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, does politics take the detour through law? Why does it not rule directly into society at its own boundary points, say by authoritatively ordering money payments, or by using economic interest groups as 'juridifying' instruments of political control? Instead, politics takes the laborious 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, 1991a). The effectiveness of law as a steering device is in turn rather skeptically assessed by the wisest among its legal sociological advocates (Rottleuthner, 1991). And not much is left of the rationality of bureaucracy in the implementation of policy-oriented legal norms (since Pressman and Wildavsky, 1973). It failed because of self-created perverse effects, implementation deficits and self-fulfilling as well as self-defeating prophecies.[1] Why then, despite all the well-known failure of law, is there this unfailing clinging to law as a means of political control?

Perhaps we can take help from a hint 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 handing 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 repugnancy 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.870; Okoth-Ogendo, 1979, p.160; Adewoye, 1986, p.60; Bentsi-Enchill,

1969). Wise self-restraint by enlightened colonialism? Quite the contrary. Critical anthropologists have recently succeeded in unmasking the secret dominance mechanism of this soft law. Through laborious 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; Ranger, 1983; Moore, 1986; Starr and Collier, 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" (Allott, 1960, p.62), but "were constructs of the European expansion and capitalist transformations", and therefore nothing but a "myth of the colonial era" (Merry, 1988, pp.875ff). Out of a multiplicity of entirely heterogeneous cultural sediments, the British jurists cobbled together only the elements that suited them, into a collage 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 ostensibly lying in the actual social practice of oppressed peoples - but usable by them for political manipulation. The effect was a stronger commitment of the 'indigenes' to their own pseudo-indigenous law, greater legitimacy and acceptance for the British colonial administration, and higher effectiveness for 'modernizing' colonial policy from the customary law thus doubly manipulated (Snyder, 1981b, pp.74ff). What does this cynical self-embedment 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 steering. Summarizing in the form of theses:

1. *Politics embeds itself in structural couplings of law and society in order to cream off the normative surplus-value of social self-reproduction for its control purposes.*
2. *I suggest to distinguish between structural coupling and linkage mechanisms in operationally closed systems: structural coupling is dependent 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 recursiveness.*
3. *In a suitable situation these linkage mechanisms may set off systematic regulatory effects which in turn, can be exploited by regulatory politics, or even artificially institutionalized.*

2. Modes of interpretation

Critical observers perceive the last position of autopoiesis theory as "radical regulatory pessimism" (Scharpf, 1989, p.10): all political and legal regulation is regarded as running up against the 'intrinsic 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 (pointedly expressed by Rottleuthner, 1989, p.281). Is it really impossible for autopoiesis theory to specify ideas on regulation, particularly those on structural coupling, sufficiently to "make

specific differences of typical problem situations visible" (Kaufmann, 1988, pp.71ff)?

Let us do a sample test. Let us take Max Weber's classical, simple example of legal regulation of the economy, 'price taxes'. Recently in particular, with the immoderate petrol price increases 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.[2] 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 reserves to bring down market prices, with the result that because of this measure they rose.[3] If here we replace simple causal control models (price regulation -> height of sanction -> motivation of actor -> compliance with or departure from norm), as still used in current mainstream sociology of law (Opp, 1973: pp.190ff; Diekmann, 1980, pp.32ff; Rottleuthner, 1987, pp.54ff) by multiple interwovenness of autonomous closed discourses, this forces upon us the world view of the sort of occasionalism once advocated by Geulincx (1624-1669). 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 hermetically closed self-reproducing discourses and that the clockwork would no longer be synchronized by God-ordered harmony but by the more or less chaotic dissonances of blind evolution. Evolution brings informational events in closed systems into such a relationship as to make some of them into 'causae occasionales' 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 its 'causa occasionalis' (Vorländer, 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 *acausal 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 price signals, now in the most diverse economic control programs in market and organization. In other words, there are various 'modes of interpretation' in which the economic discourse observes the price taxes 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 not as legal norms bidding obedience and regarded as unbreakable, but instead make strategic use of them. Legal price controls are the object 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 appositely be characterized by the formula 'efficient breach of law'. Indeed, progres-

sive legal economists are today already talking about a *legal duty* of efficient breach of legal rules (Easterbrook and Fischel, 1982, p.1177). But, and this is often overlooked, even this economic interpretation of legal price controls which it 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 indicate quite different distinctions proper to the economy.

Interpretation as 'property rights'

Not 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.[4] 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 'opportunism' is (Williamson, 1985). They are now regarded as a modification of 'property' understood in economic (not legal!) terms, of property rights, of assets, of regimes - 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 precepts; but instead 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 manoeuvre opens up where legal norms are exploited for all sorts of manoeuvres and extortions 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" (Mnookin and Kornhauser, 1978), 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 'letter' of the law becomes the keystone of the negotiating position of parties to the interaction" (Winter, 1990, p.329). Rights are not exercised, procedural positions not taken up, possibilities of legal action not exploited; instead their employment is merely threatened in order to build up a negotiating position in other economic contexts. Practice in antitrust law shows many cases where given price abuses or other situations of relevance in antitrust law, the competitors or even the antitrust authorities have allowed themselves to be well paid for not exercising their right of legal action or their powers of intervention.[5] 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-Riem, 1989).

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.[6] 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 petrol 'price taxes' by the French governmental authorities, MITI 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 interventionist law. "Once the work was done the dwarf went about boasting everywhere he had done it himself" (Kaupen, 1975, p.34).

Interpretation as 'change of preferences'

This case is often neglected by economists: de gustibus non est disputandum (Stigler 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 systems theory by contrast, this case is particularly interesting (Luhmann, 1988: 275ff, 280ff; Baecker, 1988: pp.126ff, pp.318ff). It will treat preferences of economic actors not only as external mental motivations in the heads of those involved, but as genuinely social expectations, as structures internal to the economy, attributed communicatively to the individuals or to the collective actors as semantic artefacts. 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 'education to obedience' 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 'rational' didactic legal provisions - even in the case of 'corporate actors' with concrete heads![7] 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 hotheads.

Structural coupling of the simplest type is present where 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 event that depresses the price or sends 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 Germans had 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 contra-intuitive effect, as a 'price tax'. The tranquillizing signal of releasing the reserves was misunderstood as signalling worry, and the oil market reacted with panic price increases.

The Case of 'Non-Interpretability' 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 part only by setting the economic code itself at naught (rather unlikely for the whole economy, but quite realistic in subsets of it), then structural coupling is not possible. The economy then practices civil disobedience, appeals to the highest values of the economic institution and takes refuge in black markets. The outcome of price taxes is then price increases to absorb the greater legal risk of the black market. And of course then there will be the public procurator 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 is the scare resource of the power of the bayonet really what interests us in the topic of social regulation through law?

If the humble price control 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 precarious but today on the whole have "still less chances of success than formerly" is hardly surprising (Weber, 1925, 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 autopoiesis 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 reconstruct 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.[8] But can it then still seriously be said that an autopoiesis viewpoint does not go beyond the vague pictorial language of stimulation, perturbation or modulation of closed systems?

But what is so different about this language game by comparison with causal chains reaching from the political goals via juridification and implementation up to the social effects? I shall attempt to give two brief answers and a third rather longer one.[9] Firstly: In this sort of analysis of discourse we do not, like Vilhelm Aubert (1967), get lost in the tangle of causal chains preceding 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 reconstruction. By contrast with individual causal analyses, this allows us generalizations. Secondly: acausal parallel processing of differing discourses places recursiveness - in the systems and between the systems - at 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/Rottleuthner (Diekmann, 1980, pp.67ff; Rottleuthner, 1987, pp.56ff), 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. Mere structural coupling of legal norms to other social fields does not yet lead to any systematic coordination. But occasionally social practice itself sets up firm 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 denotes a void between the systems. Humberto Maturana seeks to fill it with tautologies. As a necessary appendage to operational closure, according to Maturana, structural coupling of the system with its niche is present where both co-exist; and they co-exist where they are structurally coupled. The outcome is evolution as structural drift (Maturana, 1980, pp.102ff; Maturana and Varela, 1987, pp.113ff).

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. Where 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 conditions for its own operations, as irritations or even as opportunities (Luhmann, 1989, p.8; 1990, pp.29ff, pp.163ff).

In my view two types of structural coupling will have to be distinguished according to whether the coupled systems belong to different areas of phenomena (e.g. body-soul 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 is therefore 'linked' to the events in the coupled system in a quite specific way (Teubner, 1991b, 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 intersystem 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 contacts 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 interesting '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' (thus Mayntz, 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 mere 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. Interest 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, transitorily and tangentially, but are systematically synchronized (Teubner, 1978, pp.141ff). Formal-organizational links systematically change the duration, quality and intensity of structural couplings.[10] With an adequate range of such intersystem organizations, their micro-synchronizations ultimately lead to a position where the functional subsystems tending to drift apart are brought on to a common path of development, even though one cannot speak of 'intentional regulation' in the sense of Mayntz and Scharpf.

This is interesting enough by itself. But it becomes really exciting where it is possible to identify intersystem links that squeeze structural coupling into a direction such that systems act 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 autopoietic closure, operate outside the boundaries of autopoietic systems. This would be the case of ecological (not: systemic!) recursiveness. 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 spawn of a brain suffering from epidemic systemosis (diagnosis by Ballweg, 1972, p.580), as we learn once again from the British colonial masters. Their manipulation of 'indigenous law' presents us paradigmatically with the picture of how today so-called 'new legal pluralism' - the pluralist 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-recursive 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 transitory, 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 'nuda pacta', namely of concluding absolutely formless contracts of any content whatever, 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', 'construes', 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 norms. The law paints the quality of being a legal norm onto economic transactions by asserting that there is such a thing as 'self-created law of the economy' (Großmann-Doerth). 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 indigenous 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 cobbles the factors that suit 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 single 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, misunderstanding still remains a kind of understanding! What does Portuguese legal sociologist Boaventura de Sousa Santos, who wishes to set up a post-modern 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 as legal acts the 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 real 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

nonchalantly makes profit from legal norms created for quite different purposes, and the law, undisturbed, creams off the normative surplus-value of money circulation.

In somewhat different language, this is not just mutual reconstruction of system operations but in the strict sense a mutual catalysis of growth processes (Eigen and Schuster, 1979; Eigen, 1987, pp.225ff; Zeleny, 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, more or less in the sense described, continuing Manfred Eigen's ideas, by Ballmer and Weizsäcker (1974). The socio-legal generalization and respecification 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, into a self-reproductive process.
2. The ultra-cycle operates to accelerate growth as the economy produces transactions which at the same time act 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 operations (transactions and legal acts) for heterocatalysis. Accordingly there is no economico-legal hypercycle, but an ultracycle that crosses the limits of law and economy, a circular relationship of reinforcement between system and niche: as we already said, a kind of ecological recursiveness.

5. Politics

The evolutionary advantages of a cyclical linkage of law with the economy through the institution of the contract are obvious. Natural 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 Eigen, 1987, pp.227ff). Social scientists at the same time see other evolutionary advantages of the ultracycle. It makes the law gain in responsiveness 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 contract 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 mechanism is a kind of self-binding of the economy. While the economic discourse initially disposes freely as to the content of contractual norms, it then loses control and gets tied up in the self-set linkages of law. For the power of definition is now transferred to the legal discourse which, in the interest of internal legal consistency, disposes autocratically over the contractual norms, defining what the actual will of the parties has to be, manipulating contractual content arbitrarily through 'implied conditions' in contractual interpretation, declaring

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 overstrain structural coupling, the economic discourse willingly follows the legal corrections to the self-created law of the economy.

Now strikes the hour of politics! 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 Josef Esser, 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 bite. For structural coupling institutionalized and made durable through the contractual links continue to function even once 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 tie between the structural coupling of the economy and the law does 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).

But 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 social 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 even on extremely far-reaching norm formation - 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 (Selznick, 1969: pp.32ff; Mayntz, 1987: p.103; Kaufmann, 1988, pp.82ff; Scharpf, 1987, pp.117ff; 1989, p.16; Edelman, 1990: pp.1406ff-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.

The dramatic extension of 'due process' in US private organizations since the sixties supplies illustrative material of the new introduction of this sort of 'plural' production of law (Selznick, 1969, pp.183ff; Foulkes, 1980; Westin and Feliu 1988; 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 continually 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', comparable with the contractual mechanism. In the ultracycle of the mutual misreading of law and organization, the law gained a new source of law and the organization a new source of legitimation.

6. 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 system 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 these legal discourses in a societal, non-statal discourse, a 'legal dogmatics of private Kautelasjurisprudenz'.[11] By contrast with classical private law, we are here facing a new type of linkage of social and legal episodes.[12] A whole network of collective actors operates as 'social legislator': firms, associations, trade unions, chambers of trade, antitrust boards, quangos, municipalities, lawyers' offices, institutes 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 Bercusson, 1987, pp.50ff). 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 (Auerbach, 1983; Arthurs, 1985; also Nader, 1984; Harrington, 1985). With such happy coinages as 'practice as procedure for disclosure' (Joerges, 1981: pp.132ff) or 'private justice' as legal counterpart to 'private government' (Henry, 1983; 1987; Macaulay, 1986), but also 'alongside the State' (Ronge, 1980), jurists and sociologists are engaged in illuminating various aspects of the modern social proto-law. However we are still a long way away from a systematic, 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 Ehrlich's 'living law' (1913) can be provisionally formulated as follows:

1. The new legal pluralism does not focus primarily on the local law of ethnic communities 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 creative misunderstanding lies the legal system's own achievement in producing '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 interwovenness with its social environment (cyclical 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 politics in turn initiates 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 unburdening the state, decentralization, closeness to society and self-organization, everywhere ethical commissions, round tables, micro-corporatist bodies and negotiating rounds supported by mediators are being set up. In Community Europe the 'new approach' to legal harmonization is creating a furor: whole policy areas are being transferred to a complex procedure of private standard setting where, under the umbrella control of European Community law, substantive norm production is negotiated in pluralistically composed bodies of private associations (Bruha, 1986).

Can the British colonial masters teach us a lesson here too? After all, the parallel with their creative misunderstanding of indigenous law is all 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 couplings!

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 in the institutional design of pluralist norming bodies we should take to heart the following warnings from British colonial teaching:

Create de facto linkages! There is little sense in setting up pluralist bodies where their decision-making processes are not at the same time closely 'linked' in the sense

described above to the real elementary operations of functional sub-systems. In order for their misunderstandings to be truly constructive, care must be taken to ensure that they do not invent their norms freely but in fact 'read' their standards off from economic transactions, organizational acts, technical processes and research results that really arise. The test question is: Which 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 commissions of our day do not look too good from this viewpoint. Nor do court psychiatric procedures, since the 'woe of psychiatry' lies just in the fact that the trans-scientific questions of jurists to psychiatrists and their answers can no longer be linked up with cognitive acts of psychiatry as an academic discipline (see Prins, 1980, chapter 2). The standard-setting bodies of DIN and other safety standards committees can be given a rather better prognosis from this viewpoint. However problematic their social representativity may be, at any rate through their attempts at standardization they stick closely to technical and economic processes that are actually taking place.

Pay attention to the limits of structural coupling! The logic of constructive misunderstandings runs as if 'automatically', but only within definite limits. Pluralist norm production is entirely controllable politically, but only to 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 leeway 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, the political redefinition 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 'politicized'. The political interest representation and the regulatory intentions are already nested inside the social process of norm formation. For comprehensive 'clearing of interests' 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 sub-system and law with politics) involved too quickly, thereby overloading both. The test question is whether in such a situation the cyclical 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 standardization in 'private standardization bodies' and its political and administrative control by national and European authorities (Bruha, 1986).

In any case we should pay attention to historically tested conditions of success in advocating 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 meant self-critically too (Teubner, 1987: 33ff) and is at the same time addressed to more recent pleas for 'reflexive' forms of control (Kirsch, 1988; Rosanvallon, 1988; Offe, 1989, pp.16ff). Not that I have anything against the new 'constitutional patriotism', the patriotism of democratically constituted social micro-systems! And I am all in favor of local discourse with a learning capacity! But if we do not take sober account of their rootedness in real social processes - of the ultra-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

1. Luhmann, 1988, pp.329ff; see also the cautiously sceptical assessments by Offe, 1989, pp.9ff and the brutally negative judgments of Posner, 1987, p.761, pp.769ff.

2. Financial Times 22.8, 23.8, 25.8, 28.9, 29.9.1990; FAZ 24.8, 26.9, 28.9, 29.9.1990.

3. FAZ 28 September: "Resource to America's strategic reserves dampens oil price"; FAZ 29 September: "Bush's signal fails to bring down oil price".

4. "The ministry's control over the industry is notorious, even down to the minutest details", Financial Times, 23.8.1990, p.3.

5. On bargaining in antitrust law see Gotthold and Vieth, 1982.

6. On this see the empirical findings in Budde, Child, Francis and Kieser, 1982.

7. For one impressive empirical study on legally induced learning by corporate actors in the field of corporate governance, see Edelman, 1990.

8. A similar attempt to specify the problems of regulation is made by Kaufmann, 1988, pp.85ff. The chances of control through law are held to be specifiable only with the assistance of the 'context of differing forms of social State intervention'.

9. For more on the two brief ones see Teubner, 1991c.

10. For a theoretical interpretation of relevant empirical research see Hutter, 1989, pp.90ff, pp.127ff.

11. For a first systematic presentation see Rehbinder, 1982, pp.11ff.

12. On linkage of episodes see Teubner, 1988a, pp.432ff.

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