Chapter 11
AUTOPOIESIS AND STEERING: HOW POLITICS PROFIT
FROM THE NORMATIVE SURPLUS OF CAPITAL

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1. Introduction
I shall begin with a question that is trivial as it is fundamental: why, in order to steer society, do politicians take the course through law? Why does it not rule directly into society at its own boundary points, say by authoritative ordering money payments, or by using economic interest groups as "juridifying" instruments of political control? Instead, politics takes the subversive path of norming its policies through legislation, adjudication and administration, only in the end to find how great expectations in Washington are dashed in Oakland.

Consensus? Efficiency? Rationality? The legitimacy of legality has somewhat lost its savour, particularly if one thinks of the real acceptance problems of the law (see Teubner, 1994a). The effectiveness of law as a steering device is in turn rather skeptically assessed by the widest among its legal sociological advocates (Rittelauther, 1991). And no much is left of the rationality of bureaucracy in the implementation of policy-oriented legal norms (see Pressman and Wildavsky, 1973). It failed because of self-created perverse effects, implementation deficits and self-satisfying as well as self-defeating prophecies. Why then, despite all the well-known failure of law, is short this unfailing clinging to law as a means of political control?

Perhaps we can take help from a fact from history - specifically the history of British colonial law in Africa. In the 19th century the British colonial masters met the bitter experience that their attempts to force British law on the African colonies were ending in chaos. Their expedient, in the early 20th century, was a "soft law" method that proved to be highly successful. They instructed their legal staffs to apply the "indigenous law" of the Colonies themselves as far as possible (Ranger, 1983, pp.250ff). The colonial masters were therefore no longer binding down their own law, but instead incorporating indigenous law into their official law. They retained only one minor power. They deprived customary law of force where it proved incompatible with fundamental British legal principles. The limit to validity was the espousability principle. Indigenous law did not apply where it was "repugnant to natural justice, equity, and good conscience" or was manifestly "inconsistent with any written law" (Merry, 1988, p.810; Okunsh-Ogando, 1979, p.168; Adeyemo, 1986, p.60; Bentzi Enoch).
1969). Wise self-restraint by enlightened colonialism? Quite the contrary. Critical anthropologists have recently succeeded in unmasking the secret dominance mecha-
nism of this sotl law. Through laborsome detailed research they were able to show that
indigenous law as such did not exist anywhere. The whole thing was a bluff, a pure
fiction by the British colonial administration and its compliant anthropologists.
(Snyder, 1981a, 1981b; Rangan, 1983; Moore, 1986; Starr and Coleman, 1989). It was in
this very lie that the trick lay: indigenous law or customary law were not at all, as
assumed by traditional anthropologists, "rules that trace back to the habits, customs,
and practices of the people" (Altob, 1960, p.63), but "were constructs of the European
expansion and capitalist transformations", and therefore nothing like a "myth of the
colonial era" (Marx, 1980, pp.87ff). Out of a multiplicity of entirely heterogeneous
colonial elements, the British jurists cobbled together only the elements that suited
them, into a village they then presented as existing indigenous law in order to give it
the stamp of colonial legal authority. The British thereby opened up for themselves,
a new, richly yielding source of law with its origin comically lying in the actual social
practice of oppressed peoples - but usable by them for political manipulation. The
effect was a stronger commitment of the "indigenous" to their own pseudo-indigenous
law, greater legitimacy and acceptance for the British colonial administration, and
greater effectiveness for "modernising" colonial policy from the, customary law thus
doorly manipulated (Snyder, 1981b, pp.74ff). What does this cynical self-embrace of
British colonial administration in the indigenous culture of Africa, in order better
to control, manipulate and exploit it, teach us? It gives us a partial answer to the
initial question, why despite all failure of law politics continues to hold to law as an
instrument of ascert. Summarizing in the form of thesis:

1. Politics embeds itself in structural couplings of law and society in order to cement off
the normative and valuative social self-reproduction for its own purposes.

2. I suggest to distinguish between structural coupling and linkage mechanisms in
operationally coiled systems: structural coupling is dependant on specific linkage
mechanisms that decide its duration, quality, intensity and institutionalization. Of
particular interest are the cyclical linkages that bring about a kind of ecological
reversaliveness.

3. In a suitable situation these linkage mechanisms may set off systematic regulatory
effects which in turn, can be explained by regulatory politics, or even artificially
institutionalized.

2. Modes of interpretation

Critical observers perceive the last position of auropistos theory as "radical regulatory
pessimism" (Scharpf, 1989, p.10); all political and legal regulation is regarded as
running up against the "immanent logic" of social sub-systems. Legal norms "break"
on the code of the regulated system and can only "perturb", "modulate", and "stimulate" it
in some obscure way. Theoretical statements on regulation get stuck in vagueness and
generality without being able to point to specific criteria for regulatory practice or
even only for the detailed observation of regulation processes (pointly expressed by
Kutlelmutzer, 1989, p.291). Is it really impossible for auropistos theory to specify ideas on
regulation, particularly these on structural coupling, sufficiently to "mate
specific differences of typical problem situations visible" (Kaufmann, 1988, pp.110f).

Let us do a sample test. Let us take Max Weber's classic: simple example of legal regulation of the economy, 'price taxes.' Recently in particular, with the immediate petrol price increase by the oil multinationals taking advantage of the Gulf crisis, 'price taxes' by European Governments, particularly in France but also regulatory responses from the Japanese MITI and the World Bank, have again become topical. And immediately the effects of legal price controls are brought before our eyes again: in Southern France petrol stations closed because of the price controls. In the U.S. the President by legal regulation ordered the partial release of oil reserve so bring down market prices, with the result that because of this measure they rose. If here we replace simple casual control models (price regulation = height of sanction = motivation of actor = compliance with or departure from norms), as still used in current mainstream sociology of law (Opp, 1973: pp.190ff; Diekmann, 1980, pp.32ff; Ronteltap, 1987, pp.54ff) by multistencil interwoveness of autonomous closed discourses, this forces us upon the world view of the sort of occasionalism once advocated by Geulincx (1634-1669). The world of law and the economy would then seem to us like a mechanism of clocks running in parallel, except that we could today no longer see them as mechanical machines but as hysterically closed self-reproducing discourses and that the clockwork would no longer be synchronized by God-ordered harmony but by the more or less chaotic discontinuities of blind evolution. Evolution brings informational events in closed systems into such a relationship as to make some of them into 'cause occasionalities' of the others. The running of the clocks of law is not an effective cause of the running of the clocks of the economy, but only in a 'cause occasionally' (Vorder, 1966, pp.25ff; Jonas, 1969: IV, p.168).

We would then have to transfer the linear causal relations of Gulf blockade, price forcing by the multinationals, protests by the public, 'price taxes' by governments, and the avoidance behavior of economic actors into an acusal parallel processing of legal and economic information. What appears in law with beautiful regularity as positive or negative value of the binary code legal/illegal shows up simultaneously - in completely uncontrolled fashion - on different screens in the complex network of differences of the economy. These signals appear at quite different places, depending on how the economy's sensors happen to have gone off: now in the economic constructs of reality, now in the economic code itself, now in the signal source, now in economic perception, now in economic representation, now in economic organization. In other words, there are various 'modes of interpretation' in which the economic discourse observes the price lines of legal discourse, i.e. reconstructs them in the economy's own language as economic information.

Interpretation as 'accounting items' in the economic calculus

This is the current interpretation today. Rational economic actors interpret price taxes just as legal norms holding obedience and regarded at unchangeable, but instead make strategic use of them. Legal price controls are the objects of cost-benefit calculations, the outcome of which as net benefit decides whether they are to be complied with or not. 'Amount of sanction multiplied by likelihood of sanction' - that is, ultimately, the calculation. And the compliance or otherwise of rational actors with law can very appropriately be characterized by the formula 'efficient breach of law'. Indeed, progress...
and legal economics are today already talking about a legal duty of efficient breach of legal rules (Kastenmeyer and Fischel, 1982, p.1177). But, and this is often overlooked, even this economic interpretation of legal price controls which is already alienated from the interpretation of norms inherent in law is only one among many economic interpretations. In technical terms, the accounting item interpretation sets up structural coupling between law and the economy in such a way that the legal event of a price tax acts as a perturbation of economic processes and leads to the alteration of transaction cost calculations, that is, of program structures in the economic system. This coupling with cost calculations is, however, as we have said, not necessary. The same legal norm may also, without this being predictable or controllable externally, be used to isolate quite different distinctions proper to the economy.

**Interpretation as “property rights”**

The every legal norm is automatically interpreted by economic actors in terms of cost/benefit calculations. The responses of Japanese oil multinationals to the silent “price taxes” of MITI show that there are other ways too. Many legal norms are coupled not with program structures but with the property code of “having or not having.” The economy then no longer interprets them as an object of avoidance strategies, but on the contrary as fixed limits to actual leeway for action. In the calculations of rational actors, legal norms start to act as constraints and no longer as choices depending on how strong the “guile” of “opportunitism” is (Williamson, 1985). They are now regarded as a modification of “property” understood in economic (not legal) terms, of property rights, of assets, of regime—all interpreted as opportunities for action of a purely factual nature. Correspondingly, norms are recorded in the economic text neither as manipulable objects, nor as normative processes, but invested as genuinely economic expectations of a cognitive and not normative nature. Their bases are physical, biological and cultural factual situations, which may include legal norms too, and even our price taxes.

**Interpretation as “bargaining chip”**

Quite different room for maneuver opens up where legal norms are exploited for all sorts of maneuver and extraction in other contexts than those aimed at by the legal norm. “Trade in justice” (Schumann, 1977) faces us with a further interpretation of legal events that goes far beyond penal law practice. In “bargaining in the shadow of law” (Mooskin and Kornhauser, 1976), actors do not apply norms of conduct but employ them. They use them as a means of pressure in order to attain other goals. The “latter” of the law becomes the keystone of the negotiating position of parties in the interaction (Winter, 1990, p.329). Rights are not exercised, procedural postulates not taken up, possibilities of legal action not exploited; instead their emptiness is merely stressed in order to build up a negotiating position in other economic contexts. Practice in antitrust law shows nasty cases where given price abuses or other situations of relevance to antitrust law, the competitors or even the antitrust authorities have allowed themselves to be well paid for not exercising their right of legal action in favor of those affected. And more recent control strategies in legal policy even deliberately employ negotiating and mediating mechanisms based on this sort of economic interpretation of the law (Hoffmann-Keim, 1990).
Interpretation in the context of economic self-regulation programs of economic organizations

The need for detailed empirical studies emerges particularly with regard to the question of which specific program is being pursued by the individual firms in the economic regulatory area and correspondingly leads to a particular economic interpretation of law. Here it is by now means enough to start a priori from programs of profit maximization to which the cost calculations of legal compliance are subordinated. Instead, it needs close observation to find out which programs of self-regulation are actually being pursued in the regulatory field: organizational growth strategies, mere survival strategies by firms, priority to guaranteeing jobs, management interests or interests of institutional investors, programs of risk minimization instead of profit increase, or avoidance of losses of reputation. The specific shape of such strategies decides the central question whether legal control and economic control can meet or not. It is just as dependent on the degree of concentration of the market concerned, the specific power positions and the prevailing interaction patterns as on the rigid organizational hierarchies or else soft organizational cultures of the firms involved. The oil multinationals thus give different readings to petro \textquoteleft price taxes\textquoteright by the French governmental authorities, MTTI or the American president. If the multinationals are concerned primarily with minimizing losses of reputation, then for a happy moment the self-regulation programs of law and the economy can meet. And Mr. Nahamowitz (1990, pp.7ff) can again record a success for regulation by interventionism: law, \textquoteleft\textquoteleft Since the work we done the \\textquoteleft\textquoteleft	extquoteleft court about boosting everywhere where he had done it himself\textquoteright (Kaupas, 1975, p.34).

Interpretation as \textquoteleft change of preferences\textquoteright

This case is often neglected by economists: the gnous et est disputandum (Sigler and Becker, 1977). They prefer to deal with preferences, their formation and changes as a sort of black box, calling on other academic disciplines to shed light on it. For systemic theory by contrast, this case is particularly interesting (Luhmann, 1988: 275ff, 280ff; Barz, 1988: pp.126ff, pp.318ff). It will test preferences of economic actors not only as external causal motivations in the heads of those involved, but as genuinely social expectations, as structures internal to the economy, attributed communicatively to not individuals or to the relations among them of effects. Preference changing is after all the (alas, all too rare) ideal case of regulation of the economy by law. And if Max Weber (1978, pp.319ff) is to be believed, in saying that in the economy too \textquoteleft education to obedience\textquoteright has considerably increased in modern times, then it may be expected today that it is most likely in the work sphere and the environment sphere that real preference changes will come about on the basis of \textquoteleft rational\textquoteright didactic legal provisions - even in the case of co-operative actors with countervailing heads? However one must also take legally induced preference changes of a quite different nature into account. Nippon-style managers with great readiness for adaptation and compromise can in the face of bureaucratic legal regulations suddenly turn into super-tough US litigators, or even Bavarian legal hawks.

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Interpretation as “price signal”

Structural coupling of the simplest type is present when the enactment of a legal norm is not interpreted at all as an economic structure operating in the longer term but quite simply as economically relevant events that depress the price or send it up. This instrument is, as successful practice with “talking down the dollar” has shown, already being deliberately used by political regulatory agencies. Unfortunately, the Governor has to go and talk too loud again! As already mentioned earlier, in the most recent oil crisis too the US president employed this psychological effect of legal regulation deliberately, but with counter-intuitive effect, as a “price tax.” The tranquilising signal of releasing the experience was misunderstood as signalling worry, and the oil market reacted with panic price increases.

The case of “Non-Incertainty” of Legal Norms should not be forgotten. What we then have is an indifference of economic operations to legal norms, where the legal event can be converted into a structural par. only by setting the economic code itself as rough (rather unlikely for the whole economy, but quite realistic in subsets of it), then structural coupling is not possible. The economy even practices civil disobedience, appeals to the highest values, of the economic institutional and takes refuge in black markets. The duration of price laws is then price increases to absorb the greatest legal risk of the black market. And of course then there will be the public proclamation and the police if, say, particular prohibitions on economic action are imposed by main force, then in that area the economic code has been replaced by the power code. Economic satisfaction of needs has been replaced by political satisfaction of needs, and the advantages and drawbacks of an economy based on force can be discovered. But be a scarce resource of the power of the haves really what interests us in the topic of social regulation through law?

If the humble price counsel gives rise to such a range of economically specific interpretations, then Max Weber’s verdict that from a historical point of view “price taxes” have always been prominent but today on the whole “still less channel of success than formerly” is hardly surprising (Weber, 1922, p.197). The diverse economic interpretations of law listed here could certainly be refined still further. What is important in our connection is that they are the theoretical statements on regulation arising out of the conceptual framework of asymmetric theory. Developed further, they can supply specific criteria for regulatory practices and for the detailed observation of regulatory processes. We can see from the specific grammar of the discourses where and how they reconstrue distinctions of other discourse in their own language: in codes, structures, programs, reality constructs etc.

It is at this point that actual hypotheses must set in, presenting assumptions as to what types of legal norm can be interpreted in what type of economic interpretation under what conditions. But it is then still seriously be said that an apocalyptical viewpoint does not go beyond the vague pictorial language of stimulation, persuasion or mobilization of closed systems.

But what is so different about this language game by comparison with causal chains resulting from the political goals or juridification and implementation up to the social effects? I shall attempt to give two brief answers and a third rather longer one. Firstly; in the sort of analysis of discourse we are met, like Viiby’s authors (1967), get lost in the tangle of causal chains providing from legislative acts as primary, secondary or tertiary consequences. Instead we look for typical rules in the
discourse involved, say their degree of openness or closure towards the legal discourse, which may range from hermetic closure up to a fairly low threshold of reconstructor. By contrast with individual causal analysis, this allows us generalizations. Secondly: causal parallel processing of differing discourses plays recursiveness in the system and between the systems - as the center of analysis. Recursiveness means a constant micro-variation of meanings in applying operations to the outcomes of similar operations, which is simply forbidden in a causal analysis of the type of Opp-Diekmann/Hübenthaler (Diekmann, 1980, pp.629; Hübenthaler, 1987, pp.565), which needs a clear definition of the dependent and independent variables, stable through time.

Thirdly: Even if sociology can show only a limited amount of stable regularities in parallel processing, then it should pay more attention to society itself, particularly to stability-creating processes of social self-organization. More structural coupling of legal norms to other social fields does not yet lead to any systematic coordination. But occasionally social practice itself sets up fine links between the chaotically coupled discourses which confer duration, acceptance and directional indications on the transitory 'tangential responses' of structural coupling. And the fact that some (not all) legal norms have such firm social links available is what provides an opportunity for political regulation through plural law.

3. Structural coupling

The concept of structural coupling in autopoiesis theory closes a void between the systems. Humberto Maturana seeks to fill it with taxonomies. As a necessary appendage to operational closure, according to Maturana, structural coupling of the system with its niche is present where both co-evolve and they co-evolve where they are structurally coupled. The outcome is evolution as structural drift (Maturana, 1980, pp.1020; Maturana and Varela, 1985, pp.1130).

Niklas Luhmann has analyzed the phenomenon of structural coupling in more detail. A system is structurally coupled to its environment when it uses events in the environment as perturbations in order to build up its own structure. When a system has internally available the distinction between self-reference and hetero-reference, it may via structural coupling make itself dependent upon its environment by using external events as inputs into its own operations, as irritations or even as opportunities (Luhmann, 1999, p.28; 1990, pp.293, pp.1650).

In my view two types of structural coupling have to be distinguished according to whether the couple's systems belong to different areas of phenomena (e.g. body-self or consciousness-communication) or whether they belong to the same area of phenomena, as second-order autopoietic Systems, (e.g. law economy). The second type of structural coupling which I call interference, is distinguished by the fact that every event in the functional sub-system is at the same time always communication to the whole of society and it is therefore 'linked' to the events in the coupled system in a very specific way (Teubner, 1999b, Chapter 5). This 'all-society linkage' of in principle separate, autonomous system events puts us on the track of a more general distinction, that between coupling and linkage.

While structural coupling denotes the mechanism of actual inter-system contact, namely use of perturbation of one system to build the structure of the other, linkage
denotes the set of conditions necessary to make structural couplings possible. Without linkage, structural coupling would be confined to the extreme case of single chance couplings in which a single event acts as a perturbation and affects a single structural formation. Linkages are responsible for the fact that structural couplings can take on different values of duration, intensity, quality and institutionalization. The very material, organic and mental infrastructure of society ensures that functionally specialized communications are to some extent linked with each other, as does, as we said, the fact of society itself. But the really significant ‘close’ links are created only with the social institutions specialized for that. We need not think immediately of the institution of marriage; instead, the most important glue in functionally differentiated society is probably the formal organizations, to the extent that they are ‘multilingual’ (this Maynez, 1987, pp.100ff; Scharpf, 1989, p.15). The really effective aspect of this mediation is not even the fact that the multilingual organizations ‘understand’ various sub-systems, but the fact that they link them to each other. They thereby force the functional sub-systems each to process their own information on the same events in parallel over the long term. Interests associations, for instance, are communicatively involved in two or more functional sub-systems. They ensure that functionally specified communications of politics, the economy and law no longer meet each other merely randomly, transiently and contingently, but are systematically synchronized (Teubner, 1979, pp.141ff). Formal organizational links systematically change the duration, quality and intensity of structural couplings. With an adequate range of such inter-system organizations, their micro-synchronization ultimately lead to a position where the functional subsystems tend to drift apart are brought on to a common path of development, even though one cannot speak of ‘conscientious regulation’ in the sense of Maynez and Scharpf.

This is interesting enough by itself. But it becomes really exciting where it is possible to identify inter-system links that squeeze structural coupling into a direction such that systems react on each other catalytically in cyclical fashion. We then have the interesting case that processes of self-reproduction would, without the systems involved losing their exo-somatic closure, operate outside the boundaries of autopoietic systems. This would be the case of ecological (meta-systemic) recoverability. 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 these boundaries.

4. Ultracyclical linkage

But this is not just the sick span of a brain suffering from epidemic systemsosis (diagnosis by Wallwey, 1972, p.380), as we learn once again from the British colonial masters. Their manipulation of ‘endogenous law’ presents us paradigmatically with the picture of how today so-called ‘new legal pluralism’ – the pluralistic law of transactions, organizations and networks - is day-in and day-out linking the structural couplings of economy and the law.

The normal case of non-reproductive coupling of economy and law is for economic actors to bring their conflicts before the court. The legal discourse allows itself to be perturbed by the economic discourse, reconstructs the conflict as a legal case in special legal language, checks it against existing sets of norms produced elsewhere,
where necessary invents a new norm and processes it up to a court decision which - see above - is read by economic autopoiesis in the most divergent interpretations, or even not read at all. This is the usual, the merely trajectory, structural coupling of economy and law.

Something different happens in the modern contract law. Here jurists work, as once British colonial rulers did, with a bluff. The law, by providing the economy with the favorable opportunity of "made pacta", namely of concluding absolutely formless contracts of any content whatsoever, provides itself with the favorable opportunity of treating more or less any economic transaction as a source of law, as the conclusion of a contract creating legal norms, even where the actions were meant quite differently. The law "observes", "overturns", the economic process that has actually taken place once again, in its own language. It thereby creates the "fiction" that the economic process itself produces its legal force. The law praised the quality of being a legal norm onto economic transactions as attesting that there is such a thing as "self-created law of the economy" (Groidemann-Doechel). And then the law uses this actual fiction as the third source of law alongside statute and case law.

Really this self-created law of the economy exists just as little as did the indigeneous law of the British colonies. It is a mere construct of its inventors. Since Macaulay's pathbreaking studies, empirical legal sociology has repeatedly demonstrated that economic transactions take place free of law, that deals are struck, deliveries carried out, payments made, and long-term business relationships carried on, without legal norms being evoked or even merely insinuated (Macaulay, 1963; Daintith, 1986, pp.185ff). Transactions are made on the basis of actual chances for action in respect of changing them and projected into the future on a basis of mutual trust. But out of the actual chances for action and the economic trust the law cobblets he factors that tie it into a collage that it then presents as legal property and contractual duties created by the economy itself. This reading by law is based on a siege big misunderstanding - a creative misunderstanding. Its creativity lies not in the pure invention of something new - out of the blue but in the productive utilization of social material. Making a variation on Polanyi's famous distinction, the legal misunderstanding is creative to the extent that it builds up its explicit legal knowledge on the basis of implicit social knowledge (Polanyi, 1958, pp.69 ff). For all the misgivings, misunderstandings still remains a kind of understanding! What does Portuguese legal sociologist Boaventura de Sousa Santos, who wishes to set up a postmodern theory of legal pluralism, have to say? "Law: A Map of Misreading" (Santos, 1987). The law systematically misunderstands economic transactions as sources of law, as legal acts that create legal norms. Be it noted that this is not just legal acts as law judges using norms produced elsewhere, but as legal acts that themselves produce norms. Napoleon knew what he was saying: "Les conventions légalement formées tiennent lieu de loi à ce qui les ont faites" (Art. 1134 Code Civil). Through this not fiction, the law is today creating in the institution of the modern contract, as the British once did through indigenous law, a new, richly yielding source of law that in creativity and dynamics goes far beyond the other classical sources of law, statute and case law.

Taking the link between economy and law the other way round, where economy reads legal constructions (new legal forms of contract or newly created property rights in intellectual products, computer programs or genetic techniques) as favorable opportunities to open up new markets and exponentially increase economic transactions, we can see the mutual exploitation. The circle is complete: the economy
nonhaltanly makes profit from legal norms created for quite different purposes, and the law, undischarged, carries off the normative surplus-value of money circulation. In somewhat different language, this is not just mutual reconstruction of system operations but in the sense a mutual analysis of growth processes (Eigens and Schuster, 1979; Eigens, 1981, pp. 225f; Zelinsky, 1981, pp. 100ff). Transactions operate auto-catalytically on the reproduction of transactions and at the same time hetero-catalytically on the reproduction of legal acts that create norms. Conversely, legal acts operate auto-catalytically on the reproduction of legal acts and hetero-catalytically on the reproduction of economic transactions. We may here speak of a linkage through ‘ultra-cyclical’ processes, much or less in the sense described, continuing Max Frd’s ideas, by Bulem and Weizsacker (1974). The socio-legal generalization and respectification of ultra-cyclical relations can in my view be formulated as follows:

1. Self-reproductive processes in law and the economy join together cyclically through the institutions of contract and property, i.e. a self-reproductive process.
2. The ultra-cycle operates so as to accelerate growth as the economy produces transactions which at the same time are auto-catalytically for their own growth and hetero-catalytically for the growth of the production of legal norms, and conversely.
3. However, this ultra-cyclical linkage of law and the economy does not lead to the emergence of a new operatively closed system, but is based on the separation and autonomy of the systems involved. Indeed it exploits just that fundamental difference of the system operation (transactions and legal acts) for hetero-catalysis. Accordingly there is no economic=legal hypercycle, but an ultra-cycle that crosses the limits of law and economy, a circular relationship of referentiation between system and niche, as we already said, a kind of ecological reenervateness.

5. Politics

The evolutionary advantages of a cyclical linkage of law with the economy through the institution of the contract are obvious. Social scientists, were they to look over the fence, would perhaps recommend a look at the acceleration in rate of growth of the communication populations in the economy and the law (see Eigens, 1987, pp. 227ff). Social scientists at the same time see other evolutionary advantages of the cycle: it marks the law gain in responsive ness to the economy. As it were automatically, without need for a training in economic analysis of law, law adapts to the intrinsic logic of economic processes through incorporating contractual norms (Luhmann, 1989). With contrast law, the law has further available highly effective self-executing norms), since it develops directly out of economic motivations. But the secret trick in the contractual mechanisms is a kind of selfanaxing of the economy. While the economic discourse initially disposposes freely as to the content of contractual norms, it then loses control and gets tied up in the self-referential linkages of law. For the power of diffusion is now transferred to the legal discourse which, in the interest of internal legal consistency, dispenses auto-catalytically over the Contractual norms, defining what the actual will of the parties has to be, manipulating contractual content arbitrarily through ‘implied conditions’ in contextual interpretation, deciding
contractual norms invalid in accordance with 'public policy' and setting completely new contractual norms under the general clause of 'good faith'. And as long as the legal discourse does not overstep structural coupling, the economic discourse willingly follows the legal corrections to the self-created law of the economy.

Now strikes the hour of political. If it has hitherto had to admit that direct political regulation of the economy tended to be like the 'journey into the unknown' romanticized about by Joseph Eszter, never knowing where one might ultimately land, it now suddenly finds in the self-created law of the economy a handy control mechanism, easily manipulable and, to the delight of the regulations, also actually able to hire. For structural coupling institutionalized and made durable through the contractual links continue to function even overt the contractual norms are effectively changed with regulatory intentions. And the difficult conversion of political decisions into economic transactions now becomes mere self-regulation of law. The policy-oriented law deliberately regulates some norms of contract law. It is just as simple as that. One just has to watch out that the ties between the structural coupling of the economy and the law do not break as happened - as private lawyers know to their cost - in the case of, for instance, the legal policy control of financed purchasing contracts (more generally on the efficacy of legal policy in contractual law, see Raiser, 1990).

Thus things ought not to stop at this parasitical exploitation of the symbiosis of economy and the law for purposes of political regulation. For the mechanism of policy-oriented legal self-regulation plus twofold structural coupling can be generalized. In the new legal pluralism, politics do not exploit only the lex mercatoria, the self-created law of capital, but cream off, for regulatory purposes, the normative surplus-value of quite different processes of social reproduction.

At the center are the decisions of formal organizations. In the internal law of associations and organizations, the law is bound to the self-reproductive processes not only of the economy, but of quite different sub-systems like health, the mass media, religion or culture. Here it is the entry/exit mechanism that is fundamental for the cyclical linkage (Teubner, 1988b, pp.66ff), which the law in turn creatively misunderstands as a law-producing mechanism. Organizational structures in economic enterprises, interest associations, trade unions, press organizations, hospitals, and cultural organizations are through this legal fiction made into a rich source of 'social law' that can be taken up, disciplined and controlled by official law. The legal discourse here ventures into a territory that has already been thoroughly explored: the question of just think of the law of the Moon sects - that no legislator or judge would ever venture to formulate. And politics finds a new fertile field for regulation that allows it to govern right into closed societies. For once again it is just changing legal norms by legal norms which as it were 'by themselves' become converted into social praxis. This also confirms and at the same time extends the well-established thesis of the 'legal affinity' of formal organizations (Selnick, 1969: pp.32ff; Mayntz, 1987: p.103; Kaufmann, 1988; pp.22ff; Scharpf, 1987, pp.117ff; 1989, p.16; Edelman, 1990; pp.406ff/1435ff). This affinity is not based only on the structural similarity of legal norms and formal organizational structures, but additionally on the close cyclical linkage between law and organization. The law takes responsibility for this because it stylizes the similarity into identity by creatively misunderstanding processes within the organization as production of genuine law and thereby coupling them closely to each other.

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The dramatic extension of ‘the process’ in US private organizations since the sixties supplies illustrative material of the new introduction of this sort of ‘plural’ production of law (Ehrenreich, 1969, pp.1810; Foulkes, 1980; Weston and Felstow 1984; Edelman, 1990). Without statutory provisions here having prescribed the introduction of procedures under the rule of law, a self-accelerating process got under way in which courts misunderstood previously ‘law-free’ internal organizational decisions as legal decisions and the organizations in turn formalized the grievance procedures and extended them. The end of the development is a private machinery for norm production supported by the official law, representing a new ‘source of law’, compatible with the constitutional mechanism. In the ultracircle of the mutual misunderstanding of law and organization, the law gained a new source of law and the organization a new source of legitimation.

5. Legal pluralism

Modern legal pluralism has long outgrown its origins, contract and organization. General terms of business, agreements by the umbrella organizations of enterprises and banks and other private arrangements, in organized markets, the spirit of collective bargaining and other forms of collective law in industrial relations all make the classical individual contract look pretty old. The classical social mechanisms of norm formation, contract and organization, are far from being exhaustive today; they are superseded today by an elaborate private inter-organization law and intercontractual law. Indeed, one has to speak of a new sort of ‘network’ of private legal discourse in a society, non-status discourse, a ‘legal dogmatism of private Kuntalaspirits - prudents’. By contrast with classical private law, we are here facing a new type of linkage of social and legal episodes. A whole network of collective actors operates as ‘social legislatory’ firms, associations, trade unions, numbers of trade, assimilates boards, qoguins, municipalities, lawyers’ offices, ministries of commercial law. The formation of law takes place not in a vast number of individual contracts but in ‘private ordering’ through collective negotiations and strategic communications, in brief, through power relationships in organized markets (see Bovensiepen, 1987, pp.30ff). And it is not only the parliamentary legislatures that are involved a posteriori in the political regulation of this semi-autonomous law, but, very early on in the process of its formation, the regulatory agencies, quasi-governmental associations, anti-trust board and other authorities, and in particular courts. State law is embedding itself ever deeper into these social non-juridical forms of conflict settlement (Austhaus, 1983; Arthurs, 1983; also Nader, 1984; Harrington, 1983). With such happy coincides as ‘practise as procedure for disclosure’ (Jorjes, 1981; pp.132ff) or ‘private justice’ as legal counterpart to ‘private government’ (Henry, 1963; 1987; Macaulay, 1966), but also ‘alongside the State’ (Rogge, 1980), priests and sociologists are engaged in illuminating various aspects of the modern social proto-law. However we are still a long way away from a systemic, empirical, theoretical or doctrinal scrutiny of this self-created law of society.

Yet despite all the research deficits, the outlines of the new legal pluralism can be discerned. The differences from Eugen Ehremit’s ‘living law’ (1913) can be provisionally formulated as follows:

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1. The new legal pluralism does not focus primarily on the local law of ethnic enclaves as the old legal pluralism did. The focus is rather on the proto-law of specialized organizational and functional systems. The new living law therefore lives not from stores of tradition but from the ongoing self-reproduction of highly specialized, often formally organized systems of an economic, academic or technical nature.

2. The new social law is not formed autonomously by social processes but constituted first through the legal discourse itself, which reconstructs social processes as legal norm production. In this way, legal systems achieve their legal system's own achievement in reproducing 'social law'.

3. It is not the 'acceptance' of social law by those concerned that is the basis for its social implementation but its specific interpenetration with its social environment (cylical linkage of structural coupling). It guarantees that social operations can be continued under the dominance of the legally reconstructed social law.

4. It is not the contrast with state law that characterizes the new social law, but its instrumentalization for purposes of political regulation, which even goes so far that it is achieved through targeted artificial procedures of social norm production.

7. Conclusions

Today we see a whole wave of institutional experiments with pluralist law formation coming upon us. Under the suggestive power of unbundling the state, decentralization, cleavages in society and self-organization, everywhere ethical commissions, round tables, micro-corporate bodies and negotiating rounds supported by mediators are being set up in Community Europe the 'new approach' to legal harmonization is creating a fusion; whole policy areas are being transferred to a complex procedure of public standards setting where, under the umbrella control of European Community law, normative norm production is negotiated in pluralistically composed bodies of private associations (Bruls, 1986).

Can the British colonial masters teach us a lesson here too? After all, the parallel with their creative misunderstanding of indigenous law is too clear. But there is something new about the 'artificial' pluralist bodies. As against the subsequent political and legal exploitation of spontaneous quasi-norming, social norm production itself is being taken under political control. But this is just what the British skeptics would have regarded with suspicion. For the success of their soft law did not lie in the aspects of pluralist law production that the German debate is so fond of bringing out: democratic legitimacy through representative social relevant groups, the cozy warmth of decentralized round tables, the advantage of inter-system discourses of mutually closed conceptual worlds. With their sense of reality and aversion to all far-fetched theory, the British give us one message above all: Pay attention to the ultra-cyclical links in the structural coupling!

What this lasting legacy of European colonialism means for us today is something we can merely vaguely speculate about. Its clarification will have to be left to later empirical research. I think that it is the institutional design of pluralist norming bodies we should take to heart the following warnings from British colonial teaching: Create de facta linkages! There's little sense in setting up pluralist bodies where their decision-making processes are not at the same time closely 'linked' to the

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described above to the real elementary operations of functional sub-systems. In order for their misunderstandings to be truly constructive, ever be taken to ensure that they do not sever their norms truly but as fact read their standards off from economic transactions, organizational acts, technical processes and research results that really arise. The test question is Whom real social processes are normatively "read" in the artificially institutionalized pluralist law production - constructively misunderstood - the results of which can in turn be "read" by the real social processes? The famous ethical commitments of our day do not look too good from this viewpoint. Not do court psychiatric procedures, since the "woe of psychiatry" lies just in the fact that the trans-scientific questions of jurists to psychologists and their answers can no longer be linked up with cognitive acts of psychiatry as an academic discipline (see Prinz, 1980, chapter 2). The standard-setting bodies of ISO and other safety standards committees can be given a rather better prognosis from this viewpoint. However problematic their social representativity may be, in any case through their attempts at standardization they still closely to technical and economic processes that are actually taking place. 

Pay attention to institutional separation! The logic of constructive misunderstandings runs as if 'automatically', but only within definite limits. Pluralist norm production is entirely controllable politically, but only so the extent that its results are taken up in real social processes without a State implementing apparatus having to control their application in the individual case. The test question is: Are the political manipulations of pluralist law still moving within the motivational keyway of the social processes concerned? Here lies the deeper reason why substantive regulation of pluralist law by politics is practicable only within very narrow limits, while procedural regulation, its political redenition of control rights, property positions, participation rights, decision-making procedures and rules of evidence have much better chances of being taken up. Collective labor law offers a paradigmatic example of very far-reaching political control of social processes of norm production through procedural means. Where the limits to the motivation for take-up lie can ultimately be determined only in practice. But legal sociology and legal economics should be useful for this question, insofar as they are able to make generalizations on the readiness for acceptance in a specific social context. 

Pay attention to institutional separation! The historically successful examples of politically manipulated social law (contract, organization, bargaining system) at any rate show that the pluralist norm production regularly takes place in two stages. The law's constructive misunderstanding of social processes is the first stage, followed by the political manipulation of its product as the second stage. By contrast the more recent experiments with pluralist norming bodies are frequently distinguished by the fact that the first stage is already 'politicalized'. The political interest representation and its regulatory intentions are already nested inside the social process of norm formation. For comprehensive 'cleaning of account' this may be advantageous. It may however also be the case that this sort of compact procedure brings together the two structural couplings (law with social system and law with politics) involved too quickly, thereby overloading both. The test question is whether in such a situation the two structural linkages, which set up the coupling lastingly, mutually interfere, or even cannot be formed at all. The escape would be, in the case of artificially created pluralist procedures too, to pay heed to institutional separation, by separating either in time or organization the social norm formation and its political control. The new
approach" in European safety law seems to have intuitively grasped this range of issues by providing for procedural separation of safety standardisation and its political and administrative control by national and European authorities (Bray, 1986).

In any case we should pay attention to historically tested conditions of success in advancing extension of pluralist institutions for creating law, and not simply let ourselves be carried away by the romanticism of decentralized social dialogue or the hermeneutics of intersystem discourses. This is means self-critically see (Teubner, 1987; 350) and in the same time addressed to more explicit goals of (reflective) forms of control (Kirsch, 1988; Rauschvall, 1988; Offen, 1989, pp.5ff). Not that I have anything against the new "institutional patriotism", the patriotism of democratically constituted social micro-systems! And I am all in favor of such discourse with a learning capacity! But if we do not take sober account of their rootlessness in real social processes - of the extra-cyclical linkages of structural coupling - then we are all too likely to let our pluralist micro-bodies decay into the "talking shops" that democratically conceived institutions have already been denounced as in our century.

Notes
2. Financial Times 23.2.8, 23.6.8, 28.7.9, 29.9.9, 1990, FAZ 24.8.8, 26.9.8, 27.9.9, 1990.
3. FAZ 28 September: "Reserve in America's Strategic reserve means of power"; FAZ 29 September: "Don't neglect the image in the down payment of price."
4. "The Ministry's control over the industry is omnibene, even down to the smallest details," Financial Times, 23.8.1990, p.3.
5. On beginning in assisted living see Greenfield and Viragh, 1982.
6. On this see the empirical findings in Rügge, Child, Francis and Kiese, 1982.
7. For one impressive empirical study on legally induced learning by corporate actors in the field of corporate governance, see Ehrlich, 1990.
8. A similar attempt to specify the problems of regulation is made by Kasten, 1988, pp.85ff. The chances of control through law are held to be specific only with the amount of the content of different forms of "state intervention.
9. For more on the two broad ones see Teubner, 1991a.
10. For a theoretical interpretation of present empirical research see (Ehlers, 1989, pp.90ff, p.17ff).
11. For a systematic presentation see Behrbohrer, 1982, pp.11ff.
Bibliography

Barlow, R. & J. de Graaf (1973), Huygen’s metaphor of the vibrating mirror, Utrecht: Bijzondere.
Benson, J.K. (1978), The interorganizational network as a political economy, in: Kaplir (ed.).