

DEVELOPMENTS

Book Review - Thomas Huber, Systemtheorie des Rechts. Die Rechtstheorie Niklas Luhmanns (2007)

*By Moritz Renner**

[Thomas Huber, Systemtheorie des Rechts. Die Rechtstheorie Niklas Luhmanns. Baden-Baden: Nomos 2007, 244 pp. ISBN: 978-3-8329-2483-6. € 46.00.]

When asked about his research projects as a young professor in 1968, Niklas Luhmann laconically replied: "A theory of society, duration: 30 years, costs: none". By the time of his death in 1998, this enormous endeavor had almost been completed. The German sociologist has left an innumerable amount of books and articles on every aspect of modern society, most notably a series of monographs on the "functional subsystems" of society – the economy¹, the sciences², law³, politics⁴, religion⁵ – culminating in his *opus magnum* "Die Gesellschaft der Gesellschaft"⁶. In spite of his aim of developing an all-encompassing *grand theory* of society based on Talcott Parson's theory of social systems, as a trained lawyer Niklas Luhmann always kept a special interest in the sociology of law – an interest, however, that has only partially been reciprocated by the legal discipline.

Thomas Huber's recently published doctoral dissertation on Niklas Luhmann's systems theory of law – defended at the University of Dresden – undertakes, and

* Research Associate, DFG (German Research Foundation) Collaborative Research Centre "Transformations of the State" (<http://www.sfb597.uni-bremen.de/>). Email: moritz.renner@sfb597.uni-bremen.de

¹ DIE WIRTSCHAFT DER GESELLSCHAFT (1988)

² DIE WISSENSCHAFT DER GESELLSCHAFT (1990)

³ DAS RECHT DER GESELLSCHAFT (1993)

⁴ DIE POLITIK DER GESELLSCHAFT (2000, published posthumously).

⁵ DIE RELIGION DER GESELLSCHAFT (2000, published posthumously).

⁶ Published in 1997.

masters the daring task of analyzing Luhmann's contribution to legal theory with remarkable thoroughness. Huber's bibliography lists some 120 works by Luhmann himself alone, and he aspires to deliver a comprehensive account not only of the primary texts but also of the reception and contemporary discussion of systems theory inside the legal (theoretical) discourse. That this book has been published only as late as last year, almost ten years after Luhmann's death, is paradigmatic for the uneasy relationship legal theorists have always entertained with systems theory. Although one of the two dominating social theories in post-war Germany, together with its counterpart Jürgen Habermas' critical theory, it was not before the 1990s that German mainstream jurisprudence became first interested in Luhmann's writings.⁷ English and American legal theory, in contrast, have – until now – hardly taken notice of systems theory at all. Only in 2004, an English translation of "Das Recht der Gesellschaft" has been published.⁸ That systems theory is known outside Continental European jurisprudence at all is in large part owed to Gunther Teubner's "Law as an Autopoietic System"⁹, published in 1993 (originally in German in 1989).

The perspective that Huber takes on systems theory is a decidedly jurisprudential one. He begins with explaining the basic theoretical framework of systems theory that describes society as a system of communication, but dedicates the larger part of his book (pp. 78-199) to tracing its implications on legal theory. The merits of this approach lie in its capability to tie the highly abstract concepts of systems theory to the language and the concrete problems of legal doctrine. This becomes apparent, for example, when the author discusses the admissibility of torture (pp. 114-117) or the impact of alternative dispute-settlement mechanisms on the legal system (pp. 192-198). By using a clear, succinct language and laying out his arguments in a well-structured and systematic manner, Huber thus convincingly presents the essence of Luhmannian thought to a legal audience. Yet he is not always successful in bridging the gap between social theory and legal practice, and so some parts of his book read more like mere paraphrases or even cited reproductions of Luhmann's formulations. These parts stand in some contrast to the "critical account" of Luhmann's theory that Huber had promised in his introduction (p. 13).

⁷ See e.g. Federal Constitutional Court judge Udo di Fabio, *Luhmann im Recht – Die juristische Rezeption soziologischer Betrachtung*, in NIKLAS LUHMANN'S DENKEN. INTERDISZIPLINÄRE EINFLÜSSE UND WIRKUNGEN (Helga Gripp-Hagelstange ed. 2000), 139.

⁸ NIKLAS LUHMANN, LAW AS A SOCIAL SYSTEM (K. Ziegert transl., Kastner, Nobles, Schiff, R. Ziegert eds., 2004), see also the book review by Peer Zumbansen in 15 SOCIAL AND LEGAL STUDIES 453 (2006), available here (listing many of Luhmann's monographs published in the English language).

⁹ GUNTHER TEUBNER, LAW AS AN AUTOPOIETIC SYSTEM (1993).

This, however, is excusable - mainly for two reasons. On the one hand, Huber correctly states that theory as such needs no justification as providing guiding principles for social practices, but must aim at elaborating an adequate and problem-aware depiction of reality (p. 205). Furthermore, Luhmann's very compact and precise (if often hermetic) language does not necessarily or easily lend itself to any further simplification, so that Huber might have had few alternatives to even adopt Luhmann's taste for sublimely ironic footnotes.¹⁰

Given the hesitation with which mainstream legal scholarship engages with systems theory, Huber's book will inevitably be seen as another necessary and referred-to 'introduction' or 'invitation' to read Luhmann. Here, Huber's book could have achieved more if Huber had chosen to be more outspoken in presenting the radicalness of Luhmann's thought. Luhmann in his late work of the 1980s and 1990s, building on Heinz von Foerster's epistemological constructivism¹¹ and George Spencer-Brown's calculus of form¹², tries nothing short of developing a theory of society that breaks with the entire tradition of European rationalism. Law, just like any other social system, he argues, is founded not on reason but on a fundamental paradox:¹³ the paradox that for the unavailability of an Archimedean point from which social sense is created law is ultimately defined by - itself! Luhmann's elective (though often unadmitted) affinity to Jacques Derrida's deconstruction of the "mythical foundations of authority"¹⁴ becomes clearly visible not only at this point but throughout his writings. Although never an outspoken friend of the concept of postmodernism, Luhmann can in many regards be seen as drawing the consequences from French poststructuralism, as the often puzzling, sometimes idiosyncratic but always precise successor of the extravagantly ambiguous prophets of the end of all meta-narratives¹⁵.

Against these authors' apocalyptic visions Luhmann posits his impassionate and slightly cynical account of how modern society works, how the legal system

¹⁰ See e.g. note 108 on the beach as a social system, note 411 explaining non-verbal communication by reference to an interview with soccer player Michael Preetz, and note 902 referring to Max Weber's dire existence in the footnotes of legal theory.

¹¹ HEINZ VON FOERSTER, *OBSERVING SYSTEMS* (1982)

¹² GEORGE SPENCER-BROWN, *LAWS OF FORM* (1969)

¹³ See further Niklas Luhmann, *Tautology and Paradox in the Self-Description of Modern Society*, 6 *SOCIOLOGICAL THEORY* 26, 33-4 (1988).

¹⁴ Jacques Derrida, *Force of Law: The mythical foundations of authority*, 11 *CARDOZO L. REV.* 909 (1990).

¹⁵ See further JEAN-FRANÇOIS LYOTARD, *LA CONDITION POSTMODERNE: RAPPORT SUR LE SAVOIR* (1985)

evolves not in spite but precisely because of its *foundation-less foundation* – and our inability to look it in the eye. To him, social systems are but an elaborate mechanism of “hiding the ball”¹⁶, hiding the paradox, which is then no longer the paralyzing specter of Continental European philosophy but can be understood as a creative principle.¹⁷ Viewed from this angle, even the famous Habermas-Luhmann debate of the late 1970s might reveal not only the antagonism but also the interconnections in the work of two great theorists.¹⁸ As they both ultimately aim at developing an evolutionary perspective on law as a communicative system, identifying their “implicit agreements and tacit convergences” appears a lot more fruitful than leading endless wars of faith over the “rightness” of one theory or the other.¹⁹ It is therefore regrettable that Huber commits only a few pages (pp. 199-214) to discussing and (all too quickly) dismissing the legal theoretical approaches that rely upon and further develop Luhmann’s ideas. He is especially hard on the attempts to combine systems theory with normative concepts of Habermasian origin (pp. 209-211), mainly arguing that they “water down” the crystalline clarity of systems theory’s very own language and concepts. Huber thus presents himself as an orthodox Luhmannian, faithfully preserving system theory’s intellectual purity from any contaminating contact with its environment. In its hesitance to really open the doors for mutual irritation between system theory adepts and the lawyers of ‘daily life’²⁰ as well as the adherents of competing theories, Huber’s meticulous thesis constitutes a very accessible and clearly argued account of Luhmann’s theory of law as a social system that is true to its letter but not always to its spirit.

¹⁶ See further Pierre Schlag, *Hiding the Ball*, 71 N. Y. U. L. REV. 1681 (1996)

¹⁷ Gunther Teubner, *Dealing with Paradoxes of Law: Derrida, Luhmann, Wiethölter*, in: ON PARADOXES AND INCONSISTENCIES IN LAW (Oren Perez and Gunther Teubner eds., 2006), 41-64

¹⁸ For a recent attempt see Poul Kjaer, *Systems in Context. On the Outcome of the Habermas/Luhmann-Debate*, ANCILLA JURIS 2006, 66, available at <http://www.anci.ch/doku.php?id=beitrag:systems>.

¹⁹ See most notably Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 LAW AND SOCIETY REVIEW 239, 244 (1983).

²⁰ David Kennedy, *Autumn Weekends: An Essay on Law and Everyday Life*, in: LAW IN EVERYDAY LIFE (Austin Sarat & Thomas R. Kearns eds., 1993), 191-235