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ARTICLE

Polycontexturality for China's Legal Development? Contending with Gunther Teubner

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Abstract
In criticizing the World Bank's recommendations for China's private law reform, Gunther Teubner suggested "polycontextural law" as the best direction for developing the Chinese legal system. This model, according to Teubner, can reconnect sources of law to multiple autonomous social fields and reflect historical–cultural diversity. However, this Article argues that by proposing polycontextural law, Teubner implicitly privileges private law as the "linkage institutions" that can be used to deconstruct the traditional political–legal paradigm of the "[k]ing's two bodies," and he undermines the role of public law in redressing the unequal "irritation capacity" of different social subsystems and in founding the framework for greater responsiveness to social needs. In this respect, the polycontextural law model has not sufficiently comprehended the risks of "social exclusion" and "dejuridification" in a transitional society such as China, where the legal system, instead of evolving through recursive operations, is prone to being co-opted by power and money through their dominant media of influence.

Keywords: Polycontexturality; systems theory; integration; linkage institutions; co-optation

A. Introduction

In the early 2000s, an interest group in law and social theory was set up by a number of law professors and students at Tsinghua University in China. They were committed to reading widely about social theories and philosophies, such as the works of Max Weber, Jürgen Habermas, Henry Maine, and Michel Foucault. In Chinese this theoretical trend is named "social theory jurisprudence" (*shehui lilun faxue*), which indicates an intentional departure from analytical jurisprudence and an empirical sociology of law. On their reading lists is the work of Niklas Luhmann, among others. In recent years, there have been a growing number of Chinese scholars who are committed to applying systems theory to legal studies.[1]

The indigenization of systems-theoretical jurisprudence in China is both intellectually appealing and worthy of careful scrutiny. While in Luhmann's time the social model of China may have been more properly described as "stratified" and had not reached the threshold of functional differentiation, Gunther Teubner, both on his academic visit to China and subsequently in a coauthored paper[2] on China's modernization, expressed an affirmative attitude that systems

[1] *See* Jianyin Ma, *Shehui Lilun Faxue: Jiyuan, Jinlu yu Guanjian Yiti* [*Social Theory Jurisprudence: Origins, Approaches, and Key Issues*], 1 RENMIN FALÜ PINGLUN [RENMIN UNIV. L. REV.] 3, 3–4 (2019).

[2] *See generally* Gunther Teubner & Chunyi Qi, *Multiple Modernities: An Alternative to Western Economists' Recommendation for China's Private Law*, 1 PEKING L.J. 391 (2014).

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theory can be applied to comprehending the role that law plays in contemporary China. Such a perspective greatly refreshes Chinese legal studies and provides insightful observations on China's immense social transformations. However, this Article aims to critically engage with Teubner's conceptual framework of "polycontextural law" by situating it within the context of China's "Reform" era, with a view to examining how social responsiveness may be generated from polycontexturality and sustained against the pronounced tendency towards path dependency. The inquiry proceeds as an internal critique, interrogating the extent to which the market-oriented configuration of social systems in China can be adequately "*surprised*"—that is, productively irritated and destabilized—by polycontextural law so as to open space for structural alternatives.

The central argument advanced here is that, in the Chinese context, the proposition of polycontextural law as a substitute for the public/private law distinction risks privileging privatization as the generative mechanism for constitutionalization, without guaranteeing that social "responsiveness" will ensue as compensation. While these private law regimes during China's Reform period played a significant role in depoliticizing the traditionally stratified social order, solidarity and equitable social responsiveness remain core normative commitments of societal constitutionalism that cannot be discharged without a construction of public law. The Chinese reform trajectory demonstrates that, absent a political engagement with the problems of over-integration and under-integration in countries of peripheral modernity, the polycontextural law model may prove incapable of generating the structural irritations necessary for social systems to overcome path dependency and resist co-optation, thereby rendering the constitutional constraints on systems corruption merely aspirational.

This Article will be arranged in the following structure. In Section B, this Article introduces Teubner's critical remarks on China's legal development, in particular its private law development. While Teubner accurately appraises the functional "polytheism" emerging in contemporary China, he underestimates the value of "integration" to the constitutional process and introduces it only as a secondary, cultural–historical factor. Although this mode of re-specification is key for Teubner to develop systems theory in a globalized context, it nonetheless risks hollowing out the density of social integration, reducing it to an a posteriori rationalization of the various reconfigurations of social subsystems. This is reflected in how Teubner replaces the structural coupling of law and politics sustained by national constitutions with an open continuum of loose or tight coupling dependent on sufficient "linkage institutions," with an emphasis on enhancing the social responsiveness of private law regimes, as I will explain in Section C. However, with empirical studies of the social transformations in the Chinese Reform period, Section D of this Article contends that in countries of peripheral modernity, not only the institutional basis for developing "polycontextural law" is lacking, but the attenuation of the political system's role in redressing asymmetries in systems coupling may also perpetuate "social exclusion," precisely because it is the political system that functions as the "structural knots" for the whole social system.

B. Polycontexturality for Chinese Legal Development

Teubner's paper was cowritten with Chunyi Qi during Teubner's academic visit to China in 2012, aiming to critique the World Bank's recommendation *China 2030: Building a Modern, Harmonious, and Creative High-Income Society*. Teubner and Qi argue that in this recommendation, the World Bank justifies the exclusivity of the efficiency claims for private law development in China, given the society-wide—and today almost worldwide—institutionalization of economic rationality. They correctly noted that replacing centralized political planning rationality with decentralized economic rationality amounts to entrenching "a new monotheism that speaks with the pathos of natural law," which underestimates the social reality

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that China is heading not just towards one economic modernity but "multiple modernities."[3] By saying so, they indicate that Chinese law is in fact "exposed to a more complex transformation, from the monotheism of a society-wide political rationality to a polytheism of the many discourses in Chinese society."[4]

Therefore, considering the need for functional differentiation as well as cultural specificity, Teubner and Qi propose that polycontextural law is the best model for legal development in China, as it can de-paradoxify the traditional close coupling between law and politics and rebuild potential connections with other social subsystems. "Polycontextural law" in this case refers to a replacement of the public/private law distinction defined according to the state/society distinction by a new distinction between the public and private dimensions within each social subsystem. As Teubner and Qi put it, "[t]he central role of private law ... is to juridify diverse processes of decentralized spontaneous rule-formation in civil society" and "to constitutionalize spaces of social autonomy," while "'[p]ublic' in this new sense would refer ... to an autonomous internal reflection process within the focal social institution."[5] In other words, Teubner and Qi insist that the "publicness" of law is not lost but is reintroduced dynamically as an *internal* reflection within social institutions, which is sufficient to overcome the "peculiar asymmetry" caused by the overstretching of economic rationality.

Furthermore, polycontexturality can preserve Chinese characteristics by matching its production regime with the path-dependent evolutionary process. As Teubner and Qi suggest, the centrifugal tendencies of expansive social systems entail the entrenchment of a countervailing institution that can properly contribute to the "integration" interest of society. This is particularly important for a transitional socialist economy that requires a strong political system for a considerable time to control how the institutions of capitalism complement and replace the institutions of the planned economy.[6] In this respect, they deem that the Communist Party of China (CPC) may play an essential role, albeit under the condition that it undergoes a drastic transformation, such as the development of internal party democracy, internal opposition, and internal group pluralism.[7]

It is slightly surprising to see Teubner's emphasis on "integration" interest, because "integration" is never the focus of his research. For Teubner, centralized social integration is effectively ruled out today, as it requires "a displacement of integrative mechanisms from the level of society to the level of subsystems."[8] However, this Article aims to analyze the constitutional implications of bracketing the demands for social integration with case studies of the social and legal transformations in China during its "Reform and Opening-Up" period, and to investigate the inadequacy of "subsystem integration" in redressing social exclusion. It also aims to examine, in a broader sense, whether "internal reflection" can sufficiently link different social subsystems, deliver social responsiveness, and thereby banish the "political" dimension from societal constitutionalism. In the following, I will first sketch the polycontextural law thesis of Teubner.

C. Polycontextural Law as a New Constitutional Trajectory

I. Constitutionalizing Polycontexturality in the Globalization Context

Before delving into the model of polycontextural law, let us briefly revisit the systems-theoretical account of modern constitutionalism. Luhmann's sociology of law centers on the analysis of modern complex society which admits of multiple dimensions of description and can be rendered

[3]*Id.* at 394.
[4]*Id.* at 395.
[5]*Id.* at 404–05.
[6]*See id.* at 408–09.
[7]*See id.* at 414.
[8]Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 L. & Soc'y Rev. 239, 273 (1983).

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intelligible through a variety of observational frameworks. It stands in sharp contrast to stratified societies, in which the individual was usually assigned to one subsystem and defined entirely by that placement. Therefore, to make meaningful communications in this infinitely complex society, different social subsystems have to establish a specific difference between themselves and their environment so that social complexity can be reduced to a manageable extent. Such kind of boundary-drawing relies on the "coding" of social subsystems: every subsystem is endowed with a specific binary code that distinguishes between a positive value and a negative value, which enables the selection of system-related information and prevents other "noises" from entering and overburdening the system. Besides "coding" that defines the identity of the system, "programming" specifies the conditions and criteria for the appropriateness of selections within a given coded framework—namely, whether a given communication should be assigned to one side or the other of the system's specific binary code.[9]

With coding and programming, each subsystem constitutes an island of reduced complexity within a world of infinite complexity[10] and operates in an *autopoietic* manner. The concept of "autopoiesis" was originally coined by the biologists Humberto Maturana and Francisco Varela to describe the self-reproductive logic of living organisms, and was subsequently introduced by Luhmann into social theory as an analytical instrument for understanding social systems. Just as living systems produce their constituent elements from within their own processes, social systems are autopoietic in that they reproduce their elements exclusively from their own existing elements, which are *communications*. A social system exists as a continuous linkage of new communicative acts to antecedent ones, thereby sustaining its own reproduction.

Based on the autopoiesis theory, Luhmann defines the relationship between social subsystems as operationally closed yet cognitively open, meaning that each system reproduces itself exclusively through its own operations and cannot directly communicate with another system, though it can register perturbations from its environment. The autopoiesis thesis also fundamentally shapes Luhmann's constitutional account. Unlike other constitutional theories that are built on the unity of law and politics, Luhmann suggests that the legal and political systems are "operatively closed and non-congruent": the legal system operates in accordance with the legal/illegal code, while the binary distinction for the political system is government/opposition. It is only by means of a *structural coupling* that the legal system and the political system are linked in the *Rechtsstaat*—that is, a schema which "defines two *reverse* perspectives as a *unity*."[11] Structural coupling allows each system to operate according to its own internal logic while registering the other as part of its environment and selectively processing perturbations from it. It is thus an important concept for Luhmann to address how operationally closed systems can nonetheless exert lasting mutual influence on one another.

In Luhmann's constitutional argument, the structural couplings among law, politics, and economy were formed in the second half of the eighteenth century. Economic interests were first abstracted from their specific contexts and "homogenized" by legal operations as legally protected/unprotected interests.[12] After that, these structural couplings were further extended to the political system due to the concept of "representation" springing forth from property rights and freedom of contract. However, globalization considerably destabilized these couplings pertaining to national constitutions and broke the frame of "the traditional differentiation in line with the political principle of territoriality."[13] The structural coupling between the reflexive mechanisms of law and politics is increasingly replaced by sectoral differentiation. These self-contained regimes are not

[9]*See* Emilios Christodoulidis, Law and Reflexive Politics 178–79 (1998).

[10]*See id.* at 83–84.

[11]Niklas Luhmann, Law as a Social System 368 (2004).

[12]*Id.* at 402.

[13]Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 Mich. J. Int'l L. 999, 1009 (2004).

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simply defined by highly specialized primary rules but also produce their own procedural norms on lawmaking, recognition, and legal sanctions—so called "secondary rules." The heterarchical forms of law fundamentally change the questions of legal validity and the unity and identity of law away from normative consistency towards operative "interlegality."[14] In this respect, Teubner claims that "constitutionalism moves into the transnational context and into the private sector."[15]

Globalization also demystifies the scheme of "attribution" of political constitutionalism. With the term "attribution," Teubner refers to the Kantian social mechanism that imputes "communicative events to these social constructs called 'persons'."[16] Classical constitutionalism relies on such attributions and the strategy of "subjectivization" to solve the collision of "the struggle of the gods," as Max Weber defines it.[17] Nevertheless, as long as fundamental rights refer to individual human rights against the intervention of the state and demarcate from politics areas of autonomy, only by means of "horizontal effects" can the constitution protect individual autonomy in other nonpolitical contexts. Such a compensatory resolution always conceals, rather than reveals, that there is in fact "no transfer from the state guarantees of individual freedoms into 'horizontal' relations between private actors." In fact, when we are forced to apply concrete, state-oriented, fundamental rights wholesale to the most varied interpersonal relations,[18] "[t]he re-entry [of outside discourses] to the internal side of law has the effect of making incomparable universalities appear all of a sudden as comparable entities inside law by reproducing the external world internally."[19] However, if each discourse is legitimately institutionalized in social practice and demonstrates a universal rationality, then how can the law decide between them?[20] The incommensurability of discourses and the lack of any meta-discourse fundamentally question the process of "transubstantiation" and call for redefining the new polytheism as a collision of different "grammars" instead of different sources of law.[21]

For these two reasons, Teubner asserts that "[t]here is no hope for social regulation through law!"[22] While every autonomous social subsystem has intrinsic universalizing tendencies, neither politics nor law can be a regulatory mechanism across systems. In this context, Teubner uses the idea of polycontexturality to describe a situation in which different "meaning worlds"—the economy, science, politics, law—each operate according to their own distinct rationality, with no single center capable of coordinating them or synthesizing them into a unified meta-theory. This finding casts legal pluralism and conflicts of law in a new light: every regulatory intervention of law that goes beyond the *intrinsic* boundaries between social subsystems is either irrelevant or produces disintegrating effects on the social area of life or disintegrating effects on regulatory law itself.[23] Legal regulation over these self-organizing systems leads to stability only on the condition that the recursive application of an operation to the system builds a stable "eigenvalue" that can be *synchronized* with the law.

[14]Gunther Teubner, *Fragmented Foundations: Societal Constitutionalism Beyond the Nation State*, *in* The Twilight of Constitutionalism? 327, 331 (Petra Dobner & Martin Loughlin eds., 2010).

[15]*Id.* at 328.

[16]Gunther Teubner, *Piercing the Contractual Veil: The Social Responsibility of Contractual Networks*, *in* Perspectives of Critical Contract Law 211, 227 (Thomas Wilhelmsson ed., 1992).

[17]*See* Gunther Teubner, *Altera Pars Audiatur: Law in the Collision of Discourses*, *in* Law, Society and Economy: Centenary Essays for the London School of Economics and Political Science 1895–1995, at 149, 156 (Richard Rawlings ed., 1997).

[18]*See* Teubner, *supra* note 14, at 336–37.

[19]Teubner, *supra* note 17, at 166.

[20]*See id.* at 157.

[21]*See id.* at 154.

[22]Gunther Teubner, *Regulatory Law: Chronicle of a Death Foretold*, 1 Soc. & Legal Stud. 451, 462 (1992).

[23]*See* Gunther Teubner, Constitutional Fragments: Social Constitutionalism and Globalization 21 (2012).

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II. From "Structural Coupling" to "Linkage Institutions"

Confronting the regulatory trilemma, Alberto Febbrajo suggests that "autopoiesis is not so much a static theory concerned with system closure as a dynamic theory concerned with the way a system changes and opens up to other systems."[24] Teubner also critiques structural coupling for being "inherently static, nondynamic, nonprocessual,"[25] and not complex enough to cope with the special problems of law and society. In contrast, he steers a middle course between random linkages and comprehensive structural drift and suggests that law can be bound to a multitude of functional subsystems and formal organizations through "linkage institutions." Linkage institutions are institutionalized interfaces that connect and mediate between autonomous social subsystems without subordinating one to another. They are usually *hybrid* organizational forms sitting at the intersection of two or more functionally differentiated social systems, such as internal corporate compliance organs that mediate between corporate norms and external social expectations.[26]

Teubner borrowed the idea of linkage institutions from the "third-order autopoiesis" thesis developed by Bob Jessop. Jessop argues that the limits of Luhmann's autopoietic theory lie in the fact that it remains unclear "how a 'society effect' arises from several autonomous subsystems."[27] Consequently, he suggests that systems theory must take into account two sets of questions: first, how the autopoietic social system relates to society as a whole and secures "the performance of all the necessary societal functions," and second, how "the relations among autopoietic subsystems and/or neighboring allopoietic systems" are handled. In other words, if "rejection values" exist in each subsystem, how can social subsystems be rendered mutually compatible?[28]

Thereby, Jessop turns our attention to how different social subsystems are *articulated*, and develops a more detailed analysis within autopoietic theory by proposing a distinction between first-order, second-order, and third-order autopoietics. As he puts it, "[i]f first-order autopoietics is concerned with the general structure of communication in society and second-order autopoietics is concerned with the differentiation of autopoietic subsystems, we should develop a third-order analysis concerned with the contingent articulation among differentiated subsystems in a social formation."[29] Moreover, he elucidates that third-order articulation can occur in two forms, either as *interdiscursivity* at the level of first-order autopoiesis, or at the level of second-order autopoiesis—namely, *within* individual subsystems to establish direct links and/or to further structural coupling with other subsystems. In this respect, *strategic* analysis is preferred by Jessop to the declaration that "a system is either autopoietic or it is not."[30]

Inspired by Jessop, Teubner's approach is not only exemplary of the third-order articulation but also suggests a distinction between structural coupling and linkage institutions. As he argues, while "structural coupling" leads to transitory structural changes, "linkage institutions" are responsible for the duration, intensity, and quality of structural coupling.[31] In other words, linkage

[24]Alberto Febbrajo, *The Autopoietic Approach and Its Form*, *in* STATE, LAW AND ECONOMY AS AUTOPOIETIC SYSTEMS: REGULATION AND AUTONOMY IN A NEW PERSPECTIVE 19, 19 (Gunther Teubner & Alberto Febbrajo eds., 1992).

[25]Gunther Teubner, *Two Faces of Janus: Rethinking Legal Pluralism*, *in* LAW AND POWER: CRITICAL AND SOCIO-LEGAL ESSAYS 119, 126 (Kaarlo Tuori, Zenon Bankowski & Jyrki Uusitalo eds., 1997).

[26]*See* Gunther Teubner, *The Corporate Codes of Multinationals: Company Constitutions Beyond Corporate Governance and Co-determination*, *in* CONFLICT OF LAWS AND LAWS OF CONFLICT IN EUROPE AND BEYOND: PATTERNS OF SUPRANATIONAL AND TRANSNATIONAL JURIDIFICATION 261, 268 (Rainer Nickel ed., 2009) (mentioning "inter-systemic linking institutions," especially the hybridization of the corporate codes).

[27]Bob Jessop, *The Economy, the State and the Law: Theories of Relative Autonomy and Autopoietic Closure* 94 (Eur. Univ. Inst. Working Paper No. 263, 1987), https://cadmus.eui.eu/handle/1814/23013.

[28]*See id.* at 75.

[29]*Id.* at 80.

[30]*Id.* at 78.

[31]Gunther Teubner, *Autopoiesis and Steering: How Politics Profit from the Normative Surplus of Capital*, *in* AUTOPOIESIS AND CONFIGURATION THEORY: NEW APPROACHES TO SOCIETAL STEERING 127, 128 (Roeland J. Veld, Linze Schaap, Catrien J.A.M. Termeer, Mark J.W. Twist eds., 1991).

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institutions that bind the law to diverse social discourses much more closely than politics would suggest a "resonance" of law with civil society and an increase in ecological responsiveness. In the global context, large areas of law are only in loose, non-systematic contact with social processes; nevertheless, where legal and social processes are tightly coupled, new legal rules can be generated in ultracyclical processes.[32] Different from a hypercycle, which refers to communicative operations within a closed network that are interlinked in a circular way, an ultracycle indicates mutual perturbations between closed networks.[33] In this respect, "ultracyclic" linkages can inspire a micro-level articulation to form "autopoiesis within autopoiesis."[34] As Teubner elaborates, if parallel processes of social self-reproduction are linked permanently by such institutions to each other and cyclically act on each other, the number of possible viable eigenvalues will decrease because they are exposed to and must endure under increased perturbation.[35] Teubner thus asks,

> [i]s not law in relation to other cultural provinces like politics, science, economy, religion, culture much more "open" than the general concept of structural coupling would allow for? Is not "interdiscursivity" in law and society much more dense than mere transitory perturbations could ever produce? And do we find in the coevolution of law and society significantly more elective affinities than the mere coexistence of structural shift would provide for?[36]

The strategic construction of linkage institutions thus brings about the reentry of an institutionalized distinction into what it distinguishes, which is expected to stimulate an internal shift between *center* and *periphery*: the dominant distinction between law and politics can be decentered and replaced by distinctions between law and other social fields.[37] Subsequently, an *inversion* of the legal order will occur: legislation loses its centrality at the top of the hierarchy, while *lex mercatoria*, as an example of a social norm operating in direct coupling with global economic organizations and transactions, gains momentum. In other words, an alternative semantics of law based on the needs of polycontexturality emerges in the shadow of positivism.

Thereby, Teubner found an organized yet transformative trajectory without resorting to the political system. However, we might ask: is this internal shift between center and periphery adequate for addressing the deficiency of social responsiveness? Teubner does recognize that differences between loose and tight coupling will affect the global convergence of law because, compared with *lex mercatoria*, such synchronized coupling is largely underdeveloped in other social sectors. To this extent, he admits, "the ecologization of the economic discourse ... is a burning political issue."[38] However, this shortfall does not stop Teubner from claiming that "[t]he current task of law cannot be to reconstitute the lost unity of society but to designate borders of plural identities, protect them against domination by other discourses and limit damage from the fallout of discourse collisions."[39] In the next section, we shall explore whether the asymmetrical relationship between the center and periphery of the social system can be converted to produce genuine polycontexturality.

[32]*See* Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergencies*, 61 MOD. L. REV. 11, 18 (1998).

[33]*See* Gunther Teubner, *Self-Constitutionalizing TNCs? On the Linkage of "Private" and "Public" Corporate Codes of Conduct*, 18 IND. J. GLOB. LEGAL STUD. 617, 634 (2011).

[34]Teubner, *supra* note 25, at 123.

[35]*See id.* at 138.

[36]*Id.* at 123–24.

[37]*See* Gunther Teubner, *Breaking Frames: Economic Globalization and the Emergence of Lex Mercatoria*, 5 EUR. J. SOC. THEORY 199, 207 (2002).

[38]Teubner, *supra* note 17, at 168.

[39]*Id.* at 175.

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III. The Function–Performance–Reflection Mechanism within Private Law Regimes

"[A]fter privatization, what now?" Teubner asks.[40] With third-order autopoiesis as a means of "articulation," Teubner observes that under the prevailing economic rationality, genuine polycontexturality should be developed within private law regimes, employing the trichotomic operations of function–performance–reflection. For example, specific to the field of corporate governance, while "function" and "performance" refer respectively to the enterprise's relationship to the economy and its various environments, the "reflexive" structures within the enterprise mediate the main social task of the enterprise and its various contributions to different sectors of social life, creating potential dialectics between code-compatible and code-adverse values.

However, we might ask, which code is it exactly that Teubner refers to here? The economic code or the code of other social subsystems? The answer concerns whose "acceptance/rejection" the third-order autopoiesis is evaluated against. Can "reflection" *sufficiently* orient the functional imperatives of social subsystems towards multifunctional performance, and if so, under what conditions? Teubner does not give a definitive answer to this inquiry but is satisfied with setting up tentative contact points. For him, it is possible that without reference to public law or political constitution, the individual markets or the economy as a whole will be compelled to develop a political system of their own that protects and facilitates noneconomic activities. In other words, unlike Emilios Christodoulidis, who is concerned with the question of "irritation capacity,"[41] namely, how strongly one social system can affect and unsettle another system to force the latter to respond, the key for Teubner is less about the intensity of irritation than about the establishment of connections first. For example, insofar as codetermination shifts decisions and conflict resolutions to intra-organizational boards with labor representation, industrial conflict becomes internalized into the economic organization, "with the result that works council and management become subsystems of an integrated, internally differentiated system of industrial government which increasingly supersedes the traditionally dualistic class-based system of industrial relations."[42] Corporate social responsibility (CSR) serves as another decentralized integrative device between the autonomous economic organization and its environmental systems.[43] "Responsible" corporate behavior is characterized by contradictory demands of corporate performance and function, which may be resolved by externally stimulated internal reflection and "organizational conscience."[44] As Teubner quotes from Luhmann:

> [A]t the level of the consolidating world society, norms (in the form of values, regulations, purposes) do not anymore steer the pre-selection of the cognitive, rather vice versa the problem of adaptation through learning gains structural primacy and the structural conditions for the compatibility of all subsystems to learn have to be supported.[45]

To conclude, for Teubner, structural coupling is as destructible—between law and politics—as to be re-established between law and other social subsystems. Building up solid social responsiveness relies on effective linkage institutions that can deliver "compatibility" value to clashing social subsystems and decrease the number of separate "eigenvalues" while increasing perturbations that

[40]*See* Gunther Teubner, *The King's Many Bodies: The Self-Deconstruction of Law's Hierarchy*, 31 L. & Soc'y Rev., 763, 781 (1997).

[41]*See* Emilios Christodoulidis, *On the Politics of Societal Constitutionalism*, 20 Ind. J. Glob. Legal Stud. 629, 642 (2013).

[42]Gunther Teubner, *Industrial Democracy Through Law? Social Functions of Law in Institutional Innovations*, *in* Contract and Organization: Legal Analysis in the Light of Economic and Social Theory 261, 268 (Terence Daintith & Gunther Teubner eds., 1986).

[43]*See* Gunther Teubner, *Corporate Fiduciary Duties and Their Beneficiaries: A Functional Approach to the Legal Institutionalization of Corporate Responsibility*, *in* Corporate Governance and Directors' Liabilities 149, 162 (Klaus J. Hopt & Gunther Teubner eds., 1985).

[44]*See* Teubner, *supra* note 8, at 278.

[45]Teubner, *supra* note 33, at 636.

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lead to social responsiveness and coevolution. Based on this argument, it is clear that *connectivity* becomes central to Teubner's proposal of transnational societal constitutionalism.[46] Among the several points of connectivity, *lex mercatoria* is one of the closest and most effective couplings between the legal system and the economic system, in place of the one between law and nation-state politics. As long as enterprises can develop their own "eigendynamics" and reinforce their responsiveness to the wider civil society by means of internal politicization, the vicious circle of economic expansion can probably be turned into a virtuous one. However, what is lacking from this proposition is an answer to the question of whether these contact points are naturally constructive for polycontexturality and capable of resisting co-optation. With Teubner's insightful accounts on linkage institutions and "autopoiesis within autopoiesis," in the next section, we move to the application of the polycontextural law model to China. Based on Chinese "Reform" history, I will explore possible inadequacies of this model from three aspects.

D. The Chinese Experience: A Counterexample to Polycontextural Law?

I. An Empirical Study of Functional Differentiation in the Early "Reform" Period of China

In the law and political economy literature, China's reform trajectory poses a "great puzzle" that challenges conventional assumptions about the sequencing of law, marketization, and political change—namely, how substantial economic growth could be achieved irrespective of the quality of the country's legal institutions.[47] Existing studies have questioned whether Chinese legal development should not be read at the formal level but reconfigured along with political dynamics such as the bargaining power between the central and the local governments.[48] This approach coincides with the systemic-theoretical approach to embedding the legal evolution into the whole social system.

In many aspects, Teubner's diagnosis of Chinese legal modernization is acute and precise. Before 1978, private autonomy and the social division of labor were lacking in China due to the total fusion between private law and public law. The "work units" in urban areas and the "people's communes" in rural areas served multiple functions in people's economic and social lives and hence were the chief mechanism of social organization and integration. China's economic liberalization and social differentiation started with the contractualization of land use rights in the countryside. While according to the socialist constitution, land in rural places was owned by the rural community, the "rural household contract responsibility system" (*jiating lianchan chengbao zerenzhi*) separated land ownership from land use rights, which made it possible for peasants to sign a formal contract with their collective economic organizations and enjoy the rights to share in the income or benefits derived from the use of the collectively owned land. By doing so, peasants could return to "household farming" and work on the plots assigned to them. After that, urban reform started in approximately 1986, when state enterprises adopted the "factory director responsibility system" (*changzhang jingli fuzezhi*). In lieu of the direct leadership of the state, a factory director was selected to manage the factory and was entrusted with powers to implement the labor contract system and probation period to dismiss workers. The ownership and operation of state-owned enterprises (SOEs) were thus separated. Moreover, as the factory director responsibility system changed the model of "state-monopolized revenue and expenditure" and allowed factories to retain benefits, it gave factories the impetus to compete in the marketplace and smash the "iron rice bowl" of the workers. In other words, the lifetime employment system and the

[46]*See* Poul F. Kjaer, *Constitutionalizing Connectivity: The Constitutional Grid of World Society*, 45 J.L. & Soc'y 114, 114 (2018).

[47]*See* Tamar Groswald Ozery, Law And Political Economy in China: The Role of Law in Corporate Governance and Market Growth 1 (2023).

[48]*See* Susan L. Shirk, *The Politics of Industrial Reform*, *in* The political Economy of Reform in Post-Mao China 195–221 (Elizabeth J. Perry and Christine Wong eds., 1985).

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equalitarian distribution of benefits that disregarded the contributions of the individual worker began to collapse.

However, at that time, China was still managing a dual-track price system—namely, a system containing a fixed price and a market price for the same kind of products. For key agricultural products and important goods, only the excess to state plans could be sold at market price. The manipulation of exchanges by government officials between the two prices triggered dissatisfaction among the people and resulted in the 1989 political movement, initially in the name of anti-corruption. From 1988 and especially after 1989, the "Reform and Opening-Up" policy was suspended. "Centralization" was re-emphasized in the three-year overhaul in response to the economic blockade by foreign countries. A debate concerning the "Socialist Road" or the "Capitalist Road" that China should take was heating up.

In 1992, Deng Xiaoping gave his "Southern Tour Speech" when visiting Shenzhen, Wuchang, Zhuhai, and Shanghai, which put an end to criticisms against him and restarted the Reform agenda. Some argued that such a turning point was attributable to China already having "market-preserving federalism," the durability of which kept political conservatives, who were rejecting the "third path," from enforcing a reversal.[49] Nevertheless, following 1989, some significant deviations from a normal marketization process should be noted. First, China's SOE reforms continued as in the 1980s, but adopted a selective strategy. After the 1988 Law on Industrial Enterprise Owned by the Whole People stressed the "operational spheres of autonomy of SOEs," the Company Law came into effect on July 1, 1994, and promoted modern "corporate governance" in China. However, Iain MacNeil carefully used the term "corporatization" instead of "privatization" to define the Chinese SOE reform, as the assets of SOEs still belong to the state.[50] MacNeil thus limited the effects of "corporatization" to "formalizing the separation of state from SOEs, as the state became a shareholder rather than the direct owner of productive assets."[51]

Another significant characteristic that MacNeil observed concerning Chinese corporate governance lay in the limited marketability of shares. In the 1990s, Chinese stock exchanges fell far short of Western "outsider"-control models, as they allowed for only a small proportion of shares to be traded on the exchange.[52] Foreign investors "cannot own A shares, which represent the majority of the marketable shares of listed companies."[53] The state as the controlling shareholder thus limited the emergence of institutional investors and the possibility of takeovers. In this sense, "raising funds through issuing shares to the public" has both absorbed "the huge amount of unused money in civil society" and advanced "mainly the interest of the state as a shareholder—the biggest private interest in China."[54]

This selective strategy was more obvious in the insolvency of SOEs. In addition to the 1986 Enterprise Bankruptcy Law, the State Council issued a "notice" in 1994 which gave preferential treatment to fourteen pilot cities for them to "optimize the capital structure."[55] However, in fact, only small and medium-sized SOEs were encouraged to be leased or sold to collective organizations

[49]*See* Gabriella Montinola, Yingyi Qian & Barry R. Weingast, *Federalism, Chinese Style: The Political Basis for Economic Success*, 48 World Pol. 50, 72 (1995).

[50]*See* Iain MacNeil, *Adaptation and Convergence in Corporate Governance: The Case of Chinese Listed Companies*, 2 J. Corp. L. Stud. 289, 310 (2002). *See also* Donald C. Clarke, *Corporatization, Not Privatization*, 7 China Econ. Q. 97, 97–98 (2003).

[51]MacNeil, *supra* note 50, at 310.

[52]Roman Tomasic, *Looking at Corporate Governance in China's Large Companies: Is the Glass Half Full or Half Empty?*, *in* The Development of the Chinese Legal System: Change and Challenges 182, 196 (Guanghua Yu ed., 2011).

[53]MacNeil, *supra* note 50, at 312.

[54]Jiangyu Wang, *The Political Logic of Securities Regulation in China*, *in* The Development of the Chinese Legal System, *supra* note 52, at 227, 234, 242.

[55]Guowuyuan Guanyu Zai Ruogan Chengshi Shixing Guoyou Qiye Pochan Youguan Wenti de Tongzhi (国务院关于在若干城市试行国有企业破产有关问题的通知) [Notice on Several Issues Concerning the Trial Implementation of State-Owned Enterprise Bankruptcy in Several Cities] (issued by the State Council, Oct. 25, 1994), Chinese Central Government Website, https://www.gov.cn/zhengce/zhengceku/2010-11/15/content_1548.htm.

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or individuals.[56] If an enterprise was deemed improper to go bankrupt, the local government would subsidize it. These enterprises were mainly concentrated in China's "strategically important industries," which played the leading role in the state-owned economy. In 1999, this strategy was officially named "grasping the large and releasing the small" (*zhuada fangxiao*).[57]

This logic of "corporatization instead of privatization" was also replicated in Chinese banking reform. Since 1983, a two-tier banking system has established the framework of China's banking sector:[58] the People's Bank of China (PBC) was reorganized as the central bank of China to lead four specialized banks—Agricultural Bank of China, Industrial and Commercial Bank of China, Bank of China, and China Construction Bank—that were set up in 1984. Following that, in 1994, three "policy banks"—China Development Bank, Agricultural Development Bank of China, Export-Import Bank of China—were founded to take over policy functions from the four specialized banks which transformed them into national commercial banks so that commercialization could go along with the policy functions of the banking system. Between 1992 and 1997, the SOE reform resulted in a large amount of nonperforming loans (NPLs); hence, in 1999, the Ministry of Finance set up four asset management companies to purchase 1.4 trillion yuan of NPLs so that SOEs and state-owned commercial banks could be listed in the market.[59] Having carefully observed China's restructuring of commercial banks, Nicholas Howson has suggested that they can hardly get rid of China's nomenclature as they are "too big to fail."[60]

In the meanwhile, the 1994 tax reform was considered by many Chinese scholars to be a key reform during the 1990s. Before that, China was practicing a fiscal contracting scheme between two adjacent levels of government. "[A] lower-level regional government contracts with the upper-level regional government on the total amount (or share) of tax and profit revenue . . . to be remitted for the next several years, and the lower-level government keeps the rest."[61] It thus had given more incentives for local governments to protect local enterprises. However, from 1994, a tax-sharing reform was implemented. The national tax system and local tax system were separately established, and taxes were divided into national, local, and joint types. Taxes on banking, insurance, telecommunication, and railway industries, etc. belonged exclusively to the national tax system, and the national government relied on the mechanism of "transfer payment" to compensate local governments and hence could selectively implement its policies. According to An Chen's research, among the different types of local taxes, the largest one was the business tax levied against tertiary industries.[62] Consequently, the taxation reform significantly shifted the focus of Chinese local

[56]Zhonggong Zhongyang Guanyu Jianli Shehuizhuyi Shichangjingji Tizhi Ruogan Wenti de Jueding (中共中央关于建立社会主义市场经济体制若干问题的决定) [*Decision of the Central Committee of the CPC on Several Issues Concerning the Establishment of the Socialist Market Economy System*] (issued by the Central Committee of the CPC, Nov. 14, 1993), GAZETTE OF THE STATE COUNCIL, NO. 28, at 1288, https://www.gov.cn/gongbao/shuju/1993/gwyb199328.pdf.

[57]Central Committee of the CPC, *Zhonggong Zhongyang Guanyu Guoyou Qiye Gaige He Fazhan Ruogan Zhongda Wenti de Jueding* (中共中央关于国有企业改革和发展若干重大问题的决定 [*Decision of the Central Committee of the CPC on Major Issues Concerning the Reform and Development of State-Owned Enterprises*] (issued by the Central Committee of the CPC, Sept. 22, 1999), CHINESE COMMUNIST PARTY NEWS NETWORK, https://cpc.people.com.cn/BIG5/64162/71380/71382/71386/4837883.html.

[58]Yuwa Wei, *China's Banking Reforms at the Time of Global Economic Recession*, *in* THE DEVELOPMENT OF THE CHINESE LEGAL SYSTEM, *supra* note 52, at 209, 213.

[59]Dong Dengxin, *Zhongguo Qiye Rongzi Tixi Sanshinian Dabianqian* [*Thirty-Year Transition of China's Enterprise Financing*], SINA.COM (Dec. 14, 2010), https://finance.sina.com.cn/review/fxzs/20101214/14089104492.shtml.

[60]Nicholas Calcina Howson, *China's Restructured Commercial Banks: Nomenklatura Accountability Serving Corporate Governance Reform?*, *in* CHINA'S EMERGING FINANCIAL MARKETS: CHALLENGES AND GLOBAL IMPACT 123, 148 (Zhu Min, Cai Jinqing & Martha Avery eds., 2009).

[61]Montinola, Qian and Weingast, *supra* note 49, at 63.

[62]An Chen, *The 1994 Tax Reform and Its Impact on China's Rural Fiscal Structure*, 34 MOD. CHINA 303, 309 (2008).

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governments from "industrialization" to "urbanization" of land and gave rise to the phenomenon of "land financing" in China.[63]

While land was state-owned and collective-owned, the right to use land could be lawfully transferred—namely, a dual land tenure system was established in China. The Land Administration Law enacted in 1986 split the right to use land into non-profit use and profit-oriented use, regulated as "assignment" (*churang*) and "transference" (*zhuanrang*) separately. However, to deal with "jurisdictional conflicts" in the system of land use rights caused by separate implementing rules enacted by local governments since the 1990s, and "to tighten state control over perceived abuse,"[64] the Regulation on the Implementation of Land Administration Law was promulgated in 1998: an administrative registration procedure was implemented to unify the two types of land use rights, as they both have to be registered and regulated by the county-level or above-county-level governments. Moreover, as the Land Administration Department of the State Council manages overall planning of land use and has power to convert non-agricultural use of land under collective ownership, the state monopolizes the first-tier land market both in urban and rural areas in effect and can transact land use rights in the second-tier land market. To summarize, the taxation and land registration reforms and the SOE reform notably indicate a policy transition in the 1990s from "opening" to "managing openness," in which the function of law also shifted from decentralization to recentralization.

While reforms in land, finance, and taxation were undertaken almost at the same time, they could not be all successful without any loss—but who bore that loss? To answer this question, it is worth shedding light on the transformation and legalization of welfare services in China. The social welfare issue in pre-Reform China was part of the country's economic institutions and relied on the distribution of separate work units. However, after the introduction of bankruptcy risks, it was no longer possible for SOEs to handle this function. First, in the 1980s, work units began to distribute welfare benefits in wage form, which changed the nationally standardized wage grid practice and caused inequality across industries and factories. In addition, it transferred the categorization of welfare services from supply to consumption. The national social insurance system, comprising six basic types of insurance, was established thereafter, and its coverage was extended from SOEs to enterprises under different ownership types: private, collective, or foreign. Nevertheless, for the majority of SOE workers, this extension meant that they were deprived of their status as "masters of the factories" and compelled to purchase marketized social welfare, and by this means they were "socialized." In this process, enterprise autonomy, social security demands, and the market to supply welfare services were produced at the same time; however, underneath it were substantive losses among the Chinese working class, not to mention the effects of inflation and corruption. In 2000, Premier Rongji Zhu publicly acknowledged in a speech that there was an enormous deficit in the social pooling of pension insurance, which added up to 37.6 billion yuan in 1999.[65]

The housing reform reflected both the consequences of the land reform and those of the social security reform. It was initiated in 1988, and its immediate objective was to raise the rent, with the long-term objective of "allocating houses or apartments through the market." In 1994, the State Council issued the Decision on Deepening the Reform of the Urban Housing System, the gist of which was to "incorporate housing benefits into the salary of employees so that high-income families could buy commercial houses (*shangpinfang*), while middle-and low-income families could purchase subsidized suitable economy houses (*jingji shiyongfang*) or lease low-rent

[63]Feizhou Zhou, *Fenshuizhi Shinian: Zhidu Ji Qi Yingxiang* [*Ten Years After the Tax-Sharing System: Institutions and Their Impacts*], 27 Zhongguo Shehui Kexue [Social Science in China] 100, 114 (2006).

[64]*See* Pitman B. Potter, *Public Regulation of Private Relations: Changing Conditions of Property Regulation in China*, *in* The Development of the Chinese Legal System, *supra* note 52, at 51, 54.

[65]Zhu Rongji, *Jiakuai Wanshan Shehui Baozhang Tixi, Qieshi Baozheng Guojia Changzhijiuan* [*Speed Up Improving the Social Security System, and Ensure Lasting Peace and Stability of the Country*] (Sept. 30, 2011), https://www.71.cn/2011/0930/633233.shtml.

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apartments (*lianzufang*)."[66] While it was intended to be a system allowing the coexistence of policy housing and commercial housing, from 1998, China's public housing project decreased in size so as not to "interrupt the market order," and real estate transactions became a high-profit industry in China.

In sum, China's economic and social transition was mediated through a series of reforms, which Fan Gang and Wing Thye Woo named the "parallel partial progression" (PPP) approach. Compared to a sequencing model, reforms that were undertaken under the PPP approach were too comprehensive to resist,[67] which might explain the secret of its success. However, it is worth noting that Chinese Reform trajectory embodies deep complexity beyond privatization and a transition "from status to contract." First, there was a two-tier market structure established in China's economic system, which is crucial for us to interpret the meaning of the "socialist market economy." We can observe this structure in reforms to SOEs in China's strategic industries, the corporatization and non-marketability of shares in financial markets, the state monopoly of the first-tier land market and the divide between land ownership and the right to use, the tax sharing system and transfer payment mechanism, etc. Through these practices, China produced a model that could be called "state capitalism": market reforms were controlled and the strategically important industries were strengthened, while liquidating small and medium-sized SOEs was encouraged. Nevertheless, such hierarchy and priority were apparently not market-driven, but, concededly, a state-programmed art of government.

Second, China's socialization from the state was an enforced process guided by the state's policies. Therefore, the delivery of individual freedom from the economic reform was a dubious thesis. There were no equal parties before the contract, and there was no alternative of not contracting. This "contract without freedom" indicates an imposition of the effects of contractualization on SOE workers, where the market mechanism becomes a new means of control that is added to and blended with state administrative control. If we apply the Durkheimian thesis of "social division of labor," we would find that, because the commodification of labor, land, and other social welfare was enforced by the state, the organic solidarity derived from the process of functional differentiation turned pathological: an anomic type of social solidarity was combined with a type of forced social solidarity, which exerted a different but more ruthless control over the Chinese working class in particular.[68] As a result, the coupling between the legal system and the economic system through contractualization only increased workers' flexibility in the marketplace instead of their political autonomy and liberty.

Through this empirical study, it is clear that the Chinese legal system has operated not in an autopoietic manner but in one which is interwoven with political and economic policy priorities. It evolved as a flexible, selectively enforced, and politically embedded mechanism to facilitate decentralization, incentivize local actors, and stabilize reform outcomes without fundamentally altering the structure of party-state authority. From this perspective, Groswald Ozery has categorized the Chinese Reform process in three stages: an early stage of localized experimentation, a "legal modernization" stage featuring national-level legal reforms and recentralization, and a legalized politicization stage in which the regulatory state gained direct market governance roles through legal means.[69] This comment demonstrates that, dominated by the media of power and money, the Chinese legal system is far from operationally closed, which will affect the applicability of the polycontextural law model in China.

[66]Guanghua Yu, *The Role of Mortgages: A Case for Formal Law*, *in* THE DEVELOPMENT OF THE CHINESE LEGAL SYSTEM, *supra* note 52, at 113, 120.

[67]Fan Gang & Wing Thye Woo, *The Parallel Partial Progression Approach to Institutional Transformation in Transition Economies: Optimize Economic Coherence, Not Policy Sequence*, 35 MOD. CHINA 352, 354 (2009).

[68]See ÉMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 353–95 (George Simpson trans., 1933).

[69]See OZERY, *supra* note 47, at 34–35.

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II. Private Law as the Point of Connection for Polycontexturality

Based on Chinese reform history, my first contention with Teubner lies in his position of taking private law as the point of connection for polycontexturality. While Teubner does oppose the monotheism of the economic logic, his "attractor-legislator" thesis nevertheless privileges private law as the point of connection for polycontextuality. Teubner brought up this thesis to deal with the "regulatory trilemma": the key lies in building "elective affinity" between law and other social systems beyond the structural coupling between law and politics. He argues that through general norms or specific legal acts, the law can try to produce external interference, irritating the system in such a way that it moves from its attractor state to one which is at least compatible with the aims of the legislator.[70] In accordance with this thesis, private law attending to the nature of the marketplace (attractor) builds strategic linkage institutions between the economic system and the legal system, and in this way, private law development can gradually effectuate an inversion of the positive legal order—namely, state norms are not only subordinated to private norms but are also banished from the interior of norm-setting into the corporate environment.[71] In other words, private law development contributes to deconstructing the "[k]ing's two bodies" and the founding myth of national constitutionalism.

However, does this imply there is a natural connection between private law and the spontaneously organized civil society? The Chinese experience apparently proves the opposite. For example, the case study of SOE reform in China problematizes whether such spontaneity exists: Chinese corporate governance demonstrates that the Chinese corporate governance model cannot constitute an "autopoiesis within autopoiesis," as it was not derived from the recursive operations of the law and the market but from the political selections of what state ownership should be privatized and what social welfare should be dismantled. Consequently, in promulgating the Law on Property (LP), Chinese civil law scholars confronted a significant dilemma due to the entanglement between socialism and the market economy—namely, how to deal with the orthodoxy of public ownership while recognizing private property relations. A strategic approach had to be adopted to confine the LP to making provisions "for ownership of property rather than systems of ownership which concern the 'economic base' of society (according to Marxist theory) and which belong to the province of constitutional law rather than civil law."[72] In other words, only by suspending the discussion regarding the political concerns of equal distribution of state assets and social welfare and by reducing them to specific operations of civil law can the unique combination of socialist and private property rights be rendered possible.

While it can be contended that Chinese private law regimes did not meet the ideal function of private law in Teubner's thesis precisely because they were politicized, we could at least argue that the thesis that privatization can decenter the overdetermination of the political system and reveal the eigenvalues of social sectors lacks proof in China's Reform context. To the contrary, building hybrid, strategic linkages between the economic and legal systems only enabled Chinese political and economic elites to superimpose their interests on the evolution of the Chinese legal system while hindering generalization of these interests to the whole society. This brings us to the insights of Marcelo Neves, who is a key expert in examining Luhmann's systems theory in peripheral modernity. Neves has critically pointed out that a self-referential legal system did not arise spontaneously with the dissolving of the conventional moral consciousness in countries of peripheral modernity. Rather, under the enduring influence of the stratification principle, "[l]aw remained overdetermined by politics" and "did not have its own specific code difference between 'yes' and 'no' exclusively."[73]

[70]*See* Teubner, *supra* note 22, at 463.

[71]*See* Teubner, *supra* note 33, at 632.

[72]Albert Chen, *The Law of Property and the Evolving System of Property Rights in China*, *in* THE DEVELOPMENT OF THE CHINESE LEGAL SYSTEM, *supra* note 52, at 81, 91.

[73]Marcelo Neves, *From the Autopoiesis to the Allopoiesis of Law*, 18 J.L. & SOC'Y 242, 249 (2001).

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What is more worrying, as Neves explores, is a significant shortfall in social differentiation in countries of peripheral modernity—that is, "social exclusion." This is a type of "primary exclusion" which creates under-integrated and over-integrated segments of the population. "The over-integration pole has access to the products and benefits of the social systems without being simultaneously dependent on their constraints and rules, while the under-integrated pole is dependent on the rules and constraints without having access to the products and benefits."[74] Therefore, "social exclusion" is opposed to "citizenship" as an egalitarian legal integration and implies an absence of the impartiality of the constitutional state and the non-identification of the constitution.[75]

Neves thus names the functional differentiation in peripheral countries "allopoiesis" instead of "autopoiesis,"[76] indicating the reproduction of a system through the criteria, programs, and codes of its *environment*. And due to the fact that "the very distinction between legal and illegal becomes socially blurred,"[77] allopoietic law runs the risk of "dejuridification" instead of "juridification." As we have examined above, law in the Chinese context refers to retrospective legalization, bargaining tools between decentralization and recentralization, and regulatory norms instead of judicial independence or constitutional constraints. In contrast with welfare states where juridification "excludes the possibility of an adequate future-oriented, socially rewarding resolution,"[78] the legal system in countries of peripheral modernity has not achieved its operational closure. Neves thus argues that "constitutionalization" in countries of peripheral modernity demands a "public space construction of legality"[79] rather than the natural unfolding of the "intrinsic" orders of social sectors. Constitutionalization for them cannot be "just another and, therefore, redundant name for the self-description and self-reference of functionally differentiated systems";[80] it must be capable of promoting the equalitarian legal integration of the entire population.

In other words, when Teubner puts forward the "constitutive moment" of global societal constitutionalism, he refers, in fact, to a strategy of *hybridization* to incrementally transform the legal framework for social regulation from political law-making to private law-making. However, the "constitutive" dimension refers to the unleashing of the connective potentials of what has already been autonomous and does not exactly grasp the prevailing dilemmas in a transitional society, where the autopoiesis of law has not been entrenched as in European jurisprudence. Proposing private law-making in this case would put the cart before the horse, neglecting that the "private" cannot represent the "social" without first being generalized to be "public" interests. In the following section, I will discuss the second critical question concerning the "limitative movement" of Teubner's societal constitutionalism: can self-constraints be triggered without genuinely "social" pressures imposed on the subsystems to reverse their disaggregating and expansive tendency?

III. Constitutionalization Without Society-Wide Integration

With the whole society dissolved into separate self-contained regimes, can an equitable unity of society be guaranteed despite society's self-destructive fragmentation? Before answering this question, two more arise: do we truly need a social unity that is equivalent to organized nation-

[74]*Id.* at 261–62.

[75]*See* Marcelo Neves, *Between Under-Integration and Over-Integration: Not Taking Citizenship Seriously*, *in* IMAGINING BRAZIL 61, 69 (Jessé Souza & Valter Sinder eds., 2005).

[76]*See* Neves, *supra* note 73, at 255.

[77]Neves, *supra* note 75, at 73.

[78]TEUBNER, *supra* note 23, at 8.

[79]*See* Neves, *supra* note 75, at 76.

[80]*See* Jiří Přibáň, *Constitutionalism as Fear of the Political? A Comparative Analysis of Teubner's* Constitutional Fragments *and Thornhill's* A Sociology of Constitutions, 39 J.L. & SOC'Y 441, 448 (2012).

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states, and "to what extent must we generalize the principles of political constitutions"?[81] The answer to the first of these two subsequent questions is "no" for Teubner, because the current constitutional crisis is not caused by globalization but is "aggravated" by it to the extent that the "equilibrium" of the state ensemble is barely maintained. Deep down in jurisdictional shifts, it is the essence of political constitutionalism that calls for reconsideration. Therefore, instead of translating global constitutional fragments into a state-like integrated form, Teubner asserts that "the specific mission of legal theory would be to reflect upon the infinite game of references played out between a plurality of observation posts and upon its translation into a 'constitutional' form."[82] And this constitutional reconfiguration will depend on the interplay of a variety of "reflection centers" within functional systems apart from national politics, such as "civil society's counterpower from other contexts (media, public discussion, spontaneous protest, intellectuals, protest movements, NGOs, trade unions, professions and their organizations)."[83] In short, societal constitutionalism will be motivated by social peripheries in the shadow of politics.

While sharing the sociological approach to constitutionalism with Teubner, Chris Thornhill nevertheless believes that politics is essential for the "constitution of constitutionalism," as constitutionalism is "a revolutionary form of modern power applying itself throughout society at an unprecedented level of generalization, autonomy, and inclusion."[84] Unequal "irritation capacity" between different social sectors towards law will definitely result in asymmetrical coevolution, leave certain subsystems under-regulated or unregulated, and may finally lead to the collapse of systems coupling. However, towards such a need for social integration, Teubner responds: "Do not eliminate the divisions, but equilibrate them through *suum cuique*!"[85] Fragmentation does not necessarily entail the re-establishment of a centralized mechanism of integration; rather, it can be incrementally moderated through a *horizontal* distinction between reciprocity and impartiality.[86] Along this trajectory, numerous network phenomena will come into play in addition to legislative actions, overlaying if not replacing the integrative effects of institutionalized politics.[87] Instead of replicating political constitutionalism, Teubner claims, such a new fashion of integration can go in the direction of greater *dissociation* between law and politics and cut back the leading role of politics in integrating the whole society.[88]

Let us assume that the mechanism of integration can be reformulated devoid of politics. If the meta-code of reciprocity and impartiality must guide the process without being absorbed by the social subsystems, can Teubner refrain from declaring this integration mechanism *society-wide*? Can we merely rely on those frontier posts, contingent articulations, or "autopoiesis within autopoiesis" to contain the "spiral of growth" of social subsystems? On this point, Christodoulidis reminds us that in addition to the separate subsystemic reflection centers, "reciprocity" and "impartiality" must refer to a layer of "additional reflection" according to the public interest and public responsibility.[89] However, this additional layer is not manifested in Teubner's arguments. Instead of elaborating what distinguishes the meta-code from the social subsystems that are guided by it, Teubner immediately fuses "publicness" with its various "reentries" into the receiving subsystems and denies the existence of such a meta-constitution. Specific to the legal system, Teubner channels the meta-juridical requirement of public interest through a rearticulation of the

[81]Gunther Teubner, *Constitutionalizing Polycontexturality*, 20 Soc. & Legal Stud. 210, 215 (2011).

[82]Teubner, *supra* note 17, at 161.

[83]Teubner, *supra* note 23, at 84.

[84]*See* Přibáň, *supra* note 80, at 461.

[85]Gunther Teubner, *The Anonymous Matrix: Human Rights Violation by "Private" Transnational Actors*, 69 Mod. L. Rev. 327, 331 (2006).

[86]*See* Gunther Teubner, *Dealing with Paradoxes of Law: Derrida, Luhmann, Wiethölter*, *in* Paradoxes and Inconsistencies in the Law 41, 62 (Oren Perez & Gunther Teubner eds., 2006).

[87]*See id.* at 64.

[88]*See id.* at 62.

[89]*See* Christodoulidis, *supra* note 41, at 654.

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legal system with peripheral social sectors other than politics, so that the centrality of political law-making will be pushed to the periphery and private law-making will be raised to the center—the overruling of political "heterovalidation" by private "autovalidation."[90] However, it is worth pausing to ask: can the "meta-level" constitutionalization be *equivalently* translated into a "system-internal" conversion between "center" and "periphery" for the law? Or rather, is it the case that "re-specification overdetermines what might be generalizable in the first instance"?[91]

Here, we find that as long as Teubner positions the process of constitutionalization as one of hybridization, societal constitutionalism does not separate subsystem integration from social integration. For Teubner, radical diversity itself provides de facto guarantees for self-constraints and checks towards other expansive social subsystems; hence, he does not explain how reciprocity and impartiality are capable of coordinating social subsystems towards greater responsiveness. For Christodoulidis, however, "the problem is that with the 'reentry' into the other system's rationality, the political ceases to impact, underdetermined to the point at which it is in all cases productive to the receiving system and realigned to its functional imperatives,"[92] while being detrimental to the system's "performance" in world society.[93]

The ramifications that Christodoulidis predicts can be clearly found in Chinese constitutional reform. In 1993, the key notion of the "socialist market economy" was introduced into the Constitutional Amendment of China, which officially confirmed the role of marketization in the process of constitutionalization. What is striking, however, is that there has been no official clarification for such an extremely vague notion. Rather, its interpretation has in fact been subject to the process of market liberalization and a series of private laws that were enacted in the 1990s. On the one hand, this paradigm of legal modernization certainly coincides with Teubner's idea about "autovalidation" and the private forms of law-making. However, on the other hand, it implies that the market has been taken as the *generative* mechanism for China's constitutionalization and determines the potential extent of constitutional interpretations rather than the other way around. This is thus a pronounced example of how respecification through the private law autovalidation sacrificed what is generalizable in the first place—namely, the constitutional values of solidarity and equality. It has also resulted in a unique phenomenon of "legalization without constitutionalization" in contemporary China because the juridification of private rights must seek a way to bypass the doctrines of the socialist Constitution and inject market-enabling interpretations of it instead, which thus renders obsolete the reviewing function of the Constitution over Chinese private law reforms and prevents the "limitative" movement from taking hold.

From the Chinese experience, we can see that exchanging the "eigenvalue" of democracy for built-in perturbations and social responsiveness within the economic system can bring about social costs. Among them, the most significant one may be that the Chinese legal system has been prevented from developing congruently generalized normative expectations that can entrench the rule of law in Chinese society, because the "over-integrated" segment of the Chinese population privileged by the privatization strategy shares increasingly divergent expectations from the "under-integrated" masses. To this extent, I argue that the constitutional values of reciprocity and impartiality cannot be redressed merely through subsystem integration and equilibration. Rather, Neves reminds us that "[t]he constitution of constitutionalism requires a certain system disintegration (less dependence on functional systems), so that social integration, especially in the form of political and legal inclusion, can be increased."[94]

[90]Teubner, *supra* note 40, at 771.

[91]Emilios Christodoulidis, *Of Boundaries and "Tipping Points": A Response to Gunther Teubner*, 20 Soc. & Legal Stud. 238, 240 (2011).

[92]Christodoulidis, *supra* note 41, at 659.

[93]*See* Christodoulidis, *supra* note 91, at 239.

[94]Marcelo Neves, *From Constitutionalism to Transconstitutionalism: Beyond Constitutional Nationalism, Cosmopolitan Constitutional Unity and Fragmentary Constitutional Pluralism*, *in* Sociological Constitutionalism 267, 292–93 (Paul Blokker & Chris Thornhill eds., 2017).

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IV. Recursive Operations and Contestations of the "Non-Places"

In *Love as Passion*, Luhmann states that what his theoretical model does have in common with Michel Foucault's work is a clearly post-humanistic perspective. However, systems theory goes one step further to create a complex theoretical apparatus that can describe the nonrandom character of variations in social relations and to establish what restrictions were imposed by the social structure on possible discourse.[95] Likewise, Teubner asserts that "[r]ecursive operations cannot begin ex nihilo; they can only refer to something that does already exist . . . . And if this 'something' does not exist they have to invent it! . . . The solution again is an 'as if'."[96] Accordingly, Teubner suggests that "the experience that an energy released in society is bringing about destructive consequences" can only be overcome "by a process of self-critical reflection and a decision to engage in self-restraint."[97] The experience of the dark side of "catastrophe" will be the constitutional moment for capillary constitutions to initiate their collective learning at several "as-if" frontier posts, such as *homo politicus*, *oeconomicus*, *juridicus*, *organisatoricus*, *retalis*, etc.[98]

However, concerning these experimental linkage institutions and their cognitive values, systems theory differs greatly from Foucault's "power" discourses. While Teubner finds those as-if articulations productive for enhancing social responsiveness, Foucault reads them as the *dispositif* of knowledge-power. He examined, in particular, a new sort of governmental rationality based on the frontier post of *homo oeconomicus* that appeared in the mid-eighteenth century, which governs according to the evidence of economic analysis and to "a precise, continuous, clear and distinct knowledge of what is taking place in society, in the market, and in the economic circuits."[99] From its birth, the political constitution must cease to exert its framing function due to the inevitable lack of regulatory knowledge and the cognitively demanding requirements of governance. This conversion indicates that the binding arrangements of the constitution no longer stem from the authority or the collective will of the people but instead from the governmental truth. In Christodoulidis's revealing analysis, it indicates a tendency that environmental overcomplexity overwhelms normative undercomplexity.[100]

Nevertheless, autovalidation based on such a "truth" regime is neither the self-constitution of social sectors nor power-free for Foucault. Rather, the truth regimes, as he examined the pansexual term "sexuality," become new instruments for the people to orient their behaviors and foreclose other potentialities for change. In other words, recursive operations, even without institutionalized politics, can exclude those "non-places" from the system's operative logic and prevent them from changing the continuation of its rationality. Right at those frontier points of *homo politicus*, *oeconomicus*, and *juridicus*, Foucault found the domestication of one sectoral rationality by another occurs, whether in a traditional form of political repression or discipline, or by the "truth" regimes. This especially occurs when the asymmetrical "irritation capacity" between social subsystems affects the cognitive values of those as-if frontier posts, leaving uneven connectivity and preventing dissensus from staging contestations.

The prospective redress lies precisely in those "non-places" that can disrupt and dehomogenize the recursive operations and set up "any set of 'rationalities' as oppositional."[101] In 2021, after forty years of market-oriented reforms, the Chinese Civil Code finally came into effect following the decades-long struggle for private rights. However, this phenomenal achievement should not prevent us from attending to the adverse impacts that the market-oriented Reform paradigm left

[95]*See* Niklas Luhmann, *Preface to the English Edition*, *in* Love as Passion: The Codification of Intimacy 1, 2–4 (1986).
[96]Teubner, *supra* note 37, at 211.
[97]*See* Teubner, *supra* note 23, at 82.
[98]*See* Teubner, *supra* note 85, at 339.
[99]Michel Foucault, The Birth of Biopolitics: Lectures at the Collège de France 1978–79, at 62 (Michel Senellart ed., 2008).
[100]*See* Emilios Christodoulidis, The Redress of Law: Globalization, Constitutionalism and Market Capture 358 (2021).
[101]*See* Christodoulidis, *supra* note 41, at 650.

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on the development of other laws and the Chinese legal system in general. On this point, labor law reform in China is a particularly revealing indicator. After China's socialist "iron rice bowl" system was dissolved in the mid-1980s, the labor contract system was officially introduced by the 1994 Labor Law to guarantee the supply of human resources for China's economic reforms. Accordingly, in this law, the labor dispute resolution process is, overwhelmingly, individualized by design, containing "no constitutive laws that enable workers to assert themselves as a collective power capable of effecting labor relations."[102] The tight coupling between China's labor system and the socialist political system was thus decoupled and instead harnessed to the logic of marketization. Borrowing Teubner's words, a change in the "medium" of communication occurred: the political implications of labor mobilization were traded for the juridification of individual labor rights, which, in alignment with market imperatives, seriously diffused the collective engagement of the working class in China's political reform after 1978. Foucault's critical theory can perfectly capture the paradox of China's post-socialist protection of labor: the *subjectivation* of workers in labor law was accompanied by their degradation from a master status in the factories and their *subjugation* to market distribution. In rearticulating the subsystems of labor, law, and economy, the eigenvalue of "labor" has been reduced to one element of the commercial transactions and one party of the labor contract, which results in a remarkable co-optation of the legislative aim of labor law in service of the opposite purpose of market expansion.

This contradiction was manifest when the Labor Contract Law was promulgated in 2008. Chinese labor law scholars had an intense debate about the guiding principle of this law,[103] with some insisting that this law should protect both parties to the labor contract rather than merely the employees. Considering the dual aim of both ending the entitlements of socialism and ensuring the increased protection of labor rights under the market economy, it is not surprising that Chinese labor law was more effective in playing the former role than the latter, and that the "regulatory" aim of the Labor Contract Law became confused with that of the Contract Law. Following that, on July 16, 2021, several departments of the State Council jointly issued the *Guiding Opinions on Protecting Labor Rights and Interests of Workers Employed in New Forms*, which prescribe a *trichotomic* mode of regulation for platform employment in the context of the gig economy.[104] By defining platform employment as a "new form," the *Opinions* can either regulate platform employment with labor law or apply civil law if individuals rely on platforms to engage in freelance work, or between these two circumstances, a written agreement is required to be concluded between the worker and the enterprise to reasonably determine the rights and obligations of both parties. By listing these options, the *Opinions* can further reduce the ambit of labor law jurisdiction. Here, it is clear that the "media" for communication are also a form of power: while the growing trend of algorithmization can be perceived positively as a type of linkage institution with immensely constructive cognitive values, it can also be utilized as a strategy to evade mandatory labor protection in China.

Therefore, decisions over the normative implications and legislative orientation of labor protection must be politicized. By "politicized," I do not refer to the binary code of government and opposition of the political system but to the need for countervailing power when one

[102]Mary Gallagher, Authoritarian Legality in China: Law, Workers and the State 29 (2017).

[103]*See* Yefang Qian, *Laodong Hetongfa Xiugai Zhi Zheng Ji Xiufa Jianyi* [*Debates and Suggestions Concerning Revisions of the Labor Contract Law*], 5 Faxue [Law Science] 51, 52 (2016).

[104]*See* Renli Ziyuan Shehui Baozhangbu, Guojia Fazhan Gaigewei, Jiaotong Yunshubu Deng Guanyu Weihu Xin Jiuye Xingtai Laodongzhe Laodong Baozhang Quanyi De Zhidao Yijian (人力资源社会保障部、国家发展改革委、交通运输部等关于维护新就业形态劳动者劳动保障权益的指导意见) [*Guiding Opinions of the Ministry of Human Resources and Social Security, the National Development and Reform Commission, the Ministry of Transport, and Other Ministries and Commissions on Protecting the Labor Rights and Interests of Workers Employed in New Forms*] (issued by Ministry of Human Resources and Social Security, July 16, 2021), Ministry of Human Resources and Social Security, [2021] No. 56, https://www.mohrss.gov.cn/xxgk2020/fdzdgknr/zcfg/gfxwj/ldgx/202107/t20210722_419091.html.

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subsystem has extended beyond its boundary or when a number of society's systems enter a state of real or possible dedifferentiation.[105] Thornhill asserts that the political system may not "evolve to the level of differentiation which characterizes other systems," because the medium of power must play the role of "structural knots" whenever communications occurring at the intersection of two or more social systems become diffusively problematic and generate disabling perturbations for communications across society.[106] In other words, to redifferentiate subsystems, the political system must have the capacity to dedifferentiate subsystems. This notion of politics demands, in China, a *rupture* from the prevailing Reform mentality, which places the task of freeing workers from the socialist state's control as the primary concern but leaves the individual workers totally defenseless in the face of policy changes,[107] and which legally confirmed the All-China Federation of Trade Unions (ACFTU) as "the sole state-sanctioned union body" and discouraged independent trade unionism despite the spectacular commodification of labor forces. These gaps all call for a strengthening of the irritation capacity of the political system and a critical review of the autologics of recursive operations, where market competition is utilized to undercut the institutional basis for social solidarity that is essential for organizing atomized individuals and paving the way for democratization.

To conclude, although Teubner attributes the need for integration to the transitional, post-socialist context where the CPC continues to play a role in China's political life, this Article contends that this situation is not derived from cultural–historical uniqueness but largely from the unequal irritation capacity that results in the phenomenon of "economics overwhelm, politics underwhelm."[108] I take as a case study the decollectivization of the Chinese working class, which has weakened the irritation of the labor system, particularly as compared with that of the economic system, to the constitutional—legal—system, and has therefore further undermined the prospects for associational pluralism within the political system.

E. Conclusion

Weijiang Pan, an influential systems-theoretical scholar in China, once affirmatively declared that functional differentiation is "densifying" (*choumi hua*) in China.[109] While Teubner's polycontextural law thesis accurately captures this aspect of emerging social differentiation in China after the removal of the socialist mode of integration in the course of marketization, this Article suggests that Teubner's thesis should be confined in three aspects. First, the model of polycontextural law is designed to make up for the deficits of juridification in the context of welfare states, which in peripheral modernity has not been accomplished due to the unsuccessful filtering of political and economic influences. In other words, autovalidation of the private law regimes lacks institutional support for its operational closure when the legal code is entangled with or superimposed onto other social codes. Second, to develop polycontexturality, societal constitutionalism needs to balance multiple self-contained regimes according to the additional reflection of the "public interest," but proceduralization and hybridization fail to substantiate the meta-values of reciprocity and impartiality. Although Teubner acknowledges the necessity of contestations, he limits their occurrence merely to several frontier posts within the subsystems, but this cannot keep the "publicness" of the public interest from being co-opted. As such, the third

[105] *See* Chris Thornhill, *Niklas Luhmann, Carl Schmitt and the Modern Form of the Political*, 10 Eur. J. Soc. Theory 499, 512 (2007).

[106] *See id.* at 510–11.

[107] *See* Feng Chen, *Individual Rights and Collective Rights: Labor Predicament in China*, 40 Communist & Post-Communist Stud. 59, 63 (2007).

[108] Christodoulidis, *supra* note 41, at 642.

[109] *See* Weijiang Pan, *Zixu: Xitonglun Faxue Yu Zhongguo Falü De Zhuanxing* [*Preface: Systems-Theoretical Jurisprudence and the Transformation of Chinese Law*], *in* Falü Xitong De Ziwo Fansi: Gongneng Fenhua Shidai De Falixue [Self-Reflection of Legal System: Jurisprudence in the Age of Functional Differentiation] 1, 13–14 (2020).

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point to note is that to redress the unequal "irritation capacity" between social subsystems, external politicization is still needed to resist falling back into the recursive operations that continue discriminating against those who have no representation and thus cannot challenge the recursive rationality. Specific to the Chinese context, I argue that the dilemma of "legalization without constitutionalization" is attributable to the market-oriented Reform paradigm, which brings about separate autovalidated private law regimes without organizing them into a constitutional framework. Instead of predicting that such a Reform paradigm can deliver compensatory responsiveness to social needs as required by polycontexturality, it is critical to review the paradigm's adverse impacts on Chinese civil society following the immense privatization of the socialist country and to stress the role of public law in preventing the constitutional trajectory from being harnessed to the imperative of market allocations.

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