Articles

"Flexible, You Say. Doesn't Sound Like Property to Me": A Comment on William H. Clune[+]

By Gert Brüggemeier[*]

Core, periphery, transition, and reintegration – Bill Clune works out a topography of the legal and social development of capitalist society. The results are in large part indisputable. European theorists – relying on the conceptualizations of H.S. Maine and M. Weber – are accustomed to speak of the *formal law* of modern civil society (in contrast to the status-oriented law of traditional society), of the regulatory law of the welfare state ("*materialization*"), of phases of reformalization and/or rematerialization, and finally – as the latest evolutionary achievement – of *procedurality* or reflexive law. The concepts remain abstract, the analytical findings are no more than forecasts about tendencies, for the simple reason that sweeping statements about "the law" are no longer possible (if indeed they ever were). Not enough legal-historical and empirical material is available to "prove" theoretical statements about evolutionary legal developments.

Nevertheless, it is agreed among political scientists, legal sociologists and economic analysts of law: Control of society through law ("juridification") has reached its limits. The law of the late capitalist intervention state is said to have become conscious of its "trilemmatic structure" (G. Teubner): All attempts to exercise direct, external influence upon areas of social life must remain within certain limits; should the law overstep these boundaries, the regulatory intervention either (1) becomes irrelevant, or (2) has a disintegrating effect on the relevant life area, or (3) has a disintegrating effect on the regulatory law itself.[1] In this way, disintegration of society through law becomes a

[+] John Edward Cribbet, *Concepts in Transition: The Search for a New Definition of Property,* 1986 U. ILL. L. REV. 1 (cited in Clune, *supra*, note 27). The following remarks should be understood more as a paraphrase than as a commentary to William H. Clune, *supra*.

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[1] Gunther Teubner, *Juridification – Concepts, Aspects, Limits, Solutions*, *in* JURIFICATION OF SOCIAL SPHERES, 3 (G. Teubner, ed., 1987).

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dominant theme, deregulation a programmatic slogan, and flexibilization a goal of political reform. It is not clear where the relevant borders are to be drawn. G. Teubner introduces as a premise into his trilemma what is only supposed to come out as a result – with the self-control axiom, the limits are already given. Just as problematic is the sharp separation of system and lifeworld, of law as medium and institution, in the recent work of J. Habermas, where the regulatory intervention is either functional or dysfunctional (colonizing) depending on the social area affected.[2]

There have been many attempts at reintegration, but three approaches can be taken as representative:
Holding fast to the concept of direct social control via law. This is attempted both through a quantitative restriction of regulatory law and through its optimization via improvement of implementation agencies.[3]

Identification of legal rationality with the concept of economic efficiency. Judicial and legislative decisions should orient themselves substantively around the analysis and evaluation of economic consequences. In the long run, efficient law (whether produced by the judiciary or the legislature) supersedes inefficient law. In the civil law covering sales of goods and services, as well as in compensation and liability law, the normativity of law threatens thereby to fall away entirely. As a consequence, legal science too would be finished as an autonomous scientific discipline.[4]

Reflexive law. The normativity of law in the sense of recursive closure is retained. Here, insight into the regulatory trilemma leads logically to the rejection of direct external control. Social control via law is only still possible indirectly, through the self-control of the legal system. Improvement of the legal system's self-control capacity occurs through increasing law-specific communication: proceduralization instead of substantial programming.[5]

Here I would prefer to leave open the issue of the relative validity of these evolutionary-theoretical approaches. Instead, as a specialist in civil law, I wish to confront the procedural programs of post-regulatory law with the comparatively concrete development of the law of torts, a legal area on which W. Clune also focused.

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[2] JÜRGEN HABERMAS, THEORIE DES KOMMUNIKATIVEN HANDELNS, VOL 2., 522 (1981).

[3] Renate Mayntz, *Implementation von Regulativer Politik*, *in* IMPLEMENTATION POLITISCHER PROGRAMME II, 50 (Renate Mayntz ed., 1981).

[4] In this sense now, see Richard Posner, *The Decline of Law as an Autonomous Discipline 1962-1987*, 100 HARV. L. REV. 761 (1987).

[5] See, instead of many others, AUTOPOIETIC LAW. A NEW APPROACH TO LAW AND SOCIETY, (Gunther Teubner ed., 1988).

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In this context, it cannot be strongly enough emphasized that German tort law, as a part of the BGB (Civil Code), distinguishes itself in several respects from the development of American common tort law. Labor and traffic accident law never played as dominant a role in Germany as in the United States. Since the 1880s, industrial accident law was primarily regulated via social security laws (state-compelled insurance). Since 1909, traffic accident law was subject to a regime of strict liability, complemented after 1939 by a form of obligatory third party insurance which even today (in cases involving hit and run or uninsured autos) assures compensation for the accident victim. The battle for no-fault plans in the area of auto accident law, which stood in the center of Fleming James' work and led to the category of strict liability[6] (which would then find a prominent place elsewhere, in products liability), simply never took place in Germany.

Nevertheless: theoretically more interesting is the fact that the general development of formal law (conditional programming) through regulatory law (goal programming) to reflexive law (self programming) can be retraced only very tenuously, if at all, for German tort law. On the basis of statutory tort law since the coming into effect of the BGB on January 1, 1900, the German courts have had the on-going task of demarcating the range of possible activities of "market citizens" in an ever more complex industrial society. From the very start, tort law was more "law in action" than "law in the books".[7] The courts have always acknowledged this social function, regardless of whether official legal theory in a given period stood under the influence of the jurisprudence of concepts or legal positivism, the Free-Law-Movement or the jurisprudence of interests (Interessenjurisprudenz). In the post-war period, one finds an intensification of this structuring of society by the courts, but no fundamental qualitative changes.

Although its wording has remained almost unchanged since 1896, the current tort law, contained in 30 paragraphs of the BGB, is no longer recognizable as that which it once was. *De facto*, West Germany has a legal situation which corresponds to the legislative state of the French Civil Code of 1804: A general clause (a la art. 1382 cc) has taken the place of specified elements of individual torts. This function is fulfilled today in West German tort law by § 823 BGB. In other words: the development of liability law in West Germany[8] is on the one hand characterized by an *overcoming of the positivity of law*. On the other hand, since taking effect in 1900, the BGB tort law has been *generalized and particularized* through an on-going process of judge-directed law development. Even in civil law systems, judge-made law proves to be a further elaborated, "learning" law.

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[6] See G.L. Priest, *The Intervention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461 (1985).

[7] See, on Germany's case law revolution: J.P. DAWSON, THE ORACLES OF THE LAW, 2 (1968).

[8] East Germany, by contrast, took the path of re-codifying the civil law. The currently valid law is the *Zivilgesetzbuch der Deutschen Demokratischen Republik* of June 19, 1975.

The same process of generalization and particularization also applies to the Anglo-American common tort law. There, the tort of negligence (first developed around 1825 in England) plays a comparable role to the general clause regarding liability law. Whether strict products liability has really cut off its ties to negligence liability, as W. Clune suggests, seems doubtful to me as long as the state-of-the-art defense continues to be accepted.[9]

The supposedly new problem of the coordination of decentralized control through law (more exactly: through agencies like the courts) has also existed in the civil-law states since the 19th century. It has simply been brought into the present by the extension of judicial social structuring, in particular the tasks of protecting autonomy (e.g. privacy, medical malpractice, wrongful life cases, etc.) and property, as well as through the ever more noticeable failure of academic legal science. The increasing consequentialism (output-orientation) of the judicial system overstrains traditional (input-oriented) legal science. This was and is the good fortune of economic analysis of the law – in the US and now also in West Germany.[10] The need identified by the theory of self-referential systems – an increase in legal communication capacities – challenges legal science to supply legal actors with a language which makes social reality – in its economic, cultural and social aspects – accessible to being treated immanently, within the legal system. In liability law, prior substantive determinations are replaced by argumentatively tested rules for specific social areas. F.C. von Savigny's "community of learned jurists" (higher judges, law professors) is replaced by the "scientific community", which maintains and further develops the genuinely legal communicative nexus. This makes possible – in however mediated a manner – decentralized social control. One might also call this – using an expression that to American readers will certainly sound old-fashioned – sociological jurisprudence. Core, periphery, and transition are taken up in it: reintegration not as a result, but as the fundamentally unclosed process of guaranteeing the normativity of law.

Flexible, you say. It sounds to me like property.[*]

[9] See the New Jersey decisions *Beshada v. Johns Manville*, 447 A.2d 539 (1982); *Feldman v. Lederle Laboratoiries*, 479 A.2d 374 (1984).

[10] See PETER BEHRENS, DIE ÖKONOMISCHEN GRUNDLAGEN DES RECHTS (1986).

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