Regulatory Law: Chronicle of a Death Foretold

GUNTHER TEUBNER

European University Institute, Italy

I

IN THE *Chronicle of a Death Foretold* (Gabriel Garcia Marquez, 1982), a Columbian village on the Caribbean coast had been celebrating a sumptuous wedding festival. However, during the course of that very wedding night a calamitous event occurred. 'Angela Vicario, the beautiful girl who'd gotten married the day before, had been returned to the house of her parents, because her husband had discovered that she wasn't a virgin' (p. 20). The culprit would have to die. The fascination of the *Chronicle* lies in the ominously insistent rhythm of its narrative. With an unrelenting inevitability it takes us up to the point where we can almost feel the very 'throb of the tragedy' (p. 19) itself. Everyone in the village knows that a crime is imminent. Many want to prevent it. Some, at least, want to warn the victim. But even the attempts of the murderers themselves, the brothers Vicario, who had done much more than might be expected to get someone to stop them from killing Santiago Nasar (p. 49), could not save the victim from being 'carved up like a pig' before the whole village (p. 2).

I would like to try and give the *Chronicle* a legal-sociological interpretation, and will do so using one of the most advanced models available for measuring the effectiveness of law,[1] that developed by Opp, Diekmann and Rottleuthner (Opp, 1973: 190ff.; Diekmann, 1980: 32ff., 132ff.; Rottleuthner, 1987: 54f, 1992: 125ff.).

This text has been translated from German by Sean Smith.

Social & Legal Studies (SAGE, London, Newbury Park and New Delhi), Vol. 1 (1992), 451–475

The model does two things. Not only does it 'develop a theoretical framework' but 'in a way which can be empirically checked, it shows how it is that legal norms work and why they are effective or ineffective'. In this way the model succeeds in 'bringing a highly abstract theoretical discussion down to the level of empirical control' (Rottleuthner, 1987: 55f.). Now what is being referred to here is the well known discussion surrounding the regulatory crisis of law. With scientific precision the model isolates its dependent variable – 'the extent to which the law is followed' – and relates it positively and negatively to a range of independent variables of first and second order. It can then be used to develop explanations and prognoses of the following kind. The greater the degree of knowledge, the greater the severity and probability of sanctions, and the lower the degree of competing normative orientation and of the positive sanctioning of deviance, then the greater is the degree to which a law is followed. It also offers itself as a scientific basis for legal-political reform such as the setting up of information campaigns or the heightening of police presence in normatively ambivalent situations. In short, it provides an excellent account of the present state of development of 'German empirical sociology of law' as defined by the editors of the first issue of the *Zeitschrift für Rechtssoziologie* (1980: 1–3).

So how can we explain in legal-sociological terms the alarmingly low level of legal effectiveness in this north Columbian village? And of course it is not just the individual actions of the two Vicario brothers we are dealing with, but – *nomen est omen* – the collective deviance of the whole village (pp. 98, 111). According to universal legal standards, whether as actors, instigators, accessories or through having failed to intervene where there was a duty to do so, they have all contravened the homicide provisions of penal law. Accordingly, what is at issue here is a great number of normatively relevant situations, and not just the judgment of a unique act. Indeed, even the victim has contributed to his own death. Santiago Nasar, despite a last-minute warning, continues to make his way to the appointed place of death. As far as the dependent variable is concerned, then, we can confirm that for our population (since the number of norm-relevant situations = the number of villagers who act or for whom there exists a duty to intervene) there is a norm-following quotient of zero percent.

Now let us go through the most important independent variables. The 'degree of (indirect) knowledge of the law' explains nothing. On the contrary, it presents us with a problem, since the homicide law would have undoubtedly been known to all the participants. It is not just that the two brothers carry out the murder, in a sense, vicariously for the whole community. But the collective behaviour of the villagers following their failure to intervene betrays a more widespread awareness of the law. The *Chronicle* depicts the 'shouts of the whole town, frightened by its own crime' while the murder is being carried out (p. 120). And the fact that afterwards the villagers went down with all manner of psychosomatic symptoms (immoderate eating, pestilential diarrhoea, illusions of penitence, bladder pains, visions of phosphorescent birds, sudden death, etc.) can be taken as an expression of collective guilt (pp. 77ff.).

The next group of variables – 'sanctions' – fares little better. The 'degree of expected negative sanctions from not following the law' – as it is formulated in

the most impeccable bureaucratese – is extraordinarily high. The crime happens in public. The police are present (pp. 53, 55). The investigating judge arrives immediately (p. 99). The murderers are sent to prison for two years on remand (p. 49). In other words, the expected probability of sanctions amounts to 100 percent. And the expected severity of the sanctions is considerable. Even the last-minute reprieve cannot affect the *ex ante* considerations since it arrives unexpectedly. And in addition to the legal sanctions there are a number of other sanctions which would have to be included in our model. There was a widespread fear that the death would be avenged by the Arab community to which the victim belonged. Such 'reprisals' might include anything from poisoning to fire-raising (pp. 81ff.). Nor can we ignore the fear of religious sanctions, whether from the church or from superstition which, in a Columbian village, should certainly not be underestimated.

Moreover, the variable 'degree of expected negative sanctions through obeying the norm' contributes nothing by way of explanation. The interruption of the murderous ritual would have occasioned nothing more than a feeling of general relief. What a peculiar situation, then. Zero percent obedience. One hundred percent awareness. And an extremely high expectation of sanctions.[2]

However, with the next group of variables, the 'degree of normative deviance', comes the rehabilitation of the Opp-Diekmann model and its explanatory power. At last we are asked to think not just like bad economists – who would explain every murder, even the most impulsive, as a maximization of net gain – but as good sociologists with their dearly held 'shared normative commitments'. In spite of the miserable failures with the first two groups of variables, here the *Chronicle* can find at least a plausible legal-sociological explanation in the conflict between official legal norms and unofficial social norms. Faced with the law of Bukowina or the marriage code of a Columbian village community, the state law can be seen to be in a difficult position. 'Competing normative orientations' have been caught up in the actors' deliberations alongside calculations of positive and negative sanctions and have a negative effect on the extent to which laws are followed (Rottleuthner, 1987: 73).

II

But wait! There is something wrong. The *Chronicle of a Death Foretold* cannot quite so easily be made to fit such a pattern of 'mental causes – social effects'. If we read the *Chronicle* with greater care, we find that it goes into the actors' motivations in some detail. And it is clear that in none of the more detailed descriptions was any kind of cost–benefit calculation decisive. So it cannot be said that the decision to commit a murder was arrived at after a careful weighing of positive and negative sanctions. Nor is it the case that there was a kind of inner conflict between law and honour in which honour finally won out. On the contrary, there is no trace of consequential reasoning or balancing of values, only the abhorrence of the crime with which everyone was personally saturated from beginning to end. At the most it is only the murderers themselves who 'had done

nothing right in line with killing Santiago Nasar right off and without any public spectacle, but had done much more than could be imagined for someone to stop them from killing him, and they failed' (p. 49).

The *Chronicle*, then, does not present us with a situation where the participants first deliberate – either purpose rationally or value rationally – on the collision between competing orientations to norms and then transform this into collective action. Rather, we are confronted with the *total separation of inner motives and external action*, with the dissociation of psychic and social processes, with the reciprocal closure of two autopoietic systems. Moreover it is precisely this which makes the *Chronicle* so gripping! Against the will of all the participants, even of the murderers themselves, a murder is committed – or, rather, the murder commits itself. Step by step the crime takes it course while the perpetrators and accomplices try to break free from its ever-hastening rhythm. 'I felt the way you do when you're galloping on horseback', Pablo Vicario declared (p. 120). It is just this situation of subjective powerlessness to which the participants react either with the already described psychosomatic disorders or with all manner of (ir)rationalizations. Was it a calamitous combination of chance events that had made absurdity possible (p. 97)? Or was it the inevitability of fate which the wise women foresaw and which no one believed (p. 21)? Or: 'We thought that it was drunkards' baloney' (p. 52)? Or had the devil himself been at work, perhaps taking on the persona of the bridegroom (p. 27)? Has legal sociology nothing better by way of explanation for such a drama than cost–benefit calculations and value rational considerations operating somehow in the heads of its participants?

It is not just their homespun psychology (knowledge of norms, awareness of sanctions) which bothers me, one which – *tu quoque* – in its sheer banality is every bit a match for the amateur psychology of jurists (intention, presumption of legal knowledge) so effectively ridiculed by legal sociologists themselves (Opp, 1973: 83ff.; Rottleuthner, 1973: 192ff.). Nor is it the orientation to cost–benefit calculations which is so often questionable when we are looking at the following of legal norms. Note that where such an approach dominates, as it does in certain social contexts, it does so with the flair of rational actor theories and law-and-economics, leaving the somewhat more primitive Opp–Diekmann model trailing in their wake (Elster, 1985; Behrens, 1986). And it is no good trying to prop up purposive rationality here by throwing in a bit of value rationality. Rather, my objection is more fundamental. For it seems to me that, for something which pretends to be a legal-sociological model, it nevertheless remains deeply unsociological in its approach.

Fifteen years ago things were rather different. At that time, critical legal sociology appealed to genuine sociological evidence in order to herald the crisis of regulatory law. 'The still widespread mistaken belief in the behaviour modifying power of law cannot be sufficiently attacked' (Kaupen, 1975: 34, 38). However, post-critical legal sociology is currently prepared to denounce such a crisis as a 'myth' (Rottleuthner, 1989: 273). And the most advanced model of legal effectiveness indulges in quasi-rational-choice-pseudo-psychology instead of facing up to the fundamental separation between psychological motives and

social situations. The model itself recognizes this, at least implicitly, when it concedes that there are certain 'difficulties with checking the effectiveness of laws'. And these are supposed to result from the reduction of a complex social situation to 'the lonesome addressee'. Unfortunately, the consequences have not been drawn from such fragments of self-criticism (Rottleuthner, 1987: 71ff.). Nevertheless, a legal sociology which claims to be empirically satisfactory must be in a position to develop variables which express the genuinely social obstacles to norm following.

Perhaps at this point I ought to make a modest preliminary suggestion concerning the variables of the model. Does it not make sense when dealing with the variable 'knowledge' to distinguish between psychic knowledge and social knowledge, between 'cognitive mapping' (Savelsberg, 1987) and 'communicative mapping'? This would involve distinguishing, in norm-relevant situations, between the reality constructions in the minds of participants and the reality constructions in communication. The appropriate research techniques (interviews on the one hand, analysis of texts and transcripts on the other) can then be distinguished and developed. We could then account for that situation where, in spite of actors' subjective knowledge of the legal norm, it is not invoked in the relevant social context, not communicated, not thematized, not recognized. In spite of 'psychic' awareness there is no 'social' awareness.

As far as 'competing norm orientation' is concerned, we can observe a similar differentiation between psychic and social variables (cf. the differentiation between personal and institutional orientations in Scharpf, 1987: 113ff.). Psychic expectations must be distinguished from social expectations and correspondingly different research techniques developed. But it seems that this would be to sin against the spirit of German empirical sociology of law. Since when could social systems think, conceive, know, expect independently of actors? Does the law think? Does a village feel? That it is felt necessary to immunize the Opp–Diekmann model against a fatal 'dose of autopoietic, self-referential systems theory' is hardly accidental. Indeed, the value of just such a model is said to lie precisely in its ability to keep the speculations of contemporary German grand theory at arm's length (Rottleuthner, 1987: 56). However, perhaps this defence is itself an indication that such observation instruments as are currently available have been heavily overworked. Indeed, in empirical psychology there is already a demand for research into 'the plurality of system-types (e.g. psychic or social systems) taking into account their specific information processing mechanisms and the ways in which these refer to one another' (Schiepek, 1989: 232).

III

Having formulated the conflict not as a problem of intrapsychic motives, but at the social level as a conflict between legal and social norms, the *Chronicle* itself now compels a second correction. The chief of police, in taking the knives from the murderers, clearly believes that he has prevented any blood from being

spilled ('Now they haven't got anything to kill anybody with'). But at this point, Clotilde Armenta utters the somewhat clairvoyant words, 'That's not why . . . It's to spare those poor boys from the horrible duty that's fallen on them' (p. 57). However, it is just this emancipating act which proves to be impossible. The communicative events during the Columbian wedding night do not even admit the interpretation of the norm conflict as a norm conflict. They immunize themselves against the homicide law.

Perhaps at this point German legal empiricists could learn something from the French postmodernists, even if, indeed just because, they dismiss them as 'woolly obscurantists' (see the Autorenkollektiv, 1980: 125). Using Lyotard's crisp distinction (1983: no. 12 and *passim*) between *litige* and *différend*, we can talk of the hermetic closure of certain social discourses against the law. The *Chronicle* portrays a discourse on honour, love and death which cannot be seen as *litige*, that is, as a conflict of norms which could be resolved using common criteria, compromises or a calculation of interests. The situation of a 'competing norm orientation', rather complacently assumed in the model of legal effectiveness, does not arise here. There is no *litige*. Instead, the situation is governed by a *différend*. We are confronted not with a conflict of norms within a discourse, but with incommensurable discourses which rebound off one another. We are faced with an irreconcilable dispute between two different rule-systems. In the words of the chief witness, Jean-Francois Lyotard, 'There is a dispute ("différend") between two parties if the "resolution" of their conflict is carried out in the idiom of one of them, an idiom in which the grievance which the other suffers does not figure' (1983: no. 12). Since the thematization of law is switched off during the whole bloody affair, we can say that the law itself becomes the 'victim' since it is not even heard. The idiom of honour immunizes itself against the idiom of law. The internal logic of the discourse on the redemption of honour resists formulation in legal categories. As the *Chronicle* itself puts it, 'such affairs of honour are sacred monopolies with access only for those who are part of the drama' (p. 98).[3]

Why? Because otherwise fundamental cultural postulates would be placed in question. And where they are, discourses react by short-circuiting communication, breaking off communication (see Garfinkel, 1967). This is experienced by the Vicario brothers whose every attempt to escape the murder discourse runs into a wall of silence. Those who would introduce here individual cost–benefit calculations understand nothing of the power of *omertà*. Even the legal claim that murder is a violation of the law would be to place the compelling force of the ritual in question. It would lift it out of the realm of the natural and the necessary, and make it contingent, a cause of doubt, interpretations, justifications and dispute. More precisely, the rules of the honour discourse connect up actions in a specific way, neither through *contingentia* – to put it somewhat archaically – nor through *legitimatio*. Not even through *necessitas*, but through *fatum* (see Wiethölter, 1992). The incommensurability of discourses is a result of their different 'grammar' – the normative versus the fatal connection of act-events. The logic of redeeming family honour through killing the disgraced party cannot except upon pain of self-denial be subordinated to the contingency of the binary

code legal/illegal. Unlike the code of honour, the legal code 'tolerates' disobedience and submission to sanctions. Regaining family honour is not something that gets justified, nor is it a norm. It simply happens. 'Honour is love' (p. 98). And because of its normfree (!) internal logic, it is simply not possible to work with 'competing norm orientations' à la Opp and Rottleuthner. On this compelling ritualistic procedure hangs the collective identity of the village. And this effectively limits any simple application of state regulation even before any purpose-rational calculation of sanctions. 'Every regulatory intervention which goes beyond these limits is either irrelevant or produces disintegrating effects on the social area of life or else disintegrating effects on regulatory law itself' (Teubner, 1984: 316). In short, the blood-curdling interaction – and had Clotilde Armenta not intuitively recognized this? – resists juridification.

IV

But what can the wedding celebrations of a Columbian village tell us about regulatory opportunities in a modern world of strategic action? Once again it is the woolly obscurantists of postmodernity who come to our aid. This time it is their scandalous eclecticism which makes light work of such differences in time and place. The closure of discourses against the law is not peculiar to the honour rituals of archaic societies but is a characteristic feature of modernity. Certainly with closed societies it appears to have become worse. But it has now become fashionable – particularly with the collapse of the *grands récits* which were still able to make something like a societal superdiscourse possible – to say that the discourse on society is more than ever before confronted with a 'dissociation of its rule systems' (Lyotard, 1983: 12), a multitude 'of language-games' (Wittgenstein, 1989: 23f.), a differentiation of the 'subsystems of society' (Parsons, 1971: 10), the 'operational closure of autopoiesis' (Luhmann, 1984: *passim*), or the plurality of 'semiotic groups' (Jackson, 1988: 131ff.). And is not the persistent refusal of German empirical legal sociologists to seriously consider the speculative projections of such obscurantists a confirmation of this diagnosis? In view of '1.) the impossibility of avoiding conflicts (the impossibility of indifference) and 2.) the lack of a universal discourse with which to settle them or, if you like, the necessary impartiality of the judge' (Lyotard, 1983: 10),[4] then perhaps such a provincial self-enclosure against all relevant theoretical advances of recent years is the only way of preserving the causal/empirical integrity of legal-sociological discourse. Is it the orderliness of legal sociology which has become a 'victim' of postmodernity?

This self-immunizing of social discourses against the law opens up a wide field of research into legal effectiveness – if only empirical scientists were more open to speculation. Think of the 'legal blindness' of terrorist groups, profit-oriented businesses shortly before their collapse, fundamentalist religious sects, love as passion, the chicken games of American teenagers, or research into genetic engineering. Notice the separation of psychic motives from social communication, and the new ways in which today's discourses immunize themselves

against the law. Indeed, we should ask ourselves whether there is not in today's terms something comparable to the total immunization of the Columbian honour discourse against the legal prohibition of homicide. The answer surely is that there is. Depending on their 'internally defined criteria of relevance', modern institutions can be 'resistant to all attempts at regulation' (Scharpf, 1987: 118). However, does the resistance of today's discourse lie not in the defence of the inevitability of fate against contingency, but the defence of the contingency space of its specific code against fatal politico-legal intervention? The modern economy would certainly have an immune reaction to a legal ban on private property (in the sense of exclusive property) – either in the form of civil disobedience or the withholding of payments. Lyssenkow and the German racist ideology painfully remind us of further parallels. . . .

There are a couple of research questions which come out of this discussion of the operational closure of social systems which I would like to direct to empirical research on the effectiveness of law. They involve breaking with a simplistic psychology, with 'subjectively interpreted act-orientation', with the 'internal perspective of actors' (Rottleuthner, 1987: 78ff.) and an accommodation of the structural characteristics of social systems, of discourses, of processes of communication. For example, can the following theoretical statement be made empirically operational? 'The social effectiveness of law depends on, among other things, whether certain social interactions selectively reproduce legal events, which appear in their environment as limiting conditions, or whether they immunize themselves against them.' Can we transform into empirical indicators the distinction between total 'legal blindness' (or perhaps 'legal deafness'?) of certain discourses (not of actors!), and the variable thresholds of legal thematization in others?

The extent to which an interaction is 'deaf to the law' would have to be seen in relation to different legal spheres (penal law, civil law, public law) and to the quality of the different legal utterances themselves (the megaphone of command-and-control; the siren call of legal incentives; the whispered temptations of 'option-norms'). For instance it should be possible to develop a typology of interactions which, from Stewart Macaulay's 'juridicophobic' contract studies on the one hand to Philip Selznick's 'juridicophillic' organization studies on the other, can distinguish the degree of openness or closure of the discourse to law (Macaulay, 1963; Selznick, 1969: 32ff.). In the time dimension, it would be possible to carry out a phase analysis which distinguishes the 'legal affinity' of an interaction, for instance, in relation to its beginning, execution and winding up (consider the role of the law in intimate or in business relations).

As far as the regulated discourse is concerned, we would investigate whether it distinguishes between codes and programmes, and ask whether this correlates with its openness or closure to law. Is it the rigidity of its specific binary coding which blocks regulation? Or does the flexibility of its variable programming, the routine processing of information and consensus building, only put up a makeshift resistance? Or is it the system's idiosyncratic 'reality constructions' and the reflexive 'self-descriptions' of concrete institutions, whose 'peculiar selectivity [is] already [constituted] in the acceptance of external signals, blending

out from the start as irrelevant the overbearing complexity of all environmental information' (Scharpf, 1987: 118) and with which the boundaries of regulation are defined?

This systems-theoretical inspired analysis of the 'conceptual readiness' of legal discourse and the 'opportunity structure' of societal discourse can be used to further develop the typology of interventions suggested by Kaufmann (1988: 85ff.). His 'context-dependent forms of welfare state intervention' and identification of 'policy spheres' can be fleshed out with the help of the idea of criteria of legal affinity.

This opens up opportunities for detailed empirical studies of particular configurations. These can then be generalized in a way which should make a suitable contrast to the futile generalizations of the concrete empirical causal analyses of legal effects (in particular the indirect legal effects of, say, legislation on domestic servants as carried out by Aubert, 1967). The obsession with details which characterizes research into rule-governed autopoietically closed discourses – as a look at contemporary Flamenco research shows (Fritscher, 1989: 20ff.) – would appear to exceed our wildest expectations. The opportunities for social control through law which would find their basis in just this sort of research have, unfortunately, so far been missed by a legal effectiveness oriented research which is bound to a banal actor psychology. It seems to me, therefore, that Rottleuthner's somewhat stereotyped complaint that a theory of operatively closed social systems can only deliver 'platitudes' and 'trivialities' rather than detailed research hypotheses (Rottleuthner, 1988: 120ff.; 1989: 280), is a little premature. At the very least it deals with genuine legal-sociological questions and not parapsychology. How, then, does the legal effectiveness researcher react in the face of the hard logic of the lonesome addressee? Why, he is not even asked.

V

But why share this pain of silence imposed on the legal effectiveness researcher? Let us instead experience the 'joy which comes from finding a new idiom' (Lyotard, 1983: 33)! At last we can discover the beauty, the 'autopoetry', of autopoiesis. And I will take just one word from that idiom – that of recursivity – to bring the petrified correlations of empirical analysis to life.[5]

Let us recall the twist given to the *Chronicle of a Death Foretold* by the acquittal of the 'vicarious' killers Peter and Paul. That the trial of Angela's two brothers should end in an acquittal is clearly problematic from the standpoint of Columbian law. Since no law has been violated, there seems to be an effectiveness quotient of 100 percent. But if we take now the standpoint of the ideal jurist, the quotient plummets to zero percent. What significance, then, does the acquittal have for the effectiveness of the law? One hundred percent? (No one has infringed the homicide law, according to the legally valid judgment of the court.) Zero percent? (Everyone has infringed it.) About 2 percent? (Only the brothers Vicario are implicated.) Or about 15 percent? (The whole Vicario family has murdered the disgraced party in order to redeem its honour.) Clearly, the answer

depends on the correct interpretation of the homicide law and what is allowed by way of exculpation. And if as good legal realists we are interested in law not as it appears in books but law in action, then this in turn requires an analysis of the concrete decision-making practice of Columbian officials.

But what if – as in this case – the interpretations given to rules are themselves determined by the effectiveness of the rules? In other words, what if the independent variable itself depends on the dependent variable and not (only) the other way about? Cyberneticians love such situations – 'Ultimately the fluctuations control the mechanisms which were introduced in order to control the fluctuations' (Baecker, 1989: 514). Deviations in temperature control the thermometer and deviations against the law control the law, rather than vice versa as the healthy common sense of Opp, Diekmann & Co. would have it. Can it be that the *Chronicle* reveals the paradoxes of self-reference? No one has broken the law because everyone has broken the law? In fact, historically, this has been the case. A grossly exaggerated obsession with honour during the court procedure on the part of those – the accused – who were in truth indifferent to it had persuaded Columbian legal doctrine to simply derogate, bit by bit, from the legal norm. But as researchers into legal effectiveness what can we make of such a recursive loop: promulgation of the norm – threat of sanction – disobedience – 'annulment' of the norm?

Here, as so often with paradoxes, a simple distinction will help, that between *ex ante* and *ex post*. So too will considering only the short-term breaks up the circle of recursivity. Diekmann too (1980: 67ff., 96ff.) stresses the limitations of his causal model where the variables cannot be ordered hierarchically as its causal structure would require, and where interaction and feedback effects crop up (causal feedback and circular causal relations). According to Diekmann, a 'two-stage' procedure (read 'temporalisation of the paradox') ought still to be able to deal with such circular relationships, but only under the condition that 'not too many loops appear in the model' (p. 68). However, the *Chronicle of a Death Foretold* is full of such inconvenient little loops and all manner of recursive entanglements. Indeed on one reading it can be said to consist only of negative feedback which stabilizes the honour discourse, and of positive feedback which leads to the catastrophe (see Maruyama, 1968).

Consider the fate of the independent variable 'degree of official sanction' in the course of this gory drama. In all its phases, the effects of the law have an immediate feedback effect putting it into a kind of temporal oscillation.

1. Recursion: law – lay use of the law. What is an absolute prohibition on killing gives rise to a thematic blockade during the bloody ritual. It blocks awareness of the law, causes all manner of evasive action, including self-delusion as to the existence of the violation. All of this has an effect on the uncompromising rigidity of the law. Particularly important here are the complex forebodings and premonitions of the village women, since they operate like self-fulfilling prophecies and weaken the prohibition at its core. Even before the murder, this process of erosion would have begun such that the law in the books has already ceased to be the law in action.

2. Reciprocal effects; law – following of the law. The police turn a blind eye

(p. 53), or refrain from taking strong measures. The chief of police takes only half-hearted counter-measures (p. 55). The investigating judge makes Nietzschean flights into lyrical excess and legal nihilism (p. 100). Before, during and after the deed, then, the thematic inhibitions of the honour discourse compel changes to the original norm and the applied sanctions.

3. The interpretation of the law in the courts. The murderous brothers exaggerate beyond all measure their honourable intentions. Their representatives plead 'legitimate defence of honour'. The court acquits. The independent variable 'legal sanction' is recursively 'repealed'.

At every level, then, there are recursive relationships, reciprocal effects and continual interactions among the variables! If we extrapolate from this situation to, say, the current political struggle over unemployment, then the 'recursive confusion' (Krohn and Küppers, 1989) becomes even worse. As far as the welfare state is concerned, this recursive interweaving of variables is compounded with the compromising of legislative aims by their social effects. The problem is that the aims continually change under the influence of the social effects of implementing legislation. The situation is one of a stable time-lag between legislative aims, legal measures and legal interpretations under the pressure of self-generated social expectations. Not only 'moving targets', then, but 'moving guns'! And *Der Spiegel* reports that despite all official protestations to the contrary, the struggle against unemployment is no longer taken seriously as a legislative goal. . . .

It is not just the currently modish theories of self-organization and autopoiesis ('non-trivial machines') which take recursivity as a problem for societal regulation and its social-scientific modelling. Since at least the time of Forrester's research ('industrial dynamics', 'urban dynamics'),

> we know that through non-linear enmeshment in the system, every external intervention can lead to unforeseen 'counter-intuitive' results. Enmeshment and non-linearity make part of the standard vocabulary of informed planners. However, still today people tend to interpret unforeseen developments as a lack of knowledge about the systemic rules, i.e. knowledge about the relevant variables and their connections. (Krohn and Küppers, 1990: 114)

But how does our effectiveness researcher avoid recursive confusion? Answer: with a refined sense of irony. Rottleuthner, for instance, ridicules the Babylonian confusion in terminology (recursive = non-recursive) and laughs off the whole problem of recursivity in the following way:

> The mark of a recursive function is that the same operator is continually utilized in a given situation. Today one can perform this version of Nietzsche's 'eternal recurrence', for example, by repeatedly pressing the square root button on a pocket calculator. This image of monotonous stupidity is the appropriate metaphor for historicity as it is understood by autopoiesis. (1988: 117)

Of course, Rottleuthner cannot have failed to notice the continual micro-variations which render the stupidly monotonous recursive application of operations both intelligent and polycontextual – in the case of law, for instance,

there are continual variations in the social fabric to which the same type of normative operations are being reapplied. Rottleuthner quite wisely keeps this at arm's length, otherwise he could not rehabilitate the claim that legal sociology provides law-like generalizations about the relationship between dependent and independent variables (norms and the following of norms).

'In non-linear systems whose processes have a recursive dynamic', and here I reply with a citation from what is now common knowledge in current sociology,

> such law-like generalisations are of little use. Where one state follows another, that is, every state is a result of the immediately preceding one, then only in a few cases is there a predictable development to the system, even if its mechanism is known, the system operates deterministically, and there is no disturbance . . . Because of recursion, the slightest fluctuations in the starting conditions become compounded, such that similar initial states can in no time lead to completely discrepant system developments . . . Where a system's dynamic is non-linear and recursive . . . it is impossible to predict its development. (Krohn and Küppers, 1990: 114f.)

VI

Lasciate ogni speranza! There is no hope for social regulation through law! Never fear, we always can count on the common saying: 'this may be true in theory, but it does not apply in practice' (Kant). The poison of recursivity may be fatal to those of a somewhat delicate theoretical constitution. But the considerably more healthy practitioners of law can take encouragement from it, and identify possibilities for social control. This, at any rate, seems to be the lesson to be drawn from Friedrich von Hayek's teaching. The 'control of complex systems' through 'constructivist intervention' on the basis of 'applied causal knowledge' is, indeed, impossible. But this does not exclude practical action. In good liberal fashion, von Hayek recommends the complete renunciation of specific interventions. This is with the unique exception of 'general laws' which provide a stable framework for 'competition as a discovery procedure' and ensure the pursuit of the common good (Hayek, 1967). As a co-author of the Alternative Commentary to the *Bürgerliches Gesetzbuch*, I would certainly take great pains to distance myself from such a Thatcherist–Hayekian approach. My position is simply to make the stubborn qualification 'nevertheless'. With Hayek, and in spite of the resistance of complex recursive systems to control using detailed causal knowledge, I want to maintain the possibility of an active human intervention. Now building on this, but this time against Hayek, I want to defend an active state interventionism (admittedly more along the lines of Offe, 1990, than Nahamowitz, 1990). And it may be that I am inspired to this heretical position by some recent developments in the theory of recursive systems – the idea of attractors.

As a result of the observation of recursive systems, it is thought that, although causal chains do indeed run chaotically and therefore unpredictably, nevertheless the system history as a whole, via certain 'bifurcations', can find a state of stability. 'In the language of dynamic systems theory, the different bifurcations are called attractors. Different starting conditions place the system within the

threshold of different attractors, towards which it then develops' (Krohn and Küppers, 1990: 115). For self-organizing systems, von Förster has given this phenomenon the following conceptual statement. Ultimately, self-organizing systems should lead to stability because the recursive application of an operation to itself builds stable 'eigenvalues'. Through the recursive 'computation of computations' a system learns the type of operation which 'proves itself' in an environment to which it has no access (Förster, 1981: 278; 1985: 36).

It is this which opens up the possibility of social regulation through law! Assume that recursive and self-organizing systems can arrive at new eigenvalues on the basis of external interference. Then through general norms or specific legal acts the law can try to produce this external interference, irritating the system in such a way, and in spite of all chaos, that it moves from its attractor state to one which is at least compatible with the aims of the legislator (Krohn and Küppers, 1990: 124). Of course, this type of institutional 'shake-up', relying as it does on self-organization processes within the institution, represents a 'high-risk' strategy (Scharpf, 1987: 140ff.). Nothing guarantees that you will find the desired attractor. In principle, there are three possible courses of development. One is disintegration, or 'institutional death'. Then there is the possibility that the system is lured to an attractor which does not correspond with the desired objectives. And finally, if all goes well, it could become lured to an attractor which is compatible with the aims of the legislator. This version of the regulatory trilemma convinces Scharpf (1987: 148) of the need for a strategy of social 'gardening' rather than social 'engineering'.

By analogy with 'systems therapy' in psychology (Schiepek, 1989; Ludewig, 1990; cf. Willke, 1987), we can envisage the problems with such an attractor strategy lying in the process of trial and error. In this way, it seems, we can probe for sensitive 'intervention points' which will provoke the desired instability.

As Schiepek and Schaub (1989) in particular have stressed, this opens up possibilities for empirical research. This would have to be free from static 'if – then' correlations and be based on a concept of dynamic recursive systems. 'This concept of system gives empirical research some difficulties. Since it is understood as process, then prospective process-studies are necessary in order to describe the dynamic of the system . . . [which] in empirical terms can be grasped most cleanly in small groups' (Schiepek, 1989: 238). From this micro-analytical perspective the ambition is nursed, above all in 'empirical systems research' as it is energetically advocated by the Bamberg psychologists, of simulating the recursive networking of macro-parameters with a view to identifying bifurcations and attractors. 'The connection of macro-parameters or variables produces a relational net with which complex processes between . . . psychic and social systems can be modelled in a more abstract but at the same time more simplified way' (Schiepek, 1989: 239).

Peter Allen's studies (in Nicolis and Prigogine, 1989: 320) of town planning are relevant for our discussion on legal control. In a simplified model of a town, simulations can be carried out which can show how the different bifurcations of what is a highly non-linear model can be 'controlled' and distinct historical developments provoked (see Krohn and Küppers, 1990: 115). Such simulations

might suggest possibilities for 'contextual control' through law (Teubner and Willke, 1984) if the intervention can succeed in identifying and creating the starting conditions from which the system can be lured to the desired attractor.

In a more specifically socio-legal context, the 'rhinoceros model', which is clearly related to the recursion–attractor schema, has already established itself. In a study of the regulation of a stock exchange, Stenning et al. (1987) show how the regulatory committee identifies the critical intervention points with the help of computer scanning and trade analysis. It then introduces irritations in order to stimulate the stock exchange to move to an attractor state which approximates the legislative aims of 'stock market liquidity'. Their rhinoceros model is inspired by that master of recursive systems, Hagenbeck (1909: 164):

> . . . Suppose, for instance, that one wishes to induce a rhinoceros to walk across a gangway from a ship to the quay. It is not enough to say, 'Please, dear Mr. Rhinoceros, will you be so kind as to walk across these planks', for the great herbivore will fail to understand such language, and the most exaggerated politeness will leave him totally unmoved. Even if one places a cord around his neck, and tries to haul him across the bridge, a friend meanwhile prodding him from behind with a stick, the great beast will in all probability refuse to do what is required (for the language of physical force is a dead language to him, be it shouted never so loudly), preferring as an alternative to charge his puny tormentors, and trample them under his feet. But there is one weak spot in the pachyderm's composition, of which his crafty keeper is not slow to make use. He obeys, if not his master, the cravings of his own stomach. The indulgence of appetite establishes a cosmopolitan language, if I may be allowed to call it so, which every animal comprehends. Hold a handful of food to his nose and he will follow wherever you lead him. So it is, at least, with the rhinoceros. Only do this, and all other forms of polite persuasion become superfluous and unnecessary.

Identifying the weak spot of a system (not of an actor! – avoid all individualistic interpretations of the rhinoceros model!) may be the most important obstacle facing Krohn and Küppers (1990: 125), if they want to successfully apply their recursion–attractor model to problems of safety and environmental politics. They rely on 'irritating' the economy through 'specifying objects or time limits' to which the system must accommodate itself. The ways in which this happens, whether expected or unexpected, are left up to the system. The most likely expectation is that, possibly after a temporarily chaotic phase, it produces an eigenvalue which is compatible with the aims of the intervention. The strength of the system consists in its weakness – the way in which the system is reconstructed is left as far as possible to its own dynamic. The modelling concentrates on identifying the background conditions for effective intervention in the system.

'That's not why', cries Clotilde Armenta referring to the mere disarming of potential murderers. 'It's to spare those poor boys from the horrible duty that's fallen on them.' Should we understand her despair as the futile search for the sensitive intervention point whose irritation would free the Columbian village community from the 'fatal attraction' of the honour ritual and move them to a 'normative attractor'? In fact this takes us to an aspect of the *Chronicle* which we

have not yet discussed. The Columbian village stands in a critical transition phase between a repugnant tradition and the blessings of modern civilization. The murderous proceedings provide a point of high tension to the conflict between consciousness and communication. Finding a sensitive intervention point might change at a stroke the collective understanding of the situation. It could transform what is a tale of death by fate into a life-saving plea. The word of emancipation would break up the barbaric ritual. But can it be found in time?

VII

So far we have introduced a couple of assumptions in order to criticize and correct the model of legal effectiveness. Firstly, the closed nature of the discourse forced us to look beyond the intentions of actors to the social situation itself, to see how far its code, its programmes, its reality constructions and its identity immunize it against the invocation of legal norms. Secondly, the recursivity of interactions forced us to look beyond if–then correlations to investigate how stability is achieved despite chaos. Now, I want to replace the simplistic regulation of action through law (norm, awareness of sanction, deviance) with the idea of a complex interweaving of autonomous discourses. A one-track causal process is then seen as the 'acausal' parallel processing of several autonomous discourses. We are now confronted with the most formidable obstacle to our attempt to define in autopoietic terms the limits and the possibilities of legal control – the 'collision' which occurs between rules systems and discourses in conflict (Lyotard, 1983: no. 39), the 'structural coupling' of autopoietic systems (Maturana and Varela, 1988; Luhmann, 1989) or the 'interference' of law with the field of regulation (Teubner, 1989: *passim*).

In the simplest case this produces a redoubling of the Opp–Diekmann regulatory fantasies. Instead of the regulation of a regulated object through a regulating subject, we now have two self-standing processes of self-regulation which are nevertheless interwoven in particular ways. Accordingly, the 'death foretold' must be narrated in a double chronicle. First, it is a discourse about honour, love and death which, through the act of killing, leads inexorably to the overcoming of the difference between honour and the violation of honour. It is a discourse which, in its grammar, does not allow itself to be influenced by the law. Rather, in the event of conflict, the law becomes its victim. Secondly, it must be recounted in the grammar of legal discourse, which tells the tragic story of how an emphatic invocation of legal norms was led astray – via the complex evasions of the chief of police (pp. 55ff.), the subsequent overacting by the Vicario brothers (p. 49ff.), the lyrical excesses of the investigating judge (p. 100), and the pettifogging story-twisting of defence lawyers (p. 48) – to become a wholesale derogation in the judgment of the court. This is the law's self-regulation, which aims at the reduction of a difference – here, the difference between norm and violation. A successful case of law being controlled by society. The love–honour–death drama puts the legal discourse into resonance – it reasons, but obeys!

But how, in today's terms, should we understand the regulation of, say, the economy through law? Firstly, legal discourse builds a 'legal fiction' of the economy with its norms, dogmatic theories and legislatively fixed goals. It uses this to steer its controlling operations aiming to minimize the difference between legal norm and deviant behaviour. Violations of the law are prohibited, and legal officials are empowered with sanctions. Information about the success or failure of control is produced, if it is produced at all, exclusively within the legal system. Secondly, the economy reconstructs the same course of events with its own fictitious distinctions and indications. If legal norms appear on the screen of the economy at all, then they are treated not as normatively valid, but as entries in economic calculations. Economic communication builds an economic fiction of the law and uses it to condition its self-regulating programmes, for instance, those of cost minimization. This usually results, thirdly, in 'regulation failures', since the regulating processes are built out of different differences (norm/deviance; cost/benefit) and tend to drift off in different directions. Where jurists get infuriated over violations and circumventions of the law, economists praise what they see as efficient economic behaviour – something which is admirably summed up in the notion of 'efficient breach of contract'. Legal control of the economy is successful only in those few cases where the self-regulating programmes of the law happen to coincide with those in the economy, where economic difference-processing goes approximately in the direction intended by the legislature.

Rottleuthner criticizes this model of mere stimulation of self-regulatory processes for being too narrow (Rottleuthner, 1989: 280f.). It is not in a position to deal with 'diffuse problems', for instance problems of environmental protection, energy conservation, technology, equality of the sexes, since these cannot be referred to a single sub-system with structurally determined self-reference. He formulates this as a problem of law's capacity to learn (one question: how can the same author both deny the law's ability to conceive reality, to reflexively thematize its own identity, or to self-productively create new law and at the same time allow that it can adaptively learn new facts?). The legal system must 'learn' to transform new social facts into legally relevant ones which can take account of the 'unstructured multitude of many systems' (Rottleuthner, 1989: 282). This is certainly a suitably autopoietic way of thinking. Only it needs to be supplemented with the already more detailed systems-theoretical notion of 'polycontexturality' (Luhmann, 1986).

But still Rottleuthner is thinking too narrowly. He only connects up with one side of the problem, the internal reality constructs of the law. He leaves out of account the more dramatic questions which arise when systems come into real contact, the 'collisions' between discourses, the 'interference' between law and other social systems, the acausal parallel processing of different distinctions. In autopoiesis, what Rottleuthner calls 'diffuse problems' are seen not simply as doctrinal problems of conceptualization. They also involve, firstly on the part of the controlling subject, the interference between the self-controlling programmes of law and politics, and secondly on the part of the controlled object, the interference of payments, knowledge claims and organizational decisions

which obey their own logics but which are nevertheless structurally coupled. Technology, for example, should not be seen as an autopoietic system but a sphere of interference of the economy, science and politics (Grundmann, 1991: 147). And the setting of threshold standards of environmental damage represents a splendid example of the sort of *nom propre* which, as if by magic, makes couplings between systems possible, and to which Lyotard (1983: no. 39) refers in characteristically mysterious fashion: '. . . the sentences of different grammars and discourses are "brought together" by family names, they are "brought together" in the worlds which are constituted by the interweaving of names'.

However, Rottleuthner's criticism is directed at a more fundamental level. The excessive use of autopoietic language cannot go beyond pessimistic conclusions of the sort that every attempt at regulation founders on the internal logic of systems. It is condemned to move forever in the vague and the general without being able to deliver specific criteria for legislative practice or the more detailed observation of processes of control. Autopoieticists already know everything there is to know about the limits of traditional means of control and the possibilities of contextual law. 'They do not need any empirical evidence' (Rottleuthner, 1989: 281).

Here, it seems to me, there is an error *in obiecto*, not to mention an *aberratio ictus*. No doubt the would-be sociologist Gunther Teubner lacks the necessary equipment with which to do the more detailed empirical research. He would soon be hopelessly groping about in the mists of operationalization. Surely this old cobbler ought to keep to his lasts and fashion an autopoietic shoe for the legal person. But what can these personal failings tell us about the inherent limits of a theory? And what is there to prevent the one-time philosopher Hubert Rottleuthner, who has already successfully undertaken an empirical falsification of class justice hypotheses, from exploiting the conceptual suggestions and constructive fantasy of autopoietic theory in order to put a sheen on a somewhat dusty model of legal effectiveness which cannot see its way past concepts of norm, sanction, behaviour, and causality?[6] Where such a harsh critic of autopoietic theory as Fritz Scharpf (1989: 19) has no trouble in using it selectively in order to 'sensitize [implementation research] to the specificity and narrow-mindedness of functionally specific communication', in the statements of autopoietic theory, Rottleuthner (1989: 280) can see only 'trivialities'. Can it be that legal-sociological discourse has immunized itself against systems theory?

What I have said in this essay on the extent to which social situations are immune to the law, and on identifying attractors in relations of recursivity is intended to make the theory of legal autopoiesis fruitful, not only for legal theory or legal doctrine, but also for detailed empirical research. By way of conclusion I would like to sketch in a couple of ideas about how to frame hypotheses in an autopoietic way. One concerns concrete research into the 'eigenlogic' or internal logic of the regulating and regulated fields. The other relates to the mechanism of 'structural coupling'. In other words, we are dealing with the two central problems in the 'collision' between self-regulating processes (for more detail on both, see Teubner, 1988).

Is the theoretical apparatus of autopoiesis limited to claiming that legal norms

run up against the binary code of the economic system, giving rise only to external perturbations, stimulations, modulations? And that all this must, however, remain invisible? This, at least, is how Rottleuthner (1989: 280) would have it. But this seems to me to be a complete misunderstanding of the different ways in which autopoietic theory can be used to reconstruct different readings of how, for instance, economic discourse 'observes' legal discourse, reconstructs it in its own language, and how this in turn can be observed. I want to distinguish six possible 'economic readings of law' (for more detail, see Teubner, 1991).

1. The case of a 'non-reading', where the legal signal cannot be read because this would endanger the economic code. We have already discussed this above. Here, economic operations remain indifferent to legal norms. Of course, Hubert (Rottleuthner, 1989: 280f.), there are the state officials and the police! If a prohibition is enforced with physical power, then the economic code is replaced with the power code.

2. The 'property right' reading. Some legal norms can be read with the help of the property code 'have/have not' and understood as providing a fixed framework for action. They are valid as modifications of property rights, of patrimony, of *régime* – all this understood as providing opportunities for action. Accordingly, norms are understood not as normative commands but as genuinely economic expectations of a cognitive and not of a normative type.

3. The 'book-entry' reading. Normally legal norms are not specifically located among the external facts which define the framework of action. Rather, they are themselves the object of cost–benefit calculations, the net result of which decides whether they are to be followed or not. The severity of the sanction multiplied by the probability of the sanction – ultimately this is the formula used not only by rational actors but by legal economists and legal sociologists calculating the effectiveness of laws. But even within the economic readings of law this is – contrast Opp–Diekmann–Rottleuthner – only one among many possible readings.

4. The 'bargaining chip' reading. If economic actors do not use legal norms as such, but use their enforcement as leverage in order to achieve other objectives, then they become reconstructed as economic structures of a particular kind, as strategies for 'bargaining in the shadow of the law'.

5. The 'changed preference' reading. In systems-theoretical terms, preferences of economic actors are not only what motivates psychic systems, but equally the structures of social systems. They are specifically social expectations which can be attributed both to individual 'persons' and 'collectivities'. However infrequent, there are cases in which legal norms might lead to changed preferences among economic actors.

6. The 'self-regulating programmes' reading. The question, in particular, of which specific regulatory programme is followed in the regulated sphere, requires more detailed studies. It is certainly not enough, here, to make do with programmes of profit maximization to which the cost considerations of legal norm following become subordinated. Rather, those specific self-regulating programmes which are followed in the regulated sphere must be investigated empirically: strategies of growth in organizations, increasing market share or

turnover, bare survival strategies, pursuing internal organizational interests, work safety, programmes of risk reduction rather than increasing profits, avoiding a drop in reputation, etc. (see the empirical study by Budde et al., 1982). The concrete elaboration of such strategies decides the central question of whether legal regulation and economic self-regulation can 'come together' or not.

This distinguishing of different economic readings of law can also help us with Rottleuthner's question whether legal norms are only structures of the legal system or whether they cannot be found in almost all social systems (Rottleuthner, 1992: 135ff.). As the different readings make clear, legal norms are not found only in the legal system, but indeed everywhere in society – *ubi societas, ibi jus*. However, here we are referring to two different states of affairs which are better kept separate. First, the legal system. In systems-theoretical perspective, it encompasses all action, even lay action, insofar as it operatively uses the legal code. To the extent that every social event can be legally reconstructed then the legal system can be said to act ubiquitously. Secondly, what is also meant is the presence of legal norms 'in' other social sub-systems. Bear in mind that such ubiquitous legal norms cannot be legally reconstructed 'in' the various sub-systems. Depending on the context, they are 'read' as a fixed framework for factual action, as manipulable variables, as bargaining chips, etc.. Legal norms are, accordingly, structures which penetrate the whole of society in the following double sense. They are produced within the context of the legal system and, insofar as they disturb other systems, they become 'reconstructed' there as system-specific structures.

This is valid for constitutive legal norms just as much as it is for regulative legal norms (see the objection in Rottleuthner, 1992: 138). The juristic person is not understood in the economic context in Kelsenian fashion as a complex of legal norms which in turn are used as a marker for the attribution of further legal norms. Rather it is seen as a 'corporate actor' bearing a set of ordered preferences, a profit motive, organizational interests, formulae for rational action, and so on. Legal norms do indeed 'constitute' fields of social action. But they do so in such a way that these fields of action in turn reconstitute legal norms. Moreover, they are reconstituted not *as* legal norms but as sub-system specific structures with their own particular meaning.

Such differences in the ways in which law is read in the economy could be refined still further. Autopoietic criteria direct us to the ways in which the grammar of discourses incorporate distinctions from other systems. Does it occur at the level of the code, its structures, its programmes, reality constructions . . .? It is at this point that specific hypotheses must be framed. Under what conditions are legal norms read? Which type of legal norms? And in which type of economic readings?

By contrast, traditional socio-legal research has led to the acceptance of 'false abstractions' in the implementation field such as norm, sanction, deviance, etc. Derived from legal categories, they are ill adapted to the internal logic of those fields where law is to be implemented. This type of research simply lacks the sort of conceptual apparatus that would enable it to develop systematic hypotheses

based on the heterogeneity of contexts in which legal norms appear. And it is no good Rottleuthner talking in monotonously recursive fashion about Galanter's conflict theory which, as far as he is concerned, is supposed to have said all there is to say on the internal logic of regulated fields, and indeed much better than any pretentious grand theory (Rottleuthner, 1989: 279). But helpful as Galanter's conceptual refinements are in identifying conflictual interactions (lasting/episodic; personal/anonymous; complex/isolated; symmetric/asymmetric; instrumental/expressive), nevertheless they still inhabit the traditional universe of norm–actor–obedience–deviance–sanction, and do not take account of the linguistic diversity in which legal norms are read.

Concrete studies on the implementation of law see themselves compelled to make the corrections which would do justice to the internal logic of regulated fields. But still working within such a traditional framework, they can only do so later and *ad hoc*. Unable to take account of 'linguistic diversity', they find themselves lost in the undergrowth of social sub-systems. And from their fieldwork they can only ever hope to learn 'situatively' and not 'theoretically' (see the critical remarks of Mayntz, 1983: 13ff.; 1988: 138ff.; and from the perspective of the practitioner, Zeh, 1988: 205ff.).

A second research perspective concerns the 'structural coupling' of law and the regulated system. The basic idea is to replace the push-and-pull fantasies of norm–obedience–deviance–sanction with the image of two structurally coupled discourses which learn from one another. How fruitful such a perspective can be has only recently become evident from the detailed study of King and Piper (1990). Taking the example of child welfare in Britain they show, with the help of the conceptual apparatus of autopoiesis, how the operative closure of legal discourse confronts that of expert discourse – 'How the law thinks about children'.Detailed investigations must pursue the question of which components of the discourse are concretely coupled: 'double membership' of identical communications in different contexts, parallel use of the same structures, or the time-binding of discourses through parallel processing. Other perspectives are opened up with the question of which binding mechanisms in particular are responsible for coupling: specific interactions or formal 'multilingual' organizations? Here, it seems to me, the tradition of 'pluralist law' inspired by Ehrlich can win a new topicality (for more detail, see Teubner, 1991).

A problem which every new regulation has to face is the open question of how concrete learning processes in social communication adapt to legal communication and vice versa. We have identified six types of economic reaction. Which will be chosen in practice? Indifference, property rights, bargaining chips, book entries, changed preferences or self-regulating programmes? The politics of 'pluralist law' can play a role here as a 'parasite'. Whether intra-organizational law, enterprise law, collective bargaining, adhesion contracts, or agreements among business associations, there are already concrete binding mechanisms in place which politicians can exploit. Instead of waging a war with their internal logics, reformist law can try to modify existing 'pluralist law' and thereby influence the already operating learning processes. There is also an opportunity here for empirical legal sociology to analyse more precisely the mediations

between state law and pluralist law on the one hand, and pluralist law and the social spheres on the other. This knowledge can then be used to enrich the debate on regulatory success and failure. Pluralist law would then, and in relation to Eugen Ehrlich (1913), be given a new sense as a field for the application of research into legal effectiveness.

VIII

Let us return for one last time to the coast of north Columbia. Whether we are interested in legal effectiveness or legal autopoiesis, we are all in the position of the Nietzschean-schooled investigating judge. In view of the disastrous events of the *Chronicle*, we are left oscillating between lyrical excess and legal nihilism. Perhaps, indeed, we should even take his way out – 'Give me a prejudice, and I will move the world' (p. 101).

The theoretical prejudices which move the world of autopoiesis have been dealt with here in three empirically oriented research perspectives: (1) the degree of openness/closure of social discourses against the law; (2) bifurcations and attractors; and (3) internal reconstruction and coupling as a precondition for the coming together of legal self-regulation and social self-regulation.

Perhaps the day will even come when Hubert Rottleuthner and Gunther Teubner can together present a proposal to some Pan-European Research Council on a vexed question of social regulation through law. May their results be neither theoretically empty nor empirically blind.

NOTES

This article is a comment on Hubert Rottleuthner's 'The Limits of Law: The Myth of a Regulatory Crisis' (1989). For helpful criticism I would like to thank Wolfgang van den Daele, Klaus Eder, Rainer Döbert, Jürgen Gerhards, Sean Smith, Helmut Weidner, Helmut Willke and, last but not least, Hubert Rottleuthner.

1. 'Effectiveness' is intended to include both the following of legal norms as well as the effects of legal norms; see Rottleuthner (1987: 54ff.).
2. Following up a suggestion made in discussion with Hubert Rottleuthner, it could be objected that we are dealing with a model consisting of variables which are hypothetically connected to one another, not a set of statements about reality, but a framework of assumptions which are first of all to be checked. But this does not alter the fact that, at least in the norm-relevant situations fictively represented in the *Chronicle*, the expected positive correlation between knowledge of the norm, the severity and probability of sanctions, and the extent to which the norm is followed, does not hold. Where such correlations are not confirmed in real situations, than we would recommend a change to the model.
3. Obviously, this does not include either jurists or researchers into legal effectiveness.
4. Note that the citation refers not to legal conflicts but to conflicts between discourses.
5. This static character of empirical investigations, though chiefly those which involve if–then hypotheses, is criticized by Schiepek and Schaub (1989: 12): 'The usual

explanatory schema, the law-like generalizations in if–then form, the statements in which the antecedent conditions are formulated, and the explanandum which is thereby deduced, are ill suited as explanations of processes.'

6. See Rottleuthner (1982). His empirical investigations on the theme of class justice brought him close to systems-theoretical ideas on the autonomy of law, the differentiation of the legal system and the neutralization of the socio-cultural background. Why, then, the increasingly trenchant polemics against systems theory (Rottleuthner, 1988, 1989, 1990, 1991), rather than a bridge between the empirical, which is methodically demanding, and the theoretical, where basic concepts have been conceptually worked out?

REFERENCES

Aubert, Vilhelm (1967) 'Einige soziale Funktionen der Gesetzgebung', pp. 284–309 in E. E. Hirsch and M. Rehbinder (eds), *Studien und Materialien zur Rechtssoziologie*. Köln: Westdeutscher Verlag.

Autorenkollektiv (Ekkehard Klausa, Klaus F. Röhl, Ralf Rogowski, Hubert Rottleuthner) (1980) 'Rezension eines Denkansatzes: Die Conference on Critical Legal Studies', *Zeitschrift für Rechtssoziologie* 1: 33–126.

Baecker, Dirk (1989) 'Ranulph Glanville und der Thermostat: Zum Verständnis von Kybernetik und Konfusion', *Merkur* 43: 513–24.

Behrens, Peter (1986) *Die ökonomischen Grundlagen des Rechts: Politische Ökonomie als rationale Jurisprudenz*. Tübingen: Mohr.

Budde, Andreas, John Child, Arthur Francis and Alfred Kieser (1982) 'Corporate Goals, Managerial Objectives, and Organizational Structures in British and West German Companies', *Organization Studies* 3: 1–32.

Diekmann, Andreas (1980) *Die Befolgung von Gesetzen: Empirische Untersuchungen zu einer rechtssoziologischen Theorie*. Berlin: Duncker & Humblot.

Ehrlich, Eugen (1913) *Grundlegung der Soziologie des Rechts*. Reprint 1967. Berlin: Duncker und Humblot. English translation (1936) *Principles of the Sociology of Law*. Cambridge, MA: Harvard University Press.

Elster, Jon (1985) *Making Sense of Marx*. Cambridge: Cambridge University Press.

Förster, Heinz von (1981) *Observing Systems*. Seaside, CA: Intersystems Publications.

Förster, Heinz von (1985) 'Entdecken oder Erfinden? Wie lässt sich Verstehen verstehen?', pp. 29–68 in A. Mohlar (ed.), *Einführung in den Konstruktivismus*. München: Oldenbourg.

Fritscher, Wolfgang (1989) 'Authentizität und Flamenco: Überlegungen zur sozialen Konstruktion von Authentizität am Beispiel des Cante gitano'. München: Manuskript.

Garfinkel, Harold (1967) *Studies in Ethnomethodology*. Englewood Cliffs: Prentice Hall.

Grundmann, Reiner (1991) *Marxism and Ecology*. Oxford: Oxford University Press.

Hagenbeck, Karl (1909) *Beasts and Men*. New York: Longmans, Green & Co.

Hayek, Friedrich A. (1967) 'The Theory of Complex Phenomena', in F. A. Hayek, *Studies in Philosophy, Politics and Economics*. London: Routledge & Kegan Paul.

Jackson, Bernhard S. (1988) *Law, Fact and Normative Coherence*. Liverpool: Deborah Charles.

Kaufmann, Franz-Xaver (1988) 'Steuerung wohlfahrtsstaatlicher Abläufe durch Recht', pp. 65–108 in D. Grimm and W. Maihofer (eds), *Gesetzgebungstheorie und Rechtspolitik*. Opladen: Westdeutscher Verlag.

Kaupen, Wolfgang (1975) 'Die Grenzen des Rechts als Mittel gesellschaftlicher Gestaltung', pp. 33–42 in Institut für Gesellschaftspolitik, Wien (ed.), *Recht und Politik*.

King, Michael and Christine Piper (1990) *How the Law Thinks about Children*. Aldershot: Gower.

Krohn, Wolfgang and Günter Küppers (1989) 'Rekursives Durcheinander', *Kursbuch* 98: 69–81.

Krohn, Wolfgang and Günter Küppers (1990) 'Selbstreferenz und Planung', *Selbstorganisation* 1: 109–27.

Ludewig, Kurt (1990) 'Systemic Therapy – A Particular Drift Between Systems Theory and Psychotherapy', pp. 128–42 in W. Krohn and G. Küppers (eds) *Selforganization: Portrait of a Scientific Revolution*. Dordrecht: Kluwer.

Luhmann, Niklas (1984) *Soziale Systeme: Grundriß einer allgemeinen Theorie*. Frankfurt: Suhrkamp. English translation (1992) *Social Systems*. Palo Alto: Stanford University Press.

Luhmann, Niklas (1986) 'Die Codierung des Rechtssystems', *Rechtstheorie* 17: 171–203. English translation (1992) 'The Coding of the Legal System' in A. Febbrajo and G. Teubner (eds) *State, Law, Economy as Autopoietic Systems*. Milano: Giuffrè.

Luhmann, Niklas (1989) 'Economia e diritto: Problemi di Collegamento strutturale', pp. 27–45 in Centro nazionale di prevenzione e difesa sociale (ed.), *L'informazione nell'economia e nel diritto*. Milano: Cariplo.

Lyotard, Jean-François (1983) *Le Différend*. Paris: Minuit. English translation (1987) *The Différend: Phrases in Dispute*. Manchester: Manchester University Press.

Macaulay, Stewart (1963) 'Non-Contractual Relations in Business: A Preliminary Study', *American Sociological Review* 28: 55–67.

Marquez, Gabriel Garcia (1982) *Chronicle of a Death Foretold*. London: Cape.

Maruyama, Magoroh (1968) 'The Second Cybernetics: Deviation-Amplifying Mutual Causal Processes', pp. 304–13 in W. Buckley (ed.), *Modern Systems Research for the Behavioral Scientist*. Chicago: Aldine.

Maturana, Humberto R. and Francisco Varela (1988) *Tree of Knowledge: Biological Roots of Human Understanding*. Boston: Shambhala.

Mayntz, Renate (1983) 'Zur Einleitung: Probleme der Theoriebildung in der Implementationsforschung', pp. 7–24 in R. Mayntz (ed.), *Implementation politischer Programme II*. Opladen: Westdeutscher Verlag.

Mayntz, Renate (1988) 'Berücksichtigung von Implementationsproblemen bei der Gesetzesentwicklung', pp. 130–50 in D. Grimm and W. Maihofer (eds), *Gesetzgebungstheorie und Rechtspolitik*. Opladen: Westdeutscher Verlag.

Nahamowitz, Peter (1990) 'Interventionistisches Recht als Steuerungskonzept', *Jahresschrift für Rechtspolitologie* 7–36.

Nelken, David (1984) 'Law in Action or Living Law? Back to the Beginning in Sociology of Law', *Legal Studies* 4: 157–74.

Nicolis, Grégoire and Ilya Prigogine (1989) *Exploring Complexity*. New York: Freeman.

Offe, Claus (1990) 'Sozialwissenschaftliche Aspekte der Kontroverse über Regulierung und Deregulierung', pp. 107–26 in J. J. Hesse and Chr. Zöpel (eds), *Der Staat der Zunkunft*. Baden-Baden: Nomos.

Opp, Karl-Dieter (1973) *Soziologie im Recht*. Reinbek: Rowohlt.

Parsons, Talcott (1971) *The System of Modern Societies*. Englewood Cliffs, NJ: Prentice Hall.

Rottleuthner, Hubert (1973) *Rechtswissenschaft als Sozialwissenschaft*. Frankfurt a.M.: Fischer.

Rottleuthner, Hubert (1982) 'Abschied von der Justizforschung?' *Zeitschrift für Rechtssoziologie* 3: 82–119.

Rottleuthner, Hubert (1987) *Einführung in die Rechtssoziologie*. Darmstadt: Wissenschaftliche Buchgesellschaft.

Rottleuthner, Hubert (1988) 'Biological Metaphors in Legal Thought', pp. 97–127 in

G. Teubner (ed.), *Autopoietic Law: A New Approach to Law and Society*. Berlin: de Gruyter.

Rottleuthner, Hubert (1989) 'The Limits of Law: The Myth of a Regulatory Crisis', *International Journal of the Sociology of Law* 17: 273–85.

Rottleuthner, Hubert (1990) 'A Purified Sociology of Law: Niklas Luhmann on the Autonomy of the Legal System', *Law and Society Review* 23: 779–97.

Rottleuthner, Hubert (1992) 'Grenzen rechtlicher Steuerung', pp. 123–39 in P. Koller and O. Weinberger (eds), *Grundlagen der Rechtspolitik*. Wiesbaden: Steiner.

Savelsberg, Joachim J. (1987) 'The Making of Criminal Law Norms in Welfare States: Economic Crime in West Germany', *Law and Society Review* 21: 529–61.

Scharpf, Fritz (1987) 'Grenzen der institutionellen Reform', *Jahrbuch zur Staats- und Verwaltungswissenschaft* 1: 111–51.

Scharpf, Fritz (1989) 'Politische Steuerung und politische Institutionen', *Politische Vierteljahresschrift* 30: 10–21.

Schiepek, Günter (1989) 'Selbstreferenz und Vernetzung als Grundprinzipien zweier verschiedener Systembegriffe: Vorüberlegungen für eine sozialwissenschaftliche Synergetik', *System Familie* 2: 229–41.

Schiepek, Günter and Harald Schaub (1989) 'Als die Theorien laufen lernten . . .,' *Memorandum der Lehrstühle Psychologie II und Psychologie III*, Universität Bamberg, No. 67.

Selznick, Philip (1969) *Law, Society and Industrial Justice*. New York: Russell Sage.

Stenning, Philip, Clifford Shearing, Susan Addario and Mary Condon (1987) 'Controlling Organizational Crime: Public and Private Options: Some Reflections on the Nature of Regulation'. Toronto: Manuscript.

Sunstein, Cass R. (1990) 'Paradoxes of the Regulatory State', *University of Chicago Law Review* 57: 407–41.

Teubner, Gunther (1984) 'Verrechtlichung – Begriffe, Merkmale, Grenzen, Auswege', pp. 289–344 in F. Kübler (ed.), *Verrechtlichung von Wirtschaft, Arbeit und sozialer Solidarität*. Baden-Baden: Nomos. English translation (1987) 'Juridification: Concepts, Aspects, Limits, Solutions', pp. 3–48 in G. Teubner (ed.), *Juridification of Social Spheres: A Comparative Analysis in the Areas of Labor, Corporate, Antitrust and Social Welfare Law*. Berlin: de Gruyter.

Teubner, Gunther (1988) 'Soziale Ordnung durch Gesetzgebungslärm? Autopoietische Geschlossenheit als Problem für die Gesetzgebung', pp. 45–64 in D. Grimm and W. Maihofer (eds), *Gesetzgebungstheorie und Rechtspolitik*. Opladen: Westdeutscher Verlag. English translation (1992) 'Social Order from Legislative Noise? Autopoietic Closure as a Problem for Legal Regulation', pp. 609–50 in G. Teubner and A. Febbrajo (eds), *State, Law, Economy as Autopoietic Systems*. Milano: Giuffrè.

Teubner, Gunther (1989) *Recht als autopoietisches System*. Frankfurt: Suhrkamp. English translation (1992) *Law as Autopoietic System*. London: Blackwell.

Teubner, Gunther (1991) 'Steuerung durch plurales Recht: Oder wie die Politik den normativen Mehrwert der Geldzirkulation abschöpft', pp. 528–51 in W. Zapf (ed.), *Die Modernisierung moderner Gesellschaften*. Frankfurt: Campus. English translation (1991) 'Autopoiesis and Steering: How Politics Exploits the Normative Surplus of Capital', pp. 127–41 in R. in t'Veld, L. Schapp, C. Termeer and M. van Twist (eds), *Autopoiesis and Configuration Theory: New Approaches to Societal Steering*. Dordrecht: Kluwer.

Teubner, Gunther and Helmut Willke (1984), 'Kontext und Autonomie: Gesellschaftliche Selbststeuerung durch reflexives Recht', *Zeitschrift für Rechtssoziologie* 5: 4–35.

Wiethölter, Rudolf (1992) 'Zur Regelbildung in der Dogmatik des Zivilrechts', *Archiv für Rechts- und Sozialphilosophie*, Beiheft. Stuttgart: Franz Steiner.

Willke, Helmut (1987) 'Strategien der Intervention in autonome Systeme', pp. 333–61 in D. Baecker, J. Markowitz, R. Stichweh, H. Tyrell and H. Willke (eds), *Theorie als Passion*. Frankfurt: Suhrkamp.

Winter, Gerd and Volkmar Gessner (1989) 'Empiricism and Legal Practice', pp. 157–76 in Ch. Joerges and D. Trubek (eds), *Critical Legal Thought: An American–German Debate*. Baden-Baden: Nomos.

Wittgenstein, Ludwig (1989) 'Philosophische Untersuchungen', pp. 223–50 in *Werkausgabe Band I*. Frankfurt: Suhrkamp. English translation (1989) *Philosophical Investigations*. Oxford: Blackwell.

Zeh, Wolfgang (1988) 'Vollzugskontrolle und Wirkungsbeobachtung als Teilfunktion der Gesetzgebung', pp. 194–210 in D. Grimm and W. Maihofer (eds), *Gesetzgebungstheorie und Rechtspolitik*. Opladen: Westdeutscher Verlag.