law of 1948 protecting home servants, which though being hailed as important progress was rendered toothless by omitting sanctions.⁴² Pre- and post-market control of hazardous products legislation very often lacks even a minimum of budget allocation for enforcement.

A method particularly favoured in West Germany for self-inertisation of the law uses the legal doctrine of standing to sue. A law which *de facto* protects individual third parties, *e.g.* the nature conservation law preserving recreation areas, is regarded as a norm which is *de jure* intended to benefit only the public and not individual persons, which is why the latter are not granted standing. When the administration does not enforce the law in such cases there is no checking by the judiciary. The legislator can therefore, if he wishes unofficially to mitigate the official text, on the one hand use strong language to impress the public, and must on the other hand signalise that he is acting only in the public interest and not for individual interests.

Law is made for routine cases, and even in these it often enough remains, as has been shown, ephemeral. Even more radical is the ineffectiveness of law when major projects are concerned. Big projects create their own law, a "Sonderrecht". They proceed inexorably on their way, and when this becomes legally too constricting, the law is broadened, reinterpreted or even remade. Examples are plentiful, and still await empirical evaluation. One concerns the nuclear reprocessing plant at Wackersdorf. Industry, the Bavarian government and the Federal government are carrying out the project unperturbed by the way the law blows hot and cold. When the District Council refused to draw up the development plan, the government drew it up on his behalf. When the court quashed the development plan, the legislator stepped in and abolished the need for making a plan at all. When the permission granted under nuclear law was abrogated, building continued with permission under building law. When the district police force declared itself incapable of keeping demonstrators under control, the army was called in, although this is not permitted under constitutional law.

Among those concerned – supporters and opponents alike – there are probably few who still believe in an independent role which law can play in respect of the project. In spite of this, the law is continually adapted or reinterpreted, as if the project was to be given at

⁴¹ G. WINTER & W. WINTER V. GREGORY, *DIE ZUTEILUNG VON SOZIALWOHNUNGEN* (1983)

⁴² V. Aubert, *Some Social Functions of Legislation*, 10 *ACTA SOCIOLOGICA* 98 (1966)

least the appearance of legality. Dictators too cloak themselves in legal forms, even if no one grants them legitimacy. Why does the Emperor believe in his new clothes?

II. A Second Look: Distortions

A second look at the effects of law shows that besides the frequent ineffectiveness of the "manifest" program there is a broad range of "latent" side-effects.⁴³ We will cite only three. Others could be listed.

1. Law as a bargaining chip

A second look at the negotiation of images of reality and measures to be undertaken shows that on the informal level law is not, it is true, enforced, but is also not entirely ignored. Law appears as a brickstone in the negotiating position of the interacting parties. The position of the authorities is strengthened if the operation of the firm has to be granted permission, if they include participation by the public, if they can impose sanctions, etc. The position of the firm is strengthened if it can take legal action against acts or failure to act by the legal authorities or claim compensation. The legal positions are by no means always taken seriously in the process of negotiation, but are brought into play as bargaining chips. The authority then perhaps soon achieves an assured partial success and waives an uncertain complete success following long litigation. Sometimes results are the contrary to those intended; a woman may waive her claim to maintenance before the divorce court in exchange for custody of the children.⁴⁴ Sometimes the authority can overshoot the mark; it grants permission, and although it is obliged to do so it permits the affair to be sweetened either by a legitimate benefit or simply by a bribe. Sometimes it con exaggerates its initial position, for instance when the prosecuting counsel overstates the counts of the indictment ("overcharging") in order to have a chip in plea bargaining.⁴⁵

If law routinely becomes an object for bartering in practice, a paradoxical result occurs for the parliamentary process. In legislation the drafts have to be strategically exaggerated if a certain social condition is to be brought about. But if the exaggerated draft is taken at its face value by the political public, it will be rejected as illusionary. A paradox also results in

⁴³ The terms "manifest" and "latent" are drawn from R.K. MERTON, *SOCIAL THEORY AND SOCIAL STRUCTURE*, 60 (1957).

⁴⁴ R. Mnookin & L. Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 *YALE LAW JOURNAL* 950 (Yale L. J.) (1979). For the German experience, which show a more literal role of the law, see: B. Caesar-Wolf & D. Eidmann, *Gleichberechtigungsmodele im neuen Scheidungsfolgenrecht*, *ZEITSCHRIFT FÜR RECHTSOZIOLOGIE [ZFRSoz]* 163 (1985)

⁴⁵ K.F. SCHUMANN, *DER HANDEL MIT GERECHTIGKEIT*, 1977,133

practical law enforcement. If the person to whom the law is addressed knows from the start that the law will not be taken at its face value but regarded as a bartering object, its value as such an object is further decreased by this recognition.⁴⁶ Merely strategic thinking seems to be positively coupled and inevitably leads to a point of collapse where morality re-emerges.

2. Law as an end in itself

Latent functions also lie in the fact that legal personnel apply the law for their own purposes. Such an interest by the legal profession in itself is for instance directed in court proceedings at maintaining cooperation between the lawyers beyond their adversary relationship in the particular case, and also to save time and money. It leads to the fiction of the legally informed citizen, who himself knows what material and legal means he has available. With this fiction the judge saves himself time-consuming explanations and indications of points of law.⁴⁷ In addition it is more risky to interfere compensatingly than to remain indifferent. Someone who needs help as a party to proceedings and does not receive it, usually does not know what he or she can object against the judge's passive attitude. In contrast, the other, better-informed party usually knows the counterdefence, *i.e.* the accusation of prejudice.⁴⁸ This facilitation of legal work is also served by "Alltagstheorien" (everyday life-theories) in ascertaining the facts of the case, since it disburdens further investigation, likewise the "Normalfigur", *i.e.* a legal scheme of evaluation (*e.g.*, contract of sale) which is chosen in cases of doubt out of a number of other possible ones (*e.g.*, contract for Services, contract of employment, brokerage contract) because the judge is more familiar with it.⁴⁹

Treatment by the judges of the consequences of decisions has similar functions. They push away for their own mental comfort the more distant consequences of the verdict, which concern the social conflict (and rationalise this behaviour by claiming commitment to the allegedly clear law), whereas they certainly take into account the nearer consequences in the legal system itself, in order for instance to ensure that the verdict can be put into effect or that appeal will be unsuccessful.⁵⁰

⁴⁶ G. WINTER, BARTERING RATIONALITY IN REGULATION, 19 L. & SOC. REV. 219 (1985)

⁴⁷ R. LAUTMANN, JUSTIZ – DIE STILLE GEWALT (1972)

⁴⁸ R. Hegenbarth, *in* (K.F. Röhl), *supra*, note 16, 152

⁴⁹ Lautmann, *supra*, note 47, 57, 125

⁵⁰ Lautmann, *supra*, note 47, 71, 166

Actually, the whole procedural construction of reality that abstracts from the complexity of events serves to make the conflict able to be decided. The content of the decision is a secondary matter; the priority is that a decision is made at all and the file can therefore be closed. That was not quite what the democratic parliament intended when it made the laws and passed them over to the judiciary to be applied. But one must take account of those who apply the law when one makes law.

3. *Law as symbolism*

"If political actions upset or satisfy people, then it is not through granting or denying their substantial demands but principally through altering those demands and expectations".⁵¹ This theory of Murray Edelman's⁵¹ can also be applied to the production and application of law. One example is the mobilisation of criminal law in administrative actions. When an administrative agency initiates criminal proceedings it hardly aims at the real creation of a readiness to change in its private counterpart but rather signalises that hope has been relinquished and the constructive relationship destroyed. It offers in contrast an opportunity to the authority to demonstrate to the public that it takes its job seriously, as well as indicating to other potential obstructionists that it is worth while cooperating. In the proceedings themselves too it is not punishment of a genuine offence such as environmental pollution that is the real concern, but the punishment of disrespect for authority by the obstructionist.⁵² This too is a case of a circular process in which legal personnel are concerned only with themselves.

A classical example of symbolical legal operation is the American anti-trust law as it has been analysed by Thurman Arnold.⁵³ According to Arnold it has not in reality impeded the centralisation process of capital but rather promoted it. The major enterprises were originally regarded by public opinion in the US as per se unscrupulous, which aroused vehement criticism ("trust busting") from politicians going right up to President Roosevelt himself. They contravened the ideal of free competition among individuals. If it had really been desired to hinder concentration this would, according to Arnold, have been attainable through progressive tax laws. Instead there was a processing of public perception. The anti-trust laws and administration initiated, it is true, a campaign against trusts and thus satisfied critical public opinion. At the same time they placed the big companies on the same level as individuals, so that they no longer in principle contradicted the ideal of free competition. Only the worst practices, such as explicit price-cartels, were

⁵¹ M. EDELMAN, *POLITICS AS SYMBOLIC ACTION*, 2 (2nd ed., 1972)

⁵² K. Hawkins, *supra*, note 34, 200

⁵³ TH. ARNOLD, *THE FOLKLORE OF CAPITALISM*, 207 (1937)

suppressed, otherwise the trusts could claim to be a competing individual on the market as everybody else.

Another example of how law does not change reality, but the perception of reality, is the German co-determination legislation mentioned previously. It was established empirically that co-determination hardly alters the behaviour of enterprises. The legislation was however extended from the coal and steel sphere to the whole economy, for it allows the employees' representatives at least to believe that they are really taking part in decision-making. Thus the Federal Constitutional Court remarked complacently, "co-determination is namely regarded as appropriate for politically legitimizing market economy".⁵⁴

III. A Third Look: Constitutive Law

Up till now we have been principally concerned with protective regulation which is intended to balance out the social costs of western societies' deep structures and which fails in the way described. If on the contrary we look at these deep structures themselves it becomes clear that the law concerning them works relatively well. It would of course be false to assume that this law is first drawn up and then creates certain structures as a result. It is rather the expression and component of those structures. But it works here not counterfactually but synergetically.

What kind of law are we talking about? Basic values belong to it, such as free development of personality, which liberates from the abnegating membership in collectives; private property, the increase and defence of which against others are accepted; obedience to the law, which has to stand in a delicate relationship of double morality to the ability, under certain circumstances, to infringe the law.

This kind of law works less through the cognitive mechanism "expectation – compliance or sanctions" than through the socialisation process. Such socialisation processes occur above all in childhood as in training in (relative) truthfulness and obedience, male competitiveness and female docility, individualism and ownership of possessions.⁵⁵ They are continued in the media, in the endless repetition of basic value vocabulary and constant new staging and commentating of symbol-rich events.

A second kind of constitutive law rationalises social production, circulation and reproduction. To express it in a metaphor: moving about is easier when there are roads to move on and also sites to move from and to. In the same way law makes forms available

⁵⁴ 50 BVERFGE 351

⁵⁵ W. GOTTSCHALCH, *SOZIALISATION. THEORETISCHE ANNÄHERUNGEN UND GEGENWARTSPROBLEME* (1985)

which can be used – such as contracts – for the trading of goods; or the joint-stock company – for building a basis for cooperation; or compulsory school attendance and the right to education – for the reproduction of society. Also law which claims to be protective legislation in fact contains much which has a constitutive function. Consumer protection legislation frequently protects the consumer less than the firms concerned. Supervision of insurance rates for example is more concerned with solvency and therefore the firm's ability to survive than with reasonable prices for customers. In addition, it legalises what must be seen under the aspect of competition as a price cartel.⁵⁶ This procedure has often been called "capture", which does not actually really cover the German tradition of regulation of industries. German insurance supervision law, for instance, originally raised local market barriers and created forms of transaction for the branch; that is, it had a constitutive function. Consumer protection has been acclaimed by the supervisory authority and the firms themselves as a preventive defence strategy against a really serious supervision in the interest of consumers, which according to demands from a number of political groups should be written into the supervision law.⁵⁷

IV. Critical Empiricism II and Legal Practice

Critical empiricism II, which radically denies the effectiveness of protective legislation and instead emphasises latent, especially symbolical, self-serving and counter-intentional effects, can hope still less to be accepted by legal doctrine and legal policy than critical empiricism I, whose data are after all usable, even if robbed of theoretical and normative processing.

However, its results are not unusable. They are at bottom encouraging news for all those to whom direct access to the legal system – *e.g.*, standing, or representation on legal policy bodies – is denied. Since anyway law literally hardly has effects, it is worth while being concerned with its latent functions. These are more easily accessible to the public.

A counter-symbolism can be set up against the symbolic side-effects of law. For instance, this explains the success of Greenpeace in comparison with the fussy lobbyist environmental associations. Greenpeace systematically chooses publicity-effective actions and builds up a counter-symbolism. The image of the concerned and active Minister is contrasted with the image of the brave little boat blocking the path of the ship dumping waste into the sea. This counter-symbolism may even be more likely to induce those

⁵⁶ Federal Antitrust Commission [*Monopolkommission*], 7th Main Report [*Hauptgutachten*], *Bundestagsdrucksache* 11/2677

⁵⁷ R. GÄRTNER, *VERBRAUCHERSCHUTZ UND PRIVATISIERUNG*, 187 (1986)

producing pollution to change their ways than would be possible through the indirect method of changes in the law.

The satisfying of the legal system's interest in itself, the second latent function of law we wish to point to here, will run dry if parties seek outside the law for fora and forms of conflict-solving.

The third latent function, that namely of strengthening bargaining positions, could finally induce the parties to use a strategy of trying as soon as possible to gain as much ground as possible, so that they can by these means compensate the lack in their own legal position. Ground can for instance be gained by mobilising public opinion.

To sum up, critical empiricism though not well received by the legal system does not lack societal and political relevance. It constructs an image of the law as fact that contradicts the normativist paradigm. Thereby it opens up room for action for those who have been randomised in the process of law implementation.