

THE TWO FACES OF JANUS:  
RETHINKING LEGAL PLURALISM

by

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Et enfin: les phrases de régime ou de genre hétérogène se “rencontrent” sur les noms propres, dans les mondes déterminés par les réseaux de noms.<sup>1</sup>

I.

Postmodern jurists love legal pluralism. They do not care about the law of the centralized state with its universalist aspirations. It is the law of the Brazilian favelas, the informal counter-rules of the patchwork of minorities, the quasi-laws of dispersed ethnic, religious and cultural groups, the disciplinary techniques of “private justice”, the plurality of non-state laws in associations, formal organizations and informal networks where they find the ingredients of post-modernity: the local, the plural, the subversive. The multitude of “fragmented discourses” which are hermetically closed to each other can be identified in numerous informal kinds of law that are generated quite independent of the State and that operate at various levels of formality. Looking to the “dark side” of the majestic rule of law, legal pluralism rediscovers the subversive power of suppressed discourses. Plural, informal, local quasi-laws are seen as the “supplement” of the official, formal centralism of the modern legal order.

It is the ambivalent, double-faced character of legal pluralism that is so attractive to postmodern jurists. Like the old Roman God Janus, guardian of gates and doors, beginnings and ends, with two faces, one on the front and the other at the back of his head, legal pluralism is at the same time both: social norms *and* legal rules, law *and* society, formal *and* informal, rule-oriented *and* spontaneous. And the relations between the legal and the social in legal pluralism are highly ambiguous, almost paradoxical: separate but intertwined, autonomous but interdependent,

1 Jean-Francois Lyotard, *Le Différend* (Paris: Les Editions de Minuit, 1983), 51.

closed but open. Boaventura de Sousa Santos, one of the protagonists of postmodern legal style declares the programme:

Legal pluralism is the key concept in a post-modern view of law. Not the legal pluralism of traditional legal anthropology in which the different legal orders are conceived as separate entities coexisting in the same political space, but rather the conception of different legal spaces superposed, interpenetrated and mixed in our minds as much as in our actions, in occasions of qualitative leaps or sweeping crises in our life trajectories as well as in the dull routine of eventless everyday life.<sup>2</sup>

The crucial question of how to reconstruct, in postmodern architecture, the connections between the social and the legal finds a highly vague answer interpenetrating, intertwined, integral, superposed, mutually constitutive, dialectical ... We are left with ambiguity and confusion. After all, this is the very charm of postmodernism.

## II.

Does autopoiesis lead us any further here? Can we understand legal pluralism's interwovenness of the social and the legal better via "operational closure and structural coupling"? Legal autopoiesis and post-modern jurisprudence have several things in common: the linguistic turn away from positivist sociology of law, the dissolution of social and legal realities into discursivity, the image of fragmentation and closure of multiple discourses, the non-foundational character of legal reasoning, the decentring of the legal subject, the eclectic exploitation of diverse traditions in legal thought, the preference for difference, *différance* and *différends* over unity, and most important, the foundation of law on paradoxes, antinomies and tautologies. But here the bifurcation begins. While post-modernists are obviously satisfied to deconstruct legal doctrine and are joyfully playing with antinomies and paradoxes, legal autopoiesis poses the somewhat sobering question: After the deconstruction?

Creative use of paradox is the message that moves autopoiesis beyond deconstructive analysis into reconstructive practice. It is the experience of real life, the experience that discursive practices "know" how to overcome the blockage of paradoxes and antinomies that does not allow autopoiesis theory to remain in the comforting twilight of closure and openness, separation and interwovenness, autonomy and interdependence in legal

2 Boaventura de Sousa Santos, "Law: A Map of Misreading. Toward a Postmodern Conception of Law", *Journal of Law and Society* 14 (1987), 293.

pluralism. Paradoxes, tautologies, contradictions and ambiguities in discursive practice are not the end of autopoietic analysis; they are seen as the starting point, as the very foundation of self-organizing social practices.

At the same time legal pluralism can be seen as a kind of test case for autopoiesis theory, since even for sympathizing observers this latter theory seems to have “tended towards a too radical separation between law and society”.<sup>3</sup> Can a theory that stresses operational closure of social systems take sufficient account of “intersecting bodies of expertise”?<sup>4</sup> While it may be plausible to describe the official law of the centralized state as autonomous, self-referential, and self-productive, this becomes highly questionable in the “fleeting ambivalence” of legal pluralism<sup>5</sup> where the legal merges into the social and vice versa.

This problem has to do with autopoietics' own history. In regard to operational closure — which was the broadside on open systems theory — the theory is well developed. However, autopoiesic theory is rather underdeveloped when it comes to spelling out the logics of informational openness and structural coupling. Up to now autopoiesic theory has quite successfully transformed the theory of open systems into a theory of operationally closed systems without at the same time falling back into old ideas of a system without an environment.<sup>6</sup> Indeed, the reformulation of basic concepts of system theory from input-conversion-output into operational closure entails a fully-fledged change of paradigm. System, function, structure, process, double contingency, communication, action and, above all, meaning — all these notions find a new conceptualization in the world of autonomy and closure, self-reference and autopoiesis. However, this is the point where new problems emerge: How can one cope with the paradox that the closure of cognizing systems is the basis for their openness? How can one — on the basis of operative closure —

3 David Nelken, “Review Essay: Beyond the Study of ‘Law and Society’: Henry’s Private Justice and O’Hagan’s The End of the Law”, *American Bar Foundation Research Journal* (1986), 323-338, at 338.

4 Peter Miller and Michael Power, “Accounting, Law and Economic Calculation”, in *Accounting and the Law*, ed. M. Bromwich and A. Hopwood (London: Prentice Hall, 1992), 230-253.

5 Stuart Henry, “The Construction and Deconstruction of Social Control: Thoughts on the Discursive Production of State Law and Private Justice”, in *Transcarceration: Essays in the Sociology of Social Control*, ed. J. Lowmann, R. Menzies and T. Palys (Aldershot: Gower, 1987), 89-100, at 98.

6 Niklas Luhmann, *Social Systems* (Palo Alto: Stanford University Press, 1995).

construct an openness which is different from input-output relations? How does autopoiesis theory solve the self-imposed enigma: "L'ouvert s'appuie sur le fermé"?<sup>7</sup>

The metaphor is "order from noise". Perturbation, structural coupling and co-evolution are the key concepts.<sup>8</sup> This can be misunderstood as an easy compromise between operative closure and input-output-relations, a "middle path" between two extremes.<sup>9</sup> However, what it really does is to radicalize simultaneously both closure and openness. To make cognition possible at all, systems need to develop operative closure and at the same time open up toward their environment in a new and different way: not via input-output, but via perturbation and structural coupling. The difference is subtle but important. "Open systems" receive informational input from the environment, convert it through internal processes into informational output which may be used as new input in a feedback loop.<sup>10</sup> By contrast, an operationally closed system is structurally coupled to its niche when it uses events in the environment as perturbations in order to build or to change its internal structures. From external noise it creates internal order.<sup>11</sup> The contact between the system and its niche are real; however, the environmental constraints are not defined externally by spatio-temporal reality.<sup>12</sup> Rather, it is the system itself that defines its environmental constraints by projecting expectations on perturbing events. The perturbatory event then is interpreted as the expectation's fulfilment or its disappointment. And this bifurcation decides about the way how to continue internal operations. Thus, a system that disposes of the internal distinction between self-reference and hetero-reference makes

- 7 Edgar Morin, *La Methode: 3. La Connaissance / 1* (Paris: Seuil, 1986), 203ff.
- 8 Humberto R. Maturana and Francisco J. Varela, *Autopoiesis and Cognition* (Boston: Reidel, 1980), 102ff., and Humberto R. Maturana and Francisco J. Varela, *Tree of Knowledge: Biological Roots of Human Understanding* (Boston: Shambhala, 1988), ch.6, and Heinz von Förster, *Observing Systems* (Seaside, Cal.: Intersystems Publications, 1981), 274ff., and Luhmann, *supra* n.6, at ch.5.
- 9 Francisco J. Varela, "Living Ways of Sense-Making: A Middle Path for Neuro Science", in *Disorder and Order: Proceedings of the Stanford International Symposium*, ed. P. Livingstone (Saratoga, Cal.: Anma Libri, 1984), 208.
- 10 E.g. Walter Buckley, *Sociology and Modern Systems Theory* (Englewood Cliffs, N.J.: Prentice Hall, 1967).
- 11 Förster, *supra* n.8, at 15.
- 12 Michael A. Arbib and Mary B. Hesse, *The Construction of Reality* (Cambridge: Cambridge University Press, 1986), 3.

itself dependent upon the environment using external events as conditions of its own operations, as irritations as well as opportunities for structural change.<sup>13</sup> The multiplication of such singular micro-synchronizations of system and niche then leads to a common path of development, to structural drift and co-evolution.<sup>14</sup>

This seems a promising set of ideas to rethink the relations between the legal discourse and other social discourses, especially under the challenge of legal pluralism. It helps to understand the “relative autonomy” of law better than the simple distinction of internal and external causes of legal change would allow for.<sup>15</sup> It promises to clarify the obscure metaphor of “interwovenness” of the legal and the social and to replace it by a genuine theoretical construction which makes us see more clearly which aspects are responsible for the openness of law and which for closure, even in the twilight of legal pluralism.

However, in spite of all its innovative potential, the concept of structural coupling developed in General Systems Theory is not complex enough to cope with the special problems of law and society. After all, the relations between law and other social fields result from internal differentiation of one and only one society. Thus, in spite of all their autonomy, they belong to the same comprehensive social system and cannot simply be conceptualized according to the model of two independent autopoietic systems. The vexing conundrum of “autopoiesis within autopoiesis” which poses itself for autonomous sectors within society<sup>16</sup> presses for modifications of the general concept: Is not law in relation to other cultural provinces like politics, science, economy, religion, culture much more “open” than the general concept of structural coupling would allow for? Is not “interdiscursivity”<sup>17</sup> in law and society much more dense than mere transitory perturbations could ever produce? And do we

13 Niklas Luhmann, *Die Wissenschaft der Gesellschaft* (Frankfurt: Suhrkamp, 1990), 29ff., 163ff.

14 Maturana and Varela 1988, *supra* n.8, at ch.5.

15 Cf. the debate between Lempert (Richard Lempert, “The Autonomy of Law: Two Visions Compared”, in *Autopoietic Law: A New Approach to Law and Society*, ed. G. Teubner (Berlin: de Gruyter, 1980), 152-190), and Niklas Luhmann, “Closure and Openness: On Reality in the World of Law”, at 335 - 348).

16 Gunther Teubner, *Law as an Autopoietic System* (London: Blackwell, 1993), ch.3.

17 Bernard S. Jackson, *Law, Fact and Narrative Coherence* (Liverpool: Deborah Charles, 1988).

not find in the co-evolution of law and society significantly more elective affinities than the mere co-existence of structural drift would provide for? To use our metaphor as a theme with variations: "Order from music" instead of "order from noise"?

In order to do justice to interdiscursive relations in law and society I suggest to modify the idea of structural coupling:

(1) *Productive misreading*: Since interdiscursivity means structural coupling in a situation of autopoiesis within autopoiesis, mere perturbation does not suffice to grasp the specific closure/openness of social subsystems. In the relations between social discourses, I suggest to replace perturbation by productive misreading. In legal pluralism the legal discourse is not only perturbed by processes of social self-production, but law productively misreads other social discourses as "sources" of norm production.

(2) *Linkage institutions*: Structural coupling depends on specific institutions of linkage that shape its duration, quality and intensity. While in "old" legal pluralism the main institutional link was the legal formalization of diffuse social norms, the "new" legal pluralism is characterized by specialized institutions that bind law to a multitude of functional subsystems and formal organizations.

(3) *Responsiveness*: Co-evolution leads to mere viability of internal constructs of law. In contrast, social responsiveness comes about when linkage institutions connect law more tightly to other autonomous social discourses. Legal pluralism makes law more responsive to society, not by increasing explicit social and economic knowledge of law but by using the synchronicity of legal and social operations as the law's tacit knowledge.

### III.

The new legal pluralism moves away from questions about the effect of law on society or even the effect of society on law toward conceptualizing a more complex and interactive relationship between official and unofficial forms of ordering. Instead of mutual influences between two separate entities, this perspective sees plural forms of ordering as participating in the same social field.<sup>18</sup>

18 Sally E. Merry, "Legal Pluralism", *Law & Society Review* 22 (1988), 873.

Indeed, this new view — concisely conceptualized by Griffiths<sup>19</sup> — means considerable progress, primarily as against a legalistic view of legal pluralism that defined it as a problem of state law's "recognition" of subordinate normative orders like regional or corporate regimes. It successfully moves away from hierarchical concepts of legal pluralism that tended to identify "legal levels" with a hierarchical stratified structure of society ignoring legal phenomena outside the hierarchy.<sup>20</sup> And it liberates itself from the heritage of old-style institutionalism that "reified" the social locus of legal pluralism in formally structured institutions, corporations, and organizations.<sup>21</sup> The new legal pluralism is non-legalistic, non-hierarchical, and non-institutional. It focuses on the dynamic interaction of a multitude of "legal orders" within one social field.<sup>22</sup>

There is a price to be paid for progress. As a consequence of its own construction, the new legal pluralism is confronted with the disquieting question: "Where do we stop speaking of law and find ourselves simply describing social life?"<sup>23</sup> Two things have been lost in the course of progress, in the move from spatial separation to discursive interwovenness: (1) the notion of what is distinctively "legal" in the new legal

19 John Griffiths, "What is Legal Pluralism?", *Journal of Legal Pluralism* 24 (1986), 1-55.

20 Leopold Pospisil, *The Anthropology of Law — A Comparative Theory of Law* (New York: Harper & Row, 1971), 125.

21 Michael G. Smith, *Corporations and Society* (London: Duckworth, 1974).

22 Sally F. Moore, "Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Object of Study", *Law & Society Review* 7 (1973), 719-746; Mark Galanter, "Justice in Many Rooms", in *Access to Justice and the Welfare State*, ed. Mauro Cappelletti (Firenze: Le Monnier, 1981), 147-181; Francis Snyder, "Colonialism and Legal Form: The Creation of "Customary Law" in Senegal", *Journal of Legal Pluralism and Unofficial Law* 19 (1981), 79; Boaventura de Sousa Santos, "Modes of Production of Law and Social Power", *International Journal of the Sociology of Law* 13 (1984), 299-336; Santos, *supra* n.2; Peter Fitzpatrick, "Law and Societies", *Osgoode Hall Law Journal* 22 (1984), 115-138; Stuart Henry, *Private Justice* (Boston: Routledge and Kegan Paul, 1983); Stuart Henry, "Community Justice, Capitalist Society, and Human Agency: The Dialectics of Collective Law in the Cooperative", *Law & Society Review* 19 (1985), 303; Henry, *supra* n.5, at 89-108; Stewart Macaulay, "Private Government", in *Law and the Social Sciences*, ed. L. Lipson and S. Wheeler (New York: Russell Sage 1986), 445-518; Griffiths, *supra* n.19; Merry, *supra* n.18, at 869-901.

23 Merry, *supra* n.18, at 878.

pluralism as well as (2) a clear-cut concept of the interrelations between the social and the legal.

If we take a concrete market as our “semi-autonomous social field”,<sup>24</sup> what counts as one among many “legal orders”? Anti-trust rules, consumer protection laws and the contract law of the courts are easy cases since they have the stamp of official law. The written agreements of the parties to the transaction and the rules of adhesion contracts clearly belong to the competing “private” legal orders as well as the unwritten customary rules of the trade and the disciplinary rules within a firm. But what about the demands from informal exchange relations, the gifts, loans and favours that dominate the day-to-day relations? What about the emerging habits in an ongoing contractual relationship, what about informal rules within the firms and organizational patterns and routines, what about economic trust relations in the market? What about the exigencies of rational economic calculation? And what about power pressures from an oligopolist in the market or “tax” rules of a local mafia?

Structuralist solutions seem to me as unsatisfactory as functionalist ones. The usual structuralist solution is normativity; it includes within legal pluralism normative expectations of any kind, but excludes merely cognitive expectations as well as purely economic or political pressures. However, normative expectations as such (in a sociological, not in a legal sense, of course) are not sufficient to grasp the distinctively legal in legal pluralism. It is not only the age-old problem of how to delineate rules of non-state law from moral, social, and conventional norms, but also its inherently static, non-dynamic, non-processual character that speaks against such a structuralist solution.

Therefore, new legal pluralists tend to replace “law” by social control.<sup>25</sup> They would include all the phenomena mentioned in our example within legal pluralism, even purely economic exigencies and sheer power pressures. If legal pluralism entailed anything that serves the function of social control it would be identical with a comprehensive pluralism of social constraints of any kind. Cohen probably exaggerates in calling social control a “Mickey Mouse concept, used to include all social processes ranging from infant socialization to public education, all social policies whether called health, education or welfare”.<sup>26</sup> But he has a

24 Moore, *supra* n.22, at 719-746.

25 Moore, *supra* n.22, at 719-746; explicitly Griffiths, *supra* n.19, at 50 n.41: “more or less specialized social control”.

26 Stanley Cohen, “Social-Control Talk: Telling Stories about Correctional



point. Why should it be just the function of “social control”<sup>27</sup> that defines law in legal pluralism and not the function of “conflict resolution” as theories of private justice would suggest?<sup>28</sup> But then we would have to include different social phenomena in legal pluralism and exclude others. Why could it not be the function of “coordinating behaviour”,<sup>29</sup> the function of “securing expectations”<sup>30</sup> or the function of “social regulation” which theories of private government would underline?<sup>31</sup> And why not “discipline and punish” which would tend to include any mechanism of disciplinary micro-power that permeates social life?<sup>32</sup> Each of these functions would bring rather diverse social mechanisms into the realm of legal pluralism.<sup>33</sup> Functional analysis of this kind, which occurs because of today’s fashions in a hidden form rather than an overt one, is certainly fruitful for comparing functional equivalents of law. However, it is not at all suitable to provide criteria for the delineation of the legal and the non-legal in legal pluralism.

Now, let us follow the linguistic turn. The decisive move — it seems to me — is from structure to process, from norm to action, from unity to difference and, most important for the legal proprium, from function to code.<sup>34</sup> This move brings forward the dynamic processual character of legal pluralism, and at the same time delineates clearly the “legal” from

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Change”, in *The Power to Punish: Contemporary Penalty and Social Analysis*, ed. D. Garland and P. Young (London: Heinemann, 1983), 101-129.

27 Griffiths, *supra* n.19, at 50.

28 Galanter, *supra* n.22, at 147-181; Henry, *supra* n.22.

29 Theodor Geiger, *Vorstudien zu einer Soziologie des Rechts* (Neuwied: Luchterhand, 1987, 4th. ed.; Berlin: Duncker & Humblot, 1964), 48.

30 Niklas Luhmann, *A Sociological Theory of Law* (London: Routledge, 1985), ch.II.

31 Macaulay, *supra* n.22, at 445-518.

32 Michel Foucault, *Discipline and Punish* (New York: Vintage/Random House, 1979); Peter Fitzpatrick, “The Desperate Vacuum: Imperialism and Law in the Experience of Enlightenment”, *Droit et Société* 13 (1989), 347-358.

33 Joseph Raz, “On the Functions of Law”, in *Oxford Essays in Jurisprudence (Second Series)*, ed. A.W.B. Simpson (Oxford: Clarendon Press, 1973), 278-304; Klaus F. Röhl, *Rechtssoziologie* (Köln: Heymanns, 1987), §26,5; Michel van de Kerchove and François Ost, *Le système juridique entre ordre et désordre* (Paris: Presses Universitaires de France, 1988), 161ff.

34 See Niklas Luhmann, “Operational Closure and Structural Coupling: The Differentiation of the Legal System”, *Cardozo Law Review* 13(1992), 1419-1441, and Teubner, *supra* n.16, at ch.3.

other types of social action. *Legal pluralism is then defined no longer as a set of conflicting social norms in a given social field but as a multiplicity of diverse communicative processes that observe social action under the binary code of legal/illegal.* Purely economic calculations from our example are excluded from its ambit as are sheer pressures of power, merely conventional or moral norms, and organizational routines. But whenever such non-legal phenomena are communicatively observed under the *distinction directrice* legal/illegal<sup>35</sup> then they make part of the game of legal pluralism. It is the — implicit or explicit — invocation of the legal code which constitutes phenomena of legal pluralism, ranging from the official law of the State to the unofficial laws of markets and mafias.

To avoid misunderstanding, I should hasten to add: The binary code legal/illegal is not peculiar to the law of the State. This is not at all a view of “legal centralism”.<sup>36</sup> It refutes categorically any hierarchically superior position of the official law of the State, but invokes rather the imagery of a heterarchy of diverse legal discourses. “Tax laws” of a local mafia which grants its “protection” to the merchants are the case in point. Clearly, in their “illegality”, they are excluded from any “recognition” by the official law of the State. Nevertheless, mafia rules are an integral part of legal pluralism in our semi-autonomous social field insofar as they use the binary code of legal communication. They belong to the multitude of fragmented legal discourses, be they state law, rules of private justice, regulations of private government or outright “illegal” laws of underground organizations, that play a part in the dynamic process of mutual constitution of actions and structures in the social field. The multiple orders of legal pluralism always produce normative expectations in the sociological sense, excluding however merely social conventions and moral norms since they are not based on the binary code legal/illegal. And “law” in this broad sense may serve many functions (of the Mickey Mouse type): social control, conflict regulation, securing expectations, social regulation, coordination of behaviour, or disciplining bodies and souls. It is neither structure nor function but the binary code which defines what is

35 Niklas Luhmann, “The Coding of the Legal System”, in *State, Law and Economy as Autopoietic Systems*, ed. A. Febbrajo and G. Teubner (Milano: Giuffrè, 1992), 145-185.

36 Griffiths, *supra* n.19, at 2ff.; Franz von Benda-Beckmann, “Unterwerfung oder Distanz: Rechtssoziologie, Rechtsanthropologie und Rechtspluralismus aus rechtsanthropologischer Sicht”, *Zeitschrift für Rechtssoziologie* 12 (1991), 97 - 119, at 106ff.

“legal” in legal pluralism.

Why is it so important to be meticulous in defining the legal proprium? Should we not be more interested in a theory of law than in a mere concept of law?<sup>37</sup> And is the definition of law not something which varies according to the research interests involved? Sure, any observer may draw the lines between law and non-law according to the concrete cognitive interests. But there is one privileged delineation: this is the line that the discursive practice of law draws between itself and its environment. If we are interested in a theory of law as a self-organizing social practice, then the boundaries of law is not something which is up to the arbitrary research interests to define. Boundaries of law are one among many structures that law produces itself under the pressures of its social environment. And only a clear delineation of the self-produced boundaries of law can help to clarify the interrelations of law and other social practices.

#### IV.

Now, if law and other discourses close their boundaries via the use of binary codes, how is “interdiscursivity”<sup>38</sup> nevertheless feasible? How does legal autopoiesis answer to Lyotard’s challenge of fragmented discourses:

... il faut bien qu’elles aient ensemble des propriétés commune, et que la “rencontre” ait lieu dans un meme univers, sinon il n’y pas de rencontre du tout!<sup>39</sup>

In the case of legal pluralism, what about the relations between unofficial and official legal discourses. What about the relations between them and other social discourses? The formulas of neo-pluralism — interwoven, integral, dialectical, superimposed — are suggestive metaphors but they lack analytical power.<sup>40</sup> “Mutually constitutive”<sup>41</sup> is by far the most powerful image, but how does mutual constitution work? Fitzpatrick explains what he calls “integral pluralism”:

Custom supports law, but law transforms the elements of custom that it

37 Philippe Nonet and Philip Selznick, *Law and Society in Transition: Toward Responsive Law* (New York: Harper & Row, 1978), 10.

38 Jackson, *supra* n.17.

39 Lyotard, *supra* n.1, at 51.

40 Cf. the critique by Nelken, *supra* n.3.

41 Fitzpatrick, *supra* n.22, at 9.

appropriates into its own image and likeness. Law, in turn, supports other social forms but becomes, in the process, part of the other form.

How separate are they in their interwovenness? After all, “talking of intertwining, interaction or mutual constitution presupposes distinguishing what is being intertwined.”<sup>42</sup>

I propose to analyze “interdiscursivity” in terms of a clear-cut separation of autonomous (not semi-autonomous) discourses and, at the same time, in terms of their structural coupling. In our example of market transactions, we have a simultaneous, but a causal parallel processing of diverse legal and non-legal communicative chains that are operationally closed to each other. Each of them builds up structures of its own: concrete day-to-day interaction of the transacting parties, communication within formalized contracts and organizations, economic transactions as part of the larger economic system, and claims and counterclaims within diverse and competing legal discourses, official and unofficial ones. All these discursive processes interfere in one and the same social situation. And one and the same concrete communicative event will be processed in these different discourses which in spite of this “overlapping membership” (of a communicative event, not of a person) remain closed to each other. Over time, these discourses co-evolve in relations of structural coupling. They do not causally influence each other, rather they use each other as *chocs exogènes*,<sup>43</sup> as perturbations to build up their own internal structures.

This is the point where “productive misunderstanding” comes in to explain in more detail what could be meant by “mutually constitutive” relations between social and legal form and between different legal discourses.<sup>44</sup> In a firm, hierarchical patterns of decision-making, roles of supervision and control, and rules of competence are law-free organizational routines that guide the self-production of on-going social processes. Whenever, for example in an internal disciplinary action, the *quaestio iuris* is raised, a subtle but decisive shift of meaning occurs. The firm’s internal legal process, the system of “private justice”<sup>45</sup> — not the official

42 Benda-Beckmann, *supra* n.36, at 898.

43 Kerchove and Ost, *supra* n.33, at 151.

44 See also Gunther Teubner, “Autopoiesis and Steering: How Politics Exploits the Normative Surplus of Capital”, in *Steering: Autopoiesis and Configuration Theory*, ed. R.J. In’t Veld, L. Schaap, C.J.A.M. Termeer and M.J.W. van Twist (Dordrecht: Kluwer, 1991), 127-141.

45 Henry, *supra* n.22.

law of the State — re-reads, re-interprets, reconstructs, re-observes these routines under the code legal/illegal and constitutes them anew as integral part of intra-organizational law. This is a mere fiction because organizational routines were meant as something else. The intra-organizational legal discourse misreads organizational self-production as norm production and thus invents a new and rich “source” of law. And it is the famous “legal affinity” of formal organizations<sup>46</sup> that supports law’s subtle misreading of law. Since organizational routines tend to be “formalized”, i.e. they shift from a mix of cognitive and normative expectations to purely normative expectations, it needs only a minute shift of meaning to read them as legal norms that had already existed before.

Vice versa, a similar misreading occurs when the organization re-incorporates legal rules developed and refined in the firm’s disciplinary proceedings and makes use of them in order to restructure the firm’s decision-making process. These originally legal norms are “decoded”, i.e. observed no longer under the code legal/illegal, stripped of their legal connotations of valid/non-valid and of their structural context of disciplinary rules, and are reconstituted as power bases in the micropolitical games of the organization. The mutual constitution of law and organization turns out to be a mutual misreading, a reciprocal construction of fictitious realities, a mutual distortion which however works for practical purposes.

A similar constructive distortion takes place in the case of economic transactions. The structures of economic transactions are essentially non-legal: they build on factual chances of action and create new chances of action or on trust in future changes of chances. In ongoing business

46 Philip Selznick, *Law, Society and Industrial Justice* (New York: Russell Sage, 1969), 32ff.; Renate Mayntz, “Politische Steuerung und gesellschaftliche Steuerungsprobleme: Anmerkungen zu einem politischen Paradigma”, *Jahrbuch zur Staats- und Verwaltungswissenschaft* 1 (1987), 89-110, at 103; Fritz Scharpf, “Grenzen der institutionellen Reform”, *Jahrbuch zur Staats- und Verwaltungswissenschaft* 1 (1987), 111-151, at 117ff.; Fritz Scharpf, “Politische Steuerung und politische Institutionen”, 30 *Politische Vierteljahresschrift* (1989), 10-21 at 16; Franz-Xaver Kaufmann, “Steuerung wohlfahrtsstaatlicher Abläufe durch Recht”, in *Gesetzgebungstheorie und Rechtspolitik*, ed. D. Grimm and W. Maihofer (Opladen: Westdeutscher Verlag, 1988), 65-108, at 82ff.; Lauren B. Edelman, “Legal Environments and Organizational Governance: The Expansion of Due Process in the American Workplace”, *American Journal of Sociology* 95 (1990), 1401-1440, at 1406ff., 1435ff.

relations it is wise to keep the lawyers out. They will distort business realities.<sup>47</sup> Why? They misread factual chances of action as legal “property”, and they misunderstand mutual trust in future behaviour as contractually binding “obligations”, as “rights” and “duties”. And if their rigid and formalist claims and counterclaims are re-read in the ongoing transaction relation they will destroy precarious trust relations. The difference between economic chances of action and legal property and between trust and obligations is again due to the difference in coding. The lawyers observe economic action under the code legal/illegal and misread economic processes and structures as sources of law. Vice versa, clever economic actors misread legal norms under the economic code as bargaining chips, as new opportunities for profit-making. Again, we have a symbiosis of mutual distortion. In Lyotard’s words, the isolated discourses which are not translatable into each other “meet” in the “*reseaux de noms*”.<sup>48</sup>

Note that in both our examples the State and its official law did not enter. The juridification of social phenomena, in our words, the legal distortion of social realities, happens independently of the “recognition” of this law through the State and the courts. Within the regimes of “private government”,<sup>49</sup> “private justice”,<sup>50</sup> and “private regulation”<sup>51</sup> one should distinguish carefully between (1) phenomena like micropolitical power structures and economic exigencies and moral or social conventional expectations, which are essentially non-legal, (2) their reconstruction within genuinely legal processes of non-State character like private agreements, intraorganizational disciplinary procedures, inter-organizational regimes of oligopolist market regulations, (3) their legislative, administrative or judicial “recognition” which produces new rules of State law. Thus, interdiscursivity occurs in two diverse forms: between legal discourses (State law vs. “private law” and mafia law) and between legal and non-legal discourses (legal vs. moral, economic, political phenomena). This is due to the difference between “binary codes” which

47 See Stewart Macaulay, *Law and the Balance of Power: The Automobile Manufacturers and their Dealers* (New York: Russell Sage Foundation, 1966).

48 Lyotard, *supra* n.1, at 10, 51.

49 Macaulay, *supra* n.31, at 445-518.

50 Henry, *supra* n.22.

51 Brian Bercusson, “Juridification and Disorder”, in *Juridification of Social Spheres*, ed. G. Teubner (Berlin: de Gruyter, 1987), 49-90.

are stable and “programs” which are historically contingent.<sup>52</sup> In both cases one can speak about recontextualization, in the first case between legal and non-legal discourses as de-coding and re-coding, in the second case between different legal discourses as de-programming and re-programming. But one has to free one’s mind of any idea of information transportation.<sup>53</sup> After all these distortions, the original normative meaning will not be recognizable any more.

In any case, interdiscursivity in legal pluralism is a conspicuous case of systematically distorted communication. One cannot simply speak of a “transfer” of constructs from one normative order to the other as older theories of legal pluralism had it. Neither is “interaction”, “negotiation” or “interpenetration” of diverse legal orders the adequate metaphor. “Mutual constitution” comes close, however, only under three conditions. First, against all recent assertions on blurring the “law/society” distinction,<sup>54</sup> the boundaries of meaning that separate closed discourses need to be recognized.<sup>55</sup> Second, mutual constitution cannot be understood as a transfer of meaning from one field to the other but needs to be seen as an internal reconstruction process. Third, the internal constraints that render the mutual constitution highly selective must be taken seriously. The constraints that are responsible for systematic distortion are not something that could be avoided by rational argument. It is not just the local specialities of the diverse discourses involved but basic requirements of their self-reproduction including the resistance of presently existing structures that lead with necessity to the mutual misreading of discourses.

Unavoidably this leads us back to closure, to the separation of intertwined systems, to the *différend* of heterogenous discourses, to “the necessarily unbridgeable gaps (sic!) between law and other social forms”.<sup>56</sup> The dynamics of legal pluralism cannot be understood by a common logics of the discourses involved, be it the transaction economics of law and organization, the politics of omnipresent micro-power, the socio-logics of social control, or yesterday’s political economy. Rather, it is the radical

52 For this distinction, see Luhmann, *supra* n.35.

53 See Klaus Krippendorf, “Eine häretische Kommunikation über Kommunikation über Kommunikation über Realität”, *Delfin* 13 (1990), 52-67.

54 Robert W. Gordon, “Critical Legal Histories”, *Stanford Law Review* 36 (1984), 57-125, at 102ff.

55 Lyotard, *supra* n.1, at 12ff.

56 Fitzpatrick, *supra* n.22, at 126.

diversity of discourses — the internal rationality of the organization, the exigencies of the market, the idiosyncracies of personal interaction, and the intrinsic logics of diverse public and “private” legal orders — that are responsible for distorted communication in legal pluralism.

## V.

The shift from old to new legal pluralism is often described as a conceptual expansion from colonial domination of the indigenous population to the modern State’s domination of a variety of groups.

Legal pluralism has expanded from a concept that refers to the relations between colonized and colonizer to relations between dominant and subordinate groups, such as religious, ethnic or cultural minorities, immigrant groups, and unofficial forms of ordering located in social networks of institutions.<sup>57</sup>

In my view, such a perspective of “internal colonialism” that focuses on the modern State dominating the “laws” of diverse groups, misses crucial aspects of modernity. As a consequence, it unduly restricts the scope of the new legal pluralism. “Old” legal pluralism, be it in Europe, be it in the colonies, had to do with the legal formalization of social norms that are the product of general coordination of behaviour in diffuse processes of social reproduction. *The “new” legal pluralism needs to shift emphasis and to focus on the fragmentation of social self-production in a multiplicity of closed discourses.* “Standard setting” is the new paradigm and no longer “social customs”! Today we face an immense pluralization of legal pluralism which is due not just to the pluralization of groups and communities, but to the fragmentation of social discourses. There is a danger that legal pluralism will be marginalized if the idea of “internal colonialism” draws attention only to diverse groups, communities, and networks and their social norms instead of looking to social discourses and their diverse rationalities.

*Ubi societas, ibi ius.* This old juridical wisdom has undergone a dramatic shift of meaning. In traditional societies it meant the emergence of legal phenomena in different clans, groups, castes, strata or classes according to the prevailing principle of differentiation.<sup>58</sup> In modern

57 Merry, *supra* n.18, at 872ff.

58 Otto von Gierke, *Die Genossenschaftstheorie und die deutsche Rechtsprechung* (Berlin: Weidmann, 1863).



societies it means the emergence of legal phenomena in the context of highly specialized discourses that are the new sources of social self-reproduction which the law then misreads as sources of norm production. This changes the character of legal pluralism, its content and its dynamics. To put it into Gurvitch's imagery of "vertical" and "horizontal" relations between law and society,<sup>59</sup> the main question for legal pluralism is no longer how in the "vertical" dimension of law and society informal and diffuse social norms are gradually "formalized" into more specific legal norms. Rather it is in the "horizontal" dimension, in the relation of law to a variety of other language games, that we today observe pluralist norm production processes. The problem has changed from a "translation" of social norms of groups into legal norms to the "recoding" of a bewildering multitude of otherwise coded communication in the code of the law. And in this process, I submit, the linkage institutions of legal pluralism have also changed their character — they change from concept and structure to process and transformation.

What are linkage institutions? I propose to distinguish between structural coupling and linkage institutions.<sup>60</sup> Structural coupling as such leads only to transitory structural changes. Legal misreading of other discourses happens only at random — as tangential responses, as it were — whenever social communications are observed under the code legal/illegal. The misreading becomes epidemic when linkage institutions are evolving that are responsible for the duration, intensity and quality of structural coupling. Roman law's *boni mores*, but also classical formulas of *bona fides* and *bonus pater familias* are the paradigms of the legal tradition. It is their very ambiguity that makes them the institutional links between legal and social processes. They represent, at the same time, social norms and legal norms, "standards" as well as "directives".<sup>61</sup> Like the old Roman God Janus, they have a double-faced character. While the concept is identical in law and in society, it is nevertheless different: if you look at it from society "outside" it is different from what you see if you look at it from law "inside".

59 Georges Gurvitch, *The Sociology of Law* (London: K. Paul, Trench, Trubner & Co, 1947), 181.

60 See also Teubner, *supra* n.44.

61 Gunther Teubner, *Standards und Direktiven in Generalklauseln: Möglichkeiten und Grenzen der empirischen Sozialforschung bei der Präzisierung der Gute-Sitten-Klauseln im Privatrecht* (Frankfurt: Athenäum, 1971).

In modern terminology the old *boni mores* and other institutional links between law and society would have to be called “essentially contested concepts”.<sup>62</sup> They have no fixed reference and take on a different meaning according to the context of the relevant discourse. They have no determined content but are loci for the socio-legal debate. These concepts are “essential” because they reflect the very intrinsic logic of the discourses involved. And they are “contested” because they reflect the basic discursive differences. They do not create a new unity of the separate discourses involved, they only link them transcending the boundaries but respecting, even reaffirming them. In spite of their identical *nom propre* they are purely internal constructs of each discourse involved. Linking institutions do not have an interdiscursive common meaning, they are internal constructs, separate but complementary. “Et enfin: les phrases de régime ou de genre hétérogène se ‘rencontrent’ sur les noms propres, dans les mondes déterminés par les réseaux de noms.”<sup>63</sup>

Now, if it is true that the new legal pluralism “juridifies” specialized discourses instead of diffuse social norms in the lifeworld of groups and communities we should also expect the linkage institutions to change. Indeed, in relation to economic processes “contracting” has emerged as the modern linkage institution,<sup>64</sup> “standard setting” in relation to technical, scientific and medical processes.<sup>65</sup> The legal discourse, including “private government”, “private justice” and “private regulation”, constructively misreads economic or technical processes of social reproduction and turns them into new and rich “sources” of law. Certainly, one could interpret this as a specialization of institutional links and still adhere to the model of *boni mores* with the only difference that their content varies from field to field. But there is more to it. Our “essentially contested concepts” have become “essentially contested processes”. The legal discourse no longer

62 William B. Connolly, *The Terms of Political Discourse* (Princeton: Princeton University Press, 1983, 2nd ed.).

63 Lyotard, *supra* n.1, at 51.

64 Teubner, *supra* n.44.

65 Giandomenico Majone, “Science and Trans-Science in Standard-Setting”, *Science, Technology & Human Values* 9 (1984), 15-22; Giandomenico Majone, *Evidence, Argument and Persuasion in the Policy Process* (New Haven: Yale University Press, 1989); Loria Salter, “Science and Peer Review: The Canadian Standard-Setting Experience,” *Science, Technology & Human Values* 10 (1985), 37-46; Christian Joerges, “Quality Regulation in Consumer Good Markets: Theoretical Concepts and Practical Examples”, in *Contract and Organisation*, ed. T.C. Daintith & G. Teubner (Berlin: de Gruyter, 1986), 142-163.

“incorporates” results by misreading social norms as legal norms, today it “incorporates” processes misreading economic or technical production as law production.

VI.

Now we can see more clearly why legal pluralism represents the “openness” of the law toward society. The legal system’s boundaries, to repeat it, are not defined by the official law of the State. Rather, any communication that observes action under the legal code constitutes an integral part of the legal discourse, including communication among lay people that invoke claims against each other. It is not the distinction legal/illegal that separates the State’s law from the “law” of organizations and groups but the different use of the operative symbol of “validity”. And it is within the overarching legal discourse that we can observe secondary differentiation processes that separate centre and periphery.<sup>66</sup> The centre is not — as one would expect in old-European traditions of thought — political legislation. Legislative law is peripheral law! Rather, the centre is represented in the hierarchy of courts. They produce law in its most autonomous form. They celebrate the central function of law: using the occasion of conflicts to create congruently generalized expectations. Contemporary law’s real dynamism, however, takes place in the “legal peripheries” like the dynamism of social life in the peripheries of the grand metropolis. Peripheral law are those parts of official and unofficial law that are structurally coupled to other social discourses. Here, we find the linkage institutions that participate in legal processes as well as in economic, technical, scientific, and cultural processes. Thus, legal pluralism makes the law “responsive” toward society by transforming social self-production processes into sources of law production.

Responsiveness is not identical with viability. The distinction coupling/binding forces us to distinguish between the mere viability of social structures (knowledge, law, policies) and their responsiveness. Viability means survival of structures under conditions of “structural drift”.<sup>67</sup> Indeed if social systems co-evolve under conditions of transitory

66 Niklas Luhmann, “Die Stellung der Gerichte im Rechtssystem”, *Rechtstheorie* 21 (1990), 459-473, at 466ff.

67 Ernst von Glasersfeld, “An Epistemology for Cognitive Systems,” in *Self-Organizing Systems. An Interdisciplinary Approach*, ed. G. Roth & H. Schwegler (Frankfurt: Campus, 1981), 121-131; Ernst von Glasersfeld, *Wissen*,

structural coupling the result is mere survival of certain structures which have proved resistant to environmental perturbations. Of course, this provides the system with a certainty of reality. If the system is capable of maintaining its own autopoiesis via highly specified structures then it disposes of an internal indication that it is "on the right track, even without knowing where and how".<sup>68</sup> Viability, however, has two problems. First, there will usually be a whole variety of similarly viable solutions which poses the question of how to select among them. Secondly, mere viability says nothing about ecological compatibility, about the suitability with social, psychic and natural environments. Usually, there are more or less ecologically suitable solutions.

Thus, mere viability of systemic eigenvalues does not tell very much about their responsiveness. It is the introduction of linkage institutions that changes the situation drastically. If such institutions permanently link parallel processes of social self-reproduction to each other, the number of possible viable eigenvalues will decrease since they are exposed to increased perturbation under which they have to endure. But at the same time their ecological responsiveness is increasing. Such a responsiveness may become stable if linkage institutions squeeze structural coupling into a direction such that systems act on each other in a cyclical fashion. We then have the interesting case that processes of self-reproduction would, without the systems involved losing their autopoietic closure, take place outside the boundaries of autopoietic systems. This would be the case of ecological (not: systemic!) recursive-ness. The autopoiesis of the systems involved is not impaired; instead, it is being exploited to build up ecological cycles respecting system boundaries, even though crossing them.

This would indicate the direction in which we would have to search for "responsive law".<sup>69</sup> The usual recommendation is: politicize formal law! The open acknowledgment of the political character of law and the change of its conceptual apparatus in the political direction, the governance of "purpose", "policies" and "interests", all this would make the law more responsive to political needs. This is the message of "political jurisprudence" from Jhering to Habermas. To be sure, this strategy has

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*Sprache und Wirklichkeit: Arbeiten zum radikalen Konstruktivismus* (Braunschweig: Vieweg, 1987).

68 Luhmann, *supra* n.12, at 317.

69 Nonet and Selznick, *supra* n.37, at 73ff.

made law more responsive to institutionalised politics. However, at the same time it has subordinated law to political reality constructs. This raises the question of whether such a politicization would not remove law even further away from other social discourses instead of bringing it closer to them.

Importing social science knowledge into law is the other recommendation for making law more responsive. Instead of using the artificial reasoning of law we should use theoretical insights, empirical experience and policy recommendations of the social sciences. But again: what gives us the reassurance that scientific constructs make law more responsive to social needs?

Legal pluralism — as understood in this text — may be more promising. Linkage institutions that bind law to diverse social discourses much closer than politics or social science suggest a “resonance” of law with civil society. The institutions of legal pluralism may become a source for the law’s “tacit knowledge”<sup>70</sup> about its social ecology. Rethinking legal pluralism in the end could open an “ecological approach” to law and legal intervention.<sup>71</sup> Indeed, the intellectual tradition of “private law” which paved the way for law’s historical extraordinary responsiveness to the economic system via the institutions of property, contract and organization needs to be generalized. Social autonomy is the key word:

Taking autonomy seriously means to rely on self-determination and at the same time on inevitable externalization (outside control), not understood as hetero-determination but as a potential outside support in situations of impossible self-help. It would be similar to therapeutical help and to supportive structures outside of the law.<sup>72</sup>

70 Michael Polanyi, *Personal Knowledge: Toward a Post-Critical Philosophy* (Chicago: Chicago University Press, 1958), 69ff.

71 Karl-Heinz Ladeur, “Flexibilisierungsstrategien — Alternativen zum ‘Steuerungsstaat’ — ‘Reflexives Recht’ — ‘Prozeduralisierung’ — ‘Ökologisches Recht’”, in *Workshop zu Konzepten des postinterventionistischen Rechts*. ed. G. Bruggemeier and C. Joerges (Bremen: ZERP Materialien), 311-399; Karl-Heinz Ladeur, “The Law of Uncertainty”, in *Critical Legal Thought: An American-German Debate*, ed. C. Joerges & D. Trubek (Baden-Baden: Nomos, 1989), 567-590; David Nelken, “Law in Action or Living Law? Back to the Beginning in Sociology of law”, *Legal Studies* 4 (1984), 157-174 at 171 n. 54.

72 Rudolf Wiethölter, “Zum Fortbildungsrecht der (richterlichen) Rechtsfortbildung: Fragen eines lesenden Recht-Fertigungslehrers”, *Kritische Vierteljahrszeitschrift für Gesetzgebung und Rechtswissenschaft* 3 (1988), 1-28, at 27f.

If private law's reliance on social autonomy and structural coupling is applied not only to the economic system but to the multiplicity of social discourses<sup>73</sup> it may become a model for new ways in which law instead of relying solely on its political legitimation and its economic efficiency opens up to the dynamics of "civil society".

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