

# AUTOPOIESIS IN LAW AND SOCIETY: A REJOINDER TO BLANKENBURG

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In this rejoinder, I try to clarify and to develop further the concept of "reflexive law" by expanding its theoretical framework. I make use of the theory of autopoietic systems—a recently developed version of system theory. Legal autonomy and social autonomy turn out to be the crucial concepts. Their reformulation in terms of closed, self-referential, and self-reproductive structures leads to the core problem for a post-interventionist law: Can the law adapt its internal models of social reality to the autopoietic organization of legally regulated social systems?

## I

When two German professors, one a private lawyer and the other an empirical sociologist, dispute the socio-legal implications of the Third German *Werturteilsstreit*, a considerable amount of conceptual confusion is to be expected. If, in addition, they attempt to express their Teutonic argument in the English language and present their discussion to a largely American audience, concepts will be more confused. There is indeed confusion since Professor Blankenburg and I employ different shades of meaning in our discussion of such heavily loaded concepts as legal system, legal autonomy, evolution of law, legal formalism, and crisis of regulatory law. There are so many differences to be bridged—differences of discipline, knowledge, language, normative orientation, and cultural background—that an attempt to clarify the confusion point by point, concept by concept, seems not very promising. Thus, I would prefer to reconstruct my argument as a whole in a different theoretical context. I would like to reformulate the concept of reflexive law in the language of a somewhat obscure theory—the theory of autopoietic systems. I will use this theory, which, as we shall see, is a special kind of theory of self-referentiality, in order not only to clarify some misunderstandings in Blankenburg's critique but to develop further the argument as a whole. At the same time it seems inevitable that I myself will add to the conceptual confusion.

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However, I would not be so much interested in continuing the debate if I were not convinced that grappling with conceptual confusions is the very source of scientific progress.<sup>1</sup>

Why make use of the theory of autopoietic systems? This newly developed theory, formulated by biologists (Maturana, 1970; Maturana *et al.*, 1974; Varela, 1979; Zeleny, 1981) and transferred to the social sciences (Hejl, 1982a; 1982b; Luhmann, 1981a; 1984a; 1984b; Teubner and Willke, 1984), cannot yet claim with authority to be a fruitful paradigm. I am thus going to use it in a more experimental manner as a strictly heuristic device. What follows for the problematic law and society relation if it is reformulated in terms of self-referentiality? What hypotheses and what recommendations for political-legal action are implied?

The central hypothesis of self-reference can be clearly distinguished from older versions of systems theory. While classical notions of system concentrated on the internal relations of the elements and searched for emerging properties of the system (“the whole is more than the sum of the parts”), modern open systems theories stress the exchange relations between system and environment. Open systems approaches seek to answer such questions as: How can the system cope with an overcomplex environment (Ashby, 1961)? How are internal structures derived from environmental demands (Lawrence and Lorsch, 1967)? And by what kind of internal process are inputs converted into outputs (Easton, 1965)?

The theory of autopoietic systems seems in one way to return to the concept of a closed system, even to a radical concept of closure, because the theory’s central tenet is that *a system produces and reproduces its own elements by the interaction of its elements* (Maturana *et al.*, 1974: 187). By definition, a self-referential system is a closed system. What makes the theory more promising than either its internal looking or external looking forerunners is the inherent relation

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<sup>1</sup> For the sake of developing a coherent argument, I have to sacrifice a detailed discussion of some of Blankenburg’s objections to reflexive law. For example, I cannot deal with Blankenburg’s misunderstanding of Habermas and Luhmann. In my view, it does not make sense to interpret Habermas as a partisan of a delegalization movement or to read Luhmann’s theory of legal evolution as dealing only with the internal justification problems of legal systems. Furthermore, I cannot discuss here the logical and functional status of “grand concepts” of law or respond to Blankenburg’s claim that they are nothing but pathological normative projections. In my view, they are not theories about law but strategic models of law, i.e., legal “internal models” of law in society whose main function is to use the identity of law to produce criteria for its self-transformation. For an elaboration of these arguments, see Teubner (1984).

of self-referentiality to the environment. Self-referential systems, as closed systems of self-producing interactions, are necessarily, at the same time, open systems with boundary trespassing processes (Hejl, 1982b: 57). It is this linkage between internally directed self-referential mechanisms and externally oriented environmental exchange mechanisms that makes the concept of self-reference more complex and potentially more fruitful than its predecessors' somewhat sterile alternative of closed versus open systems.

What is gained when one brings this perspective to bear on the legal system is a clearer understanding of the concept of autonomy. The autonomy of law and its relation to the autonomy of other social subsystems are two of the main themes to which the theory of autopoiesis can contribute. I would like to present two theses and relate them to Blankenburg's argument:

(1) As a result of socio-legal evolution, the legal system develops an autonomy which has to be understood as self-referential closure. Legal formalism is the structural counterpart of this autonomy. While legal formalism is an adequate expression of legal self-referentiality, it cannot satisfactorily deal with the self-referentiality of other social systems.

(2) The crisis of legal formalism emerges from the problematic relation between legal and social autonomy. Instrumental law is an attempt to overcome this crisis, but its implicit models of unilinear causality are inadequate for the problem. The task for post-instrumental law is to construct internal models of social reality that can explicitly take into account the autopoietic structure of social subsystems.

## II

The first thesis—that the increasing autonomy of the legal system is the product of socio-legal evolution—seems to be the source of considerable conceptual confusion. Let me try to clarify some of the difficulties by discussing Blankenburg's critique.

With respect to the *legal system*, there is confusion about whether we talk about law as a symbolic system (consisting of norms and decisions) or as a comprehensive system of communicative actions. It is crucial to be clear on this point because how one conceptualizes evolution, autonomy, legal formalism, and regulatory crisis depends on what one means by "law" and "legal system." In his critique of reflexive law,

Blankenburg constantly shifts the possible meanings of these terms. He makes a number of very loose distinctions: “internal” versus “external”; “factual tendencies” versus “internal justification” versus “external beliefs”; “rhetorics of lawmakers” versus “text of their codes” versus “implementation”; and “ideological” theories of the law versus “real” observable practice of the law, to name a few. All these might be plausible *ad hoc* distinctions, useful for everyday talk, but they do not reflect a clear theoretical orientation that might guide Blankenburg’s conceptualizations and his critique of reflexive law.

In contrast to these oscillating meanings of legal system, the concept of reflexive law is based on a strict definition of law in the tradition of functionalist systems theory. It includes the symbolic system of legal rules, but it excludes the concrete acting individuals. Its basic units are legal communications. The legal system is seen as a system of actions, comprising not only legal discourse about norms or organized action like court decisions and legislation, but any human communication which has reference to legal expectations (Luhmann, 1981b: 35).

On the issue of *evolution*, Blankenburg, relying on Friedman (1975), warns against interpreting observable legal changes in terms of macro-social evolution. Instead, we should be more modest and describe them in terms of tendencies, a description which allows for the analysis of countertendencies. Concepts like “responsive” or “reflexive” law are, for Blankenburg, immodest claims of macro-social evolution. Since the concepts are tied to a developmental logic, Blankenburg sees them as normative projections of personal preferences into the future.

Actually, my understanding of socio-legal evolution is more modest than Blankenburg supposes. The artificial dichotomy between evolution and tendencies cannot capture this understanding since the dichotomy is based on a somewhat outmoded concept of evolution, with connotations of unilinearity, necessity, directedness, and progress (Eisenstadt, 1970: 17). Indeed, it is easy to criticize the poverty of evolutionism if one chooses to define it in this way. In my view, however, socio-legal evolution should not be understood as a developmental universal that necessarily unfolds to reveal higher and higher stages of law and society. Rather, we have to see it both as the product of the interaction among a number of mechanisms of variation, selection, and retention (Campbell, 1969: 69) that can be identified within the legal system and as

the product of the interaction of these mechanisms with similar mechanisms in other social subsystems (Luhmann, 1981b: 11). I can easily agree with Blankenburg's tentative sketch of socio-legal evolution insofar as it points to the importance of needs that are created by certain modes of social and economic organization. To this picture, however, one should add, as an essential component, the internal dynamics of the legal system. These internal workings limit the possibilities for change and channel the impact of external forces without in any way depending on a mysterious normative logic of evolution.

To understand reflexive law, it is crucial to understand what is meant by *autonomy*. Contrary to what Blankenburg seems to imply, autonomy is not necessarily connected to an artificial conceptualism of "legal science" and does not exclude far-reaching interdependencies with the political system. By autonomy I mean the *self-referential and autopoietic organization of the legal system*. To give a technical definition: "The autopoietic organization is defined as a unity by a network of productions of components which (1) participate recursively in the same network of production of components which produced these components and (2) realize the network of productions as a unity in the space in which the components exist" (Maturana *et al.*, 1974: 188). The legal system is autonomous if its elements—legal acts—are components in the sense that their interaction is operatively closed with respect to legal acts and recursively reproduces legal acts (Teubner and Willke, 1984).

The self-referential closure of the legal system can be found in the circular relation between legal decisions and normative rules: decisions refer to rules and rules to decisions. As Luhmann (1984a: 6) writes: "Decisions are legally valid only on the basis of normative rules because normative rules are valid only when implemented by decisions." This basal circularity of the law is the foundation for legal autonomy. One cannot speak of legal autonomy if conflicts are decided in the general context of political and social processes. A self-referential structure emerges only when a decision resolving a conflict refers to another such decision and develops criteria for deciding out of the relation between them. This self-referential structure becomes an autopoietic organization to the degree that references to external factors, e.g. politics or religion, are replaced by references to legal rules (stemming from court decisions, doctrinal inventions, or legislative acts).

While the circular reference of rules to decisions and decisions to rules creates the autonomy of the legal system in regard to other social systems, it does not isolate law from its environment. On the contrary, the interdependency of law and society increases. The self-referential circle of law is connected to its environment by two channels: the “programming decisions” that define the factual premises of legal rules and the “cases” that transform social acts into legally relevant acts. Of course the crucial problem for “responsive” law is, as we shall see, whether these two channels provide adequate learning capacities for the legal system (Teubner, 1984).

*Legal formalism* is an idea that Blankenburg tends to identify with “conceptual jurisprudence,” as represented by German Pandektism in its purest form. The construction of a doctrinal system and the deductive style of legal reasoning are seen as its main elements. This is not wrong, but it tells only half the story. Legal formalism is indeed the doctrinal expression of legal self-referentiality. It is a particular type of social abstraction of the circular relations between decisions and rules, and as such is the medium by which the law itself reproduces its normative elements. However, legal formalism in this sense is only one historical possibility for the realization of legal self-reproduction. As the case of common law demonstrates, there are functional equivalents to the deductive stringency of a doctrinal system. An elaborated case law system can equally well realize the circular self-referentiality of law. In such a system, autonomy is rooted in the network of precedents and the concomitant methods of *stare decisis*, distinguishing and overruling. Thus, legal formalism—be it continental doctrinal constructivism, the Anglo-American case law network, or a contemporary mixture of both—is an adequate internal structure for the autopoietic organization of the law. Its major problem is dealing with the environment, or, more precisely, with the autopoietic organization of other social subsystems. This problem—it seems to me—creates what we call today the *crisis of regulatory law*. Blankenburg suggests this is a spurious problem. Is it indeed, as he puts it, nothing but a “dominant German view”?

### III

This leads us to the second part of the argument. Due to their self-referential circularity, autopoietic systems cannot interact directly with each other. Self-referentially closed systems only interact internally with their own elements.

However, they compensate for this radical mutual inaccessibility by constructing internal models of the outside world with which they are able to interact internally (Hejl, 1982b). These models cannot be "true" in the sense of being identical to reality. They can be "adequate" but only in terms of their operative success (Maturana, 1970). If the legal system is organized autopoietically, then it does not directly regulate social behavior. Rather, it formulates rules and decisions with reference to an internal legal representation of social reality. It is for this reason that legal models of the social world are crucial. The importance of these internal representations is overlooked in the classic distinction between law in the books and law in action, with its emphasis on the "real" and "effective" law in action, on which Blankenburg relies so strongly.

In constructing its internal model of society, legal formalism is not sufficiently prepared for the fact that other social subsystems regulated by law have their own self-referential autopoietic organization. Autonomous law (Nonet and Selznick, 1978) does not adequately take account of this new form of social organization. However, in its philosophy of freedom it has developed a formula which can be interpreted as a rudimentary response to the self-referentiality of its social environment. Law defines its task as guaranteeing freedom for autonomous social action. This is the more profound meaning of legal formality to which authors like Habermas (1976), Kennedy (1976), Wiethoelter (1982), and Heller (1979) refer. Unfortunately, this dimension of legal formality does not emerge in Blankenburg's characterization of formal law, which he sees as a "jurisprudence based purely on a system of terminology regardless of substantive ends." Equating legal formality with conceptual jurisprudence in this way is superficial and misses the main point. The substantive justification of formal law lies in its formality in a more profound sense: its facilitation of social autonomy. From the point of view expressed here, one can even go a step further and describe formal law, in its withdrawal from regulatory functions and retreat to sheer formality, as a first attempt to cope with the autopoietic structure of the social subsystems that constitute the law's environment. Guided by the liberal, individualistic philosophy of freedom, the law is reduced to general rules of social interaction, thus contributing to the further development and stabilization of self-organizing



subsystems in society. The contrast with the interventions of the old *Polizeistaat* is striking.

The twentieth century has revealed the dysfunctional consequences of such a legal-political withdrawal into formalism. The dynamics of autopoietic self-organization in society, especially in the economy, make it clear that the self-closure that results from functional differentiation has not only the advantage of increasing subsystem rationality but major disadvantages for the encompassing society as well. To compensate for those disadvantages, the welfare state emerges and develops instruments of social intervention, one of which is the law in its instrumentalist or purposive form. Seen in this light, the "materialization" of law that characterizes the emerging welfare state cannot be viewed as the mere repetition of analogous earlier processes, as Blankenburg would have it, but stands as a profound evolutionary transformation (Brüggemeier, 1980; Wiethoelter, 1982; Trubek, 1972; Unger, 1976).

A remarkable point about the purposive law of the interventionist state is that its models of social reality are rather primitive in comparison with the complicated self-referential structure of the various social subsystems. Chief among these is a model of linear causality that guides purposive legal action. Legislative goals are thought to lead to the selection of a legal program which in turn changes social behavior so as to realize the desired goals. This has remained the basic model, even in the most recent and more refined models of implementation research (Mayntz, 1983). It has strongly influenced modern instrumental interpretations of law, from the teleological method to the more recent broad social policy orientation (Steindorff, 1973).

Linear causal models are, however, unable to describe the interaction between self-referentially closed social systems (Hejl, 1982b). Taking self-reference seriously means that we have to give up conceptions of direct regulatory action. Instead, we have to speak of an *external stimulation of internal self-regulating processes which, in principle, cannot be controlled from the outside*. Thus, purposive law is, in comparison with formal law, progressive and regressive at the same time. It is progressive in that it attempts to cope with the dysfunctional consequences of self-referentially closed social systems that had been left "autonomous" under formal law. It is regressive insofar as the structure of its interventions derives from models of social reality which are ill-suited to the complex



structure of self-organizing social systems. In this respect, formal law was more successful, albeit at major social costs. The breaking of the current developmental “bottle-neck” turns on whether law can develop internal models of social reality that account adequately for the autopoietic organization of social systems surrounding the legal system (Teubner, 1984; Teubner and Willke, 1984).

This is the problem that modern conceptualizations of post-instrumental law have to deal with, be they “procedural” (Wiethoelter, 1982), “relational” (Willke, 1983), “post-liberal” (Unger, 1976), “socially adequate” (Luhmann, 1974) or, to use my word, “reflexive” (Teubner, 1983). Either implicitly or explicitly, such conceptualizations must face the problem of the law’s need to develop internal structures that will allow it to cope with highly functionally differentiated, autonomous social subsystems, or more precisely, in my interpretation, with their self-referential and autopoietic organization. It is a superficial reading of “reflexive law” that identifies it, as Blankenburg does, with just any procedurally-oriented type of law. Such a reading ignores the way the concept of reflexive law responds to the problems posed by increasing functional differentiation and strips from the concept its specific relation to the problem of social autonomy. It is then easy to ask: What’s new?

It is trivial to say that procedurally-oriented law has existed for centuries, or even that procedure is at the heart of the phenomenon of law as such. However, it is not trivial to attempt to specify what kinds of procedure the law will develop if it is going to cope with a high degree of social autonomy or, in our terms, with self-referential closure. It is similarly trivial to say that law has always been dependent upon the social structures it has had to deal with. It is not trivial to identify the internal models of social reality and forms of “regulation” that the law will develop in dealing with social systems, which are, in principle, inaccessible to regulation. Therefore, I insist on the formulation that not only are different “rationales of law” at stake, as Blankenburg would have it, but there is also the question of what rationality the law will develop under conditions of high functional differentiation.

A promising guide for understanding how the law might cope with the problem of “regulation” in spite of inaccessibility can be found in the theory of “black boxes” developed in the context of cybernetics (Glanville, 1975). Self-referential systems—social systems like law, politics, and regulated

subsystems—are “black boxes” in the sense of mutual inaccessibility. Each knows the input and the output of the other, but the internal processes that convert inputs to outputs remain obscure. “Black-box-techniques” do not try to shed light on the obscure internal processes but attempt to circumvent the problems posed by this obscurity through an indirect “procedural” route. When the actions of black boxes must be coordinated, each focuses not on the unseen internal workings of the other but on the interrelations between them. The experience gained from observing patterns of behavior is increasingly valuable even though internal causal processes remain unknown. Thus, interacting “black boxes” become mutually “whitened” in the sense that the interaction relation that develops between them achieves transparency in its regularities.

It is not a question of the forms of legal regulation, such as those I describe, stopping the process of legalization and judicialization. I have not made such a claim. Thus, there should be no reason for Blankenburg to attempt to refute this claim. “Reflexive law” does not support the hopes of a naive delegalization movement, with which Blankenburg seems to have sympathies. On the contrary, it is to be expected that, with the increasing autonomy of social subsystems (in the sense of autopoietic organization), the trend of increasing legalization will continue. However, the quality of the legalization process may change if the legal system becomes aware of the autopoietic character of its surrounding social systems and adapts its normative structures to it. This change of direction may lead towards a richness of legal evolution which legal evolutionism in its poverty would never have contemplated.

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