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Regulation of Hybrid Networks at the Intersection between Governmental Administration and Economic Self-Organisation^{*}

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^{*} An evolutionary-theory contribution on morphogenesis as coevolutionary strategy of social systems, exemplified by the agreement on the Swiss banks' code of conduct with regard to the exercise of due diligence (CDB). Accepted for publication in Gunther Teubner / Marc Amstutz (eds.), *Contractual Networks: Legal Issues of Multilateral Cooperation*, Oxford: Hart, 2006.

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I. Irritations in law: cooperation between government administration and private persons in network form

A. The case: Swiss Federal Court decision 109 Ib 146 (1983)

Today's *increasingly cooperative relations between State and private persons* have brought numbers of new problems in law. It may even be held that the new types of 'cooperationism' between State and private persons has plunged the law into deep crisis. For by on the one hand freeing the administration from the constraints of binding by statute, and on the other transferring to private entities competences hitherto incumbent on government for the upholding of public interests, they are calling into question the basic pillars of democracy under rule of law. This can be illustrated very clearly by the example of Decision 109 Ib 146 (1983) of the Swiss Federal Court on the Agreement on the Swiss banks' code of conduct with regard to the exercise of due diligence [abbreviated as CDB]. But that is not all: 109 Ib 146 also indicates that the problem of cooperationism may be closely connected with another new sort of phenomenon that is increasingly irritating the law: the *organisational form of the network*.¹

*Specifically, the object of the Federal Court decision 109 Ib 146 (1983) was that the Swiss National Bank, a public institution of the Confederation, had without specific legislative mandate renewed with the overwhelming majority of Swiss banks, in the form of bilateral agreements, the "Agreement on the Swiss banks" code of conduct with regard to the exercise of due diligence' (CDB).*² The renewed CDB from 1983 contained tighter rules on disclosure of the identity of third parties on whose account assets had been invested. By contrast with earlier agreements from 1977, in this version of the CDB the range of those not required to disclose the origin of monies to be invested was smaller. The Association of Trustees [Treuhänder-Verband] affected thereby asked to be exempted from the identity disclosure as had been the lawyers and the Chamber of Trustees and Auditors [Treuhänder- und Revisionskammer].³ This was rejected by the National Bank in a letter to the petitioner. The Association of Trustees challenged this letter as an administrative decision, in an administrative-court complaint to the Federal Court.⁴

¹ According to G Teubner, 'Coincidentia oppositorum: Das Recht der Netzwerke jenseits von Vertrag und Organisation' in M Amstutz (ed), *Die vernetzte Wirtschaft* (Zürich, 2004), a network, or combination of contracts, exists where, first, the bilateral contracts reciprocally refer to each other in the performance programme or in contractual practice; second, there is reference in the content to the overall project; and third, there is legally relevant close cooperation between the parties to the combination ('economic unit').

² For the first time in the Agreement of 9 December 1977. The Swiss Federal Court decision 109 Ib 146 was about the CDB of 1 July 1982. Cf. the comparison of the first two versions of the CDB in P Nobel, 'Die neuen Standesregeln zur Sorgfaltspflicht der Banken' (1987) *Wirtschaft und Recht* 149-166, with further references.

³ In particular, the Treuhänder-Verband might have wanted to counter image damage. However, the overwhelming majority of the banks actually participated in the CDB, so that the limited choice of bank did amount to an economic disadvantage for the members of the Treuhänder-Verband.

⁴ Federal Court decision 109 Ib 146, 146 f.

Before briefly summarising the Federal Court's considerations, let us mention the *prehistory of the CDB*. Foreign investors had in the mid 70s, using guarantees and sureties from a major Swiss bank and in infringement of Swiss capital inflow regulations, transferred money amounting to over 2 billion Swiss Francs to the Texon finance company in Vaduz (Liechtenstein), operative in Switzerland.⁵ The money invested was linked above all with tax evasion and black money, whereupon among other things foreign policy pressed the Swiss legislature to take corrective action.⁶ The resulting scandal – initially political, but immediately in the business world too – affected the image of the Swiss banking sector so much that as a direct consequence the self-restraint of the know-your-customer rule was brought in, in the form of the CDB agreement in the sector. The first CDB in 1977 required in particular, in Art. 4, determination of the origins of funds.⁷ Once the Texon scandal had died down, in 1982 the banks agreed a new version of the CDB with the National Bank, which while still directed against furtherance of economic criminality by the banking industry⁸ largely formalised the clarification duties.⁹

How, then, did the Federal Court, in 109 Ib 146, respond to CDB 1982 as an agreement between the National Bank and the banks, and in particular to the third-party interests of the Treuhänder-Verband? The *Federal Court did not take up the complaint*, on the ground that the CDB was a private contract, and accordingly the National Bank's note to the Treuhänder-Verband not an administrative decision that might be challengeable. For the CDB was aimed primarily at taking over provisions from foreign penal law, in order to avert conflicts with foreign legal systems (sic!). Since, however, the actions aimed at in the CDB, like active assistance with tax or currency offences abroad, were not punishable in Swiss law, the interests

⁵ For a summary of the events see the reports in the *Neue Zürcher Zeitung* (NZZ) 26 April 1977: 15 and 28 April 1977: 13; in detail see J Jung, *From Schweizerische Kreditanstalt to Credit Suisse Corp. - The History of a Bank* (Zürich, 2000), 245 ff., esp. 257. Cf. Federal Court decision 105 Ib 348. Specifically, there was infringement of capital-movement regulations aimed at reducing the inflow of foreign money, particularly through levies.

⁶ At first, mainly Italy was affected by this capital drain of approximately 2 billion Swiss Francs: cf. NZZ 20 April 1977: 15, 26 April 1977: 15, 28 April 1977: 13 and 6 May 1977: 17; cf. also Federal Court decision 105 Ib 348, esp. facts A., E. 10d) and 11; see G Müller, 'Zur Rechtsnatur der Vereinbarung über die Sorgfaltspflichten der Banken bei der Entgegennahme von Geldern und über die Handhabung des Bankgeheimnisses' (1984) *SJZ* 349-351, 350, Nobel n 2, 149 ff.; P Nobel, *Schweizerisches Finanzmarktrecht* (Bern, 2004), §6 N 6, n 6.

⁷ The main purpose of the first CDB from 1977 has remained almost unchanged to this day: 'All due diligence which can be reasonably expected under the circumstances must be exercised in establishing the identity of the beneficial owner. If there is any doubt as to whether the contracting partner is himself the beneficial owner, the bank shall require by means of Form A a written declaration setting forth the identity of the beneficial owner.' Art. 3 Abs. 1 CDB 2003. For an overview of the CDB's origins, see U Zulauf, 'Gläubigerschutz und Vertrauensschutz: Zur Sorgfaltspflicht der Bank im öffentlichen Recht der Schweiz' (1994) *ZSR* 359-535, 434 ff., D Zuberbühler, 'Das Verhältnis zwischen der Bankenaufsicht, insbesondere der Überwachung der einwandfreien Geschäftstätigkeit, und der neuen Sorgfaltspflichtvereinbarung der Banken' (1987) *Wirtschaft und Recht* 167- and Nobel n 2. As to new developments see Wd Capitani, 'Die Aufsichtskommission VSB und das zehnte Gebot' in HCvd Crone, P Forstmoser, RH Weber and R Zäch (ed), *Aktuelle Fragen des Bank- und Finanzmarktrechts: Festschrift für Dieter Zobl zum 60. Geburtstag* (Zürich, 2004).

⁸ Explicitly in the preamble to CDB 1982.

⁹ Art. 2-5 CDB 1982; cf. the comparison with CDB 1977 in Nobel n 2.

theory did not lead to an allocation to public law.¹⁰ And on the subordination theory, it would seem that while the National Bank had been 'encouraged' to act by the Swiss Federal Council (i.e. the Swiss Government), it was not exercising any specific legislative mandate, and the individual banks had accordingly been at liberty whether or not to join the Agreement. The fact that a similar arrangement could also have been created by statute was not relevant in the eyes of the court. Accordingly, the CDB was to be defined as a private contract.¹¹ At most, a complaint to a supervisory authority might be brought against the National Bank, which ...

*'...in its private-law activities analogously [sic] has to comply with the constitutional basic rights. In particular, even as a subject of private law it must not confer rights or impose duties legally unequally or arbitrarily.'*¹²

Legal scholars are to date in disagreement on the law's needful adaptations to the emerging trends to *cooperationism and privatisation* (or 'essentialisation' [Verwesentlichung] of the State's functions¹³): on the one hand there are calls for extension of public law,¹⁴ though this certainly brings the danger of stifling the new-style cooperationist forms under restrictive regulations.¹⁵ On the other, there are suggestions that the law should follow social changes by shifting corresponding situations from public to private law and especially law of contract,¹⁶ which would, however, thereby be confronted with standards hitherto located in public law, and thus irritated in the extreme, to the point of calling its own premises into question.¹⁷

This extremely demanding adaptation of law to increasing governmental cooperationism is however – as is evident from 109 Ib 146 – at the same time exposed to further irritations from equally far-reaching and novel changes in the environment: the shifts from market-related organisational structures on the one hand and hierarchical ones on the other (reflected in law as contract and corporations) to *network-type structures*, for which the law is not ready with categories of its own.¹⁸

¹⁰ 109 Ib 146 (1983), 149 ff., esp. E. 2.

¹¹ 109 Ib 146 (1983), 152 ff., E. 3.

¹² 109 Ib 146 (1983), 155, E. 4.

¹³ Thus e.g. G Müller, *Wege zu einem schlanken Staat: Überprüfung der Aufgaben stete Pflicht der Staatsleitung*, NZZ, 16. März 2005.

¹⁴ Thus e.g. Richli, who criticizes the Federal Court decision 109 Ib 146 for calling the CDB a private contract, but praises it for the observation that the National Bank does come under the fundamental rights: P Richli, 'Die verwaltungsrechtliche Rechtsprechung des BGer 1983: Bankengesetz' (1985) ZBJV 428-430; cf. recently also Y Hangartner, 'Bemerkungen zu BGE 129 III 35' (2003) AJP 690-693.

¹⁵ In 129 III 35 (2003) the Federal Court responded logically to the essentialization of State tasks being pursued politically; see M Amstutz, A Abegg and V Karavas, *Soziales Vertragsrecht* (Basel, im Erscheinen, 2006).

¹⁶ Thus e.g. A Marti, 'Aufgabenteilung zwischen Staat und Privaten auf dem Gebiet der Rechtsetzung - Ende des staatlichen Rechtsetzungsmonopols?' (2002) AJP 1154-1162, 1158.

¹⁷ For instance, in Federal Court decision 129 III 35 (2003) constitutional tasks for law of contract emerge openly: Amstutz, Abegg and Karavas n 15. And in the theory of mutually absorbing systems, private law functionalized by public interests henceforth appears – putting it rather sharply – as now just an appendage to public law.

¹⁸ For much more on this see G Teubner, *Netzwerk als Vertragsverbund: Virtuelle Unternehmen, Franchising, Just-in-time in sozialwissenschaftlicher und juristischer Sicht* (Baden-Baden, 2004).

These two new-style contextual conditions of cooperationism and network structures do not always appear as isolated contextual constraints on law, but may be so interlinked as to heighten the demands on the law's adaptability. Hitherto, such phenomena have been studied under the heading 'self-regulation under governmental direction',¹⁹ though that put insufficient emphasis on, first, the active role of the economy and second, the new-style network organisation.²⁰ It seems manifest to me that cooperationism between State and private persons happening purely in individual contracts in the foreground, yet nonetheless in the background in network structures which ultimately bring about more than the sum of the individual contracts, possesses enormously explosive implications for current legal concepts such as the rule-of-law binding of administrations on the one hand or the privity of contracts on the other.

B. Exploratory movements in the co-evolution of politics, economy and law

Once the Federal Court had assigned the CDB to private law while at the same time pointing out the National Bank's 'analogous' binding by fundamental rights, and after ensuing criticisms by legal scholars had highlighted the inability of the Federal Court's chosen option to provide stability and called for the CDB to be brought back under public law,²¹ economic and political actors responded. For the *new version of the CDB in 1987*, the National Bank withdrew from the Agreement, thus following those critics who had complained of the lack of statutory basis for the National Bank's involvement in the CDB.²² This change was intended to avert the danger that the CDB might, as some critics were demanding, still be brought under public law or – yet more undesirably – lead to far-reaching legislation.²³ The place of the National Bank was taken by the Swiss Federal Banking Commission (Federal Banking Commission), which possessed the appropriate statutory powers as a supervisory authority to act in relation to the CDB, and indeed had even felt called on in 1991 to abrogate parts of the CDB.²⁴ Moreover, unlike the National Bank the Federal Banking Commission no longer appeared as direct contracting party with the

¹⁹ Among many, Marti n 16, with further references; on the history of self-regulation in Switzerland cf. A Mach, G Schnyder, T David and M Lüpold, 'Transformations de l'autoregulation et (re)regulation publique en matiere de gouvernement d'entreprise en Suisse (1980-2002)' (2006) *im Erscheinen*; Y Sancey, *Un capitalisme de Gentlemen. Emergence et consolidation de l'autorégulation bancaire en Suisse et en Angleterre (1914-1960) (Diss.)* (Lausanne, 2004); H Bänzinger, *Die Entwicklung der Bankenaufsicht in der Schweiz seit dem 19. Jahrhundert* (Bern, 1986).

²⁰ Typical of this approach is U Di Fabio, 'Verwaltung und Verwaltungsrecht zwischen gesellschaftlicher Selbstregulierung und staatlicher Steuerung' in *Kontrolle der auswärtigen Gewalt: Veröffentlichungen der Vereinigung der deutschen Staatsrechtslehrer Heft 56* 1997).

²¹ See esp. Müller n 6; R Rhinow, 'Verfügung, Verwaltungsvertrag und privatrechtlicher Vertrag' in Juristische Fakultät der Universität Basel (ed), *Privatrecht - Öffentliches Recht - Strafrecht: Grenzen und Grenzüberschreitungen; Festgabe zum Schweizerischen Juristentag* 1985); R Rhinow, 'Verwaltungsrechtlicher oder privatrechtlicher Vertrag: Fiskalwirkung der Grundrechte' (1985) *recht* 57-64.

²² Initially, the National Bank became involved because the Texon scandal not only affected the stock quotation of the Kreditanstalt, the bank involved in the scandal, but also resulted in a sharp decline of the Swiss Franc: NZZ 27 April 1977: 17 and 5 May 1977: 29.

²³ Thus also the interpretation by Zuberbühler n 7, 167.

²⁴ Specifically, this concerned the ban on Form B by the EBK circular of 25 April/1 July 1991: Jahresbericht der EBK zum Jahr 1991, 17 f. Form B allowed trustees to declare that the party actually entitled was known, but was not being disclosed.

banks, something similarly intended to avert further politicisation. Correspondingly, the network came to meet the demands from legal scholars on the one hand to equip the CDB with comprehensive framework legislation, and on the other replace it with more or less traditional professional etiquette. The position as centre of the network, concluding the individual agreements with the banks, was now taken over by the banks' private trade association, the Swiss Bankers' Association, while the Federal Banking Commission was intended to act as supervisory authority.²⁵

However, these changes could not prevent *further pressure on Switzerland as a banking centre* and on the CDB.²⁶ There followed attacks on the Swiss banks during the US 'war on drugs', contributing to the introduction of the penal prohibition of money laundering.²⁷ This penal provision stated, by way of a framework act, that the identification duty was to be carried out with the care appropriate to the circumstances, something – so ran the message from the Swiss Federal Council²⁸ – that was fleshed out in the CDB. To be sure, numerous legal scholars immediately accused this penal framework law of infringing the principle of clarity and definiteness.²⁹ Renewed pressure on bank regulation, leading *inter alia* to further tightening of the provisions against money laundering, came after 1992, first in connection with the Italian 'Mani pulite' campaign following bribery scandals, and more recently under the heading of terrorism.³⁰

How did the Federal Court respond to these developments, i.e. to the criticisms from legal scholars of the decision 109 Ib 146 and to the moves for adjustments from politics and business? Two years after 109 Ib 146, the Federal Court again had a chance to speak on the CDB. Though

²⁵ As also in CDB 2003 of 2 December 2002, available at: http://www.swissbanking.org/1116_d.pdf. The EBK issues instructions as to which institutions a declaration on actual entitlement must be secured from (Art. 3, N 34.4), receives notices of infringements from the audit office and the CDB supervisory commission (Art. 10 and 12(9)) and authorizes amendments to the CDB (Art. 14(3)).

²⁶ From an evolutionary-theory viewpoint, these further developments can be brought together under the concept of punctuated equilibrium: variations do not appear in a system uniformly and gradually, but are generated above all by unexpected or even scandalous events that cause the possibility of actual evolutionary jumps (in the sense of contingency), thus differing from either arbitrariness or predetermination. See N Luhmann, *Das Recht der Gesellschaft* (Frankfurt a.M., 1993), 243; MT Fögen, 'Rechtsgeschichte - Geschichte der Evolution eines sozialen Systems' (2002) *Rechtsgeschichte* 14-19; M Amstutz, 'Die Verfassung von Vertragsverbindungen' in M Amstutz (ed), *Die vernetzte Wirtschaft* (Zürich, 2004), 55 ff.; Fögen has coined the appropriate expression 'sensational stories' for the jumps, and calls Gould's punctuated equilibrium an 'attractive third way the social sciences might also take': MT Fögen, *Römische Rechtsgeschichten über Ursprung und Evolution eines sozialen Systems* (Göttingen, 2002), 16 and 18 f.; Luhmann points out that in modern society the punctuational aspect is radicalized by the mass media, which preferentially report divergent variations: N Luhmann, *Die Gesellschaft der Gesellschaft* (Frankfurt am Main, 1997), 474.

²⁷ Art. 305ter StGB, introduced by No. I of the BG of 23 March 1990, in force since 1 Aug. 1990 (official collection of Swiss law 1990 1077 1078; BBl 1989 II 1061).

²⁸ BBl 1989 I 1089 f.

²⁹ Among many: Wd Capitani, 'Zum Identifikationsverfahren bei Kontoeröffnungen aus dem Ausland' (1993) *SJZ* 21-27, 21 f., n 2 with further references.

³⁰ Cf. e.g. Art. 305ter (2), introduced by the BG of 18 March 1994, in force since 1 Aug. 1994 (official collection of Swiss law 1994 1614 1618; BBl 1993 III 277), and the Swiss Federal Council's message of 17 June 1996 on money laundering: BBl 1996 III 1101. On the fight against terrorism cf. Art. 1 of CDB 2003.

the case was quite different, the Federal Court considered, alluding directly to the previous judgment, 109 Ib 146, that it need not go into whether the CDB was private-law or public-law in nature; in any case, it bound the Federal Banking Commission neither in interpreting the Banking Act nor in its tasks as supervisory body.³¹ The Federal Court had thus not only reduced the importance of the CDB as self-regulation, but also indicated in an *obiter dictum* that the description of the CDB as a private contract was no longer so certain. In its judgment 125 IV 139 (1999), the Federal Court once again reduced the importance of the CDB and the bank sector deregulation it constituted. For the interpretation of the penal provision of Art. 305ter StGB (money laundering), the CDB was, it said, merely an aid to interpretation.³²

This is the stage, in the intersections between the discourses of economics, politics, law and scholarship, at which the *CDB network today* finds itself; though it continues to be disputed whether the CDB is to be classed under private or public law.³³ Centrally, the newest version, CDB 2003, is structured as follows: the Swiss Bankers' Association concludes the agreement with the signatory banks for a period of five years in each case.³⁴ The governmental Federal Banking Commission checks whether the arrangement meets the requirements of the Money-laundering Act.³⁵ The CDB sees itself as a piece of regulated professional etiquette which – in order, in accordance with Art. 1, 'to uphold the reputation of the Swiss banking industry at home and abroad' – fleshes out the statutorily regulated duties of care in the Money-laundering Act and the Criminal Code, while 'normal banking business ... [ought] not to be hampered thereby.' For

³¹ Federal Court decision 111 Ib 127, 127 f.

³² Federal Court decision 125 IV 139, E. 3d, 144 f.: 'While as regards the demands on verification of identity the message refers to the model role of the CDB, and the duties of care on financial intermediaries now introduced in the Money-laundering Act are in the words of the message meant to form the criterion for the care to be observed in financial transactions in accordance with Art. 305ter Abs. 1 StGB, this can of course not mean that the degree of care when receiving assets required by the penal provision is as it were absorbed into the relevant rules of the CDB. The CDB has to do with rules of professional etiquette, formulated by the Swiss Bankers' Association, to which the signatory banks submit. They are an instrument of ethical self-regulation, and serve primarily to uphold the reputation of the profession (Art. 1 CDB) and thereby the interests of the banks, but are also protective as being self-protection against unclear situations that might lead to claims for damages. That they further lay claim to fleshing out 'the concept of the care required by the circumstances when receiving assets' (Art. 305ter StGB) is not binding on the criminal-court judge – for all one's recognition for self-regulatory efforts.'

³³ In favour of the classification under private law, most recently Marti n 16, 1158 f. and A Marti, 'Selbstregulierung anstelle staatlicher Gesetzgebung?' (2000) *ZBL* 561-586, 576. For allocation to public law, recently U Häfelin and G Müller, *Allgemeines Verwaltungsrecht* (Zürich, 2002), N 1060. Allocation to private law while maintaining the binding by fundamental rights is advocated by M Schefer, 'Grundrechtliche Schutzpflichten und die Auslagerung staatlicher Aufgaben' (2002) *AJP* 1131-1143, 1139 f.

³⁴ The most recent dating from 2 December: cf. n 25.

³⁵ Cf. esp. Art. 16 and 42 GwG; see also J-B Zufferey and Expertengruppe Finanzmarktaufsicht, *Finanzmarktregulierung und -aufsicht in der Schweiz. Schlussbericht* (Bern, 2000), N 251 and Eidgenössische Finanzverwaltung, *Geldwäschereibekämpfung in der Schweiz* (Bern, 2003), 43, Arbeitsgruppe KYC, *Sorgfaltspflichten von Banken und Effekthändlern bei Geldwäscherei, Terrorismusfinanzierung und Beziehungen zu politisch exponierten Personen*, 2005, available at: <http://www.ebk.admin.ch/d/archiv/2002/pdf/neu090702-02d.pdf>, 12, and the explanations by the Bankers' Association at <http://www.swissbanking.org/home/allgemein.htm>. On all this see also Nobel n 6, § 6 N 10, § 9 N 40 ff., esp. N 55 ff and § 11 N 27.

the duties of care where there is heightened risk of money laundering the CDB refers to national law, namely the Federal Banking Commission regulation.³⁶ Arts. 2-9 CDB regulate the specific duties of care and define their scope. By Art. 10, the signatory banks authorise a review body to monitor compliance with the CDB and notify the CDB supervisory commission and the governmental Federal Banking Commission of infringements. The supervisory commission, set up to investigate breaches, informs the Federal Banking Commission of its decisions (Art. 12, esp. 12(9)). Finally, an arbitration tribunal will, upon a complaint brought by the Swiss Bankers Association against the bank concerned, hand down a final decision as to whether there has or has not been a violation of the terms of the agreement (Art. 13).

That concludes my reconstruction of the evolution of the CDB and of the social systems affected by the CDB.³⁷ *This reconstruction of developments to date since the emergence of the CDB in 1977 has shown the following:* The Federal Court's decision 109 Ib 146, which I have commented on, had largely allocated the CDB to private law and thus given full leeway to its experimental programme. It initially sparked off vehement criticism from legal scholars, stressing the lack of internal legal consistency in the Federal Court's option, especially with the concept of the democratic State under rule of law, thus showing that the option could not bring stability. The immediately ensuing exploratory moves by the CDB network chiefly served the goal of keeping the network in the sphere of private law and thus free from political instrumentalisation, though without wishing to lose the link to politics.³⁸ However, because of repeated scandals and larger political events,³⁹ as well as the criticisms by legal scholars of the conflict with rule-of-law principles, this could not be maintained. Instead, the academic critique on the one hand and the scandals and broader events on the other engendered politically-led legislative impulses that reduced the CDB's importance as self-regulation and increasingly subjected it to political structures. Even today, the economic, political and legal systems have not yet found lasting stability in their coevolution in the area of the CDB, something reflected in the continuing criticisms by legal scholars of the dogmatic classification of the CDB as private law.⁴⁰

I shall cast an eye below over the law's neighbour disciplines, to sound out the conditions for possibilities of overcoming the crisis.⁴¹ At the centre is the thesis that while legal science had identified the new-style cooperationism between State and private persons as the starting point for continuing irritations, which are at the point of intersection of a clash of discourses of Babylonian proportions, it was unable with the old rigid concepts to respond properly to these new-style irritations, and also ignored the emergence of network-type organisation bound up with cooperationism. It consequently needs a theory able to deal with the dynamic coevolution of

³⁶ Art. 1(3) CDB 2003; Regulation of the Confederal Banking Commission on the Prevention of Money Laundering of 18 December 2002.

³⁷ For the dogmatic presentation of the CDB, see the relevant literature, e.g. Nobel n 6, § 6, with exhaustive literature references.

³⁸ We shall return to the link between the economy and politics in the network: I.B, 15 ff.

³⁹ Above, at n 27.

⁴⁰ According to Di Fabio, this finding is valid for the whole topic of self-regulation: Di Fabio n 20, 275.

⁴¹ On the call to bring the neighbour sciences into jurisprudence, see P Gauch, 'Die Fehlerwelt der Juris ten' in *Festschrift für Heinz Rey* (Zürich, 2003), N 19 f.

the various discourses involved. I shall employ evolutionary theory for this, attempting in the process to make the natural-science concept of morphogenesis bear fruit.

II. The morphogenesis of hybrid networks

According to Kämper/Schmidt, the point with networks is not the harmonisation of functional systems, still less integration of society.⁴² My analysis of the coevolutionary search-moves to date around the CDB network, however, points in just the opposite direction: the CDB network, and very generally, hybrid networks located between social subsystems of society, may constitute strategies of these social subsystems in order simultaneously to retain their own specific system nature and respond as far as necessary to contradictory irritations.⁴³ What is involved here is nothing less than the *social integrative function of evolution*.⁴⁴ Some elucidation is called for, as follows.

It has more than once been pointed out that *hybrid networks are an institutional reaction to ambivalent, contradictory or paradoxical requirements*.⁴⁵ Institutionally, this response means redundancy, i.e. the system reacts to particular events by repeatedly reducing possible behaviour modes.⁴⁶ Since the heightened demands from the environment cannot be escaped, the system at this point comes closer to the complexity of the environment.⁴⁷ This process whereby the system lowers its internal consistency in one sub-area may, borrowing from the natural sciences, be called morphogenesis.⁴⁸ In fact the CDB network is responding simultaneously, as will immediately be described in more detail, to at least three paradoxical demands from the environment, resulting from the repeated bank scandals and the calls (admittedly uncomfortable for the economic system) to restrain economic logic. First, though, I wish to go into the concept of morphogenesis as further developed by the natural sciences in recent years, so as to use it as a

⁴² E Kämper and JFK Schmidt, 'Netzwerke als strukturelle Kopplung' in J Weyer (ed), *Soziale Netzwerke: Konzepte und Methoden der sozialwissenschaftlichen Netzwerkforschung* (München, 2000), 227; with a different view, D Messner, 'Netzwerktheorien: Die Suche nach Ursachen und Auswegen aus der Krise staatlicher Steuerungspolitik' in E Altvater, A Brunnengräber, M Haake and H Walk (ed), *Vernetzt und verstrickt: Nicht-Regierung-Organisationen als gesellschaftliche Produktivkraft* 1997), 42 f.

⁴³ M Amstutz, *Evolutorisches Wirtschaftsrecht: Vorstudien zum Recht und seiner Methode in den Diskurskollisionen der Marktgesellschaft* (Baden-Baden, 2001), 290 ff.; M Amstutz, 'Widerstreitende Götter - Zu Manfred Aschkes Rekonstruktion der systemsoziologischen Evolutionstheorie und ihrer rechtstheoretischen Bedeutung' (2003) *Rechtsgeschichte* 14-24; Teubner n 18, 29.

⁴⁴ On this see now Amstutz, Abegg and Karavas n 15.

⁴⁵ G Teubner, 'Das Recht hybrider Netzwerke' (2001) *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht* 550-575; K-H Ladeur, *Das Umweltrecht der Wissensgesellschaft: von der Gefahrenabwehr zum Risikomanagement* (Berlin, 1995), 31 ff.

⁴⁶ Luhmann n 26, 355 f.

⁴⁷ Amstutz (2001) n 43, 291; cf. also Kämper and Schmid n 42, 229 f.

⁴⁸ For the natural sciences cf. AV Spirov, 'Game of Morphogenesis: What Can We Learn from the Pattern-Form Interplay Models?' (1998) *International Journal of Bifurcations and Chaos* 991-1001, with further references, and below n 54 ff.. For the social sciences see Teubner n 45, and N Luhmann, *Soziale Systeme: Grundriss einer allgemeinen Theorie* (Frankfurt a.M., 1987), 480 f. and 485 f. with further references on adoption of the concept in the social sciences.

metaphor (i.e. an outline solution that provides inspiration) to describe the function of hybrid networks in the evolution of social systems.⁴⁹

Recent natural-science theories of morphogenesis fit astonishingly precisely with Kauffman's concept of spontaneous order, exploited by Amstutz for legal theory. As S.A. Kauffman showed, not only does a system's evolution come from selection of suitable variations, but selection must meet with an *internal so-called spontaneous order*, which is what makes the evolution of a system possible at all.⁵⁰ This spontaneous order keeps the system in a condition in which it is best prepared for evolutionary processes. Kauffman has shown that systems are able to respond to irritations from outside when their epistatic connectivity⁵¹ $K = 2$. A crystal with $K = 1$ is by contrast unreceptive to external irritations, while with a higher connectivity of $K = N-1$ the system drifts into chaos at practically every butterfly touch. Put more simply, the elements of the system must be loosely enough bound to be able to take on the irritations 'at the edge of chaos,' but not too loose for the system to be unable to maintain itself as such despite irritations.⁵² The place, or '*unit of selection*', where evolution first becomes possible along with maintenance of intrinsic rationality is not the system as a whole, which would be unable to effect the necessary adaptation. Instead, the system differentiates out particular areas that have to accomplish the adaptation, and are to this end coupled with the corresponding environment.⁵³

This concept of spontaneous order has now been taken up by *recent theories of morphogenesis*: according to Harrison, morphogenesis means the emergence of a complex system from a simpler one, a process that presupposes internal spontaneous order.⁵⁴ A central place in the process of morphogenesis is taken by the interactions between the dynamic elements of the system: on the one hand, changes in the system's relation to its environment must be quickly and precisely grasped, and communicated within the system; on the other, change should be set going in the system in the other direction.⁵⁵ In the case of cells, the interplay between spontaneous order and change in form consists in a complex bio-mechanical and chemical process, in which – in a nutshell – in a first step the cell biomechanically 'feels out' its position (form) in its environment, and thus also the environment as such; then this information is sent to the genome in the cell's nucleus, and finally the genome sets off a gene cascade, to start off further changes on the desired path of morphogenesis. Put simply, then, morphogenic changes are set going, then checked against the position aimed at in the system, and that against the position relative to the system's environment, and in a feedback loop with the changes aimed at,

⁴⁹ On the concept of metaphor cf. Amstutz (2001) n 43, 160 ff.

⁵⁰ SA Kauffman, *The origins of order self-organisation and selection in evolution* (New York, 1993); SA Kauffman, *Investigations* (Oxford, 2000).

⁵¹ In biology, epistatic connectivity denotes dependence between genes, i.e. that one gene 'covers up' the effects of another. If, then, variant *a* leads to phenotype A and variant *b* to phenotype B, but the combination *ab* results only in phenotype A, then *a* is epistatic to *b*.

⁵² Kauffman (1993) n 50, 219 ff. and 255 ff.; see Amstutz (2001) n 43, 278 ff., 286 ff. and 290 ff.; cf. also A Watson, *The Evolution of Western Private Law* (Baltimore, 2001), 264 f.

⁵³ Luhmann n 26, 281; so also Amstutz (2001) n 43, 290 ff. and Watson n 52, 264.

⁵⁴ LG Harrison, 'Physical chemistry of biological morphogenesis' (1981) *Chemical Society Reviews* 491-528, 491 and 502; DJ Depew and BH Weber, *Darwinism Evolving: Systems Dynamics and the Genealogy of Natural Selection* (Cambridge Massachusetts, 1997), 528 f., with further references.

⁵⁵ Among many FW Cummings, 'Aspects of growth and form' (1994) *Physica D: Nonlinear Phenomena* 146-163; Spirov n 48.

then in accordance with this result and the morphogenesis aimed at, new changes in turn set off, etc.⁵⁶ This morphogenic loop is, however, only one source of the change. Equally decisive are the aforementioned spontaneous order, and the rigid geometric constraints the system is subject to, and along which it evolves.⁵⁷

If this *image of spontaneous order and morphogenesis is applied to the case of hybrid networks*, it may be concluded that a system – in our case of the CDB mainly the economy, but also politics – will differentiate out a particularly flexible sub-order if it has to respond to intensive and complex irritations from the environment. The system will do so by lowering its coherence, i.e. bringing about a process towards a more complex form – while of course simultaneously maintaining its own autopoiesis. While the sub-order's specific rationality ensures a certain resistance to evolution (form), its dynamic elements will be loosely enough linked to react to the irritations from the environment – but only so loosely as always to allow the sub-area's specific rationality to be maintained. The form of the hybrid network with its particularly loosely linked elements is, then – as Teubner has shown – particularly appropriate where internal variations have to be formed out of contradictory or even paradoxical high-intensity irritations.⁵⁸ In effect, the point for the system is thus, using the network, to revamp the relation between function, performance and reflection within the system in such a way that it can react as optimally as possible to intensive, complex and even contradictory demands from the environment without endangering its intrinsic rationality.⁵⁹

This adaptation of the system now comes about in a *morphogenic feedback loop* along the system's intrinsic constraints: at the loci of the structural couplings the system feels out its form and its position in the environment, and from this information the system takes on variations within the context of the subsystem's specific rationality, which are subjected to selection (change or non-change to the previous elements and structures). The modification brought by the selection, as well as the rejection of modification, are in turn felt out for the position in the system and – again with the help of structural couplings – so is the position in the environment, which can now in a further loop set off new variations and selections.

The special thing about the form of the hybrid network is now that it can *simultaneously take up manifold structural couplings with various systems*. This gives more importance to the morphogenic loop, in which the results of previous selections can be squared with the internal and external demands on the system and if need be corrections made, till in the long run a

⁵⁶ NK Bjorklund and R Gordon, 'Nuclear state splitting: a working model for the mechanochemical coupling of differentiation waves to master genes' (1993) *Russian J. Dev. Biol.* 79-95; similarly earlier Harrison n 54, 502 ff. and LG Harrison, 'Kinetic Theory of Living Pattern and Form and Its Possible Relationship to Evolution' in BH Weber, DJ Depew and JD Smith (ed), *Entropy, Information, and Evolution: New Perspectives on Physical and Biological Evolution* (Cambridge, Massachusetts, 1988), 63 and 73, referring to S.A. Kauffman.

⁵⁷ FW Cummings, 'The Interaction of Surface Geometry with Morphogens' (2001) *Journal of Theoretical Biology* 303-313.

⁵⁸ G Teubner, *Recht als autopoietisches System* (Frankfurt a.M., 1989), 75; Amstutz (2001) n 43, 290 ff.

⁵⁹ There would of course also be much to say about the CDB network in terms of social systems, organisation and interaction. I will, however, concentrate below on the level of coevolution of social subsystems. On this distinction, cf. N Luhmann, 'Interaktion, Organisation, Gesellschaft' in *Soziologische Aufklärung* 2 (Opladen, 1975).

punctuated equilibrium between the system and its environment is reached. In this light, the morphogenic loop is the precondition for a system's being able to take on intensive demands from surrounding systems while maintaining its own rationality, and to aim at a punctuated equilibrium with its surrounding systems.

I wish now to use the *specific example of the CDB network* to show that in this case the economy responded to intensive and contradictory irritations with the form of the hybrid network, and thus differentiated out a specific sub-order which created for the economy the conditions for the possibility of coevolution with its surrounding systems through morphogenic loops. On the basis of the model of a polycontextural society,⁶⁰ I shall further seek to draw normative conclusions from the observations derived from evolutionary theory.

Here there is, however, a need to take account of intrinsically legal constraints in the form of the *rigid compulsory connections of legal dogmatics*. The institutions of organisation and contract in law build on long traditions, whereas the forms between organisation and contract and between State and private self-organisation were banished with the emergence of the police State.⁶¹ There is thus no updated pool of elements able without further ado to be linked up with today's legal dogmatics, from which to select suitable variations for the new types of phenomenon. Additionally, pre-liberal solutions for a stratified society can be considered for a postmodern polycontextural society of law only with great caution. The locating of new phenomena such as hybrid networks between government administration and private persons thus cannot be linked up with existing concepts, and creating a corresponding field of law *ex nihilo* is out of the question, even if only because of the internal constraints of legal dogmatics. Dogmatics watches too rigidly over the consistency of new norm variations with the existing norms. Accordingly, the new-style phenomena located between the old dichotomies of contract and organisation or of State and private self-organisation must be found a place in these existing dichotomies, though of course their 'reverse side' has to be taken account of *within* the relevant legal order.

⁶⁰ Among many, see: G Teubner, 'Vertragswelten: Das Recht in der Fragmentierung von private governance regimes' (1998) *Rechtshistorisches Journal* 234-265, 234 ff., esp. 241 ff.; M Amstutz, 'Vertragskollisionen: Fragmente für eine Lehre von der Vertragsverbindung' in H Honsell, W Portmann, R Zäch and D Zobel (ed), *Aktuelle Aspekte des Schuld- und Sachenrechts: Festschrift für Heinz Rey zum 60. Geburtstag* (Zürich, 2003), 165 f., and most recently Amstutz, Abegg and Karavas n 15.

⁶¹ On this see, Justi, *Grundsätze der Polizeiwissenschaft* (Göttingen, 1782/1756), preface and JHGv Justi, *Die Grundfeste zu der Macht und Glückseeligkeit der Staaten, oder, Ausführliche Vorstellung der gesamten Policy-Wissenschaft* (Königsberg, 1760), Vol. 2, § 554-555. Chiefly, since the 16th century the aim was to bring the fragmented jurisdiction of Church, landowners etc. under State control as the sole kind of local government. The more this succeeded, the more the concepts of political power (as the capacity to secure obedience) and legal power came to coincide in sovereignty as supreme power. To date the field is still marked by Hobbes's theory of the State: see Luhmann n 26, 407 ff. From a contemporary viewpoint, V Karavas, *Die Drittwirkung der Grundrechte im Internet (Diss.)* (Frankfurt a.M., im Erscheinen, 2006) deals with the intermediaries.

III. The CDB in the light of evolutionary network theory

A. Development of paradoxical demands: cooperation of competitors

The Texon scandal may definitely also be seen as one internal to politics. For Swiss policy, which profits from the banking business through taxes and levies, was afraid of coming still more under disrepute and felt accordingly under pressure to act correctively on the banks.⁶² However, for manifold reasons such as complexity and technicality, limited means and privatisation, as well as globalisation of both knowledge and resources, politics failed to regulate the dynamic economic sector of the banks authoritatively through traditional legislation.⁶³ Furthermore, it was a primary objective of the Swiss banks to avoid political regulation that might have hampered 'normal banking business'.⁶⁴ As a result of further scandals and major political events, this aim could not fully be achieved.⁶⁵ But the objective of not letting 'normal banking business' be 'hampered', thus averting a politically imposed straitjacket (and be it noted that the sub-area's specific rationality under the sign of extreme plasticity clearly shines through), is still today formulated with noteworthy clarity in the CDB:

'This agreement lays down, with binding effect, valid rules of good conduct in bank management as a code of professional ethics. They should put in concrete terms certain points of due diligence governed by the Anti Money Laundering Act (art. 3 through 5 of the AMLA) and "the diligence that can be reasonably expected under the circumstances" (art. 305ter of the Swiss Penal Code). Special due diligence rules for business relations and transactions involving higher risks are set forth in the Anti Money Laundering Ordinance by the Swiss Federal Banking Commission. – This is not intended to impede normal banking business.' [My emphasis]⁶⁶

How could this objective be achieved? To avoid an inconvenient straitjacket through political regulation, *politics had to be irritated by the economy in such a way as to eliminate the preconditions for politics to take regulatory action.* If, however, individual economic actors had unilaterally and voluntarily taken over political instructions as politico-ethical guidelines and thus restricted their economic possibilities in the light of politics, then obviously these individual banks would have been facing considerable competitive disadvantages by comparison with noncompliant competitors – without necessarily getting rid of the problem for politics. A

⁶² Cf. NZZ 6 May 1977: 17 and NZZ 5 May 1977: 25 and 29, esp. the Federal Council's statement on the Bank scandal; Jung n 5, 261.

⁶³ On these factors, very widely held responsible for the increasing cooperationism of governmental administration, cf. among many TP Müller, *Verwaltungsverträge im Spannungsfeld von Recht, Politik und Wirtschaft: eine systemtheoretische Analyse von Verträgen zwischen dem Gemeinwesen und Privaten mit Hinweisen auf die rechtsdogmatischen Konsequenzen* (Basel, 1997), 142 ff.; P Uebersax, 'Privatisierung der Verwaltung' (2001) ZBL 393-422; P Zumbansen, 'Spiegelungen von "Staat und Gesellschaft": Governance-Erfahrungen in der Globalisierungsdebatte' in M Anderheiden, S Huster and S Kirste (ed), *Globalisierung als Problem der Steuerungsfähigkeit des Rechts und der Gerechtigkeit*, ARSP Beiheft 79 (Stuttgart, 2001).

⁶⁴ Cf. the leading article in the NZZ 7/8 May 1977 and the reports of the parliamentary debate in the NZZ 5 May 1977: 25 and 29; also ferner Mach, Schnyder, David and Lüpold n 19.

⁶⁵ Above at n 5, also in section I.B., 4 ff.

⁶⁶ Art. 1(3) CDB 2003.

unilateral adaptation by banks to the demands of politics was thus manifestly illusory because of constraints immanent in the economic system.⁶⁷

As we know, ordoliberal theory [a German school of neoliberalism– tr.] turned liberalism on its head by recognising that a market regime is not the consequence of but a precondition for the market mechanism.⁶⁸ In the light of this ordoliberal theory it was up to the banks *jointly to set up a market regime* that simultaneously and equally restrained the economic possibilities of the biggest players in the banking sector and was therefore, at least within the circle of important market participants, largely competitively neutral in its effects, i.e. cartellised the new duties of care.⁶⁹ Joint action by the competitors to this end would, however, have brought considerable dangers. By founding a formal organisation the competitors would have come so close together as to call the fundamental premisses of the market into question, while at the same time risking corresponding reactions from politics and law. The banking sector thus found itself facing the paradoxical requirement to cooperate while maintaining competition.

The *form of the network* does not – as anti-trust law⁷⁰ might suggest – resolve this contradictoriness by suppressing one side, the organisation, but instead *accomplishes a both-and*. How does this look *in the CDB case*? In the CDB network, regulations were formulated whereby the economy took the environmental demands to some extent into account – specifically, in the banking area it restricted possibilities of business action. Since, however, this restriction of economic rationality in bilateral arrangements that were preconditions for each other was stabilised through contract law, as from a certain threshold of collective market power onward the result was so-called cartellisation, i.e. the arrangement stabilised in the contracts became competitively neutral, since one market participant no longer competed with another by underbidding the established standard. The network, *in structural coupling to the legal system* through the various bilateral but always identical and interrelated contractual arrangements, thus obtained control over the opportunistic conduct of its participants in one sub-area of competition, while the network participants continued to compete with each other in the other areas.⁷¹

The economy was thus able to overcome the blockade threatening the banking sector from paradoxical demands through a network-type organisation that was flexible enough to *unfold the paradox by introducing several levels*: the network-type web of contracts was able on the one hand to secure the *cooperation* that could meet the political demands, while on the other this

⁶⁷ On the problems of business ethics cf. N Luhmann, *Die Wirtschaft der Gesellschaft* (Frankfurt a.M., 1989), 84 ff.

⁶⁸ See the excellent presentation of the circumstances in R Wiethölter, *Rechtswissenschaft* (Basel/Frankfurt a.M., 1986/1968); and fundamentally on this, F Böhm, *Wettbewerb und Monopolkampf* (Berlin, 1933).

⁶⁹ On the interplay between the legislation framework set up by the state and self-regulation of the market see F Böhm, 'Privatrechtsgesellschaft und Marktwirtschaft' (1966) *ORDO* 75-151 and E-J Mestmäcker, 'Die Wiederkehr der bürgerlichen Gesellschaft und ihres Rechts' (1991) *Rechtshistorisches Journal* 177-192. On the cartellization effect of social norms cf. S Huf, 'Die sozialstaatliche Einbettung der Marktwirtschaft' (1999) *ZfS* 221-241, 227 f.

⁷⁰ The first anti-trust act to protect competition dates from 1985 (see official collection of Swiss law 1986 874).

⁷¹ This was secured by an arbitration clause, which presupposed a private law contractual arrangement: see Art. 14 CDB 1977.

cooperation in the form of conclusion of a contract between the individual bank and a neutral network centre was so loose and so limited in content that not only was the *form of competition* maintained for the economic system, but this could correspondingly also be signalled to the other systems, especially the legal system.⁷² This simultaneously minimised the target area for political or legal interventions and thus averted excessive influence by legislative policy; as the network was arranged and as it was also perceived by the Federal Court, it was meant to constitute for the law only a loosely associated bundle of private contracts.

How, then, is this *re-entry of organisation into contract* to be classified legally? In law of contract, it can with no problems be brought into the content of the contract (if need be, interpreted normatively).⁷³ A sober glance at *antitrust law*, however, raises doubts whether the CDB ought not to be brought under the Cartel Act.⁷⁴ Yet if we regard the CDB as a strategy of the economy for so organising the sub-area of banking that it can absorb complex and intensive irritations from the environment on the basis of its internal order (in S.A. Kauffman's sense) and respond to them flexibly (through morphogenic loops),⁷⁵ it would against the background of the model of a polycontextural society be downright fatal for the law to force the network into the traditional dichotomies of competition versus cooperation, or contract versus organisation, i.e. most notably to describe it as an illicit competition agreement and thus suppress the organisation element, or else construe it as an organisation, which would leave the central role of the contract out of account. From this viewpoint, quite to the contrary, the so-called re-entry of the organisation into the form of the contract seems deserving of protection – at least insofar as it lets the economy absorb irritations from the environment better and correspondingly orient its structure better to the demands of the surrounding systems.⁷⁶

⁷² The central function of the contract for networks is also stressed by J Sydow and A Windeler, 'Steuerung von und in Netzwerken - Perspektiven, Konzepte, vor allem aber offene Fragen' in J Sydow and A Windeler (ed), *Steuerung von Netzwerken* (Opladen, 2000), 14 f. Here, however, the point is not so much the classical contract, nor a long-term continuing contract, but a medium-term contract that gives the parties decisive freedom to adjust the contractual relation to changing circumstances: OE Williamson, 'Comparativ economic organisation: The analysis of discrete structural alternatives' in SM Lindenberg and H Schreuder (ed), *Interdisciplinary Perspectives on Organization Studies* (Oxford, 1991).

⁷³ Cf. e.g. the forms of contract in favour of third parties (Art. 112 OR). See, with further references, P Krauskopf, *Der Vertrag zugunsten Dritter (Diss.)* (Fribourg, 2000).

⁷⁴ So also Zulauf n 7; cf. Art. 5 f. KG (Cartel Act).

⁷⁵ Cf. section II., 8 ff.

⁷⁶ In fact the CDB, in which Switzerland's biggest banks were involved from the outset, obviously does eliminate competition in the area regulated: Zulauf n 7 explicitly states this. By the political exceptional clause of Art. 6(2) KG (Cartel Act), however, those competition arrangements which are designated in ordinances and public announcements and concern '... particular forms of cooperation in single economic sectors, especially agreements on the rational implementation of public-law measures to protect customers and investors in the financial services area' are justified. Cf. the Swiss Federal Council's message on auditing in BBl 1994, 564, which refers explicitly to the banking sector. In Art. 6(2) KG the legislator acknowledges that cooperation arrangements may also support competition or be of public (i.e. primarily political) interest, as specifically the legislative reference to consumer protection in the area of financial services shows. This niche of the antitrust system was able to bring in the more recent recognition that while competition is certainly the fundamental premiss of the market economy, it may very well be compatible with that premiss for firms, for the most varied purposes and on specific points – i.e. product-, project- or time-related – to change from

However, the network not only lets the economy absorb intensive contradictory or even paradoxical demands, but additionally has a socially integrative function. What this socially integrative function of the CDB network consists of, and what part the morphogenic loops mentioned play, I shall now go on to explain.

B. Compatibilisation of contradictory rationalities

After the Texon scandal the banking sector not only had to create a market regime while simultaneously maintaining competition, but was additionally confronted with a second contradictory demand. The banking-sector had to come closer to politics while at the same time keeping it at arm's length: the CDB network was called into being primarily to cushion pressures from international and national politics and make them compatible with the banking sector.⁷⁷ Correspondingly, from the outset connections with this political dimension were established, first by bringing in the National Bank as network centre, and in the second phase of the CDB by integrating the Federal Banking Commission as top supervisory body for the network. Nonetheless, it was always an object of the CDB to keep the influence of politics as 'business-compatible' as possible, something clearly expressed in Art. 1 CDB mentioned earlier.⁷⁸

How, then, was the economy able using the network to respond to the paradoxical requirement to include politics while keeping it at arm's length? I wish here to distinguish two dimensions: first, communication about the need for collectively binding decisions, and second, the problem of legitimation.

1. Communication about the need for collectively binding decisions

If the economy wishes to signal to politics the need (or else non-need) for collectively binding decisions, this communication cannot come about just anyhow and anywhere. If we take the model of the polycontextural society seriously, then because of the unbridgeable autonomy of the various systems and of the corresponding Babylonian confusion of tongues there is *no direct communication channel between the economy and politics* through which this information could pass without further ado. And correspondingly, even in the network the various rationalities cannot 'find each other' in such a way that, à la Savigny, they would all be within some all-embracing world-spirit.⁷⁹ From the viewpoint of systems theory and evolutionary

competitors to cooperating partners: cf. H-J Bunte (ed), *Kommentar zum deutschen und europäischen Kartellrecht* (Neuwied, 2004), § 1 N 161; C Kirchner, 'Unternehmensorganisation und Vertragsnetz' in C Ott and H-B Schäfer (ed), *Ökonomische Analyse des Unternehmensrechts : Beiträge zum 3. Travemünder Symposium zur ökonomischen Analyse des Rechts* (Heidelberg, 1993); also P Zurkinden, HR Trüeb and J Rutishauser, *Das neue Kartellgesetz Handkommentar* (Zürich, 2004), on Art. 6 KG (Cartel Act).

⁷⁷ Cf. above, section I.B., 4 ff.

⁷⁸ Above, at n 66. T Strulik, 'Governance globalisierter Finanzmärkte: Policy-Netzwerke und Kontextsteuerung im Bankensystem' in J Sydow and A Windeler (ed), *Steuerung von Netzwerken* (Opladen, 2000), 322, points out that something similar is true of the international level too. However, he portrays an almost harmonious picture of the cooperation of the economy and politics in networks, something that cannot be asserted of the CDB case.

⁷⁹ FK Savigny, *System des heutigen Römischen Rechts, Bd. 1-4* (Berlin, 1973/1840), Vol. I, 22 f.

theory, the economy is left with no possibility but so to irritate politics at the locus of structural coupling that in the system of politics the necessary variations are formed and selected.⁸⁰ Although the chances of success in bringing about the desired selections in a surrounding system through irritations have to be rated as poor, the CDB network did manage to install relatively effective morphogenic structures by linking up simultaneously to several structural couplings:

- whereas the network appears to the law primarily as a bundle of contracts, because of the network effect it at the same time presents itself to politics as an *organisation*, or more precisely, as a *collective actor*. This enables the relevant sub-area of the economy to appear to legislative policy as a point of identification at which politics obtains information about the other system and especially about the possibility conditions for collectively binding decisions, and communicates the possibility conditions for future collectively binding decisions, in order on the basis of reactions to test the chances for realising political programmes. The economy for its part reads this communication about planned collectively binding decisions as a cost, and in turn uses the organisation to communicate to politics the need or non-need for collectively binding decisions.⁸¹ For the banking sector, this possibility of communicating to politics the non-need for legislative intervention about duties of due diligence is of central importance. For in this way politics could and can be relatively quickly and reliably made aware of the efforts within the economy to reach a punctuated equilibrium with politics. In our case, politics too was pressing for a solution to the crisis (within politics) of Switzerland as a banking centre, and from the viewpoint of the economy the slowly grinding and (for the economy) incalculable mills of legislation should if it all possible not be set going at all.⁸²

- while legislative politics could not have been reached through the *structural coupling of the contract* alone, the contractual incorporation of the National Bank, a political actor of great renown, as network centre made it easier especially at the beginning, after the influential Texon scandal, for the network to get a hearing from it. For through the contract as structural coupling via which projects of various systems could, using law, be stabilised for a definite duration, the National Bank was able to bring the concerns of politics relatively directly into the network.⁸³ Alongside this specific 'release' of a narrow range of irritations, however, the irritations at the site of the structural coupling were at the same time limited and an important precondition for the compatibilisation of the systems thereby created: the network participants gave up their autonomy in two respects, so as to enable cooperation in the network. Not only did the economic actors involved in the network abstain from those actions which while bringing them competitive advantages on the market called cooperation

⁸⁰ A Abegg, 'Evolutorische Rechtstheorie' in S Buckel, R Christensen and A Fischer-Lescano (ed), *Neuere Theorien des Rechts* 2006).

⁸¹ A Brodacz, 'Strukturelle Kopplung durch Verbände' (1996) *Soziale Systeme* 361-387, 367; G Teubner, 'Polykorporatismus: Der Staat als "Netzwerk" öffentlicher und privater Akteure' in H Brunkhorst and P Niesen (ed), *Das Recht der Republik* (Frankfurt a.M., 1999), 349; N Luhmann, *Die Politik der Gesellschaft* (Frankfurt am Main, 2002), 396 ff.

⁸² Cf. e.g. the leading article in the NZZ 7/8 May 1977. Cf. also above, section I.B., 4 ff.

⁸³ On the contract as structural coupling see, among many: G Teubner, 'Ein Fall von struktureller Korruption? Die Familienbürgerschaft in der Kollision unverträglicher Handlungslogiken (BVerfGE 89, 214 ff.)' (2000) *KritV* 388-404; Teubner n 60; Amstutz, Abegg and Karavas n 15.

in the network into question, but additionally they reduced their autonomy in mutually shaping their business relations, while equally the government administration involved restricted its own possibilities of acting on the banking sector by way of the hierarchical legislative process.⁸⁴

This *self-restraint of the systems involved presupposes their maintenance of their respective intrinsic rationalities*. Thus, the example of the early CDB shows that the network could not be stabilised with a weakly legitimated public institution – in this case the National Bank, which while it did have the necessary reputation, lacked any suitable statutory basis.⁸⁵ For if the network positions itself at the intersection of the economy and politics in order decisively to influence the framework conditions of a market, then it is dependent on the link to the power and legitimation resources of politics. We shall come back to this.⁸⁶

The network thus constitutes an *institutional strategy of society's mutually estranged subsystems* so as to have dealings with each other on condition of maintaining their own intrinsic rationalities, in search of a punctuated equilibrium. To that extent, the chameleonic network form has evolutionary importance in rendering contradictory rationalities compatible.⁸⁷ The general picture is that the economy, using the structural couplings, feels out its own position in relation to the demands of politics, in order on the basis of this information to set off changes in the sub-area of the banking sector through the structural linkage of the contract, which will in turn be brought to the attention of politics through the structural coupling of organisation and checked for success, etc.

These *morphogenic processes* have to be not just respected, but also *normatively underpinned*, from the legal viewpoint; but here neither a reconstruction of the network solely as a disconnected bundle of contracts nor solely as an organisation will do; just as neither one from a purely economic nor a purely political viewpoint will. Instead, the need is first to secure the re-entry of the organisation form into the content of the contracts in such a way that the process of squaring off between the systems of the economy and politics can happen at the site of the structural coupling of the organisation. And second, the various differing rationalities that come together in the network must be secured against one another.⁸⁸ To summarise: what is involved is the institutional guaranteeing of the network in the light of its evolutionary function.

But that is only *one side of the coin*. The contractual form – as the Federal Court decision 109 Ib 149 shows – also offers good protection against claims and interferences by third parties: the network ought by no means to appear to the law as an organisation. This is why third parties can be directed to its individual nodes, which in turn appeal against the accusation of breach of the law to the superordinate political aspect of the network effect, i.e. the market regime. But this opens up a legitimation problem for the network which I shall now go into.

⁸⁴ Cf. Teubner n 81, 363 with further references.

⁸⁵ This warning was already given by C Schmid, 'Die neue Vereinbarung über die Sorgfaltspflichten der Banken' (1983) *SJZ* 69-73, 72. Messner n 42, 52. For the question of legal statutory basis cf. n 22.

⁸⁶ Below, section III.2, 18 ff.

⁸⁷ Fundamentally on this, Teubner n 45, 570 ff.; Teubner n 1, 40 ff.

⁸⁸ Thus also the interpretation by Messner n 42, 50 f. and 57.

2. Legitimation

a) *The problem*

In the case of the CDB, from the outset the banking sector could not get by without any *political involvement* at all. Initially, the banks needed a neutral arbitration agency, to overcome the competition and set cooperation going.⁸⁹ Thereafter, the involvement of a political actor helped the network to get a better hearing from politics. But that was not all: in order to implement a market regime, economic rationality needed *the political symbols of constraint and indisposability*.

What is meant thereby? It is already inherent in the concept of a *market regime* that it should apply to a whole sub-area of the economy and consequently affect a multiplicity of market participants at various levels and restrict their economic possibilities, and that it should in the last instance also be imposed coercively. If, however, law – associated with the political symbol of constraint – is used instrumentally, for instance, as in our case, to secure a particular market regime, then the question of the legitimation of this law arises. The Swiss Federal Court decision 109 Ib 146 commented on above shows these issues clearly: what was being debated in 109 Ib 146 was the interests of the Treuhänder-Verband and its members. They had undergone a considerable competitive disadvantage from the new CDB arrangement, yet were unable in any way to influence the CDB, set up primarily by the banks. The reactions to the case showed clearly, moreover, that purely private-law legitimation, legitimising the legal stabilisation of bilateral differentials by the free will of the participants, and the exclusion of third-party interests by the mechanism of the self-regulating market, was too weak for a permanent stabilisation: for the CDB network amounted to more than just a bundle of contracts.⁹⁰ Instead, the intended network effect, by combining overwhelming market power and incorporating politics, attained something going well beyond the sum of the individual contracts, namely a comprehensive market regime – and that in a key market of central political importance. Today, these issues are already signalled in law by the fact that the Cartel Act is inapplicable only because of political exceptional clauses.⁹¹ The legitimation issues were accordingly not solved by the traditional legitimation mechanisms of private law, but instead *recourse had to be had to political legitimation mechanisms*.⁹²

To obtain legitimation, admittedly, the economy cannot copy the sort of ramified participatory procedures that serve to produce legitimacy for the democratic rule of law without denying its own rationality, which relies on lowering transaction costs.⁹³ In this respect it is subject to the constraints intrinsic to its system. *The economy must accordingly find another way*

⁸⁹ In fact the National Bank took on a leading role in the coming to terms with the Texon-scandal: cf. NZZ 27 April 1977: 17 und 28 April 1977: 13.

⁹⁰ On legitimation cf. R Brownsword, 'Network Contracts Revisited' in G Teubner and M Amstutz (ed), *Contractual networks: Legal issues of multilateral cooperation* (forthcoming, 2006).

⁹¹ Cf. n 76.

⁹² On this distinction see already M Weber, *Wirtschaft und Gesellschaft* (Tübingen, 1980/1921-1925), 123.

⁹³ On legitimation in democracy under rule of law cf. Luhmann n 26, 416 ff.

of obtaining for its self-regulation the political symbolism of constraint and above all of legitimization.

This was done in the CDB case initially by bringing a political actor into the network by contract. While the law enabled the rationalities involved in the contract to clothe their project in the form of law and thus link to the *rule-of-law* legitimization mechanisms, the involvement of politics was meant to convey the *democratic* aspects of legitimization.⁹⁴ The cooperationist solution with the National Bank as network centre proved incapable of stabilisation, however, as the critique of the Federal Court decision 109 Ib 146 from legal scholars shows: the National Bank already lacked a statutory basis for getting involved in this area at all; despite its great political prestige, accordingly, it could not adequately convey the democratic symbolism, bringing the danger of the very political interventions that were to be averted. Correspondingly, structural changes were initiated in the network, so as to oppose this danger. The National Bank was replaced in the network by the politically better underpinned Federal Banking Commission.

But even with the legislative mandate the Federal Banking Commission possesses, a cooperationist combination of the economy and politics by contract would have been hard to stabilise. For *the contractual combination between politics and the economy even threatens to break up the existing legitimization mechanisms of the democratic State under rule of law*: if government administration is to be able to have dealings with other areas of society in cooperationist fashion, it must have the corresponding freedom to negotiate the ends and means of the cooperation. Here the administration determines not just the way to the political goal, but increasingly also the goal itself, calling into question the administration's formal and material legality as (central for the economy) guarantor of rule-of-law restraints on social happenings and as (for society in general) intermediary of democratic legitimization in the form of a developed participatory procedure.⁹⁵ Correspondingly, in the CDB network the contractual connections between politics and the economy were loosened. The political actor was replaced at the network centre by the banks' own trade organisation, while politics repositioned itself at the periphery of the network and took on the role of overall governmental supervision.⁹⁶ In this way, the network arrangement was on the one hand brought closer to an unproblematic private-law code of professional ethics, and on the other subjected to a public-law political framework system.⁹⁷ These structural adjustments to the network justified the criticisms of the legal scholars who had sought to solve the legitimization problem by *extending the political and suppressing the contradictory demands of conflicting spheres of action*.⁹⁸

⁹⁴ This is also indicated by Müller, when he calls the involvement of the National Bank the 'official veneer' for the CDB: Müller n 6, 350 f.

⁹⁵ J Habermas, *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (Frankfurt a.M., 1992), 519 ff.; E Schmidt-Assmann, 'Das Recht der Verwaltungsverträge zwischen gesetzlicher Bindung und administrativer Gestaltung' in W Drenseck (ed), *Festschrift für Heinrich Wilhelm Kruse zum 70. Geburtstag* (Köln, 2001).

⁹⁶ For the relationship between the CDB-supervision and the Federal Banking Commission: cf. Capitani n 7 and Zuberbühler n 7.

⁹⁷ Above, section I.B., 4 ff.

⁹⁸ Cf. esp. Müller n 6 and Rhinow n 21; with a similar opinion, Marti n 33, 576, n 81; and for another, differentiated one Schefer n 33, 1139 f.

With the *partial retreat into the traditional dichotomies* of public and private, while the network managed to some extent to ward off the danger of politicisation through direct legislative intervention or a judicial classification as public law, which would have seen the politicised 'public interests' taking the network largely away from economic rationality, by withdrawing into more traditional areas of self-regulation the CDB also lost a significant part of its capacity to adapt to the contradictory demands of conflicting rationalities; the economy's direct link to the symbiosis of law and politics to secure the symbol of legitimation through a contractual connection with politics was largely severed, and the possibility of morphogenesis restricted. Admittedly, the morphogenic structures remained, insofar as the economy and politics could continue to have exchanges (more exactly: to irritate each other) about the need for collective decisions at the locus of the structural coupling of organisation. And with the Federal Banking Commission, politics could continue to benefit from the banks' specific technical knowledge of how a functioning market regime is to be constituted, and at the same time to let its political demands flow into the network – though of course no longer in the existing differentiated cooperationist fashion, but only in the sense of an *ordre public*.⁹⁹ Politics thus lost influence over the details of the arrangement, and the economy now had no way of pushing the morphogenesis far enough for the political demands to be able to flow into the CDB relatively directly via the structural coupling of the contract. Today's numerous legal provisions in this connection are, then, also pointers to the *failures of the CDB as an experimental programme*, at least in its original radicality.¹⁰⁰ And even if a sizeable core of self-regulation has been left, we nonetheless have to state that today's self-regulation – as the Federal Court decision 125 IV 139 shows – cannot lead much farther than a traditional code of professional ethics.¹⁰¹

From the *viewpoint of an evolutionary theory* taking as its basis the model of a polycontextural society, this development of the CDB is regrettable. For the original CDB network with its morphogenic structures had proved to be a promising strategy for opening up contradictory and even paradoxical demands at the intersection of conflicting social systems, and thus an important contribution to the coevolution and integration of mutually estranged social systems – while simultaneously maintaining each of their own intrinsic rationalities.¹⁰² That does not mean one should forget the difficulties the CDB network raised for politics. Certainly, in my view the withdrawal into the traditional dichotomy of private and public came far too early. For there definitely are possibilities of reconciling a network structure, especially one based on the structural coupling of the contract for integrating the mutually estranged systems, with the need for legitimation. I shall briefly outline these approaches to solutions.

⁹⁹ For a description of reflexive regulation of the banking sector see Strulik n 78, 308 f.

¹⁰⁰ Cf. only the now copious regulations in the Federal Act of 10 October 1997 to combat money laundering in the financial sector (Money-laundering Act) and the corresponding EBK order of 18 December 2002 on the prevention of money laundering (EBK money-laundering order).

¹⁰¹ Above, n 32.

¹⁰² Cf Messner n 42 , 58 ff.

b) Rule-of-law legitimization mechanisms

When it comes to rule-of-law legitimization mechanisms, very basically and in the framework of traditional application of fundamental rights the *effect of political communication on the economic side of the network* can be tested against the fundamental rights:

- To the extent the administration gives private persons the possibility, through their entry into a cooperative relation directly with the administration, to prevent a command-type procedure being commenced, the *freedom of the private person* is not a prerequisite; it is only once the private person is faced with the option between 'contract or command' that the decision in favour of freedom – pre-formed by the administration – can be taken, in the light of the conduct demanded by it. The freedom traditionally presupposed in private law (as freedom to do something or not) is here conferred by the administration. Åkerstrøm Andersen has persuasively pointed out that before this conferred freedom as premiss, all that remains is bare 'freedom of thought' (Gewissensfreiheit) as the residue of the freedom without preconditions due to human beings by virtue of being human.¹⁰³ The freedom conferred by the administration is thus far removed from the Kantian freedom, which has no prior cause, which is a value in itself, transcendently, and as such in principle not dependent on sensuous or social needs either.¹⁰⁴ Here the legitimating function of private law's delegation of self-organisation is almost completely absent, so that the cooperationist relation between private persons and government administration is to be allocated to public law and its legitimization mechanisms, which are traditionally concerned with securing society's areas of freedom against the State, as well as with legitimising interventions that restrict freedom through the concept of the democratic rule of law.¹⁰⁵ In the case of the CDB, while a market regulation by legislative policy was in prospect, it was not so immediate that the banks' freedom in the decision whether and how to build a self-regulation would have to be regarded as mediated by the State. Instead, the proactive conduct of the banks in the course of the CDB's evolution shows that the decisive thrusts towards self-regulation always came from the private side.¹⁰⁶

- Even if a case of self-regulation is – particularly on the criterion of freedom of decision – assigned to private law, we must first ask whether the *governmental pressure for self-regulation or the pressure to cooperate* infringes fundamental rights. Since free assent is constitutive for private self-regulation, a self-regulation imposed by governmental administrative units potentially constitutes a fundamental-rights infringement, which correspondingly has to be justified. Here we must also keep in mind the gradual evolution of those cooperations and self-regulations that may very well start within the framework of the

¹⁰³ N Åkerstrøm Andersen, 'The Contractualisation of the Citizen - on the transformation of obligation into freedom' (2004) *Soziale Systeme* 273-291.

¹⁰⁴ I Kant, *Kritik der reinen Vernunft* (Hamburg, 1993/1787), 561 f.; I Kant, *Kritik der praktischen Vernunft* (Hamburg, 1993/1788), 60 f.; I Kant, 'Metaphysische Anfangsgründe der Rechtslehre' in *Rechtslehre: Schriften zur Rechtsphilosophie* (Berlin, 1988/1797), 27 f.

¹⁰⁵ Cf. also the neoliberal extreme position of W Zöllner, 'Regelungsspielräume im Schuldvertragsrecht' (1996) *Archiv für die civilistische Praxis* 1-36, 26 ff. and 35 f.

¹⁰⁶ Müller n 6, 350 f., argues in the opposite direction, but then calls the National Bank's involvement the 'official veneer' for the CDB.

fundamental rights, but later may cross the threshold to fundamental-rights infringement. Or in other words: a gradual increase in duties of cooperation and self-regulation cannot without further ado justify a fundamental-rights infringement.¹⁰⁷ For instance, the Federal Banking Commission ban on a CDB form on which trustees could declare that the economic beneficiary, while known, would not be disclosed should correspondingly have been checked for compliance with fundamental rights.¹⁰⁸

- It should then be a principle that politics is not to be freed of *guarantee responsibility*, where it is involved in a regulation or influences it. Accordingly, in a mixed hybrid network the political communications of the public-law network nodes must be challengeable as a decision, so that higher priority ought also to go to the justification of the administrative decision.¹⁰⁹ This does not of course mean that every corresponding court decision would have direct repercussions on the network and on the private-law contracts: insofar as the network is to be described as a bundle of private contracts, any infringement of the private-law rationality that in principle stabilises the bipolarity of the contracting parties and excludes third-party interests would require especial justification.¹¹⁰ Still, alongside the possibility of demanding damages from the political actors, with an appropriate judgment a duty on the political actors to act on the network ought also to arise.¹¹¹

As an extension of this sort of monocausal application of the fundamental rights against politics, the law has to call on the systems involved for a new way of applying them: *a polycontextural application of the fundamental rights*. For if politics can no longer be trusted with nor expected to handle the constitutional shaping of the total polycontextural society, then the consequence is that *each social subsystem* has to be called on for a corresponding self-restraint, with as its object the legal liberation and at the same time curbing of the system's specific rationality vis-à-vis internal spontaneous order and vis-à-vis other social sectors.¹¹² This demand may be placed on the CDB network in various ways. In particular, the Federal Banking Commission as regulatory body ought to call for this self-restraint when giving authorisation to the CDB in connection with the general clause of the Banking Act which prescribes the ensuring of proper business conduct. And the courts should call for this sort of self-restraint of economic rationality when – as in the Federal Court decision 109 Ib 146 – dealing with relevant cases. This sort of substantive self-restraint by the economy is often discussed under the heading of democratic legitimisation mechanisms. I should like – again sketchily – to show how democratic legitimisation mechanisms might be recast for these issues.

¹⁰⁷ Di Fabio n 20, 256 f.

¹⁰⁸ Cf. n 24 above.

¹⁰⁹ N Luhmann, *Legitimation durch Verfahren* (Frankfurt a.M., 1983/1969), 215 ff.

¹¹⁰ In detail see P Gauch, 'Zuschlag und Verfügung - Ein Beitrag zum öffentlichen Vergaberecht' in *Mensch und Staat, Festgabe für Thomas Fleiner* (Freiburg i.Ue., 2003).

¹¹¹ Cf. also Di Fabio n 20, 270 ff.

¹¹² G Teubner, 'Globale Zivilverfassungen: Alternativen zur staatszentrierten Verfassungstheorie' (2003) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 1-28; Messner n 42.

c) *Democratic legitimization mechanisms*

According to such authors as Habermas or Grimm, new types of administrative conduct, detached from the traditional structures of the democratic rule of law, can secure legitimization above all by supplementing recourse to normative grounds by an internal democratisation. This so-called internal democratisation can according to area – apart from the legal protection to be adapted to the new forms – result from participation in administration, i.e. institutionalisation of ombudsforms within the administration, court-like procedures, hearings and publications, involvement in decisions of those affected or their representatives, etc.¹¹³ As already with the concept of the Social State, the point is for the individuals, or the addressees of the administrative action, to be put into a position to be able to cultivate and protect their interests and bring them to bear in decision-making processes.

From the viewpoint of an evolutionary theory based on systems theory, caution is of course in order here, since the polycontextural aspects of today's society, i.e. the differentiation of society into various subsystems, each functioning on a different intrinsic logic, have to be taken as the basis for the model of today's society, as achievements of modernity. Whether society's differentiation already contains – as in Teubner – a normative principle,¹¹⁴ or whether the observer has to take this differentiation as the basis for his model of society if he is to secure an adequate picture he can orient himself by, need not be gone into here. For acknowledging the polycontextural society as a society of law can already enable dangers, such as those described under the heading of the regulatory trilemma that threaten if Habermas's proposals are implemented, to be recognised and avoided.¹¹⁵ In the light of evolutionary theory, then, we must warn against any too direct interference with complex evolutionarily grown structures of other subsystems.¹¹⁶ The point must instead be – from the viewpoint of evolutionary theory – to support the system's internal reorientation of function, performance and reflexion through law in such a way that the system can react optimally to intensive, complex and even contradictory environmental demands without endangering its own rationality.¹¹⁷ We shall come back to this.

We certainly should, though, follow Habermas in his finding that numerous forms of cooperation between State and private persons, as in our case of the early CDB network, cannot meet the demands of politics for legitimate regulation: the economy, while it does link up with politics, fails in the concrete cooperation insofar as that is allocated to economic rationality to achieve the re-entry of the political, or succeeds only insufficiently. Today too, the continual demands from many legal scholars to bring the network back still more strongly into public law are signalling that the CDB still lacks legitimization, so that the banking sector has not yet met the

¹¹³ Habermas n 95, 527 ff.; similarly D Grimm, *Die Zukunft der Verfassung* (Frankfurt am Main, 1991), 414.

¹¹⁴ Teubner n 83; here Di Fabio agrees with Teubner: Di Fabio n 20, 262.

¹¹⁵ G Teubner, 'Das regulatorische Trilemma: Zur Diskussion um post-instrumentale Rechtsmodelle' (1984) *Quaderni Fiorentini per la Storia del Pensiero Giuridico Moderno* 109-149.

¹¹⁶ In this sense Schneider also warns against over-direct politicization of policy networks. Instead he calls for a strengthening of the traditional democratic legislative processes: V Schneider, 'Möglichkeiten und Grenzen der Demokratisierung von Netzwerken in der Politik' in J Sydow and A Windeler (ed), *Steuerung von Netzwerken* (Opladen, 2000), 342 f.

¹¹⁷ On the triad of function, performance and reflexion see Luhmann n 59.

political demands regarding a punctuated equilibrium. How, then, can these demands of politics on the economy be supported by a polycontextural application of the fundamental rights?

d) Evolutionary-procedural legitimation mechanisms

The *statements so far* have identified the morphogenic structures¹¹⁸ of cooperationist and especially network-type arrangements as an evolutionary strategy for adapting to the polycontextural society, which is to be upheld through law. This sort of morphogenic structure, to be supported by law, thus makes it easier for the various social systems to enter into dealings with each other, whereby the rationalities rebounding from each other inside these structures have to be secured against each other by reconfigured fundamental rights.

The difficult constitutional question now is *how the different systems, supported by law, can be brought by law to take into account the differentiation of their surrounding systems, and their most important demands in order to obtain a punctuated equilibrium*, or in the CDB case: how on the one hand politics can be induced, despite a political programme that has to be implemented and despite continuing guarantee responsibility, to respect economic freedom even within self-regulation (as re-entry of the economy into politics), and how on the other the economy can be induced to enter into the political demands for a legitimate CDB network (as re-entry of politics into the rationality of the economy) – especially if legislative interventions by politics are to be avoided on grounds of the legislator's being overburdened for the specific object, while at the same time in a polycontextural society the law has neither the knowledge nor the possibility of implanting specific, effective regulations into the economy.¹¹⁹

We can be helped over this uncertainty as to the right law by a *procedural approach*, as described by Wiethölter. He – much as Habermas has called for – promises continued renewal of the integration of the society of law through the involvement of society in the production and justification of law, thereby simultaneously bringing about a new type of legitimation:¹²⁰

In a procedural method, the courts especially must have more dealings than before with the differentiated polycontextural society. The job of finding socially adequate norms must no longer be delegated *solely* through private autonomy to the economy and through legislation to politics. In the difficult task of finding the legal needs of the polycontextural society, the courts are of course supported by *the law's neighbour sciences*: law is structurally coupled with these (e.g. legal sociology, legal philosophy, legal history, legal psychology, etc.), first via legal theory as the reflexion mechanism of law and second, in a narrowly limited normative fashion, through (mostly politically) inserted general clauses as well as norm references. The systems in conflict, such as the economy, the family or politics, are however just as far from science – be it economic, family or political science – as from the law.

¹¹⁸ What is meant are particularly the feedback loops between the structural couplings and the selection within the system that repositions it within its environment: above, section II., 8 ff.

¹¹⁹ This is sometimes forgotten when the by now familiar concepts of a procedural or reflexive law are being talked about: cf. e.g. Strulik n 78, 322 ff., with an interesting perspective on the reflexive regulation of the international banking sector.

¹²⁰ Fundamentally, R Wiethölter, 'Materialization and Proceduralization in Modern Law' in G Teubner (ed), *Dilemmas of Law in the Welfare State* (Berlin, 1982).

If, then, as stated above, the need is to promote possibilities for the mutually estranged subsystems of society to observe each other and respond to the various demands of the surrounding systems, then attention must be directed not just at the structural couplings which, as we have seen, enable systems to perceive themselves as the environment for the other system in each case, but also at the structures on the basis of which systems respond to demands from their environment while taking account of their own intrinsic rationality. If these morphogenic structures are so threatened by one system that other systems can no longer adapt their operations and structures to the changing environment, the law should protect them, say by a judicially established obligation to contract, if as in the Federal Court decision 109 Ib 146 political legitimisation demands on a market regime set up by the economy are not covered because of structural shortcomings. This calls for some further explanation, as follows.

From the viewpoint of dogma, decisions intended to promote a balancing of the relationship among function, performance and reflexion within the system – in the CDB case to demand re-entry of the political demands into economic rationality – can be located in so-called *niches*:¹²¹ First, possible niches in which variations with contents capable of compatibilisation may be formed should be sought in the legal subsystem coupled with the observed rationality, in our case law of contract. Mostly, such a niche can be found in the form of a reservation norm, which acts as a signal norm pointing to the conflict issues. Such *conflict norms* are as a rule couched openly, to be able to grasp the evolutionary dimension of the coexistence of systems. Traditionally, in Swiss law of contract the general clauses on public morals (Art. 19 f. OR, Art. 27 f. CC), good faith (Art. 2 CC) and the application of the law (Art. 1 CC) take on this role.¹²² Corresponding niches through which the CDB network could be brought to render political demands compatible with the rationality of the economic subsystem are, however, also present in antitrust law.¹²³ If the niche and the conflict norm have been set up, the need is then to identify the *specific legal sub-rationality that produces consistency within the subsystems*. Only in this way can on the one hand the reason for the conflict and on the other the external form of the evolutionary capacity be recognised. This specific legal sub-rationality is to be gathered from the relevant precedents (empirically), for it is not already laid down fixedly from the outset, but constructed through the applicable cases.¹²⁴

Such a decision ought not only to protect the morphogenic structure in the case up for judgment, but also, just because of its coarse structure, set off a complex process of 'social' lawmaking in an interplay of law, scholarship and the systems involved in the conflict, in which the systems involved are led by the judicial considerations to generate new variations, these are

¹²¹ This model was developed for economic law: Amstutz (2001) n 43, 326 ff.

¹²² Swiss Civil Code CC (SR 210); Swiss Code of Obligations CO (SR 220). Cf. most recently the methodological observations of P Gauch, 'Der Schätzer und die Dritten' in *Norm und Wirkung: Festschrift für Wolfgang Wiegand zum 65. Geburtstag* (Bern, 2005).

¹²³ By Art. 7 KG, abuse of a position of market domination is impermissible. Of course, the Treuhänder-Verband as consumer of the service could probably not have based its claim on antitrust law, since by Art. 12 KG claims arise under antitrust law only for those who are 'hampered in the initiation or exercise of competition by an impermissible restraint of trade.'; cf. also J Ensthaler and D Gesmann-Nuissl, 'Virtuelle Unternehmen in der Praxis - eine Herausforderung für das Zivil-, Gesellschafts- und Kartellrecht' (2000) *Betriebs-Berater* 2265-2271, 2270.

¹²⁴ On all this: Amstutz (2001) n 43, 326 ff.; Abegg n 80.

checked by legal scholars for dogmatic consistency, then if need be presented to the courts for selection, perhaps sent back again etc. – until a selection capable of stabilisation has been found.¹²⁵ In short, the point is to refer the conflict back to the systems involved – with, of course, an indication of the solution to be sought.

In the 109 Ib 146 case, the problem was essentially that the legitimation for the market regime produced ought to have been brought about by politics and the law through the structural coupling of the contract. The specific shape of the CDB at the locus of the structural coupling of the contract suffered from the fact that no contractual partner adequately legitimated by political mechanisms was included in the network, so that the two systems of the economy and politics were brought together in structurally unsatisfactory fashion. Accordingly, the network nodes ought to have been forced into contracting with third parties concerned, till the network had linked its market regime with a sufficiently legitimated political body or opened up some other adequate source of legitimation, which would subsequently have led to a situation-specific re-entry of the political legitimation demands into the CDB's economic rationality and thus to a step in the direction of a punctuated equilibrium. For normative protection of the structural coupling of the economy and (legislative) politics also guarantees the possibility of coevolution of the systems, letting both of them irritate each other with their respective demands. In the case of 109 Ib 146, the banks involved in the network would then have been obliged to treat members of the Treuhänder-Verband equally with the privileged lawyers and members of the Chamber of Trustees and Auditors [Treuhänder- und Revisionskammer] in relation to the disclosure duty.¹²⁶ Thus, a simple 'not that way' and relatively vague demands on dogmatics in the light of the above-stated normative demand ought to start off a process whereby procedurally, utilising evolutionary structures, empirically underpinned solutions are sought that obey the strict normative requirements of the law and at the same time meet with compliance in those rationalities that brought the conflict before the law.

Finally, it should be pointed out that through this procedural approach the various systems involved in the conflict are squared off with each other, along with the law, in evolutionary fashion *at the locus of structural couplings* and thus a coevolution of the systems ensured, which reciprocally promotes the differentiation of the conflicting systems – in a direction towards constitutionalising the respective systems in relation to the systems in their environment and making them compatible.¹²⁷ This procedural extension of law set going by court decisions, appropriate to new types of problems arising in today's polycontextual society and finding its normativity in formal respects by utilising the structural couplings of law and other social systems, moves in strikingly parallel fashion to the law's stated function of protecting the morphogenic structures between the systems involved, so that the systems, in our case politics and the economy, can observe each other and guarantee each other in their differentiation. Or, putting it another way: the substantive normative demand for protection for morphogenic structures and structural couplings between the conflicting social subsystems in order to

¹²⁵ Cf. Amstutz/Abegg/Karavas n 15.

¹²⁶ Cf. above, n 4.

¹²⁷ Similarly R Wiethölter, 'Recht-Fertigungen eines Gesellschafts-Rechts' in C Joerges and G Teubner (ed), *Rechtsverfassungsrecht: Recht-Fertigung zwischen Privatrechtsdogmatik und Gesellschaftstheorie* (Baden-Baden, 2003).

guarantee the capacity for evolution (or as Wiethölter puts it: developmental dynamics) can be secured in the form of the procedural and evolutionary method of adjudication described, at the sites of the structural couplings between the law and the various social subsystems.¹²⁸ In this sense the law – as called for by democratic legitimation theories – involves the society of law in finding the law and protects the differentiated society – as with rule-of-law legitimation theories – while preserving the central rule-of-law function of the courts.

¹²⁸ Cf. also Wiethölter n 127.