1-2008

# Complementary Institutions and Reflexive Governance in Autonomous Social Law

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# In Autonomous Social Law

## Introduction

We approach institutions as stabilizing structures with consequences of functional incorporateness. Yet we also imagine, assert and enact claims and warrants as institutionalizable practices. There are functional supports. And there are the warranted claims of categorical normativity. Normativity in itself can be understood in terms of compliance with or acquiescence in legitimating structures. Yet normativity itself can be understood as a solidarism we intersubjectively co-constitute. The challenge in political thought has been dealing with the disincorporateness associated with modernity, specifically how a new order and dialogue may be of heterogeneous social values. A new way of ordering socioeconomic relationships of necessity must involve a heteronomy of perspectives and discourses in need of coordination. All this revolves around a core conceptual challenge of the past century--the rise of the autonomous social in all its heteronomy, and its pluralist provocation to the sovereignty of either the State or the Market.

Regimes of formality are constituted by historically determinate social practices and are related to a categorical transformation of socio-economic relationships. The *governance of autonomous social law* is such an emergent regime of formality. It constitutes itself as institutionalizing practice and as positive law that leave indelible traces as a self-constituting model of our subjectivity, ordering, rights, law and institutional justice. In its emergence, these new practices came to be known as *complementary institutions*.

The governance of autonomous social law is the institutionalization of a governance rationale that both transcends and complements liberal institutions. It is law created by non-statist institutions which resist incorporation into a sovereign State. Governance is increasingly the concept used to refer to alternatives to state-centered law. Specifically, governance refers to the institutional capacity within self-regulating organizational networks of trust and reciprocity with significant autonomy from state governments. It refers to a strong undercurrent in legal practices associated with the labor law.
This is a tradition of relational contracting and autonomous law-making that remains and reveals

1. alternative research paths to those of organized group access to policy-making structures of governance that have characterized the neocorporatist practices of Keynesian Welfare State Democracy impasses of the 1970s; as well as

2. corrective understandings of how multipartite governance need not wind up in either vertical concertation and the subversion of the rule of law.

Beyond the inter-individual prerogative contract of laissez-faire liberalism, there is the governance of autonomous social law--that is,

1. schemes of internal governance of collective constitutive contract based on multipartite consultations, bargaining and negotiation; and

2. the law of groups in the construction of autonomous' spheres (or subsystems) of deliberate self-regulation.

At work alongside this emergent regime of formality is a critical sociology of law understood as a dialectic of formality and solidarity that lead to emergent institutional complementarity and a semblance of deliberative democracy.

Amidst the increasing collaborative institutional ecologies in the parallel development of global capitalism, there is a vital undercurrent and sophisticated strategy of labor law. This is an unfolding the Philip Selznick (1969) saw as rooted in the ways contract and association have moving away from the traditional contract of individual prerogative as organizations. This is an unfolding pattern of institutionalized interactions would become central to economic and legal sociology, as John R, Commons, Harold Laski and the Weimar era critical sociologists had noted earlier in the twentieth century. This is an unfolding of self-organizing forms of *reflexive law* and *reflexive governance* separate from the logics of market nor hierarchy, and what is referred to as *heterarchy* -- a cybernetic term sociologized over the last two decades by Guenther Teubner and David Stark. (See for example, Stark, 2000 and Teubner, 2003/04).

We are witnessing in our epoch of globalized capitalism the emergence, formulation, codification and monitoring of transnational conventions, standards and rules that come to function as constituted supervening norms. This is a norm elaboration increasingly negotiated by non-state actors. Again, this is a legal subjectivity of codes and protocols linked to a mutuality of being in an on-going concern, and extended by a pluralism of standard-setting procedures that develop conditional relations of trust beyond the traditional two person relationship of contract. Our understanding of contract is extended – from its original transactional sense into a relational sense, metamorphosed into a *network* of relational contracts intermeshed and operating recursively with its plural contextures and colliding discourses. With the proliferation of normatizing networks, there comes a need for effective interfaces, interoperability and complementarity. These autonomous non-statist associational networks multi-laterally regulate both intra-organizational and inter-organizational conflicts that emerge both within national bounds and which increasingly cross national borders.

We are challenged to represent a *polycontextuaral sense of institutional complementarity* in the reflexive self-organization of civil society associations. (See for example,Teubner ). This is an institutional framework within which seemingly incommensurable and colliding discourses can be regulated, if not reconciled. ( See also Robert Boyer, ) This is an unfolding institutional *assemblage* of negotiating social partners in a complex and heterogeneous network, rather than an ordering of holders of sovereign authority within hierarchy.

## I. Network Institutionalism: Beyond NeoPluralism and NeoCorporatism

Our touchstone is the proliferation of norm creation and legal regulation that shifts away from the public ordering of formal law-making by government toward the processes of autonomous self-regulation outside government control, referred to as *governance.* A significant concern becomes the extent to which these emergent subsystems of social regulation become operationally autonomous from the organizing and steering principles of state selectivity with regard to the regulation of the capital accumulation process (Jessop , Boyer )

From the framework that has been the governance of autonomous spheres of law evolves a relentless functional differentiation that results in autonomous self-regulatory/self-legitimating procedural subsystems as new modes of juridical fields (Bourdieu ) and new modes of Social Partnership (Ebbinghaus, 2006). These amount to a *multi-level governance of a complex pluralism* that goes beyond the deal-making athleticism of an interest group liberalism outside the rule of law known as neopluralism; as well as beyond the encapsulating and exclusionary neocorporatist practices of concertation, pillarization and tripartite consultation.

This is a reflexive multi-level governance that is decentered and more horizontally or *heterarchically* iter-linked

- resisting centralized coordination;
- resisting *dirigiste* administrative colonization of the economy;
- resisting a single universalist value system or form of life; and
- resisting conceptions of either an ontologically privileged class or institutional substance.

The relentlessly emergent *autonomous social subsystems* constitute both a normed pluralism and a complex pluralism that transcends both traditional principal/agent approaches as well as twentieth century interpretations of pluralism. From the governance of autonomous social law to the deliberate self-regulation of autonomous social subsystems, we are confronted with both historically contingent institutionalizing practices and an on-going epistemic subject based on pragmatic understandings. Such practices and epistemic subject serve as bearers of new claims and warranted assertions that fit with recursively reorganizing modes of interest intermediation as well as the reciprocal coordination and recursive referentiality of autonomous social subsystems that leads to *procedural contextualization.*

Chris Ansell (2006) uses the term *network institutionalism* to stress the need to comprehend policy-making behavior *contextually,* especially where institutional complementarity, interweaving, interdiscursivity and interconnectivity generate strong norms of mutual obligation and reciprocity. Ansell (76-77) notes how Granovetter (1985) stressed a social network approach to avoid

- *either* a completely norm-determined (overly-sociologized) perspective *or* an interest group determined (under-sociologized) perspective;

- *either* a market *or* a hierarchical approach.

Network institutionalism as a stepped up constructivism enables us to heed the argumentative turn in policy analysis with a focus on discursive committedness itself, rather than merely the application of the commitment of others. This is an interpretivist focus on how we create normic statements and practices; and reflexively critique the institutionalizing practical reason behind them. Agency and material interests are seen as *context - - dependent*.

Beyond the application of sedimented discursive strategies that come to be taken for granted (e.g., Hay, Schmidt) we need a focus on representing the interpretations by which new discourse and institutions are constructed *endogenously within* a field of practical reason (e.g., Ansell, Bevir, ) - - one that leads to critical evaluation of the truthfulness of justice of such newly constructed discourse and institutional practice.

Ansell's network-oriented approach recognizes the necessity for argumentative strategies to work their way out both inter-organizationally and at multiple levels of governance. Ansell's network institutionalism (**NI**) further recognizes the complementarity in heterarchy, rather than the pyramid quality of hierarchy. **NI** also understands that like markets, networks operate without central direction and according to rules of exchange. Nonetheless, unlike markets, network interactions are more diffuse than discrete, and more social than impersonal. In contrast to markets, normative commitments and commitedness are important (Ansell,1997-2000).

Following Frank Nullmeier (2006), we an distinguish two types of non-hierarchical networks: *bargaining regimes* and *argumentation networks.* The former allows for heterarchy, but participation can be limited to a few exclusive participating actors whose preferred knowledge form is the generated managerial expertise as discourse. The extent of recognition of participants and their discourse is the main characteristic, as is an emphasis on allocation privileges rather than on participatory rights.

Bargaining regime is a term used by David Kettler ( ) to characterize the Social Partnership relations and *rapports* associated with both neopluralism and neocorporatism as well as the statistic integration of labor. (In the U.S., e.g., the Wagner Labor Relations Act of 1935). Bargaining regimes inclusive of social partnership forms like advisory councils, works councils, codetermination and quangos tend to justify demands within a discourse of generally accepted/credible norms, consensus bound norms rather than consensus projecting ones.

Argumentation networks encourage participant negotiating actors to persuade each other of the validity and justifiability of their warranted assertions. They do so within generalizable norms, rather than generally accepted conventions. They do so knowing they can pursue their claim's immanent justifiability, in terms of broader concepts of social justice.

Networks serve as enduring relations and institutional frameworks of negotiated interaction among a plurality of interdependent yet operationally autonomous actors (Sorenson and Torfing, 2007: 10, 26/27). Further, networks

- are not based on the sameness, but on the complementarity of heterogeneous elements
- exhibit "bounded rationality" in enduring fundamental values within

which internal negotiations can take place;

- are incessantly creating and transforming codes and protocols defining them;
- exhibit an awareness of and responsiveness to emergent effects of their network interactions;
- confront the limits of network range in confronting other autonomous social subsystems; and
- need to be coordinated and "structurally coupled" to maximize their contribution to larger issues of socio-economic justice and ordering beyond their own domain.

Network governance both characterizes and renews an increasingly complex pluralism.

## II. A Vital Undercurrent in Comparative Labor Law

A *critical sociology of law* developed along paths ploughed by Harold Laski in Britain and America before the Second World War, as well as by the Weimar Republic Era Labor Lawyers, (eg., Herman Heller 1927;cf. Caldwell; Dyzeahaus); Franz Neumann, (1942; 1986/1st published 1936) and Otto Kahn-Freund (1970 a, 1970b, 1976, 1981).

This argumentative strand of social democracy critically describes an evolution- within the husk of capitalist private and public law--of postliberal conceptions of governmentality, institutional justice and jurisprudence wherein contract and private property rights are adapted to a sense of constitutional reordering of the economy and society. Such evolution is rooted in the collective constitutive contracts and multipartite consultations and bargaining that characterize what the political sociologist Gerhard Lehmbruch (1998) defines as "Negotiated Democracy."

Laski and the Weimar labor lawyers keep us aware of the importance of both *practice* and *juridification* in institutionalizing a regime of the Autonomous Social – uncoupled from the State, yet linked through complementary institutions with civil society as a new form of live – that is, a new governmentality. Such practice and institutionalizing reflect the discursive struggles of *pluralist* Social Subjects of Rights, rather than a *monist* Hegelian-Marxist notion of a Social Subject of Right. Their focus was on the law creating capacity of autonomous collective associations. They shape their own autonomous domains heteronomously. They institutionalize collective rationalities – institutionally separated, but recursively and complementarily connected to each other. The governance of social law derives from collegial institutional forms of association, as noted from Otto von Gierke a century ago, through F.W. Maitland and Harold Laski in the early twentieth century, down to Guenther Teubner today. This is a form embedded in different genres of discourse and practice, with immanent capacity of blossoming into an integral concrete institutional order. Teubner has followed his social law predecessors at the London School of Economics, Laski, Otto Kahn Freund and Lord Wedderburn; and continues this critical sociology of law focus non-oligarchic horizontal coordination as *heterarchy*. This amounts to a pluralization of deliberative democracy within the autonomous law-making.

This tradition of institutional logic does not start with a system of natural rights preceding human association, rather it starts with a pluralist tradition of consociates constructing forms of intersubjective sociality. This institutionalizing tradition reflects a century of liberation from traditional forms of solidarity--including mutual benefit and local insurance communities. It has been a century in which the limits of liberalism became apparent in its inability to either provide social security or to maintain or generate social solidarity in the face of disincorporated social relations. Social law came to include poor law, education law, family law, social insurance law, and social services law -- in addition to labor law. All provocatively confront the concept of private property as the core ordering principle.

Peter Caldwell ( ) notes that the term *Social Rechtsstaat* (*Sozialer Rechtsstaat*) was a term used by Hermann Heller; and that it is best translated into English as the Rule of Social Law--or the Governance of Social Law--rather than the "Social Rule of Law" State. The social law tradition and concept of Social *Rechtsstaat* captures best the approach of Hugo Sinzheimer (1875-1945). Making use of the *Genossenchaft* theory of Otto Gierke, Sinzheimer challenged the "concession theory" of legal groups of German positive and Roman law. Like Frederick Maitland, John Figgis, and Harold Laski in England, Sinzheimer argued that social groups are "organic entities," autonomously capable of willing and acting rather than legally fictitious personalities as they were understood under Roman law. These authentic group personalities make their own rules--what Gierke called "social law." Collective bargaining agreements fit this new category. Gierke's theory meant that labor unions as well as employer associations were legitimate groups with rights and duties. These groups could speak through their own organs in ways determined by their own internal rules, that is, their own substantive rationality. Not only within one's own particular group but between groups, such social law takes legal priority over the simple individual labor contract.

Hermann Heller (1891-1933), like Neumann, would come under the wing of Harold Laski. He championed the idea of the Social *Rechtsstaat* in the sense of the socializing of the *Rechtsstaat* idea and its institutionalizing practice. Heller understood the Social *Rechtsstaat* as a process of the democratization of reason, a conceptualized process which replaced the idea of the dictatorship of the proletariat--as the meaning constitutive human activity which continually shapes the normativity of the social lifeworld as institutional facts.

Heller understood how institutions traditionally associated with the *Rechtsstaat* idea and practices of liberalism could be given a new and broader social base. A Social *Rechtsstaat* was in the interest of the bourgeoise whose concern was with security of both contract and property with certainty; and in the interest of the proletariat intent on developing social claims of opportunity, protection and participation. There was a Laski-like pluralist emphasis on the organized collectivities of civil society, and on an awareness of a possible new civic culture of enabling group rights.

Heller came to understand concepts such as the "governance of social law" and Social Rechtsstaat as *middle range* concepts that refer back to broader shared regulative values of social democratic justice as they are credibly applied in practice. He stressed an internal connection between a sociological approach and the reasoning drawn from theories of justice.

Immanently posed as a focus not only on autonomous spheres of justice, but how they could be *coupled* or *coordinated* in a process suffused by democracy and "the rule of law."

The governance of social law came to be understood as a genre of collegial institutional forms within civil society wherein forms of sociability and solidarity are channeled

1. without nostalgic gild attachments: and
2. without a syndicalist fascination (or "prophylaxis" to quote Robert Michels) with the simplicity of the workers councils/communities (*Arbeitsrate*).

Sinzheimer along with Hugo Preuss--the draftsman of the Weimar Republic Constitution--helped break the backbone of the Luxembourgian (*Arbeitsrate*) with the institutionalizing of works' communities (*Betriebsrate*) with a program of protocolism, arbitration and joint decision-making--later supplemented in 1972 by co-determination on corporate boards (*Mitbestimmung*). More recently, the *consultative councils* in the Netherlands play a similar role as the *Betriebsrate*. All operate as *complementary institutions*--complementary and parallel with rights of property and contract.

Carl Schmitt had noted in "*Freiheitsrechte und Institutionelle Guarantien der Reichsverfassung*" (1931) and "*Grundrechte und Grundpflichten* (1932) that the Weimar Constitution and the Weimar Era generated a new constitutional category of institutional guarantees which surpassed the traditional protection of individual liberties, e.g., private property; marriage and family; the right to inheritance; and added the autonomy of the municipalities and of the universities and of independent works unions. Included in the section of the Weimar Constitution on Basic Rights were not only the classic liberal formalistic guarantees, but in addition and alongside were as well programmatic statements of social rights to education, freedom and property which help us transcend social inequality so as to assure the enjoyment of the primordial liberal rights. These were constitutionally-based guarantees of the State's responsibility to create a protective environment of institutionalized procedures to promote and secure the Basic (Liberal) Rights. Ironically, the fascist corporatism initially espoused in Schmitt's analysis contributed to the growing recognition of these new guarantees of institutional roles and protections, necessary to enable Basic Rights. These auxiliary rights are seen as promises rather than Basic Rights by such leading statute positivist interpreters of the Weimar popular sovereignty beyond the definition of sovereignty offered by Hobbes.

Neumann's Weimar Republic work in labor and social law – influenced by Carl Schmitt--focused on the legal formulations of institutional guarantees (*institutionalle Garantien*) as complementary guarantees (*Konnexgarantian),* and as complementary institutions (*Konnexinstitut),* associated with the freedom of association. (Neumann, 1932: 86-88, 116-119.) Neumann saw the collective contract of labor law resulting from collective bargaining and what would come to be called Codetermination (*Mitbistimmung*) as complementary institutions serving as the bearers of a social democratic interpretation of law. The *complementary institutions* were understood in monopoly capitalism within national boarders as cartels and counter-balancing trade unions, anticipating the transnational corporations, transnational labor confederations, and international nongovernmental organization of contemporary global capitalism. The complementary institutions come to force into the background the "principal

institutions" such as the partnership, firm and individual prerogative contract that they were originally intended to augment and serve through auxiliary legal interpretations and institutional practices. (Neumann, 1930.)

The related problematics of *the governance of social law* and *complementary institutions* are further differentiated in the effect of regional frameworks such as the European Union (EU), in state regime forms such as the *Rechtsstaat* or the *Sozialstaat*. The differentiation changes the appropriate normative-empirical frame of reference. EU practices of coordination of member nation policies -- OMC/ "Open Method of Coordination" -- and related transnational "comitological" policymaking under the auspices of the European Commission create "multiple policy Europes." Such a two or three tiered EU, referred to as a ***Sektoral Staat*** wherein social policy, social rights and law must be complemented on a EU level to deal with market-correcting consequences of globalization and European regionalism. (See MacCormick 2007; cf. Schmitter, 2000 and Scharpf, 1999.) State regime forms have to be adapted in order to guarantee social policy and social rights and law, increasingly affected by what we will refer to as transnational networks of enterprise that divide up the globe and regions of it in heterarchical sectors. See Figure 1.

Figure 1 below summarizes genealogies of the critical sociology of law inferred from the vital undercurrents in comparative labor law and the law of associations. This summary framework of genealogies also contextuates the development of the issues of the governance of social law/reflexive governance that ensues in the sections that follow.

# GENEALOGIES OF A CRITICAL SOCIOLOGY OF LAW

**Droit social/Solidarité**
Duguit
Hauriou
Kurkheim
Gurvitch

Kant **(Rechtstaat)**
Hegel **(Rechtstaat & Sittlichkeit)**

**Weber** (Anstalt: institutional theory of associations)

**Marx**
Renner
H. Preuss
(Weimar constitution)

**Sinzheimer**

**Theory of Pluralism**
**Maitland**
**Laski**
legal personality of association & social rights

**Jhering (institutionalist theory of law**
**Gierke (theory of natural law of associations)**

**Schmitt**
(institutional substance)

R.M. MacIver
R. Miliband
P. Hirst
L. Panitch
K. Mannheim (sociology of knowledge)

**Weimar Labor Law Legacy**
Kirchheimer
H. Heller
Neumann
Kahn-Freund

Luhmann (systems analysis)

**Critical Theory of Society**
(Adorno & Horkheimer)
**Habermas**

**Lord Wedderburn**

**Law of Associations & Corporate Governance**
S. Leader
M. Roe
P. Gourvetich & J. Shinn

**New Deal Legacy**
John R. Commons & Philip Selznick (old institutionalism)
Adolphe Berle
Lon Fuller
David Truman
William Simon, David Stark & Charles Sabel **(heterarchy)**

Neil MacCormick & Ota Weinberger **(institutional theory of law/normative institutionalism)**

**Teubner**
D. Zolo
Latour
theories of **complexity, polycontexturality & networks**

**Kritische Justiz**
U. Preuss
B. Peters
K. Gunther
Joerges

Alexy,

## III. Laski-Schmitt Aporetics on the Possibility of the Social

Aporia: the experience of a non-passage before a threshold.

Aporetic knots present us with a condition of impossibility and possibility.

Aporias reveal impasses and the step related to the path beyond**.**

Aporetic paradoxes posed theoretically seven decades ago by Carl Schmitt and his egalitarian opponent Harold Laski persist as the most important in the past century regarding alternatives to sate-centered law, and the extent to which private law making is not only beyond state law, but commercial law as well, revealing what Leon Duguit—following Rudolf von Jhering--referred to as "the law of purpose" and indeed social law, reflecting social solidarity as an intact substance of collective will, rather than an aggregate of individual consciences. Aporias are puzzles that can reveal the promise of discourse, not un-bridgeable antinomies.

"Laski-Schmitt aporetics" propel our thinking toward a non-statist law-making that represents path-shaping rather than patterned path dependency. At the root of both thinkers' work is the related coupling of "complementary institutions" and "institutional complementarity." This coupling has emerged as a central motif in present day arguments from both historical institutionalism and rational choice theory. But significantly in rethinking social democracy, it is no longer a phenomena within national borders. This critical coupling now ghosts transnational nonstatist law and regulation. A plurality of nonstatist networks has emerged where state governments cannot steer directly. These complex networks are bounded not by territory, but by functionality, communicative codes, and particular practices. These networks anticipate what Ann-Marie Slaughter refers to as the "decentered form of global governance and cosmopolitan law." Beyond Laski's own focus on protecting labor and social rights from the vicissitudes of monopolization, the problematics of sovereignty and complementary institutions needs to be appreciated both endogenously as well as exogenously within an internal rules jurisprudence both within borders and beyond.

Carl Schmitt tantalizes the Critical Legal Studies (CLS) Movement with its decinstructivist emphasis on the rule of law as ideology. This differs diametrically from the Critical Sociology of Law tradition with its constructivist calling to institutionalize in legal practice deliberative or negotiated democracy. There is Schmitt'srecognition of normative indeterminacy. How we ask do we participate in norms in age of disincorporateness, non-Euclidian geometry and a physics that defies a stable unifying Kantian system? The law is seen as unavoidably indeterminate in its meaning and its application; it is no longer derivable from natural law, and seems robbed of its authoritative substance for meaningful guidelines. Is there a consequent of any semblance of determinancy in a pluriverse of incommensurable subjecivites and ideologies, rendering all things equivalent? Can we fill the voids and close the gaps left by the letter of the law in such an age of pluralism?

Schmitt invites a post-liberal governmentality, and before the 1930s searched for a concrete institutionalist order that overcame liberalism on the pattern of Gierke's *Genossenschafslehre* studies of medieval guilds and associations. Schmitt searched for an institutional order capable of forming a concrete order of substance beyond the de-soulded and vulnerable liberal state neutrality. He saw liberalism as creating (1) a society which desperately requires a sovereign decision, but seeks at every point to postpone or prevent such a decision from being made; and (2) a system of democracy within which interest groups can impose their values on others if they capture governmental power. Every political institution, argued Schmitt, is specifically intended; each with a particular principle on which it rests, and which must be the criterion of institutional legitimacy. But Schmitt's anti-liberalism amounts to (1) almost agnostic reflections on the disappearance of soul and substance--a Sorelian affirmative mythic substance – enabling us to be treated equally; and (2) ultimately the retrieval of a prefigurative sacral ordering rather than in creating open future-oriented ones--as well as a state separate from society, yet keeping the latter in check. Order/ordering is seen as creating norms and rules, rather than vice versa.

Like his great foil of that era Harold Laski, Schmitt was pushed from the institutional ordering provocation of pluralism toward statism--both for opposite reasons in confronting egalitarianism and its fascist containment. Both remain ironically linked. Both wondered whether equality and social rights, rather than property and private rights, are affirmations of the concrete substance of popular sovereignty and post-liberal governmentality. But whereas Schmitt turned toward an instinctive homogeneous General Will, Laski worked for a socially constructivist/heterogenous one. Both understood the eclipse of state sovereignty that the earliest years of the Weimar Republic foretold, as an autonomous network of negotiated democracy/social compact rather than a state *per se* was emerging. Contrary to Laski's Rousseauian disposition, Schmitt saw political theory as one endless footnote to the *Leviathan*. Contrary to Schmitt's unitary purpose and mystical communal indwellingness, Laski searched for the passage to a Legal Order/ordering found in the pluriverse of social reality, which men and women make for themselves as the *social subject[s] or right[s]* in their private associations and their transaction, as well as in their social solidarity and its consequent labor law and social law.

For Laski, the vital query was how legal forms emerged reflecting the nature of negotiated democracy. Specifically, this is the *autonomous law* made by collective organizations (*heterarchy*) and not state-centered regimes (hierarchy). This is what Philip Selznick (1997) referred to as the constituting of a scheme of inner governance of regulative institutional practices--reflecting a community of discursive commitments, possessing an inner legality. This is a vital--if latent--undercurrent according to Laski's LSE descendent and successor to Otto Kahn-Freund, Lord Wedderburn: a decentered discursive tradition of institutions and practices rather than external standards of justification tied to collective labor law, adapting property rights to social/mutual ordering. This autonomous law is not the object of pure cognition, but the values that the trade union and social democracy movements commit themselves to--as warranted assertions of a postliberal juridico-discursive order. Schmitt's challenge is to find a concrete postliberal institutional order, that the State cannot be a mere battleground for different interest groups which can impose their own values. Schmitt cannot do so without an appeal to religion and tradition; and without pushing a de-formalization regarding the gap between norm and concrete case. He emphasizes *normless will* to replace the *will-less* norm associated with the Hans Kelsen's pure normativism. This de-formalist/anti-formalist communitarianism of the *Volk*

attracts Leftist CLS (especially Unger) with its simplistic value of community over form. Yet its aestheticism ignores the way many corporations take advantage of deformalized environmental law by controlling expert discussion.

Laski skirted around the syndicalism of Duguit and the functional corporatism of Durkheim, by aligning with the pluralism of William James and the progressive constitutionalism of Justices Oliver Wendell Holmes and Felix Frankfurter. He resisted aspects of the Marxist tradition:

1. the determinist/instrumentalist approach to the legal, the normative, and the institutional as mere superstructure; and
2. the theory of the proletariat as a theory of the proletariat.

Instead, he recognized the reality of social, cultural and political pluralism and with it

1. the emergence of private alternative governance regimes moving away from the traditional theories of the individual prerogative contract and private property;
2. What went with this development, a phenomenon Gunther Teubner likes to label today as "the collision of legal regimes."

Rather than a theory of the historical agency of the proletariat as the Social Subject of Rights, Laski infers the Social Subject[s] of Right[s] as the engine of Rousseauian popular sovereignty and its law-making function.

Schmitt distinguished between 19th century liberalism and 20th century democracy. Yet rather than a Democratic *Rechtsstaat* based on reflexivity and proceduralism within institutional spheres, he offers a model of a strong state which cancelled out civil society's own independence and the social dilemmas it generates. Schmitt eschews the *Rechtssaat tradition of Kant and Hegel* as well as the British 'Rule of Law" commitment championed by Laski--as well as Barker and Maitland--and which drew the interest of Neumann and Kahn-Freund. Instead, Schmitt looked for a release from the fetters of Kelsen-like normativism and proceduralism, with enabling acts that increase the discretionary power of the Executive and negates the emergent negotiated democracy of interest group associations, professional societies, corporations, and trade unions. The political was unavoidable for Schmitt, who was determined to save the state from socialism and cosmopolitanism, from the politics of deadlock/gridlock and immanent civil war, from the penetration of the State by worm-like civil society association--from a normativist set of procedures on global regulation of commerce and human rights, which lack *pouvoir constituent*.

Laski and Neumann and the tradition they spawned suggests a pluralism which placed the source of rights outside and prior to the State. Such a pluralism is one of the democratizing social subjects(s) of rights(s) realizing generalizability of rules and egalitarian impulses which might not founder on the rocks of national sovereignty.

The Laski -Neumann *rapport* resists Schmitt's politically oriented law, and sense of "institutional justice" which

1. does not tolerate formalism;

2. does not accept a disaggregation of sovereignty or multiple legal regimes and new forms of rule creation;
3. does not welcome multiple perspectives, interpretations, and participation in questioning the legitimacy of legality itself; and
4. which is antagonistic to the Wilhelmine notion of a *Koordinationsrecht* where each sovereign has its realm and a state coordinates the plural regimes of regulatory and legislative authority. (See here Gunther Teubner: "'Global Bukowina;' Legal Pluralism in the World Society," and "Societal Constitutionalism: Alternatives to State--Centered Constitutional Theory." )

Laski presents sovereignty not as *imperium*, but as formalized voluntarism. He positions the crucial queries of democratic legitimacy taken up by Jurgen Habermas and his students regarding the democratic institutionalizing of internal rules jurisprudence--and what goes along with it, a theory of institutional justice with a related political sociology of institutional normativism. This enabled him to gauge the disintegration of private property relations, the transformation of contract law, and the growing extent of both overlapping legal forms and the lucrative practice in "conflict of laws."

Laski suggested a third revolution in sovereignty--beyond Hobbes' and Locke's property securing accounts. His legal analyses in the teens and the twenties anticipate the accelerating movement for universal human rights and the need for transnational economic regulation. These also anticipate the emerging transnational regulations coming from nation states, transnational private actors and nongovernmental organizations as a *ratio juris* undergirding a mutually willed normativism, rather than a coalition of the norm-less willing sovereigns.

Lord Wedderburn himself in "Laski's Law Behind the Law: 1906 to European Law" (R. Rawlings, ed. *Law, Society and Economy,* Oxford: 1997) notes how remarkably Laski foresaw the drift toward de-regulation of commercial enterprise. Further, Wedderburn shows how Laski's own work started with his analysis of judicial creativity in interpreting the common law--as in the 1901 decision of Taff Vale Co. v. Amalgamated Society of Railway Servants--could overturn legislated/posited labor law and the mutual orderings of complementary institutions of conflict regulation they overturn. Laski, argues Wedderburn, represents the need to oust the common law behind the alternative labor/social law; and would work to defend and sustain the institutional complementarity of European Union Labor law and social law, the Social Charter of the Protocols of Maastricht, the Conventions of the International Labor Organization, and the European Convention for Protection of Human Rights.

Unfortunately, In Laski's leadership of the Labour Party Campaign of 1945 and his collectivist turn during the War Against Fascism, he regressed to a view of the state as the only vehicle to restrict private greed. While this undercut of the enduring force of his scholarship, it does not demean it. In rethinking social democracy, we need not only retrieve, but more critically *redeem* his pioneering work on alternative forms of autonomous law.

## IV. From Plurality to Complexity

We go beyond Laski's theories of pluralist ordering of a new heterogeneous social democracy as a counter to Schmitt's reordering along notions of homogeneous nationalism/racialism. There is an emerging interrelated sociological theory of **heterarchy** and **networks**. These are the enduring patterns of large scale interaction among heterogeneous social actors constituted by **relational contracts** and shared **protocols** with coordinating norms, values and practices. Compared to hierarchies, the individual components in a network are more autonomous--bidirectional and multilateral rather than characterized by vertical integration. Conflicts are settled by negotiations referring to commonly agreed to **benchmarking** delineated in protocols.

Heterarchies/Networks are constituted by **relational contracts** and the **connected contracts** spelling out the multilateral self-regulation structures that secure the network with norms of reciprocity and relational purpose. These internal structures of legal review facilitate juridical mediation, arbitrations, correction and development of the latest interaction of collective contracting with institutional guarantees for organized participants in these autonomous networks (or sectors).

**Polycontexturality** combines heterarchy with a need for coordinating the resolution of the colliding autonomous subsystemic regime logics of each network/heterarchy (or sector). (Teubner 2002; 2003/04a.) Teubner uses the concept of polycontexturality to account for the necessary recognition of each organizational node of a network of the related autonomous regimes that affects it or could affect it; as well as to build on the concept of "institutional guarantees" for the autonomy of the complementary institutional nodes of networks.

Guenther Teubner poses *polycontexturality* as the response to the fragmentation of our modern society into a plurality of self-constituting contextures of conflict regulation and self-limitation. *Society exists only in the mutual recognition of the blindspot that comes from one's own contexture, and that a unified noncontextural perspective (pace Schmittian homogeneity)is unavailable. There are plural modes of discourse, and frames of reference.* These contextures emerge as codes and programs of internal governance beyond representative state apparata, transcending the traditional binaries of State/civil society and public law/private law. *Polycontexturality* enables the overburdened private law subsystem reflecting social differentiation/fragmentation to respond to the particularities of institutional contextures within civil society as well as to the colliding discursive regimes they engender. How can private law regimes calibrate their conflict regulation procedures to the plurality of discourse regimes? Beyond the affirmation of diversity, there is the need to protect the complexity/differentiation of the global network society Manual Castells describes as being constituted by the space of capital and information flows.

We can detect a four state mutual development in the advanced industrial societies, as the chart that follows summarizes.

| *Types of pluralism* | *types of social rights* |
|---|---|

| | |
|---|---|
| Pluralism I: the web of multiple Voluntary associations | 1. the right to association |
| Pluralism II: interest group liberalism Centered around a Keynesian welfare state | 2. rights to social protection enabling assistance |
| Pluralism III: the flowering of diversity/ Multiculturalism | 3. rights of peoples re: their culture and language |
| Pluralism IV: the complexity of cybernetic Information flows | 4. rights of peoples re: system complexity |

Teubner's polycontexturality approach conceptualizes an emergent "heterarchical" yet institutionally complementary and interconnected network –type linkage at the level of organizations and professions. Teubner looks to a multiplicity of *subsystemic subconstitutions*, where private law is constitutionally constrained to take of its diverse social systemic context (hence polycontexturality). Danielo Zolo (1992), adds a new level of social rights--the rights of complexity, the right to preserve practices/processes necessary for social systems to retain pattern maintenance. These can be ethnic of linguistic, community or neighborhood based, craftsman or expert based.

Following Charles Sabel, we can take our lead from the attempted countervailing globalization of information flows and advocacy campaigns around labor/social rights and human rights. Specifically, we note how such countervailing power are pressuring multinational corporations (MNCs) and multinational nongovernmental organizations NGO to adopt labor and social standards and to set up evaluation and monitoring protocols with a schedule of enforceable sanctions. In many ways this paper poses a sociology of rights and law approach to the creation of a New New Deal to regulate globalized capitalism.

Under conditions of globalization, autonomous governance regimes increase. At the same time they lose political mediation by the State. Sites of decentered discourse and decentralized law are extended. An environment of complexity grows with a cascading amount of choices, differentiated subsystems. As the level of decentralization grows there grows a complexity of plural logics, and the more interdependent the variables become (Zolo: 3-7). A higher order of plurality grows one that involves not just the mutual recognition of otherness, but a recognition of the plurality of discursive logics within global society and the need for some *interdiscursivity* of colliding rationalities. This is a hetarchy of logical domains. Luhmann, in *The Differentiation of Society* (1982), noted this plurality of logical domains, which--following Gotthard Gunther (1982, 1985) and Warren McColloch (1945) before him--he labeled *contextures.* Within institutional contextures specific codes emerge to help provide transjuctional operations of plurality, rather than operations of simple binaries. These are codes for interdiscursivity and mutual learning. They are not guided by a prefigurative or prestabilized harmony, as hinted by Carl Schmitt.

In this higher order of plurality correlative to globalization -- heterarchies of discourse specific norms and institutional contextures--call for a new form of governance. This is one with a sense

of complementarity necessary to bring together seemingly incommensurable and conflicting explanatory systems/perspectives/rationale. This is a non-linear complementarity: a circular organization on the pattern of neural networks rather than on that of hierarchical order.

This is the complementarity of the network model, which Castells (1997: 356-59) notes involve variable and fractal non-Euclidian geometry of plural truths, as well as a dematerialized geography.

Sociologically, networks can be understood as voluntary systems of negotiation, consultation and shared governance-well beyond the simple dyadic relation of the individual prerogative contract. (See, for example, Scharpf, 1997: 136-147.) They are constellations of relationships for resource exchange and mutual support within a wide set of organizational actors.

1. trying to influence collective decision-making; and transactions
2. trying to stabilize trustworthy interactions, flows of information and transactions.

Networks are at a level of modeling wherein one event can express itself simultaneously in different forms--wherein similarity is understood as *iteration* rather than sameness.

Teubner (1999) – following Luhmann, McColluch and Gunther--refers to this complementarity of fragmented rationales/perspectives as *polycontexturality*. He argues that private law cannot abdicate its responsibility to connect to these diverse rationales/perspectives and the new conflicts they engender. And recognizing the need for a new form of the governance of social law, Teubner argues for a constitution of polycontextural law reflexively responsive to the collisions involved in this heterarchy of discourse specific norms. Can private law take a partisan stance for the "Other"? For the diverse colliding rationales polycontextural law recognizes and responds to this heterarchy--a mastery without a master, a society without a sovereign. Over and above the late 20$^{th}$ century recognition of a third generation of social rights to sustain and protect relations of diversity (i.e., multiculturalism), there is a fourth generation social rights to sustain and protect polycontextural complexity necessary for equitable information pooling and mutual monitoring in a global network society. Polycontextural logic (**PCL**) helps us to institutionally design the procedures and communicative presuppositions for discursive deliberation in the context of fragmented/plural legal territories of relatively autonomous law.

These third and fourth generation of social rights are supportive of action within group life, rather than of the recipient passivity of the protected individual. They carry with them enabling associative potential rather than stabilizing entitlement allegiance. They can create morally autonomous citizens rather than clients or footloose entrepreneurs without social obligations.

Teubner sees the governance of social law, as a required polycontexturality addition to regimes of private law--a requirement to consider affecting institutional contextures. And Sabel (1994a) sees such institutional design as transforming transactions into discussions by which parties come to reinterpret themselves and their relation to each other by continual joint deliberations. Through these, common understandings are articulated as reciprocally defining. Plural communities are contextuated institutionally to regulate themselves in their interdiscursivity.

They are connected to social bonding and self-binding elocutionary forces inherent in communicative reason, and in an evolving constitution of decentralized discourse rationality and autonomous law (Bohman, 1995: 241; and Alexy: 1989, 1993).

The third and fourth generation social rights are discursive rights to diversity and complexity. They fit into an evolving theory of centrifugal legal pluralism. They fit into a *relationism* articulated by Karl Mannheim in *Ideology and Utopia* some eighty years ago--one which accepts plural validity within multiple perspectives. And they fit into the relationism of interdiscursivity and long term relational contracting we have described. But discourse, discourse-specific norms and procedures, as well as principles for critically evaluating discourse are not enough. They must be linked to institutions, institutionalized practices, and institutional guarantees.

Carl Schmitt saw the institutional guarantees of social rights as part of a fatal tension and stress-fracturing of the Weimar Constitution the unbalance relation between its legitimizing and its integrative functions. Precisely this is the tension between a foundationalist participation in the process of democratic will formation and the commitment to institutional devices to foster the social cooperation of dissenting political forces. The pressure for state intervention to assure social integration undercut the assurance of democratic self-government, and substituted for the lack of development of a deeply articulated and autonomous civil society.

## V. Institutionalizing the New Protocolism

Charles Sabel in numerous articles over the past decade (1994; 1995a; 1995b; 1996; 2006) points to Social "Learning by (Mutual) Monitoring" as a successor form of the governance of social law--a mode of coordinating decentralized chains of suppliers. The goal is to rechannel diverse forces of globalization for the advancement of social ends that can constitute a transnational regime of labor and social performance standards. It marks a form of protocolism for collaborative social learning: a protocalism of mutual monitoring and evaluating subcontractors that leads to continued reflection, analysis and democratic experimentation that further refines both the standards and the monitoring. "Protocolism" is a concept derived from the "Protocol of Peace" that Louis Brandeis got mutual agreement to restrain chiseling in the New York garment trades in 1910. It was a "treaty of peace, a conflict-regulation regime of norms and internal trade governance laws. It specified modes of arbitration and interpretation of the bargaining agreement. This protocolism was extended by Morris Hillquit in the tripartite National Recovery Act Codes during the First New Deal of Franklin Roosevelt.

In the movement from national laissez faire capitalist regimes to national organized capitalist regimes, protocolism emerged as both a voluntary system of code creation and constitutive contracts that configured collective negotiation orders. The enduring trace of practice here is the law-creating capacity of autonomous associations either within or across nations--what can be referred to as *the governance of social law* beyond private commercial contracts. Within such autonomous social law, private law is institutionally constrained to account for the colliding norms and discourses that contextuate
associations engaged in transnational commerce.

Where governments and transnational corporations have been slow to respond to environmental spoliation, and the suppression of rights of workers, children, and indigenous peoples, **INGOs** [international nongovernmental organizations] have taken the initiative to create institutions of monitoring, accountability, and compliance. INGOs are subcontracting agencies involved in advocacy, service and mutual benefit activities in transnational settings, often for those who lack a voice in the globalizing market and its political economy. INGOs play a critical new role in constructing a voluntary system of code creation that develops, maintains and sustains cosmopolitan social standards, possibly linked to the benchmarking protocols of the International Standards Organization (ISO)., and as *lex mercatoria* and *lex digitalis/electronica* (Teubner, 2007). These are networks of transnational voluntarism. Some INGOs and trans-national corporations (TNCs) – like Nike, Reebok, and Mattel – have voluntarily agreed upon codes of conduct regarding labor standards and social performance audits for their subcontractors in lesser developed countries. These voluntary code authorities provide baseline self-regulation and disciplined self-monitoring in the manner of National Recovery Act compulsory code setting discussed above. INGOs take advantage of newly rescaled supra-national spaces, in arguing for new forms of multi-level/multi-layered governance. Their legal activism contributes to "tightening up the stitches in the legal net" (Cassesse, 1990), and in generating a network of autonomous institutions for standards and signals of reflexive governance (Benhabib, 2006; Teubner, 2007) which is discussed just below in the next section.

In the regime of globalized capitalism, a new form of protocolism has emerged, instituted less by labor unions and corporations and more by INGOs: e.g., codes of *transparency* in conduct and procedure; social *performance audits;* and *learning by monitoring* practices. This protocolism reveals an emergentism of a cosmopolitan governance of social law--one whch complements and corrects the notion that multipartite governance winds up in vertical concertation and the subversion of the rule of law. We find that the *democratic experimentalism* of INGO protocolism actually advances diversity of governance, hierarchy rather than hetarchy, institutional complementarity, and what Sabel and Gerstenberg refer to as "directly deliberative polyarchy" and what Sabel, O'Rourke and Fung [2000, 2001a, 2001b] refer to as "ratcheting labor standards." From a protocolism for organized capitalism in the early 20$^{th}$ century, we approach a protocolism for global capitalism in the early 21$^{st}$ century.

Sabel suggests a system of "benchmarking" rolling rule regulation of decentralized labor and social practices--benchmarking proceedings of decentralized learning creating pragmatic protocols for obligations within networks. These benchmarked norms and laws are incrementally "bootstrapped" into a more enveloping transnational regime of social law. Subnational units of governance can set social performance standards and choose the means to attain them. Regional and national coordinating bodies require actors to share their knowledge with others confronting similar situations.

Mutual monitoring and learning among the network participants is encouraged; and a sense of mutual and respective accountability is stimulated through the participation of citizens in decisions that affect them. Sabel and Dorf (1998) give examples in the regulation of the environment; the regulation of nuclear power plants; the procurement procedures vis-à-vis sophisticated military hardware; child protection services; industrial toxins control; and community policing. Each project of collaborative learning is a *iteration* within a network of

joint inquiry that binds firms in the network together, so as to allow predictiveness in the evaluation of network structure and capabilities.

Specifically, Sabel sets out the steps in "Learning by Monitoring' social governance:

1. adopt voluntary codes of conduct for social performance standards;
2. set evaluation and monitoring protocols;
3. determine how to monitor compliance with such standards;
4. determine how to test and evaluate social performance;
5. set up a system of information pooling by participants within the network;
6. verify information pooling data for the network;
7. build a system of completing third party monitors from certified accounting and consulting firms to audit subcontractors to detect protocol/code violations;
8. use competitive pressures and learning opportunities to improve social performance;
9. institutionalize a schedule of sanctions through a superordinate regional, national or international body so as to guarantee that suppliers in the supply network do supply;
10. provide opportunities for interfirm and intrafirm reflection and recalibration of social performance;
11. determine how to set goals for improvement or modification of social performance;
12. use "social labeling" to reward and shame scofflaws; and
13. utilize surprise inspections and follow-up inspections to keep firms serious about social performance.

The primary moral duties of those who run firms is to obey the law and ensure that their employees do as well. Trust relations are a key goal of the governance of social law. And a sanctions schedule helps build a pattern of comparative advantage for compliance with social performance standards.

On a global scale, the Fair Labor Association (FLA) directed by 1960s antiwar activist and former Carter administration ambassador Sam Brown has developed an Apparel Industry Partnership and a 1997 Workplace Code of Conduct and Principles of Monitoring. The Ethical Trading Initiative (ETI) has organized training programs, tested models for inspecting verification standards and for selecting local stakeholder participants in the evaluation process. The United Nations has recently promulgated a Draft Code of Conduct for Transnational Corporations. The World Trade Organization (WTO) and the World Bank can set up sanctions schedules. And the International Labor Organization and the International Confederation of Free Trade Unions can set up monitoring and evaluation standards. Social clauses can be written into trade agreements. Other examples include the Global Reporting Initiative, the Ethical Trading Initiative, the Clean Clothes Campaign, the Workers Rights Consortium. These are a new generation of governance of social law issues. As in Weimar these are complementary institutions at best, complementary to capitalist relations of property and contract, as were *Betriebsrate*/works councils.

## VI. Reflexive Law / Reflexive Governance

The new protocolism focuses on standard-setting: e.g., performance standards, quality standards, compatibility standards, interoperability standards, ratcheting labor standards, ecological standards. Such autonomously constituted standards - - outside formal government rule-making - - is referred to as the *self-enforcing reciprocity norms* (SERN) characteristic of *reflexive governance.*

The new protocolism reflects the multiplicity of autonomous social subsystem regimes of rules, standards, laws and logics. It is a form of network self-regulation wherein one autonomous subsystem's reflexion with other subsystem constitutes the heterarchy of multi-level governance. Such self-regulation is a communicative network of institutionalized practices rather than as a well-integrated system of social interaction with a sense of collective conscience. Involved in such self-regulation is a context of procedural reflexivity built into subsystem sensors to monitor unintended consequences of planned policy strategies.

Rather than regulating society by a comprehensive code of substantive norms, there emerges multiple sites of social ordering; each with its own distinctive rationality, each with capability of reflexive feedback. (DeSchutter and Deakin, 2006). It is a network institutionalism (**NI**) shaped ;by the contexts these multiple sites are located in. The state apparata limits itself to respecting the contextual proceduralism and rules of competence by which an *autonomous social subsystem* regulated itself (e.g., in the workplace, in the corporation, in the profession, in the inter-linked network).

For Philip Selznick (1969), *reflexive law* goes beyond the social law constituted in collective bargaining, but stops short of compulsory state interventionism. Kettler (1987:75) noted how Selznick sough to stretch the concept of autonomous social law to one of *reflexive governance*.

Selznick looked to the evolution of self-regulating institutions of conflict regulation in industrial and labor relations, where proceduralist formalism as contextualization would provide a context for participatory rule-making. Like his mentor Robert K. Merton, Selznick saw these institutions in a middle range conception between generality and specificity. Reflexive law represents negotiation protocols. The mutual understandings by which actors engage in practical situations within the social space/civil spheres they share.

Guenther Teunber saw reflexive law as broader than negotiation protocols within bargaining regimes. He saw reflexive law as an expansion of autonomous social law in a way that opens up the network governance/argumentative networks Ansell (2006) recently describes.

Teubner describes reflexive law as a new evolutionary stage wherein the law of a particular subsystem realizes its limits with respect to the legal culture and bench-marking by another subsystem. Reflexivity is understood as subsystemic self-referentiality. Each subsystem is autonomous in its being operatively closed, but is polycontextural in its being cognitively open.

Reflexive governance has come to refer to the self-regulation of each autonomous social subsystem, each horizontal network of civil society associational governance - - beyond the

initial labor law perspective. Where the networks resist tendencies toward centralization, spawn a bewildering range of incompatible discourses, norms and rules as well as a range of ad hoc dances and collisions between subsystems. As an effect of their interaction, these autonomous social systems transform each other heterarchically across multiple levels of governance and between jurisdictions.

Reflexive governance is understood as a self-critical effort by network participants to use legal norms, procedures and sanctions to frame and to steer the self-regulation process in a procedural horizontal rather than in a vertical substantial normative setting (Smismans, 2004a, 2004b; LeNoble and Maesschalck, 2003; Hendriks and Grin, 2006). A self-critical proceduralist mode of governance to go with a critical sociology of law and associations. First order reflexivity involves the mutuality of interdependency and interpretation, especially with respect to the unintended consequences/externalities of modernization (Beck, 1994: ch.1). Second order reflexivity involves self-conscious/self-critical reflection on the process of modernity itself, as well as the instrumental rationality in modernity's functional differentiation.

The French Regulation School, that the work of Robert Boyer (e.g., 2005) represents, focuses on the capacity of a market economy to respond to social partner differentiation and negotiated regimes of reflexive governance. What is stressed is the viability of an institutional form in its conjunction with the existence of several other institutional forms. What is studies is the extent such conjunction "offers greater resilience and possibly better performance compared to alternative (institutional) configurations. Boyer (2005: 67) refers to this phenomena as the *institutional complementarity hypothesis*: one which is rooted in the critical sociology of law and associations, and which characterizes emergent regimes of reflexive governance.

## VII. Complementary Institutions / Institutional Complementarity

*Institutional complementarity* is the term that game theorists and economists like Jenna Bednar (2005) and Bruno Amable (2003, 2005a, 2005b) refer the way in which specified institutional patterns effect institutional influences on specified other institutions. This is critical in the emerging heterarchies and networks of our socio-economic and legal context.

The institutional complementarity of heterarchical or network society is seen by Castells as the new institutional practices/structures and successor modes of social partnership beyond the complementary institutions jerry-rigged to support the 1930s New Deal in the US or the 1970s neocorporatist Social Contract in Western Europe. The governance of social law is understood heterarchically, and not according to hierarchical principal-agent accountability and sovereignty (Sabel and Simon, 2006).The institutional complementarity necessary for the emerging network society Castells describes requires "structural coupling" (his words) of autonomous subsystem regimes of standard-setting social law with other differentiated autonomous social subsystems of relational contracts and connecting multilateral contracts within the internal governance that the relational contracts constitute. These are autonomous subsystems of self-regulation -- institutions of internal network self-regulation .

*Complementarity* can be understood as the manner in which components of a whole compensate for each other's deficiencies, contradictions and colliding discourses in constituting the whole. It can be understood as a production regime. With regard to autonomous social law, it can be understood as a production regime regulated by polycontextural social recognitions and social regulations. Robert Boyer in (Amable in Crouch, 2005b: 368) uses the terminology of Teubner and Castells: using the concept of *hybridization* to describe the process of how colliding subsystem regime logics transform each other heterarchically

The near future portends more networked governance and networked deliberative decision-making/problem-solving (Castells 1996, 1997, 2004, 2005; cf. Latour, 2005). Such networked governance amounts to law; standard setting, and protocols: e.g., monitoring transparency subsystems (Fung, et. al.,2004) such as monitoring multinational financial reporting, nutrition labeling, pollution reporting, safety rules, school standards. Networks of autonomous social law will be assembled as enduring relational going concerns defined by nodes interactions, and governed conflict regulation. The networks will be self-renewing if they are to persist. They will amount to autonomous social law beyond the law of private transactions and public law promulgated by state executives, legislatures and courts.

Following the sociology of Pierre Bourdieu [1992, 2000] rather than the more symbolic one of Niklas Luhmann, we have argued that autonomous / autopoietic subsystems of law have emerged over the past century as both active discourse and material practice. They have operated not as mere theorizing or rhetoric, but as juridical fields of negotiated protocols with self-sustaining values and solidarism, with legitimated logics of appropriateness, and with a degree of calculability regarding claims and counterclaims.

These are collaborative subsystems capable of enlisting self-regulatory stakeholders in problem-so living, standard setting, mutually guaranteed compliance and sanction-backed enforcement. They are characterized by discursive standards, argumentative claims, bounded rationality, and institutional guarantees of mutual social responsibility. Subsystems of autonomous law are compliance maintenance regimes based on bounded rationality of relatively enduring mutually reinforcing relations.

Autonomous social law emerges in the wake of the transcendence of traditional notions of individual prerogative contract and organization based on hierarchy. These autopoietic subsystems are not jus ad hoc intermediary holding operations, they are networks of mutual interests with generalized reciprocity relations beyond short term opportunism. They are characterized by diffuse moral obligations based on fairness rather than self-interest. Legal categories such as "reliance" and "good faith" become increasingly characterized by institutionalist agents and interlocutors, rather than individualist ones. Autopoietic social systems emerge around increasingly recursive legal operations, wherein interactions become increasingly distinct and differentiated from other systemic/subsystemic interactions in the socio-economic environment.

Teubner, like Castells and Latour, stress the increased emergence of simultaneously heterarchical and overarching relations within networks: how these networks are defined neither by foundational act of associational contract, membership or pooling of resources. These

networks resist tendencies toward centralization; and range from loosely organized decentralized nets with multiple serial nodes, to those handling franchise contracts to nets with fully collectivized liability. Most are of mixed or hybrid character, spawning a bewildering range of legal obligation and liability patterns; as well as modes of interweaving of interweaving of incompatible norms, laws and discourses.

Our paper's focus on retrieving and extending the vital undercurrent in labor law--we identify as the governance of social law--enables us to rethink social democracy heterarchically rather than through vertical statist concertation. This focus also generates further research questions for economic and political sociology.

- How do these networks of negotiated social protocols act as complementary institutions, rather than as just interlocking institutions?
- How do these emergent hybrid networks coordinate discourse among economic elites, state agents, policy elites, advocacy coalitions, social movements and epistemic communities. (Cf. the Open Method of Coordination [OMC] in EU Social Policy.)
- To what extent do participating INGOs act as autonomous social subjects, or to what extent are they tied to transnational corporations and foundations that fund them in promoting global and society relations of contract, property, liability and the rule of law? (E.g. Harvard-based Civicus, World Bank, United Nations Development Program, Carnegie Private Agencies Acting Together; Bristol-Meyers-Squibb.)
- To what extent are the travel expenses of participants of INGOs at the World Social Federation funded by these transnational corporations and foundations?

Given the structural separation of corporate ownership and control from corporate ownership and control from direct producers and consumers, there is the ever possibility of incentives for fully maximizing profit regardless of social conscience, operating with guile. What factors would ever get a transnational corporation to act in socially responsible manner at even the most minimal level? Following a suggestive economic sociology paper by John Campbell (2005), let us list a number of necessary practices.

- Operating in a relatively unhealthy economic environment limiting the possibility for near term profitability;
- Operating in an environment where regulations and enforcement capacities are based on ongoing extant practices of negotiation between corporations, the State, unions, NGOs and other relevant stakeholders;
- Operating in an environment where there is the perceived system of well-organized and effective industrial self-regulation, supported by the State;
- Operating in an environment where INGOs, social movement organizations, professional societies, advocacy coalitions, institutional investors and the press monitor their behavior;
- Belonging to labor, trade or employers associations and in regular institutional connexion with business schools and publications promoting socially responsible corporate behavior; and
- Engaging in institutionalized dialogue with all the actors mentioned in the two previous bulleted items.

Finally, we reach the further research queries enabling us to approach a theory of institutional complementarity in these subsystems of autonomous social law (Bednar, 2004; Milgrom and Roberts, 1990).

- To what extent do subsystems of autonomous law have to build and utilize cartel-like "common pool resources (cf. Ostrom, 1990) to support sanctions?
- Is there a target effort level of complementary adjustment and readjustment required from all contributing players in a range of cooperative to non-cooperative Nash equilibrium games?
- Is there a threshold where sanctioning mechanisms are triggered signaling a necessary precautionary comparison of punishment sanctions and the duration of such sanctions for non-compliant behavior by a participant in network mutual relations?
- To what extent are these thresholds consistently monitored and enforced?
- To what extent are multiple signals of lateral heterarchy more efficient the signal from vertical hierarchy?
- Under what conditions will action and sanction by a combination of multiple institutional actors (e.g., in federalism) improve chances for sustained compliant conduct within a hybrid network of autonomous law?

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