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

*Gunther Teubner**

I. THE RAINBOW COALITION: A PARADIGMATIC CASE

In the elections for the work council of Daimler Benz AG, a large corporate group in Germany, the powerful industrial union, IG-Metall, experienced problems with an internal opposition group. After a long fight between the majority and the minority, the union established an election list that excluded any candidate from the minority group. The minority group then formed a "rainbow coalition" that united union members and non-members. Politically, the coalition united the radical reformist, feminist, anti-discriminatory, and ecological movements and challenged the union's course of close union-management cooperation. The rainbow-coalition won the majority of the work council seats in the elections. However, because the union considered any candidacy on a competing election list damaging to its interests, it proceeded to expel the rainbow coalition's leading members.

This case is paradigmatic of some of the recent developments in the German law of private associations. Like a magnifying glass, the case accentuates a number of crucial legal issues: (1) autonomy of labor unions and other intermediary associations against state and court interference; (2) constitutional rights for organizations, especially in the field of collective bargaining¹; (3) right to access intermediary associations, from any sector of society and for every member of this sector; (4) judicial review of internal rule production within the intermediary association; (5) protection of individual rights of membership against the intermediary associations, particularly protection against expulsion; (6) minimal legal requirements for internal democracy in intermediary

* Professor of law at European University Institute, Firenze, and London School of Economics.

1. GRUNDGESETZ [Constitution] [GG] art. 9, pt. III & 19, pt. III (F.R.G.).

associations; and (7) public responsibility of private organizations (*Gemeinwohl-verpflichtung*).

My main argument is that the courts decide these questions according to a theory of associations internal to the law. Over time, legal discourse develops an internal theory about the position of private associations in politics and society. In fact, how the law regulates the internal affairs of associations depends on major historical shifts in the meaning of the public-private distinction. The "public" status of "private" associations means different things in different historical periods. In post-war German history, three ideal-typical configurations can be distinguished: pluralism, macrocorporatism, and polycorporatism. Presently, it appears that while older pluralist arrangements have been replaced by more recent neocorporatist arrangements, a new shift is taking place within neocorporatism. Macrocorporatist arrangements are being superseded by a new political arrangement between the state and numerous private associations—one which I call "polycorporatist." In particular, a relationship exists between the new polycorporatist political arrangement, the legal perception of a public status of private associations, and the legal rules governing their external status and internal structures. This relationship has repercussions for all seven legal issues that are emerging in the rainbow-coalition case.

II. FROM HIERARCHY TO HETERARCHY

"Invoking civil society" is the suggestive title of an article by Charles Taylor in which he discusses the public status of intermediary associations.² The ideas Taylor develops in the broader framework of political theory may be helpful in revising traditional legal perceptions of private associations. Taylor argues that a web of autonomous associations, independent of the state, is the core institution of civil society. And yet, because two competing models of civil society exist, it is unclear what invoking civil society actually means. In the tradition of Montesquieu (what Taylor calls the "M-stream"), civil society means political society. However, while civil society in the M-stream develops within the political process, it is

2. Charles Taylor, *Invoking Civil Society*, in WORKING PAPERS AND PROCEEDINGS OF THE CENTER FOR PSYCHOSOCIAL STUDIES 1-17 (G. Urban & B. Lee eds., 1990).

crucial that it maintain its autonomy against state institutions. Of particular importance is the autonomy of intermediary associations.³ Intermediary associations are constitutionally diverse, distributing power among many independent sources.

The tradition of Locke (what Taylor calls the "L-stream") works on different assumptions. In the L-stream, civil society is pre-political society, a self-organizing, extra-political reality. In civil society, the social defends its autonomy against the political. (Adam Smith and Karl Marx's works evince this conception.) Civil society is not limited to the economy, but extends especially to things "public," and more generally to "civilization."

Hegel attempted a synthesis integrating both L-stream and M-stream traditions in the idea of the overarching State. However, in retrospect, this turned out to be a great historical error. Therefore, which interpretation of civil society, Taylor asks, is valid under (post)modern conditions? In this context, he discusses neocorporatist arrangements in Germany and Japan as well as critiques of them from the right and the left. The question also arises whether we are presently experiencing a new dominance of the L-stream or whether we can foresee a new balance between L-stream and M-stream traditions?

From this perspective, the communitarianism versus individualism dichotomy seems to present misleading alternatives. It presupposes a simplified image of society as a hierarchical relationship between individuals and an overarching "state," with intermediary organizations lying somewhere in between. In this conceptual framework, intermediary associations "mediate" vertically individual needs and collective goals. Consequently, their orientation oscillates between individualist and communitarian concerns. However, as suggestive as this image might be, it would result in misleading public policies and legal regulations. The "public status" of intermediary associations would take on a rather impoverished meaning. The image would characterize intermediary organizations as the main link between individual interests and the state's interests. And, as a result, the concomitant idea of intra-organizational democracy would likely end in simple requests for more citizen participation in

3. See generally SEYMOUR M. LIPSET, *POLITICAL MAN: THE SOCIAL BASES OF POLITICS* (1960); ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Phillips Bradley ed. & Henry Reeve trans., Alfred A. Knopf, Inc. 1945) (1972).

public affairs within the associations.

Indeed, the contemporary discussion on intermediary associations has usually taken place within these assumptions.⁴ However, if Taylor is correct in viewing modern civil society as a new combination of L-stream and M-stream conceptions, then the hierarchical model is plainly inadequate. It cannot cope with the contemporary reality of a fragmented society. The differentiation of specialized discourses within society precludes a simple hierarchical model of rulers and ruled; for politics itself has become decentered. In fact, politics is no longer the central instance of society, but only one among many discourses. Different lines of thought about modern society converge on this important point. A general discourse on society is, more than ever before, confronted with a "dissociation of its rule systems,"⁵ a multitude "of language-games,"⁶ and a plurality of "semiotic groups."⁷ Sociologists characterize modernity as the "separation of spheres,"⁸ the differentiation of the "subsystems of society,"⁹ the "operational closure of autopoiesis,"¹⁰ and the plurality of "forms of discourse and negotiation."¹¹ In this view of modern society, the hierarchy of state versus individual is irreversibly replaced by the heterarchy of different spheres of society.

In a society thus fragmented, intermediary associations play a different role. Their main activity is not to mediate "vertically" between rulers and ruled in a manner comparable to the estates of the ancient regime. Rather, their new role is to mediate "horizontally" between the autonomous logics of different social discourses. Intermediary associations mediate

4. LIPSET, *supra* note 3; THOMAS H. MARSHALL, CLASS, CITIZENSHIP, AND SOCIAL DEVELOPMENT (1964); Johan P. Olsen, *Integrated Organizational Participation in Government*, in HANDBOOK OF ORGANIZATIONAL DESIGN 492, 492-516 (Paul C. Nystrom & William H. Starbuck eds., 1981).

5. JEAN-FRANÇOIS LYOTARD, THE DIFFÉREND: PHRASES IN DISPUTE 12 (Manchester: Manchester University Press 1987).

6. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 23-24 (Oxford: Blackwell 1989).

7. BERNARD S. JACKSON, LAW, FACT AND NARRATIVE COHERENCE 133 *et seq.* (Liverpool: Deborah Charles 1988).

8. PHILIP SELZNICK, THE MORAL COMMONWEALTH: SOCIAL THEORY AND THE PROMISE OF COMMUNITY 4 *et seq.* (1992).

9. TALCOTT PARSONS, THE SYSTEM OF MODERN SOCIETIES 10 (1971).

10. NIKLAS LUHMANN, SOZIALE SYSTEME: GRUNDRIß EINER ALLGEMEINEN THEORIE *passim* (Frankfurt: Suhrkamp 1984).

11. JÜRGEN HABERMAS, FAKTIZITÄT UND GELTUNG 196 (Frankfurt: Suhrkamp 1992).

politics with other specialized sectors of society. Therefore, they participate simultaneously in the world of politics and in their specialized fields within society. The result is that intermediary associations have multiple memberships in different worlds of meaning, with their internal grammar reflecting the often contradictory claims of different discourses. Thus, the legal rules governing their public status as well as those governing their internal democratic processes need to be reformulated in light of the contradictory claims of these different discourses, instead of merely in light of the claims of their members and politics at large.¹²

But how do intermediary organizations reflect Taylor's suggestion of a new balance between the M-stream and L-stream models? To respond, we need to distinguish between the differentiation of society in general and the internal differentiation of politics in particular. This will enable us to see "civil society" as a construct that combines elements of the M-stream and L-stream models. Social differentiation in general creates, among other things, the hiatus between the political process and non-political spheres of society. In this perspective we recognize the L-stream. Civil society appears as a multitude of non-political, self-regulating social discourses with their own codes and programs, the economy being just one of these discourses. Furthermore, intermediary associations have the capacities of formal organizations (like political parties and special interest groups) to participate in both politics and sectors of civil society. It is their organizational goal to mediate internally between the demands of civil society and the requirements of the political process.

At the same time, the political process in particular is internally differentiated into diverse sub-discourses: party politics, governmental institutions (parliament, administration, courts), and the political public (media, associations). The "state" is no longer the formal organization of society as a whole, but merely a self-description of politics, personifying parts of the political process in the image of a collective actor.¹³ In this perspective we recognize the M-stream. Thus,

12. Wolfgang Streeck & Philippe Schmitter, *Community, Market, State—and Associations? The Prospective Contribution of Interest Governance to Social Order*, in *PRIVATE INTEREST GOVERNMENT: BEYOND MARKET AND STATE* 22-29 (Wolfgang Streeck & Philippe Schmitter eds., 1985).

13. NIKLAS LUHMANN, *Political Theory in the Welfare State*, in *POLITICAL*

a multitude of intermediary associations reappears within the political discourse as "mirroring," "representing" and "mapping" civil society. Such associations represent the plurality of social discourses within the political discourse. Their capacity as intermediaries depends on their relative autonomy within politics.

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

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

III. PLURALISM: THE LAW OF SOCIAL INTEREST REPRESENTATION

In post-war Germany, reconstructing intermediate associations turned out to be a difficult task. The effort had to steer clear of two opposite traditions. The main task was to dismantle the authoritarian state corporatism of the fascist period with its compulsory associations that comprehensively organized whole sectors of society under the tight control of a single political party.¹⁴ At the same time, it was not

THEORY IN THE WELFARE STATE 21 *et seq.* (Berlin: de Gruyter 1990).

14. GAETANO VARDARO, DIRITTO DEL LAVORO E CORPORATIVISMI IN EUROPA: IERI

conceivable to return to a regime of liberal associationalism where associations with exclusively private status needed protection against state interference.¹⁵ In this situation, political pluralism was a convincing concept that allowed for a new perception of political life and provided private associations with a public role to play. Forcefully advocated by American political scientists,¹⁶ political pluralism gained strong influence in West Germany. Indeed, pluralism transformed the private status of associations into a new public status without impairing their autonomy against the state. The perception of the new role of private associations was to aggregate private interests from different sectors of society into political interests, to represent those interests in politics, to serve as centers of political opposition, and to produce a pool of alternative political elites.¹⁷

The new West German law also responded positively to the messages of political pluralism. Constitutional law as well as private law developed rules and principles that constituted a new public status for private associations. The *Grundgesetz* (GG), West Germany's new constitution, granted a mix of old and new guarantees to associations. Article 9 (GG) guaranteed freedom of association and freedom of collective bargaining. Article 19, part III (GG) gave constitutional rights to legal persons. And Article 21, part II (GG) granted constitutional guarantees for political parties but at the same time required a minimum amount of intra-party democracy.

In the first post-war period, German courts and doctrine gave these guarantees an explicitly pluralist interpretation. As compared to the classical liberal *negative* freedom of association, the courts elaborated *positive* constitutional guarantees for a pluralist system of interest mediation.¹⁸ Such a system's essential components were seen as organized in an unlimited number of different, voluntary, competing, non-

E OGGI (Milano: Franco Angeli 1988).

15. WILHELM VON HUMBOLDT, *Ideen zu einem Versuch, die Grenzen der Wirksamkeit des Staates zu bestimmen*, in 1 WERKE 56-233 (Stuttgart 1792).

16. ARTHUR F. BENTLEY, *THE PROCESS OF GOVERNMENT: A STUDY OF SOCIAL PRESSURES* (1908); LIPSET, *supra* note 3; SEYMOUR M. LIPSET ET AL., *UNION DEMOCRACY: THE INTERNAL POLITICS OF THE INTERNATIONAL TYPOGRAPHICAL UNION* (1956); DAVID B. TRUMAN, *THE GOVERNMENTAL PROCESS: POLITICAL* (1951).

17. LIPSET ET AL., *supra* note 16, at 85 *et seq.*

18. Alfred Rinke in RUDOLF WASSERMANN, *ALTERNATIVKOMMENTAR ZUM GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND* 797 *et seq.* (Neuwied: Luchterhand 1984).

hierarchical and autonomous groups. Apart from the general guarantees of the constitution, these groups had no special state license, state recognition or state support. They were self-organizing and not formed upon state initiative. There was no state control over the recruitment of leaders or over interest articulation. And they had no representational monopoly within the social sector they represented.¹⁹

The *Bürgerliche Gesetzbuch* (BGB), the German civil code, provided only minimal requirements through mandatory rules for an association's internal organization. In the pluralist period, the courts applied straightforwardly the classical principles of the law of private associations with only slight modifications. Of central importance was the legal mechanism of "exit control." The basic norm was contained in section 39 BGB, which guaranteed the freedom to leave private associations at any time. Furthermore, the governing principles of the internal order of pluralist associations were contractual conceptions of internal relationships, permissiveness in the internal provisions of associations, and high internal autonomy for organizations to "exit control" through the membership market.²⁰ The guiding idea was to maintain a free membership market in different spheres of society.

Similarly, the relationship between intermediary associations and politics was supposed to be governed by market-type mechanisms. Just as a multitude of free firms is a virtual guarantee of economic competition, a pluralism composed of free intermediary associations helps guarantee competition among private associations for influence in the political market. Legally, this competition is supported by the incorporation of such associations as collective actors. The fiction of the legal person provides intermediary associations with the capacity for collective action in the political market. Another guarantee of this competition is the right of a private organization to freely define its own goals. Finally, the rule system of normative conditions that regulates their recognition in practice comes close to the principle of free formation of bodies corporate which is necessary for the free interplay of

19. Philippe C. Schmitter, *Still the Century of Corporatism?*, in *THE NEW CORPORATISM: SOCIAL-POLITICAL STRUCTURES IN THE IBERIAN WORLD* 85-131 (F.B. Pike & T. Stritch eds., 1974).

20. ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970).

political associations on the political market.²¹

After World War II, the BGB still contained certain repressive tendencies stemming from the discrimination of the *Kaiserreich* of 1900 against political associations (such as political parties and labor unions). To discourage their activities, the BGB had subjected them to discriminatory rules. For example, it applied to political associations ill-suited regulations from the law of partnerships and imposed upon them tough liability rules. In reaction, political parties and labor unions had traditionally refused to incorporate in order to avoid administrative pressures and controls. Now, under the *Grundgesetz*, a series of court decisions as well as new legislation totally freed political associations from all government discrimination.²² Against the explicit wording of the BGB, the courts privileged associations, particularly labor unions, by giving them a public status and full rights of legal persons without undergoing the normal procedures of incorporation. In this way, the courts converted the positive constitutional guarantees for intermediary organizations into new rules of private law.

However, under the regime of political pluralism, the recognition of the public status of intermediary associations was limited, particularly in their relation to civil society. The courts refused to recognize an individual right of access (*Aufnahmezwang*) to private associations, even if they were intermediary organizations like labor unions, professional organizations and political parties. Instead, the courts permitted each organization to define the criteria of membership and to accept or refuse new members according to its own discretion. A state-granted right of access, the courts argued, would violate constitutional guarantees of freedom of association²³ and the freedom of political parties.²⁴ According to the courts, freedom of association does not end as an

21. See generally THOMAS VORMBAUM, *DIE RECHTSFÄHIGKEIT DER VEREINE IM 19. JAHRHUNDERT: EIN BEITRAG ZUR ENTSTEHUNGSGESCHICHTE DES BGB* (Berlin: Duncker & Humblot 1976).

22. Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 13, 5, 10-11, 42, 210, 215; 43, 245, 257; 50, 325, 331 *et seq.* (F.R.G.); Parteiengesetz 24.7.1967, BGBI. I (1537) (F.R.G.).

23. See GRUNDGESETZ [Constitution] [GG] art. 9 (F.R.G.).

24. See GRUNDGESETZ [Constitution] [GG] art. 21, pt. I, § 2 (F.R.G.); Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 101, 193 *et seq.* (F.R.G.) for political parties.

individual right with the founding of an association. Rather, the right continues as a collective right of "the legitimate organs of the association to decide in their own responsibility and without any state interference . . . the question [of] who shall be accepted as a new member."²⁵ Under this pluralist regime, the mediation between politics and social discourses remained a matter of private initiative and was not regulated by the political process.

At the same time, the courts upheld a high degree of group autonomy against state and court interference with the associations' internal affairs.²⁶ In this respect, the courts once again considered public status irrelevant. In those days, they explicitly refused to apply different rules to associations holding a monopoly or a special position of social power.²⁷ The courts recognized an extended associational autonomy not only for private clubs but also for intermediate organizations. Thus, the courts interfered with disciplinary action only in very narrow circumstances. The normative basis of any such interference was section 826 BGB (violation of *boni mores*). The courts would only interfere with an association's internal affairs if it "act[ed] against the law or against *boni mores* or violat[ed] blatantly equity."²⁸ Against the growing opposition of legal doctrine, German courts refused to scrutinize cases of disciplinary action for many years. Even in cases involving the expulsion of members, they were not willing to test the truth of the associations' factual bases. In fact, the courts granted judicial review only to answer two narrow questions: Did the expulsion have a formal basis in the constitution? Were some minimal requirements of due process met?²⁹

This type of organizational law may be termed "neutral formal law," which ideally meets the conditions of privateness, conditionality, formality and generality.³⁰ State control is used in a very indirect sense—only to the extent that the law

25. Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 101, 193 *et seq.* (F.R.G.).

26. This has occurred since Entscheidungen des Reichsgericht in Zivilsachen [RGZ] 49, 150 (F.R.G.).

27. See Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 47, 381, 384-85 (F.R.G.).

28. See Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 13, 5, 10-11; 21, 370; 29, 354; 36, 109; 75, 158, 159; 87, 337, 343 (F.R.G.).

29. BGHZ 45, 314.

30. See JÜRGEN HABERMAS, ZUR REKONSTRUKTION DES HISTORISCHEN MATERIALISMUS (Frankfurt: Suhrkamp 1976).

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

This two-fold contractual mechanism (toward politics and toward civil society) creates an "elective affinity" of private organization law with the ideal type of a pluralist social structure. If pluralism is defined as transferring the liberal market model from individual actors to groups and organizations, then associative organizations can be seen as competing in two markets. They act in the market for political influence vis-à-vis governmental bodies and political parties on the one hand, and in the market of different sectors of civil society that are competing for political representation on the other. In summation, then, in this first, pluralist phase of West German law, the rules of private organizations generally tended to supply legal structures that reflected a social pluralism.

IV. MACROCORPORATISM: INTEGRATING CAPITAL AND LABOR INTO THE STATE

The discrepancies between a pure pluralism model and the ugly reality of an asymmetrical pluralism with its consequences for the law of associations do not concern us here. Instead, our focus is on the transformation from pluralist to neocorporatist structures that occurred in West Germany mainly in the 1960s and 1970s. This transformation is relevant not only for political science but also for law and legal policy. Consequently, it is important to evaluate the doctrinal problems that social organizations have faced as a result of this transformation, and

the response of the legal regime surrounding intermediary organizations.

There are a number of competing concepts in the neocorporatist developmental trend. For the analytical model chosen here, a particularly suitable one would seem to be Philippe Schmitter's conception which splits the relationship between pluralism and corporatism into a number of dichotomies along different dimensions. "Social corporatism" is defined as a

system of interest representation whose essential components are organized in a limited number of individual compulsory associations, not competing with each other, with a hierarchical structure and demarcated from each other in functional respects. They have governmental recognition or permission, if they are not indeed set up on governmental initiatives. In the areas they represent, they are explicitly allowed a monopoly of representation, in exchange for which they must observe particular conditions in selecting leading personnel and in articulating or supporting claims.³¹

For our discussion concerning the law of private organizations, Schmitter's definition must be rethought in terms of the legal relationships between associations and sectors of civil society on the one hand, and between associations and the political system on the other. Processes of transition to neocorporatist interest representation can then, generalizing, be described as a *loss of market mechanisms* in both of an organization's relevant environments. On the one hand this means that competition between associations in the market for political influence is replaced by a new symbiosis between government agencies and big interest organizations, mainly capital and labor, which in part move directly into decision-making positions. On the other hand, there are repercussions in the "membership market" of civil society. Both changes directly impact the internal organizational structures. Governmental institutionalization, which makes the organization relatively independent vis-à-vis its members, along with the production of public benefits, which decreases the incentive to join,³² cause fundamental changes in the

31. Schmitter, *supra* note 19, at 94-95; Streeck & Schmitter, *supra* note 12, at 8 *et seq.*

32. See generally MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965).

relationships between members and organizations. Under neocorporatist conditions, internal structures are increasingly marked by the "logic of administration." In response to neocorporatist developments, free associations tend to become professional, centralized, functionally differentiated and "administratively rational" organizations. The neocorporatist paradigm has also produced a number of other concerns.

A. *Shifts in the Political Market*

Political pluralism had been characterized by a multiplicity of highly specialized interest organizations competing with each other. The aggregation of interests emerged, as it were, external to the single association because of competition in the political market for influence. However, under neocorporatist conditions, only a few umbrella associations with claims to wide-ranging representation and an institutionalized monopoly of representation arose. As a result, the aggregation of interests had to be accomplished internally—that is, within the large associations. The problem then became whether neocorporatist equivalents for competition between associations could be found.

B. *Shifts in Civil Society*

In pluralistic associational systems, the individual associations had still been largely dependent on the membership markets in different sectors of civil society. Entry and exit had been the main response mechanisms through which organizational control operated. Under neocorporatist conditions, the relative weight of those mechanisms diminished as the associations gradually became part of the government structure. Because the members' motives and an organization's goals became increasingly independent of each other, the subtle mechanisms of consensus and control based on the principles of free entry and free exit were partly deprived of their force. Intermediary associations gained a new independence in relation to their membership that made their responsiveness to civil society questionable. Thus, the issue became whether neocorporatist substitutes for pluralist organizational controls were available which would strengthen the associations' intermediary position between politics and civil society.

C. *Changing Legitimation Problems*

The transition from pluralistic to neocorporatist forms was motivated essentially because the legitimation of politics versus civil society had become problematic. The new symbiosis of big interest organizations and governmental agencies unburdened the latter because they could now count on support from the organizations and on the internal enforcement of decisions in the organizations. However, the outcome was merely a shift in the legitimation gap. Similar legitimation problems now emerged between associations with public status and civil society as a conflict between the membership and the leadership of the various organizations. This presented a new challenge: the legitimation effects of the membership market and those of the influence market now had to be secured within the organization rather than from without.

D. *Increase in Need for Integration*

The mediation between social demands and government policy in the pluralism paradigm had brought about a pressure politics model. Private organizations had been linked with political decision-making bodies through channels of influence. Moreover, because of their relative autonomy, these organizations could afford to pursue their social interests rather ruthlessly. Mediations with other social interests and with governmental viewpoints had been left up to the governmental decision-making bodies. This necessarily changed as neocorporatist organizations became involved directly in political decisions. They now had to act responsibly—that is, to bring about a two-fold integration by balancing organization policy with both governmental policies and social interests.

A parallel development could be seen in all four concerns just discussed: a shift from *external* coordination between the political and the social markets to *internal* political processes within the intermediary organizations. Not surprisingly, legal policy focused particularly on the formation of political interests within neocorporatist organizations, though often with confusing references to “organizational democracy” (understood as membership participation).

In the German legal policy debate over corporatist legal regimes, the following public law concepts have been proposed for these formerly private law areas: (1) the actions of parties

to collective bargaining should be tied to imperative guidelines laid down by the government, (2) the legal principles of the *beliehenen Unternehmer* (private enterprises with public tasks to which rules of public law are applied selectively) should be extended far beyond their original range of application, (3) the actions of associations should be brought under government supervision, (4) checks on the legality of such actions should be made through the courts, (5) parliamentary controls and supervision of associations through the courts of auditors should be introduced, and (6) associations should be brought under judicial or parliamentary control by legally binding them to a "public good" clause or some other general clause. The result of these proposals would be to convert private organizations into public-law corporate bodies.³³

V. POLYCORPORATISM: THE "STATE" OF PRIVATE NETWORKS

The 1980s drastically altered the character of West Germany's macrocorporatism. The world-wide revitalization of neo-liberal policies has also deeply affected the German regime of trilateralism. Although it is true that German neo-corporatist regimes have not been destroyed by the wave of internationalization, deregulation and de-unionization, the quality of the corporatist regime in Germany has undergone substantial change.³⁴ Political scientists have observed tendencies toward the decentralization and pluralization of the centralized trilateral corporatist arrangement between state, labor unions, and industrial associations. As Mayntz has observed, "At least in some areas the stable bilateral or trilateral relations of neo-corporatism seem to be substituted . . . by large interorganizational networks."³⁵

While the central importance of the German "iron triangle" has considerably decreased, specialized political arenas increasingly have adopted corporatist arrangements.³⁶ In Germany,

33. See Gunther Teubner, *Neo-korporatistische Strategien rechtlicher Organisationssteuerung: Staatliche Strukturvorgaben für gesellschaftliche Verarbeitung politischer Konflikte*, 10 ZEITSCHRIFT FÜR PARLAMENTSFragen 469-502 (1979).

34. Wolfgang Streeck, *Status and Contract: Basic Categories of a Sociological Theory of Industrial Relations*, in REGULATING CORPORATE GROUPS IN EUROPE 105, 135-45 (D. Sugarman & G. Teubner eds., Baden-Baden: Nomos 1990).

35. Renate Mayntz, *Interessenverbände und Gemeinwohl: Die Verbändestudie der Bertelsmann Stiftung*, in VERBÄNDE ZWISCHEN MITGLIEDERINTERESSEN UND GEMEINWOHL 32 (Renate Mayntz ed., Gütersloh: Bertelsmann Stiftung 1992).

36. Marian Döhler & Philip Manow-Borgwardt, *Korporatisierung als*

there are now several policy arenas in which corporatist arrangements have been firmly established. This is especially true for technical standardization,³⁷ environmental policies,³⁸ vocational training,³⁹ the health care sector,⁴⁰ and social policy.⁴¹

Kenis and Schneider attempt to give a broader interpretation to these developments.⁴² They argue that the tendencies toward a new "polycorporatism" are fostered by the following underlying long-term trends which became highly visible in the 1980s: (1) the strengthening of non-state formal organizations in different sectors of society,⁴³ (2) the increasing sectoralization and functional differentiation resulting in "overcrowded" policy making,⁴⁴ (3) the increased scope of state poli-

gesundheitspolitische Strategie, in MAX-PLANCK-INSTITUT FÜR GESELLSCHAFTSFORSCHUNG (Köln: Discussion Paper 91/9 1991); Helena Flam, *Corporate Actors: Definition, Genesis, and Interaction, in* MAX-PLANCK-INSTITUT FÜR GESELLSCHAFTSFORSCHUNG (Köln: Discussion Paper 90/11 1990).

37. See Josef Falke, *Normungspolitik der Europäischen Gemeinschaften zum Schutz von Verbrauchern und Arbeitnehmern, in* 3 JAHRBUCH ZUR STAATS- UND VERWALTUNGSWISSENSCHAFT 217-46 (1987); RAINER WOLF, *DER STAND DER TECHNIK: GESCHICHTE, STRUKTURELEMENTE UND FUNKTION DER VERRECHTLICHUNG RECHTLICHER RISIKEN AM BEISPIEL DES IMMISSIONSSCHUTZES* (Opladen: Westdeutscher Verlag 1986).

38. See Helmut Voelzkow, et al., *'Regierung durch Verbände'-am Beispiel der umweltbezogenen Techniksteuerung, 28 POLITISCHE VIERTELJAHRESSCHRIFT* 80-100 (1987).

39. See Josef Hilbert et al., *Selbstordnung der Berufsbildung: Eine Fallstudie über die Evolution, Organisation und Funktion Privater Regierungen', in* ARBEITSBERICHTE UND FORSCHUNGSMATERIALIEN 18 (Forschungsschwerpunkt Zukunft der Arbeit an der Universität Bielefeld ed., 1986); Wolfgang Streeck, *Interessenverbände als Hindernis und Vollzugsträger öffentlicher Politik, in* INSTITUTIONELLE BEDINGUNGEN DER ARBEITSMARKT- UND BESCHÄFTIGUNGSPOLITIK 179-98 (F. Scharpf & M. Brockmann eds., Frankfurt: Campus 1983).

40. See MARIAN DÖHLER, *GESUNDHEITSPOLITIK NACH DER "WENDE": POLICY NETZWERKE UND ORDNUNGSPOLITISCHER STRATEGIEWECHSEL IN GROSSBRITANNIEN, DEN USA UND DER BUNDESREPUBLIK DEUTSCHLAND* (Berlin: edition Sigma 1990); GÉRARD GÄFGEN, *NEOKORPORATISMUS UND GESUNDHEITSWESEN* (Baden-Baden: Nomos 1988).

41. See Rolf G. Heinze & Thomas Olk, *Sozialpolitische Steuerung: Von der Subsidiarität zum Korporatismus, in* GESELLSCHAFTSSTEUERUNG ZWISCHEN KORPORATISMUS UND SUBSIDIARITÄT 162-94 (M. Glasgow ed., Bielefeld: Centaurus 1984).

42. See Patrick Kenis & Volker Schneider, *Policy Networks and Policy Analysis: Scrutinizing a New Analytical Toolbox, in* POLICY NETWORKS: EMPIRICAL EVIDENCE AND THEORETICAL CONSIDERATIONS 26, 34-59 (Bernd Marin & Renate Mayntz eds., Frankfurt: Campus 1991).

43. See Charles Perrow, *A Society of Organizations, in* KULTUR UND GESELLSCHAFT 3 et seq. (M. Haller et al. eds., Frankfurt: Campus 1988).

44. See J. Richardson & A.G. Jordan *Overcrowded Policy Making: Some British and European Reflections, 15 POLY SCI.* 247, 247-68 (1983).

cy making in diverse policy arenas without the concomitant growth of necessary control capacities,⁴⁵ (4) the decentralization and fragmentation of the state,⁴⁶ and (5) the blurring of the boundaries between the public and the private resulting in trends of informal administrative action.⁴⁷

Kenis and Schneider argue that these trends are causing political overload and "governance under pressure." Increasingly unable to mobilize all necessary policy resources within its own realm, government consequently is becoming dependent upon the cooperation and joint resource mobilization of policy actors outside its hierarchical control. As a result, policy networks between state and interest groups increase in importance. These policy networks should be understood as webs of relatively stable and ongoing relationships that mobilize dispersed resources so that collective action can be orchestrated toward the solution of a common policy problem.⁴⁸

In the move from centralized macrocorporatist arrangements to the more flexible, decentralized and pluralized networks of polycorporatism, the internal differentiation of politics seems to undergo a new change. Two contradictory tendencies are working at the same time. First, the *Entstaatlichung* (privatizing) of public policy: The state as a collective actor is receding into the background. The experience of state failure in welfarist policies and the wave of deregulation have led to a partial retreat of administrative bureaucracies. Second, the *Verstaatlichung* (absorption into the state) of intermediary organizations: The role of intermediary organizations no longer consists solely of representing pluralist interests, but also of full-fledged participation in public policy, the implementation of state decisions, and even the autonomous self-administration of public affairs.

The result is a new "state" of private networks. Against all observations to the contrary, the state as the self-description of politics does not shrink at all; rather, it expands its scope and includes new and different collective actors. Instead of being the collective personification of a centralized governmental

45. See Evelyn Z. Brodtkin, *Policy Politics: If We Can't Govern, Can We Manage?*, 102 POL. SCI. Q. 571, 571-87 (1987).

46. See generally PATRICK KENIS, *THE SOCIAL CONSTRUCTION OF AN INDUSTRY: A WORLD OF CHEMICAL FIBRE* (Frankfurt: Campus 1991).

47. See Jochen Hücke, *Implementing Environmental Regulations in the Federal Republic of Germany*, 1 POLY STUD. J. 130, 130-40 (1982).

48. See Kenis & Schneider, *supra* note 42, at 36.

hierarchy, the state is now being transformed into the self-description of a loose network of private and public actors. In such a network, governmental bureaucracies, political parties and autonomous social organizations form a loosely joined cooperative configuration which replaces the hierarchical unity of old state government.⁴⁹

Within this network, a new political division of power between governmental bureaucracies and private sector organizations is emerging. Governmental bureaucracies relinquish part of their public competence while private associations give up a part of their private autonomy.⁵⁰ Thus, "private" associations take over governmental activities which, in their view, were not functioning well.⁵¹ But this requires a new orientation of their activities. With this new public role for private associations, the new objective for the legal constitution of social organizations is to increase their responsiveness to general and public interests.⁵² The new formula is "publicly responsible self-regulation in decentralized social systems."⁵³

Consequently, the "network state" can only work if government is strong, not weak. Government in this regime is concerned with facilitating organizational development and institutionalizing the public status of intermediary groups. If these associations are to work as private governments, they need to be supplied with additional power and authority that they could not mobilize solely on a voluntary basis. At the same time, government is not restricted merely to delegating decision-making power to intermediary organizations. Rather, the new governmental role is to monitor constantly and to redesign the self-regulation of intermediaries. Thus, government retains considerable power of direct regulation, not only as a last resort but also as a credible threat to the new private governments. It

49. See generally Fritz W. Scharpf, *Die Handlungsfähigkeit des Staates am Ende des Zwanzigsten Jahrhunderts*, 32 POLITISCHE VIERTELJAHRESSCHRIFT 621-34 (1991).

50. See Wolfgang Streeck, *Vielfalt und Interdependenz: Probleme intermediärer Organisationen in sich ändernden Umwelten*, 39 KÖLNER ZEITSCHRIFT FÜR SOZIOLOGIE UND SOZIALPSYCHOLOGIE 488 (1987).

51. See Volker Ronge, *Vom Verbändegesetz zur Sozialverträglichkeit: Die öffentliche und verbandliche Diskussion über den Gemeinwohlbezug von Verbänden in den 80er Jahren*, in VERBÄNDE ZWISCHEN MITGLIEDERINTERESSEN UND GEMEINWOHL 59 (R. Mayntz ed., Gütersloh: Bertelsmann Stiftung 1992).

52. See Mayntz, *supra* note 35, at 13; Streeck & Schmitter, *supra* note 12, at 21.

53. See Mayntz, *supra* note 35, at 22.

is only "by a combination of procedural, instead of substantive, regulations with a credible threat of direct intervention" that government can hold private governments at least partially accountable to the public.⁵⁴

VI. CONSTITUTIONALIZING POLYCORPORATIST ASSOCIATIONS

What are the consequences of polycorporatism for the law of intermediary associations? And what role are the courts playing in the new polycorporatist arrangements? Let us return to the rainbow-coalition, our paradigmatic case in which a union expelled some of its members because in the elections for work councils they had challenged their union with an alternative list of candidates. In a series of decisions, the courts came up with a solution that totally reversed traditional principles of the law of private associations. The courts now tend to nullify such expulsions and to reinstate the political opponents to their former membership status. Our case illustrates how private law is reacting to the transition from pluralist interest mediation, to neo-corporatist arrangements as well as to the recent tendencies toward polycorporatism. It also suggests how the courts may deal in the future with some of the legal issues delineated at the beginning of this paper.⁵⁵

A. *Autonomy of Polycorporatist Associations Against Court Interference*

In the area of the autonomy of polycorporatist associations in relation to the courts, a dramatic change of the courts' policies has occurred. In 1983, a landmark decision finally abandoned the old tradition of associational autonomy.⁵⁶ Since then, the courts have also scrutinized the factual basis of an association's disciplinary actions. The underlying motive for this change was the new public status of private associations, which has moved the review of private associations very close to the judicial review of governmental administrative decisions. The result is the pervasive judicial control of the administrative decisions of intermediary associations, with some narrowly interpreted areas of secondary discretion.

54. See Streeck & Schmitter, *supra* note 12, at 26.

55. See *supra* part I.

56. Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 87, 338 et seq (F.R.G.).

*B. Constitutional Rights for Organizations
(GG art. 9, pt. III & art. 19, pt. III (F.R.G.))*

Here as well we find a dramatic reinterpretation of the negative effects of rights in terms of institutional guarantees with procedural consequences. In the work council election cases, the unions claimed that their internal decision-making processes were strongly protected by the constitutional guarantees of GG art. 9, pt. III. If under law unions have the institutional entitlement to participate in work council elections, they argued, then the constitution protects their right to influence their members in the election procedure. Furthermore, the unions argued that this protection should also cover the right to put their members under the obligation not to appear as candidates on competing election lists.⁵⁷

The courts, however, perceived the consequence of the neocorporatist incorporation of labor unions into the process of work council elections within enterprises. Accordingly, the courts extended the institutional protection of the integrity of the voting procedures into the internal decision-making processes of the unions, insofar as the voting procedures are an integral part of the election process. Thus, they applied section 20 Betriebsverfassungsgesetz, which prohibits "influenc[ing] the work council elections by threatening or inducing damages," even in relation to internal affairs of unions. As is clear, the courts in this situation were confronted with a conflict between the external principles of a free work council election and the internal autonomy of labor unions. In the end, they gave priority to the integrity of the election procedure, thereby building on the neocorporatist integration of unions that can no longer legitimately claim the autonomy of purely private associations.

*C. Individual Rights of Membership, Judicial Review of
Internal Rule-Making, and Protections Against Expulsion
Under Polycorporatist Regime*

To what extent are individual rights of membership reinterpreted under a polycorporatist regime? Should the courts

57. Ulrike Wendeling-Schröder, *Aktuelle Probleme der Rechtsprechung zum Gewerkschaftsausschluß*, 19 ZEITSCHRIFT FÜR GESELLSCHAFTS-UND UNTERNEHMENSRECHT 110-11 (1990).

protect sectors of civil society by granting individual rights against associations, including the right of access? And should there be judicial control over the internal rule-making of associations and protection of individuals against expulsion? In principle, if a social organization exclusively represents entire sectors of social life, its public status requires it to guarantee access to interested individuals and to protect their membership status.

Here we find the third decisive turn of the German judiciary.⁵⁸ Once again, it was the historical shift in the external relations of private associations that motivated the courts to abandon the old principle of associational freedom in the selection of its members. Neocorporatist associations have a monopoly of representation in their respective social spheres. As a consequence of such monopoly power, the courts have curtailed the freedom of neocorporatist associations to deny individuals membership. However, the courts also have extended their control beyond associations with a representative monopoly. Now it is sufficient if they exert considerable "social power." In fact, if an association performs a public role, then the courts will grant individuals the right to access that association. Should it desire to refuse someone membership, the association must demonstrate "substantive reasons," which the courts reserve the right to review.⁵⁹

By implication, judicial supervision of access to associations has been extended to include judicial review of the associations' internal rule-making procedures. The internal law-making power of private associations has long been the center of associational autonomy and had been respected by the courts. However, the German Federal Court no longer recognizes this autonomy for associations with a public status. Rather, judicial control is presently necessary for those "associations that exert considerable power in the economic or social sector."⁶⁰ Theoretically, the courts employ the "good faith" standard to review an association's laws and procedures. Practically, however, they weigh the interests of an association against the interests of its members.⁶¹

58. See *Entscheidungen des Bundesgerichtshofes in Zivilsachen* [BGHZ] 63, 282; 93, 151; 102, 265 (F.R.G.).

59. Peter Bartodiziej, *Ansprüche auf Mitgliedschaft in Vereinen und Verbänden*, 20 *ZEITSCHRIFT FÜR GESELLSCHAFTS-UND UNTERNEHMENSRECHT* 517-546 (1991).

60. BGH NJW 1989, 1724.

61. See Hermann-Josef Bunte, *Richterliche Inhaltskontrolle von Verbandsnormen*:

Strong judicial protection of members in their micropolitical activities within the union against expulsion and other disciplinary matters follows directly from this new perception of private associations. This protection is especially relevant in our paradigmatic case of work council elections.⁶² The courts themselves draw the fine line between legitimate internal opposition and illegitimate activities which damage the association. Currently, participation in a competing election list is still covered by the right to internal opposition. The limits of legitimate dissent are reached when the opposition works toward a "total confrontation."⁶³

*D. Internal Democracy in Quasi-Public Private Associations:
Minimal Requirements of Law*

In the work council cases, the courts went beyond the mere protection of individual membership positions by demanding a minimal amount of associational democracy from associations with the institutionalized right to participate in work council elections. They made the union's right to request election discipline contingent upon the nature of the internal procedures governing the preselection of union candidates.⁶⁴ Moreover, the courts did not require internal elections in the unions. Rather, we encounter a judicial reinterpretation of direct and participatory democracy in terms of internal pluralism and the public responsibility of private organizations.

VII. GEMEINWOHLVERPFLICHTUNG:
PUBLIC RESPONSIBILITY OF PRIVATE ORGANIZATIONS

These developments in judge-made law can be understood as tendencies toward a new legal regime of polycorporatism. The key theoretical development is a new concept of

Besprechung der Entscheidung BGH ZIP 1989, 14, 20 ZEITSCHRIFT FÜR GESELLSCHAFTS-UND UNTERNEHMENSRECHT 316, 317-25 (1991); BARBARA GRUNEWALD, DER AUSSCHLUSS AUS GESELLSCHAFT UND VEREIN 126 et seq. (Köln: Heymanns 1987).

62. Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 45, 314 et seq.; 71, 126 et seq.; 87, 337 et seq.; 102, 265 (F.R.G.).

63. Cf. Wendeling-Schröder, *supra* note 57, at 107, 107-130; WOLFGANG ZÖLLNER, ZUR FRAGE DES GEWERKSCHAFTSAUSSCHLUSSES WEGEN GEWERKSCHAFTSSCHÄDIGENDER KANDIDATUR BEI BETRIEBSRATSWAHLEN: EIN RECHTSGUTACHTEN (Stuttgart: Daiber 1983).

64. Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 45, 314 et seq.; 71, 126 et seq.; 87, 337 et seq.; 102, 265 (F.R.G.).

associational autonomy. Classical private autonomy shielded associations' activities against judicial intervention and allowed judicial review only in the narrow case of an open abuse of power. Under conditions of polycorporatism, this private autonomy tends to be replaced by a new social autonomy of quasi-public associations.

Taking autonomy seriously means to rely on self-determination and at the same time on inevitable externalization (outside control), not understood as hetero-determination but as a potential outside support in situations of impossible self-help. It would be similar to therapeutical help and to supportive structures outside of the law.⁶⁵

The private law of polycorporatism is looking to a new balance of social autonomy of intermediary associations on the one side, and their structural coupling to the legal system on the other. Under a polycorporatist regime, intermediary associations take over important public decision-making powers. And while the courts do not interfere with these powers, they do place limits on the intermediaries' control of membership conditions and on their rule-making power. Here, one might find elements of what Taylor calls the new balance between the L-stream and M-stream conceptions. If the idea of social autonomy is applied not only to the economic sector, but also to a multiplicity of social discourses,⁶⁶ it may well become a model for new ways in which law opens up to the dynamics of civil society.

65. Rudolf Wiethölter, *Zum Fortbildungsrecht der (richterlichen) Rechtsfortbildung: Fragen eines lesenden Recht-Fertigungslehrers*, in 3 KRITISCHE VIERTELJAHRESZEITSCHRIFT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT 1, 27-28 (1988).

66. *Id.*