A PURIFIED SOCIOLOGY OF LAW: NIKLAS LUHMANN ON THE AUTONOMY OF THE LEGAL SYSTEM

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I. INTRODUCTION

Niklas Luhmann is a troublemaker: he writes a great deal, and on very many subjects, and he is still expanding his theory. As a jurist, he started with studies on law and administration, but soon he reached the level of general sociology and published a wealth of books and articles on power, love, religion, morality, education, art, the economy, and the like.[1] With his supertheory he is now on his way to inheriting the philosophical tradition of the occident (cf. Habermas, 1985: 426–45). Luhmann has developed his own terminology, which sounds familiar, but in which the meaning of customary expressions such as "legitimacy," "ideology," "institution," and "meaning" is intentionally distorted. He also uses new concepts like "autopoiesis" and has created models for a fashionable semantic: "reduction of complexity," "legitimation by procedure"—now clichés for a social scientist. His compact-hermetic supertheory, his nicely constructed conceptual framework does not derive from a single source or principle only; rather, Luhmann has combined various theories and approaches in his super-mega-world view. Not only does he use cybernetics, formal systems theory (input-output models), sociological systems theory à la Parsons, Husserl's phenomenological epistemology, Gehlen's anthropology, and symbolic interactionism, but he has also recently borrowed from thermodynamics, biology, neurophysiology, theory of cells, and computer theory (cf. Luhmann, 1984: 27). Luhmann claims to have established a general systems theory, for which law and sociology of law are only a single field of application.

A particular problem in analyzing Luhmann's theory, especially his sociological theory of law, results from a change of paradigm in his approach. Luhmann no longer conceptualizes systems primarily as input-output models, but gives greater weight to the internal operations of self-reproduction ("autopoiesis") of functionally specified systems. Luhmann developed this new approach on a general level (1984). However, the consequences for this new

[1] An almost complete bibliography of Luhmann's writings from 1958 to 1980 can be found in Scholz (1981: 263–71). For the most recent bibliography, cf. Baecker *et al.* (1987: 720–37).

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way of looking at the legal system are not yet sufficiently elaborated.

In talking about Luhmann one easily tends to talk like Luhmann. In my exposition and discussion of Luhmann's sociology of law I will attempt to avoid this "maelstrom" effect of his terminology. Instead I will approach the material from an external point of view—as my own autopoet, so to speak. It is also not my intention to produce competing grand theories or even metatheories. My critique has grown out of the situation of sociology of law in West Germany, which can be characterized as a schism between purely grand-theoretical approaches such as Luhmann's, and also that of Teubner, Luhmann's mouthpiece in the field of legal doctrine on the one side and empirically oriented scholars on the other side, especially those who try to systematize the present state of empirical sociolegal research (cf. Raiser, 1987; Röhl, 1987; Rottleuthner, 1987). There are people who strive to invent lenses that will provide a comprehensive world view; there are others who prefer to look through their glasses in order to find out what is going on in the world. In either case it is necessary to polish one's instruments. But is the point of this to produce an internally consistent theory or to improve our empirically established knowledge? I will examine both matters. Luhmann's contributions to the sociology of law, especially his rigid reductionism, will be subjected to a critique on a conceptual level, and the usefulness of his concepts for empirical research will also be discussed. First, however, I wish to provide a very brief summary of Luhmann's general theory.

II. LUHMANN'S GENERAL SYSTEMS THEORY

A "system," according to Luhmann, can be defined as an entity that delimits itself from its environment by establishing and stabilizing the distinction between internal and external (Luhmann, 1968: 120). "System" and "environment" are complementary concepts. The external-internal boundary between both can be characterized by a grade of complexity: an environment is more complex than a system. Environmental complexity is reduced by selection of external information and by internal structuring. Systems and their elements are not conceptualized as the relationship between wholes and their parts. The "early Luhmann" stressed the open character of systems, the input-output relationship, problems of boundary maintenance, and reduction of complexity. He also gave—in contrast to Parsons—greater weight to the function than to the structure of systems, to the search for "functional equivalents," that is, for replacing systems mechanisms by other systems that meet the relevant functional exigencies. Luhmann distinguishes mechanic, organic, mental (psychic), and social systems. Only mental and social systems are

"meaning systems" insofar as they produce a surplus of references to other possibilities of experience and action. Consciousness of meaning (within a mental system) as well as communication about the meaningful (within a social system) always refer to more than pure facticity (actuality), but always comprise within their horizon the "possible" and the "negative" (Luhmann, 1984: 92ff.).

Rather than dealing in greater detail with the epistemological and anthropological assumptions implicit in Luhmann's concept of "meaning," it is more important to note that Luhmann holds that one kind of system (social, mental, etc.) cannot be reduced to another. Therefore, persons are not elements of social systems; rather, they constitute a part of the environment of social systems.[2] Luhmann distinguishes between various types of social systems: interactions, organizations, social (sub)systems, and *the* social system—that is, society. But—as their basic elements—all social systems consist of "meaningful *communications*" (or a synthesis of information, communication, comprehension) (Luhmann, 1988a).

Modern societies can best be characterized by *social differentiation*. They are no longer hierarchically structured as class societies but are functionally differentiated in various systems such as the political system, the legal or economic system, religion, education, art, and so on. The theory of social differentiation and the radicalization of functional specification (i.e., the assumption that every system fulfills one fundamental function that cannot be substituted by other systems) stimulated Luhmann's paradigm change and his theoretical movement toward autopoiesis.

The scope of interest now moves from input-output relationships, from exchanges between systems and environment, to the internal operations of the systems themselves. Systems are conceived as self-reproducing, self-regulating entities that are operationally closed. There is no communication with the environment, only *about* the environment within a self-referential system. Not only are the structures of the system self-organized, the self-referential operations also include the elements of a system. Since communications are basic elements of a social system, communication (or communicative acts) can only be created, produced, constituted by other communications within a system. "An autopoietic system . . . constitutes the elements of what it consists through the elements of which it consists" (Luhmann, 1988a: 14). An autopoietic system is "recursively" closed insofar as it "can neither derive its operations from its environment nor pass them on to that environment" (Luhmann, 1988a: 18).

Autopoietic systems are not totally closed, autistic systems.

[2] This is the reason why Habermas characterizes Luhmann's position as a "methodological antihumanism" (Habermas, 1985: 436). Legal scholars are outraged at the deportation (dismissal) of the human element from the legal domain.

But the concept of autopoiesis—borrowed from biology[3]—leads to a shift of theoretical perspectives. The autonomy of a system, internal operations, and temporalization increase in importance. Instead of established structures, we have to look at the process of permanent restructuring. The autonomy of this liquid system is secured by its functional irreplaceableness and its internal recursive, circular operations. It is no longer the search for "functional equivalence" that confers upon Luhmann's theory the flair of technocratic liberalism. Instead, autopoietic systems gain their autonomy because they are functionally specified and because their basic function cannot be substituted by other systems. The functional irreplaceableness of systems constitutes their autonomy, their independence, but, at the same time, makes them more dependent on other systems. So, autonomy and dependence accumulate simultaneously. A social subsystem has no impact, no influence on another. Different systems can only irritate each other. Also, there does not exist a "leading system," like the political or the economic one, which, according to the early Luhmann, once dominated society. Therefore, the theoretical perspective moves away from design and control to autonomy, from planning to evolution.

So much for a brief summary of Luhmann's general systems theory, mostly in his own words. A discussion of his autopoietic approach at this general level would lead only to a proof of internal conceptual consistency. Therefore, I will move on to Luhmann's sociology of law and the use that he makes of his general theoretical framework in this context.

III. BASIC CONCEPTS AND ASSUMPTIONS IN LUHMANN'S SOCIOLOGY OF LAW

As mentioned previously, it is not easy to ascertain the consequences of Luhmann's paradigm change for his sociology of law. There are some recent articles in which he attempts to apply autopoietic concepts to the legal system (Luhmann, 1983b; 1986b; 1986c; 1986d; 1988a; 1988b; see also 1986a: 124–49). But in his main work, *Social Systems* (1984), law plays only a minor role. The only change to the second edition of his *Sociological Theory of Law* (1983a) is some concluding remarks, though he does say that the book merits further substantial revisions in light of his recent developments. So we step on shaky ground, not knowing whether

[3] Luhmann usually cites Maturana as the founding father:

> We maintain that there are systems that are defined as unities as networks of productions of components that: (1) recursively, through their interactions, generate and realize the networks that produce them; and (2) constitute, in the space in which they exist, the boundaries of this network as components that participate in the realization of the network. (Maturana, 1981: S. 21)

Applying the concept of autopoiesis to social systems obviously changes its meaning, and it has to be redefined on an abstract level (cf. Lipp, 1987; Rottleuthner, 1988).

Luhmann (not as a mental system but as an element of the social scientific system) would self-referentially refer to his earlier writings, thus constituting at least a bibliographical continuum covered by a hypercycle of self-reverence (to give another example of the contagious nature of his terminology).

Expectations play the role of a starting point in Luhmann's sociology of law (1972a). The environment not only is complex (too complex to be perceptible as such), but is also contingent, for in addition to the actual, an indefinite number of possible world states (natural events and the behavior of others) must be taken into account. Expectations reduce the complexity so that we can cope with the contingency nature of the world. But other persons also have their expectations and vary their behavior according to them. The difficulties caused by this "double contingency" (Parsons) involved in interaction processes are solved not only by expecting the behavior of others but also by expecting their expectations; and these expectations can, again, be expected, and so forth.

The next step toward the introduction of law is the distinction between *cognitive* and *normative expectations*. The difference between these two styles of orientation or expectation is defined as the difference between learning and not learning. In the face of inconsistent, unexpected events, one can either change one's expectations ("learning") or maintain them ("not learning"). "Normativity" means "clinging to expectations despite disappointments" (Luhmann, 1988a: 22). The maintenance of normative, counterfactual expectations is supported by explanations given for deviant events that are available within a society (supernatural forces, insanity, class bias, etc.) or by the threat of sanctions that could be imposed.

Luhmann defines norms as "counterfactually stabilized behavioral expectations" (Luhmann, 1972a: 43); yet not all norms are "legal norms." The next step of introducing the "legal" consists of a generalization of normative expectations. According to Luhmann, expectations can be generalized in three dimensions: *temporal*, they become enduring over time; *substantive*, according to whether expectations refer to persons, roles, programs, or values; *social* ("institutionalization"), norms do not structure interactions of two persons only—third parties, observers, or an anonymous public are regularly involved. "Institutionalization," then, means that a (fictitious) consensus of an indefinite number of "third persons" can be expected or assumed. *Law*, finally, is defined by Luhmann as congruently—that is, temporally, substantively, and socially—generalized behavioral expectations (Luhmann, 1972a: 99).

Luhmann's sociological theory of law (1972a) consists—besides this systematic introduction of the concept of law—for the most part of a theory of *legal evolution*. He distinguishes three steps in societal (and according to it legal) evolution: archaic societies with

segmentary differentiation; premodern high cultures, mostly hierarchically structured; and modern industrial societies with functional differentiation. From biology Luhmann transfers to sociology three evolutionary mechanisms: variation, selection, and stabilization. The third stage of legal evolution is characterized by the "positivity" of law. That is, law has become a "positive" means according to Luhmann, in that

1. There are special procedures of legislation.
2. The validity of legal norms is based on selective decisions among different normative proposals.
3. Law is interpreted as permanently alterable.
4. Legislation becomes routine.
5. It is thought that social change can be induced by legal measures.
6. The primary mode of legitimating legislation is the belief in the legality of the law-creating procedures.

In his *Sociological Theory of Law* Luhmann discusses the social prerequisites and consequences of the "positivity of law" in depth.

In his most recent contributions Luhmann stresses the autonomy of the legal system. He does not dismiss his basic assumptions about normative and cognitive expectations and the congruent generalization of normative expectations as law, but he attaches greater importance to the legal code and to the form of legal programs and the specific function of the legal system. These three features are, in combination, essential for the autonomy of the legal system. The legal system is differentiated as a special system of society on the basis of a *binary code*. All operations of the legal system and only operations of the legal system are oriented by the code of right and wrong.[4] The basic form of legal norms or programs consists of an if-then relationship, of what Luhmann calls a "*conditional program*." They connect a past event described in the *if* clause with legal consequences (e.g., sanctions). Programs allocate the legal "values" right and wrong. They can do this correctly or incorrectly. But only conditional programs that are oriented toward past events and not toward future goals like purposive programs can implement the binary code. This is because the future is uncertain. In operating on the basis of a specific code by means of particular programs, the legal system fulfills a function that no other system can replace. The function of law, of the legal system, according to Luhmann's view of autopoiesis (for earlier views, cf. Luhmann, 1974b), consists neither in guaranteeing expectations nor in the control of behavior; rather, it consists in the use of conflicts, in "the exploitation of conflict perspectives for the formation and reproduction of congruently (temporally/objec-

[4] In German: *Recht/Unrecht* (cf. Luhmann, 1986e); sometimes this distinction is translated as legal/illegal or lawful/unlawful (cf. Luhmann, 1986d; 1988a: 16, 25).

tively/socially) generalized behavioral expectations" (Luhmann, 1988a: 27).

IV. CRITICAL REMARKS

The following critical remarks are primarily devoted to Luhmann's systematic introduction of the concept of law and especially to his concept of the autonomy of the legal system. His work on single sociolegal topics, such as his contribution to a theory of administration, his monographs on constitutional rights (Luhmann, 1965) and on the legitimating effects of procedures, particularly court procedures (Luhmann, 1969), his interpretation of legal dogmatics, including a critique of legal consequentialism (Luhmann, 1974a; 1986b: 28–31), and his work on individual rights (Luhmann, 1970) or justice (Luhmann, 1973; 1986b: 38–44), will not be alluded to.

A. From Expectations to Law

The various steps that Luhmann constructs in his attempt to introduce law do not represent a genetic chain. Luhmann's introduction is not a historical, or even genetic, reconstruction of the formation of law. He does not explain how law came into this world and into human societies (did there already exist some kind of ape law?), nor does he explain the historical development of law by referring to expectations (for this purpose he introduces evolutionary mechanisms). Again, he gives no account of the formation of legislative acts, of the issuing of legal regulations. Perhaps he describes how norms are generated in interactions, but how can he bridge the gap between expectations and law, which, according to him, already exists in every society?

The underlying problem is that of the relationship between mental (psychic) systems and social systems. Luhmann draws a sharp distinction between them; social systems cannot be reduced to mental systems. Therefore, he has to redefine the psychological terms "expectations" and "orientation" on a societal level: "Social systems in general use expectations as structures which control the process of reproduction of communication by communication" (Luhmann, 1986d: 170). But what does "expectation" mean in this context without any notion of consciousness, ideas, bodily feelings, and the like?

Luhmann creates the impression that law has its origin in (normative) expectations; that these expectations become law by a process of "congruent generalization." But the term "generalization" only masks the difficulties of bridging the gap between mental and social systems. Luhmann's starting point is similar to Ehrlich's approach. They are both trying to avoid a state-oriented concept of law, a concept of law, as used by Weber or Geiger, for example, that refers to state agencies, a legal staff, or professional

groups that can operate/conduct the state machinery/apparatus. While Ehrlich refers to emotional (re)actions, Luhmann talks about expectations and orientations. Ehrlich sees no problems basing his sociology of law on such a "societal psychology." But because of Luhmann's own presuppositions he cannot take this step. Therefore, he has to redefine the notion of expectation. He contends that, from the point of view of social systems, expectations are social "forms of meaning," not "intrapsychic events" (Luhmann, 1984: 139ff., 396ff.). Consequently, we have expectations$_P$ (in a psychological sense) and expectations$_S$ (in a sociological sense, whatever this might mean) with two different meanings. The term "generalization" does not refer to a "real" process of shaping expectations$_P$ so that they become law, but only hides a shift of the conceptual frame of reference, whether we describe mental systems in psychological terms or social systems in sociological terms. Maybe this interpretation sheds some light on the following sentence of Luhmann: "Law exists only as communication (or, in psychological terms, as the prospect of communication)" (Luhmann, 1988a: 17).[5]

Therefore, one assumes that it would no longer be consistent with Luhmann's social-systems perspective to say that law is generated by and consists of congruently generalized behavioral expectations. Rather, whatever the origins of the legal system might be, it uses conflicting expectations of the $_S$-type, that is, social "meaning forms" (or of the $_P$-type?), to select and generalize congruently legal/illegal expectations$_S$.

Expectations are anticipations of future events. But as soon as they become elements of the legal system (e.g., as claims), they are submitted for selection and generalization to the legal-illegal code and to conditional programs. Conditional programs, according to Luhmann, the standard form of legal norms, combine past events with legal consequences. They are, unlike expectations, oriented toward past events.[6] One can expect only that those things mentioned in the *if* clause of a conditional program won't happen and that then the judge will issue the consequences provided by the program.

Therefore, the construction principle of Luhmann's "sociological theory of law" should be reversed. From the point of view of a strict social-systems approach, one should start with the existing legal system, for only then could one look at how this system operates its communicative elements, for example, expectations$_S$. The

[5] Likewise, the meaning of "person" changes within a social-systems frame of reference: "A person is a unity formed only for purposes of communication, merely a point of allocation and address" (Luhmann, 1988b: 339).

[6] Of course, there exist legal norms that mention future states, e.g., "the best interest of the child." According to Luhmann, however, law, i.e., the application of conditional programs by judges, is not and should not be specialized in controlling the future (cf. Luhmann, 1974a; 1986d: 118–19).

use of psychologically laden symbolic interactionism and action theory as a frame of reference for the introduction of law is inconsistent with Luhmann's own standards for a social-systems theory.

B. Cognitive and Normative Expectations

Aside from the psychological connotations of "expectation," there are also problems with the distinction of cognitive and normative expectations on a conceptual level, with critical consequences for empirical research. If the difference between the two styles of expectation is defined as the difference between "learning" and "not-learning" in case of "disappointments," the distinction could only be applied if somebody were confronted with a disappointing event and were to display a kind of behavior that could be classified as "learning" (change of expectation) or "not-learning" (clinging to the expectation).

In everyday life as well as in empirical research the sharp distinction between cognitive/normative expectations or learning/not-learning is not as clear-cut as it might seem at first glance. Luhmann concedes this vagueness of his basic distinctions, but he has never attempted to test the applicability of them in sociolegal research.

From the point of view of empirical research one could ask whether it is learning or not-learning behavior that should be observed or whether it is also possible, in a questionnaire, to seek out somebody's expectations or anticipations ("How would you react in the event . . . ?"). However, it could happen that somebody "changes" his/her "expectations" by being confronted with an unexpected event. What then is/was the expectation?

Does Luhmann really talk about expectations$_p$ as intrapsychic states that exist as such, independently of possible reactions, or does he restrict his analysis to observable behavior, reactions to certain events, as Ehrlich did? Ehrlich tried to introduce a behavioral definition of "norms" and "legal norms" by distinguishing overtones of feelings and reactions in particular situations. For him the feeling of revolt ("Empörung") at a type of behavior would indicate the existence of a legal norm; a feeling of indignation ("Entrüstung") would indicate a law of morality (cf. Ehrlich, 1913: 132; English trans. 1936: 165). One could add underlying normative expectations of various kinds to these types of behavior (although it would hardly be feasible to operationalize "revolt" in contrast to "indignation," "disgust," "disapproval," etc.).

The reference to Ehrlich demonstrates that there exist various types of "normative" reactions and consequently, in Luhmann's terms, normative "expectations." But what kind of normative expectations finally become law? Or rather, which conflicting expectations are selected and "generalized" by the legal system as legal or illegal? The answer to this question cannot be given by refer-

ence to the "nature" of the expectation, possibly because they are generalized or "generalizable." (The same holds for Ehrlich, who fails to base law on a feeling of "revolt.") The answer is given by the legal system—that is, by the legislature and finally by the courts. Therefore, a psychological or "societal" approach, in either case a nonstatist approach to law, turns out to be inappropriate.

Luhmann's definition of law as congruently (temporally/substantively/socially) generalized behavioral expectations sounds nonstatist; in fact, it implies with the mechanism of "congruent generalization" a reference to state agencies. "When these (normative) expectations are created, it is decided that they do not need to be changed in the event of being disappointed" (Luhmann, 1988a: 19). In the case of "congruently generalized" expectations, this decision is made within the legal system by competent state agencies.

Most of the definitions of law given by legal sociologists, like Ehrlich, Geiger, or Weber, and legal anthropologists aim at a distinction between legal and non- or prelegal organizations/institutions or between legal norms and other kinds of norms such as moral or cultural norms in order to delineate the field of sociolegal research. Luhmann's definition of law apparently does not serve this purpose; it is not intended to guide empirical research. Rather, it presupposes the knowledge of what valid legal norms are, by the application of which conflicting behavioral expectations are "congruently generalized" when these legal norms are applied by courts or other state officials.

C. *What Is Law?*

Before turning to the question of how Luhmann conceives the relationship between the political and the legal as the relationship between political and legal systems, it is necessary to point out a fundamental ambiguity in Luhmann's sociological concept of law before his poststructuralist, autopoietic turn. In his *Sociological Theory of Law*, Luhmann characterizes law as an "expectation structure of society" (1972a: 105):

> Law must be conceived as a structure that defines the boundaries and selective modes of the social system. It is not the only social structure. . . . But law as a structure is indispensable, for without a congruent generalization of normative behavioral expectations people could not orient themselves towards each other, they could not expect their expectations. Law as structure must be institutionalized on the level of society. (Luhmann, 1972a: 134)

At the same time Luhmann writes about the "legal system" as one subsystem of society besides the political, the economic, and other systems. Law as a general structure of society, however, would pervade all other social subsystems. A third option for talking about law would be to conceive of it as a "general media of

communication" (like power, love, or money) that operates with a binary code within a single system. The latter option Luhmann did not pursue. And after his autopoietic turn he should also remove the idea of law as structure. The only way of talking about the *autonomy* of law is to understand law as the legal system, not as an all-pervasive structure.

D. The Legal and the Political System

After this rather immanent critique and the "internal" recommendations to provide theoretical consistency, the problem of the autonomy of law—that is, the autonomy of the legal system—should be addressed.

Luhmann applies the cognitive/normative distinction not only to expectations but also to the legal system. The legal system, he claims, is normatively closed and, at the same time, cognitively open. It is normatively closed insofar as it processes counterfactually stabilized norms: the violation of a norm does not invalidate it. It is cognitively open insofar as norms or programs can be changed; a legal system is able to "learn." In fact, the legal system as a "self-generating connection of legal elements" (Luhmann, 1988a: 20) finds itself in permanent change, in the change of legal positions induced by legally relevant events. Besides this autopoietic, self-reproducing change of legal positions (under constant legal norms?) there also exists a "planned structural change" (Luhmann, 1988a: 18)—the legislative and, sometimes, judicial enactment and revision of legal norms.

So it appears that the legislative and the judicial system form subsystems of the legal system. One could easily equate the legislative system with the political system. Consequentially, the political system would become an element of the legal system.

But this would be too simple a critique. Aiming at a sharp distinction between the political and the legal system, Luhmann has to define narrowly the specific functions that constitute the autonomy of both systems. The function of the political system, once determined by Luhmann as the production of binding decisions, now consists, at least in Western party democracies, in winning majorities in order to recruit, select, and establish party candidates (cf. Luhmann, 1986a). The function of the legal system, however, consists in the "exploitation of conflict perspectives for the formation and reproduction of congruently generalized behavioral expectations" (Luhmann, 1988a: 27).

The restriction of the legal system to a very particular function generates problems for both the internal consistency of the theory and for the applicability of the theory as well. Luhmann himself distinguishes between the political and the legal use of the law. The basic characteristic of modern law, its "positivity," was brought about by the political usurpation of the legal system

(Luhmann, 1972a: 244; 1972b/1981: 147). So the indistinguishability of "the political" and "the legal" would be a constituent element of a modern legal system. Luhmann, however, maintains in his recent writings that the political instrumentalization of law presupposes the differentiation of the legal system, that is, its autonomy (Luhmann, 1988b: 346). At the same time he states that "the legal system does not determine the content of legal decisions" (Luhmann, 1986d: 117). Content and impact of court decisions or decisions of the legislator cannot be autopoietically determined as a result of the legal system itself—if one defines the legal system as a totally formalized network of legal acts that are, in a Kelsenian manner, only produced or constituted by legal norms.

"The social-engineering approach to the law is a political approach—and, of course, completely legitimate as a perspective of the political system" (Luhmann, 1986d: 122). But this is, "of course," Luhmann's private evaluation of what might be "legitimate," but not an adequate description of the perspective of the legal profession and the theoretical reflections in legal theories. Luhmann's idiosyncratic "definition" excludes from his autopoietic sociology of law all considerations of the origins of the content of legal norms and decisions as well as their impact and social influence. This decision on a conceptual level has consequences for substantive issues also. Because Luhmann maintains that social subsystems are autopoietically closed—with specific elements and a single, irreplaceable function—one system cannot influence, control, or determine the other; there are only irritations among the systems. (For example, Luhmann's theory might be irritating but not convincing for others.) Therefore, his theoretical attention shifts from possible input-output relations of systems to their internal operations. But this result is induced by conceptual restrictions only.

In contrast to Luhmann's conceptual approach, one could try to answer the question of how legislative, administrative, or court decisions come into existence, of how statutes and their interpretations are changed, and what impact they have. In empirical investigations of these problems one could test the applicability of Luhmann's distinctions; one could see what use could be made of them, if they are useful at all.

From the point of view of autopoiesis there cannot be much said about the evolution of law except that norms are created by norms; or that the law creates the conflicts that it needs for its own evolution (Luhmann, 1986c: 18). (Are these conflicts external to the legal system, and, if so, how are they fed back into it?) Likewise a social engineering approach with its questions of impact and efficiency attracts but little attention. One of Luhmann's few and truly penetrating remarks in the area is "The degree to which probability law contributes to the achievement of its political goal, is a question, the answer to which depends on other fac-

tors (i.e., factors external to the legal system, H.R.)" (Luhmann, 1986a: 129).

E. Luhmann's Reductionism

Luhmann's merely conceptual justification of the autonomy of the legal system rests on rigid reductionism. His purified sociology of law resembles Kelsen's Pure Theory of Law (Kelsen, 1960) insofar as both are primarily concerned with internal operations of the legal system, and both share a reductionist approach in their attempt to isolate "final," "basic" elements of a legal system.[7]

According to Luhmann's binary type of thinking, systems are autopoietic or they are not. There is no gradation of more or less autopoiesis in a system (Luhmann, 1988b: 346). Of course, it would be interesting to learn when, in the historical evolution of law, the autopoietic bang took place, from what time on law was created by law only (i.e., when new law was created in accordance with existing law).[8] In addition, it would be nice to test the applicability of the concept of an autopoietic legal system to hear an answer to this question from the various adherents of autopoiesis independently of each other.

The classificatory use of autopoiesis implies that there is no "relative autonomy" of the legal system. The legal system is autonomous, or it is not. The autopoietic foundation of the autonomy of the legal system rests on a radical reduction: of the *elements*, the *codes*, the *programs*, and *functions* of the legal systems.

1. Elements of the Legal System. There is, according to Luhmann, only one type of "final element," "basic element," or "elementary unit" in the legal system: *legal acts*, that is, acts that give rise to legal consequences or that change the legal position (Luhmann, 1988a: 16ff.).[9] But legal acts can have legal consequences only because they correspond to norms that enable the

[7] Luhmann differs from Kelsen in that he does not maintain a hierarchy of norms ("Stufenbau der Rechtsordnung") but a "circular relationship between rules and their application" (Luhmann, 1988a: 21). For a comparison of Kelsen and the preautopoietic Luhmann, cf. Dreier (1983).

[8] A similar problem arises in H. Hart's (1961) concept of law. He maintains that for a legal order to come into existence it must consist of both primary rules (duty-imposing rules and power-conferring rules) and secondary rules (of identification, adjudication, and change). When did these types of rules start to operate jointly in legal history?

[9] Kelsen already gave an "autopoietic" definition of a legal act:

> The Pure Theory of Law defines the concept of the legal act as follows: A legal act is an act by means of which a legal norm is issued (figuratively speaking "created") or applied. Moreover, the Pure Theory claims that an act is a law-creating or law-applying act only if it corresponds to the norms that govern the creation and application of the law within the legal system, that is, only if the act in question is based on the legal system. That the law governs its own creation and application is a characteristic of the normative order as a dynamic system (Kelsen, 1952: 200).

creation and application of legal consequences. In contrast to Kelsen, Luhmann orders acts and norms not hierarchically, rather he speaks of a "basic circularity" of legal decisions and normative rules (Luhmann, 1988a: 21–22). But if such a "basic circularity" exists, why don't *legal norms* count as basic elements of a legal system as well as *legal acts*. Luhmann, however, maintains that norms are not elements of a legal system (1986d: 114).

In other contexts Luhmann treats *legal communications* as basic units of a legal system. "The legal system . . . consists only of communicative actions which engender legal consequences . . . . It consists solely of the thematization of . . . events in a communication which treats them as legally relevant and thereby assigns itself to the legal system" (Luhmann, 1988a: 19). Every communication that processes a legal-normative expectation—in the context of law enforcement, provisions for legal conflicts, legal change—is an operation internal to the law. This communication, at the same time, defines the boundaries between the legal system and its context in daily life that gives rise to the thematization of a legally relevant question (Luhmann, 1986c: 9).

2. Code. The "self-generating connection of legal elements" (Luhmann, 1988a: 20) is produced according to the binary schematization of right and wrong (sometimes legal/illegal) (cf. Luhmann, 1986e). The distinction between legally relevant and legally irrelevant elements defines the boundary of the legal system. But whatever can enter into the legal system, whatever is legally relevant, becomes an element within the self-reproduction of the legal system, which is controlled by the code of legal/illegal.

Doubts are legitimate as to whether the distinction of legal/illegal or right/wrong is the only, or even the primary, code of the legal system. Another basic distinction is that between the legally valid and the legally invalid. An act can be performed "successfully"—that is, according to legal provisions, according to "institutive rules" in the sense of MacCormick (1976)—to engender legal consequences (a valid contract, a valid marriage, a valid last will, etc.). Performative fallacies are not "illegal"; however, they do not lead to legally valid consequences, nor do they change legal positions or the legal state of affairs. There are events that are not illegal (e.g., adultery, at least in some countries) but that can be used to invalidate a legal state of affairs (e.g., a marriage).

Luhmann maintains that the autonomy of the legal system depends on a strict distinction of the legal and the illegal. Considerations of purpose, if admitted, would destroy the autonomy of law. Even in the event, however, that all legal communications had to pass the shibboleth of legal/illegal or valid/invalid, the application of these codes could be guided by purposive considerations. Purpose or consequential considerations are explicitly introduced in cases of agreement in court; for example, a dismissal is held to be

legally valid, but the judge negotiates with the parties about the amount of the settlement—a prominent example of so-called dethematization of law within the legal system.

3. Programs. Similar to Kelsen and other purists who reduce all legal norms to "hypothetical imperatives," Luhmann states that all legal norms are conditional programs or that they can be translated into if-then relationships (Luhmann, 1986a: 129; 1986d: 118; 1988a: 24). But what sense does it make to reduce all kinds of legal norms to this one legal form, even norms that are explicitly formulated as "purposive programs," stating a purpose that can be achieved by various means selected on the basis of reasonable discretion?

Legal theorists offer a great variety of classifications of legal forms (cf. Rottleuthner, 1982). Some of them prefer dichotomies (e.g., rules/principles, primary/secondary norms or rules). Luhmann belongs to the group of extreme reductionists. Therefore, his "translation" surely is not an appropriate description of the theoretical self-descriptions of the legal system.

4. Functions. According to Luhmann, the core problem of the autonomy of the legal system consists in its functional specification. The legal system is autonomous if no other system can replace its function (Luhmann, 1986d: 112), if it is exclusively orientated to one single function.

Therefore, Luhmann's strategy of establishing legal autonomy consists in finding one narrow function of the legal system for which there does not exist a functional equivalent. Otherwise the legal system would be replaceable. "It is certainly not sufficient to use very general definitions—say contribution to the order of society, because this would confer on anything the status of being a functional equivalent of the law" (Luhmann, 1986d: 121).

Again Luhmann gives a reductionist (and idiosyncratic) definition of law's function, not a description of what is held by legal theorists or other members of the legal profession to be the function, or rather the functions, of law. Furthermore, Luhmann himself has changed his view of what could be admitted as the function(s) of law. He once mentioned the stabilization of expectations as well as the control or guidance of behavior (Luhmann, 1974b). According to Luhmann, law does not solve or reduce conflicts. Rather it multiplies conflict opportunities (Luhmann, 1984: 518, 535). At the beginning of legal evolution, law probably was used to control the extreme outburst of public reactions in the face of an infringement of norms (Luhmann, 1984: 455), yet it now makes conflicts communicable. It serves the continuation of communication by other means (Luhmann, 1984: 511). The primary function of law now consists in the use of conflict perspectives for the formation and reproduction of congruently generalized behavioral ex-

pectations (says Luhmann, 1988a: 27).[10] The option for one single function of law is not the result of empirical studies of law in action. It is the result of the application of the theory of autopoiesis to the legal system, of treating law as an autopoietic system, of defining autonomy by functional specification and recursive inclusiveness. The autonomy of law is the result of conceptual purism and of theoretical rigidity.

V. A PLEA FOR A "MULTIPLE" SOCIOLOGY OF LAW

In contrast to Luhmann's rigid purification of the sociology of law, his concentration on the internal self-reproduction of the legal system, and his reductions to basic entities, I should like to make a plea for a nonreductionist, "multiple," and empirically oriented sociology of law.

Why should we admit one basic element of the legal system only? Why not talk about various dimensions of law (legislation, the legal profession, popular legal culture)? Why not use norms, actions, activities, interactions, individuals with their social features, opinions, knowledge; why not use roles, procedures, groups, organizations, and institutions all as elements of law? The conceptual delimitation of the legal domain could be achieved, at least in modern societies, by using a statist concept of law, or occasionally also a "pluralistic" approach.

Why shouldn't we investigate in the use of two codes, the code of legal/illegal and the code of valid/invalid, and see how they become relativized within the legal system? For a sociologist of law—that is, for an observer outside the legal system—the use of a "gradual" concept of law, a concept of more or less law, to describe the evolution of legal characteristics (as, e.g., Schwartz and Miller, 1964, did) or the degree of "legalization" or "delegalization" (cf. Abel, 1980; Blankenburg, 1980a) should also be allowed.

Why not conduct content analysis of legislation to see the various types of statutes? Of course, this requires conceptual efforts, but why must they end in one single form of program? Instead, one could distinguish various forms, for example, according to the different "motivational" means used by the legislator to "influence" the addressees of statutes.

Why not use the multitude of definitions of law's function in empirical research in order to find out to what extent they are achieved (if these definitions can be operationalized at all)? One could look not only at how the legal system (the courts in particular) exploits the expectations of parties; one could also reverse the

[10] The political use of the legal system reverses—and perverts—this conflict perspective of law: "It is no longer a question of deciding what expectations (tested against what generalizations) can be maintained in the event of conflict, if instead conflicts decided in advance are created in order to append regulations to them which have legal validity" (Luhmann, 1988a: 32).

perspective and study how clients use the courts, or what type of conflict results in interpretational issues and in problems of legal reasoning.[11] What functions does the legal system fulfill in the process of the mobilization of law (cf. Blankenburg, 1980b).

My opposition to Luhmann's sociolegal approach is based on the preference for empirically oriented sociolegal research that investigates the various dimensions and levels of aggregation in the legal system, the relationship between the legal system and other social subsystems, or the social system in general. This does not exclude analysis of the internal operations of the legal system itself—for example, problems of legal reasoning, the relationship between (external) correlations and (internal) argumentation.

Of course, these efforts call for conceptual and theoretical clarification.[12] But it is one thing to do conceptual-theoretical work in order to find out empirically what is going on in the world of law. It is quite another thing to engage in conceptual arrangements and theoretical constructions in order to solve internally produced problems of definition and theory—and use "the world" for illustrative purposes only.

No doubt, many of Luhmann's works are stimulating, and not only for those who are interested in grand theories. They can also stimulate empirical sociolegal research.[13]

Sociologists of law should bear in mind that Luhmann is engaged in building an all-embracing megatheory that fits the whole world. The world of law, however, cannot be grasped from this abstract point of view in its multifarious aspects. And why should a conceptually consistent supertheory fit an inconsistent part of the world? We look forward to seeing the dialectical arrangements of a new Hegel.

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[11] On legal reasoning, cf. Luhmann (1986b). He uses, as a sociological observer of the legal system, the concept of redundance. In studying problems of legal reasoning and statutory interpretation from a sociological point of view, I would prefer a conflict approach in order to investigate the precourt origins of conflicts and their transformation into interpretational issues within the court system. Of course, most of the cases do not reach this stage of doctrinal subtlety.

[12] See my attempts, using the concept of relative autonomy, to interpret the results of an empirical study of labor courts in terms of Marxist theory as well as from a systems-theory perspective: Rottleuthner (1984).

[13] For this purpose Luhmann is at his best on a theoretical middle level, applying primarily a symbolic-interactionist approach. His famous book on "legitimation by procedure" (Luhmann, 1969) not only raises evaluative problems, but also leads to empirically testable questions concerning the acceptance of court decisions.

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