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Law as a Social System, by Niklas Luhmann

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NIKLAS LUHMANN, *Law as a Social System*. Oxford: Oxford University Press, 2004, 498 pp., ISBN 0-19-826238-8, £65.00.

Despite the availability of sometimes brilliant English translations of many texts by the late German sociologist and legal theorist Niklas Luhmann, his influence on Anglo-American theory continues to be minimal. In his version and elaboration of systems theory, Luhmann describes the collision of societal systems in an endless struggle not for coherence, but for interpenetration, co-existence and perturbation, operational closure and cognitive openness, not for 'exit, voice and loyalty', but for reflexive processes of irritation and co-evolution, not for regulatory competition versus harmonization, but for evolution and autopoietic self-reproduction. These are key words that are central to Luhmann's theoretical construction and on which Europeans may spend years of intellectual probing, convening conferences of extraordinary magnitude and exhausting intensity, where they show their grey faces sticking out of turtlenecks or tieless shirts while they drink black coffee; not much of this seems to be of great appeal to the Anglo-American world.

Where can we look for reasons? Already the number of English language translations that are available of Luhmann's oeuvre should refute possible comparisons to another case of – at least in the beginning – scholarly disinterest in the English-speaking world in the work of Carl Schmitt, whose wide-ranging work has only more recently really been discovered in English. The comparison does not hold because Carl Schmitt eventually found his way into the debates in the English-speaking world, his work has been translated and he has become the target of symposia, conferences and major collections. Giorgio Agamben's persistent inquiry into the 'state of exception' signalled a renewed interest in Schmitt's work and influence on contemporary legal and political thinking, one that is again increasingly dominated by a normative thrust and a seemingly inevitable moralization of positions into either good or bad, friend or foe. Luhmann, in contrast, is

regularly seen as disinterested, even incompatible to such universalizing legal-political discourse. Instead, his identification of society as consisting of communications that take place among scattered systems of consciousness, his pernicious insistence on the self-referentiality of systems of meaning and the ensuing, hard-to-swallow, dire consequence of an exclusion of moral thinking from driving and determining learning processes seem to situate Luhmann's concepts on the outside of most contemporary political and legal theory. A closer look at the admittedly overwhelming volume of Luhmann's literary production, however, reveals a different story, one that is again powerfully told by the latest English translation of his *Das Recht der Gesellschaft*.

Luhmann's work appeared in English translation considerably early, but was accompanied by nothing as vivid a discussion of his work as there has been in Germany. After the first English translation of his small book, *Vertrauen* (1979a), his important books from the 1960s and 1970s found their way into the English-speaking world at best indirectly, through their Spanish, Italian, or Japanese translations perhaps, but not through the availability of English translations. This changed in 1985 with the publication by Routledge of an English version of Luhmann's *Rechtssoziologie* (*A Sociological Theory of Law*), originally published in German in 1972. While translations of his writings, in rapid succession, appeared in Spanish, Italian, Japanese, Portuguese, and even Serbo-Croat, English translations remained scarce. Another considerably isolated English translation of his *Macht* was published by Wiley in 1979. The subsequent publication of his outstanding essays in (altogether) six volumes of *Soziologische Aufklärung* and his four volumes of *Gesellschaftsstruktur und Semantik* startlingly failed to arouse any English publisher's interest, while these essays that are rightly considered to contain the central gist of Luhmann's thinking were greeted with sustained enthusiasm in Italy and in Japan. The 1980s and 1990s, then, saw English translations of his related,

exquisite study, *Liebe als Passion* (1986), and of his *magnus opus*, *Soziale Systeme* (1995). Two happy incidents of timely translation are those of Luhmann's intriguing study, *Ökologische Kommunikation* (1989), and of his formidable study of welfare politics and the dynamics of inclusion and exclusion in *Politische Theorie im Wohlfahrtsstaat* (1990), while the 1988 major study that would inaugurate Luhmann's individualized explorations of singular social systems beginning with the economy, his *Die Wirtschaft der Gesellschaft* (1988) is lost to the English language world. The same fate seemed to be reserved for the ensuing studies in this programme, *Das Recht der Gesellschaft* (1993), *Die Kunst der Gesellschaft* (1995), culminating in the 1997 volume, *Die Gesellschaft der Gesellschaft*, and the posthumously published volumes, *Die Politik der Gesellschaft* (2000), and *Die Religion der Gesellschaft* (2000). Laudable exceptions are the early availability of the English texts of *Soziologie des Risikos* (1993) and of *Die Realität der Massenmedien* (2000).

It is against this background that in 2004 a brilliant English translation of Niklas Luhmann's major treatise on legal theory, *Das Recht der Gesellschaft* was (finally) published, accompanied by a comprehensive introduction written by Richard Nobles and David Schiff, both experts on jurisprudence in general and on Luhmann in particular. The English edition of the complex and densely argued volume has been prepared by the translator, Klaus Ziegert, Nobles and Schiff, Fatima Kastner and Rosamund Ziegert. With 11 years since the publication of the book in German, *Law as a Social System* meets a somewhat changed theoretical and political situation of thinking about law. While, in 1993 in Germany, Luhmann's book was understood by many as the major counter-project to Habermas's *Facts and Norms* (1996), the discussion that dominated German discussions in the 1990s has since moved on. With Habermas's extension of his theory of discursive ethics to the rule of law and parliamentary democracy, to the welfare state and

private law theory, culminating in a far-reaching concept of *proceduralized law*, Luhmann's book did indeed seem like a stern counter-proposal, negating the direct determination of law by political or, even less, moral concerns, while affirming law's 'irritability' to conditions in its environment. In contrast to Habermas's passionate belief in the capacity of a fragmented, highly diversified civil society to create conditions of mutual recognition and democratic deliberation, Luhmann's work has regularly been received as much more dispassionate, even a-passionate with regard to normative claims offered about the miracles that law was meant to achieve in bringing about a just society. A striking *coup d'œil* of these alternative approaches to law is given in Luhmann's exquisite review of Habermas's treatise (see Luhmann 1998). In it, Luhmann famously suggests that had Habermas regarded the place of law within society with a greater sense of irony, his theory would not have spelled out so great a demand (and, indeed, hope) for an integrative function of the law.

Today, Luhmann's major treatise of legal theory is likely to unfold in the contemporary climate of the separating-out of the legal and the political. The thesis of law's autonomy as a social system, its autopoietic reproduction in a conflict-ridden domain and in co-existence to other social systems, such as politics, economy and religion, is likely to be even more provocative in times of law's besieging by the sword-clinging armies of anti-terrorism warfare and hegemonic politics (see Koskeniemi, 2002; Paulus, 2004; Krisch, 2005). And yet, the long overdue, posthumous publication – Luhmann died in 1998 – of the English text gives clear testimony of Luhmann's uncompromising sensitivity to the very challenges that law is facing – then and today. Luhmann's legal theory is a highly sophisticated study of the conditions that must be present if any communicative meaning is to survive from the battlefield of contemporary conflict into tomorrow's search for stability and memory. Law can fulfil this stabilizing function – despite, or should we say

because of its relative autonomy from the rule-production that is otherwise taking place within the parameters of economic exchange or political discourse. Law's reproduction of meaning consists of capturing a specific, timely understanding of 'legal' as differentiated from 'illegal', without, however, allowing a larger societal discourse to set, shape and further define this meaning and distinction of legal/illegal – against the tides of domestic and international conflict. Instead, law – through an 'introversion' of sorts – develops rules and norms informed by yesterday's definition and assignment of legal/illegal, that will serve as guiding post and reminder when applied to conflict situations tomorrow. In a paradoxical combination of vulnerability and sovereignty for the decision over the concrete case, the law relies on rules that it has developed through repeated application in previous cases and it is through this application today that the law constantly refines and improves its sensitivity to each new and different situation awaiting regulation.

As always, Luhmann's language, here in a faithful English translation, is straightforward and matter-of-fact in stating what – in his eyes – ought to be seen as the basis for understanding contemporary societies. It is only against the background of this understanding of the particular role of law, that its function can be grasped. Building on his groundbreaking theory that understands society as the co-existence and complex inter-action ('co-evolution') of different systems of societal production that he laid out in his 1984 work, *Soziale Systeme*, Luhmann posits the law as one of society's social systems, that is, one of the building elements of Luhmann's description of society as a whole. Law, however, presents itself as a special case in the concert of social systems constituting society. The reason for the difficulty of identifying law as a social system alongside those of the economy, art, religion or politics, is that law seemingly permeates all layers, spheres or, 'systems' of society. Luhmann says that law as a social system

performs society, it does so 'with each of its operations by reproducing communication and delineating it against everything else. But it instantiates its own autopoiesis, the autopoiesis of the legal system, by following the legal coding rather than any other coding or even no coding at all' (p. 467). In light of this description it is obvious that law's confinement to the logics of a system's autopoietic reproduction arouses resistance.

Luhmann is certainly aware of this and he carefully traces the origins and, in his view, at least partially misleading assumptions that support the traditional positioning of legal thinking. As is true of his masterful, early treatise in the *Sociology of Law* (1972), Luhmann's *Law as a Social System* explores the very possibility of law. Rather than engaging in searches for law's essence or its otherwise eternal inner nature, Luhmann is interested in the ways in which we can see law perform its particular function. In the search for identifying the function of law it becomes clear that what is at stake is the recognition of the boundaries of law. With a view to what is inside, we gain a view on what is outside – seen from the inside, through the lenses only there available. Luhmann distinguishes law's *performance* from its *function*: while law's performance must be seen, first of all, in the resolution of disputes and, building on this, in the steering of human behaviour, law nonetheless has no *exclusive* mandate to do so. With other mechanisms available for resolving conflicts and for shaping human conduct, law cannot be defined exclusively through its performance. It is instead through its function that we can begin to understand the unique quality of law.

In Luhmann's theory, law serves primarily to stabilize expectations. It does so by producing rules that preserve the identification of something as 'legal' over time and that therefore are available for an assessment at a later point in time. The time-binding quality of law is thus the basis and the core of Luhmann's legal theory and it is here that many commentators miss an outspoken commitment to a normative framework, a certain

political or ethical model of social order. In Luhmann's view, the law cannot offer such a model, or programme. Instead, it 'reacts' to normative or other demands, irritations, from outside its systematic frame of reference, by reacting to changes in its own mode. The legal system does not react to the world outside, it reacts to challenges from inside that result from the way in which the law deals with a new case. At first sight, this must seem to stand at odds with the view that identifies the law as never having been anything but a formidable weapon in the hands of the powerful in the first place.

When Luhmann insists that there is 'no transfer of information from the environment to the system' (p. 468), this must rightly disturb those who wish to shape the legal system on the basis of political demands and ethical programmes. Yet Luhmann makes clear that the law is not blind to what is going on outside of it. Instead, '[t]he social relevance of law is indisputable. However, its integrative function is very much in doubt. This has been pointed out time and again by, above all, the critical legal studies movement and by other critics inspired by Marx.' 'We can avoid', Luhmann goes on, 'this controversy by moving the problem to the temporal dimension. We see the social meaning of law in the fact that there are social consequences if expectations can be secured as stable expectations over time' (p. 143). Later, we read: 'Abstractly, law deals with the social costs of the time binding of expectations. Concretely, law deals with the function of the stabilization of the normative expectations by regulating how they are generalized in relation to their temporal, factual, and social dimensions' (pp. 147-8).

In the middle chapters of the book, this inside/outside perspective is further laid out. The 'Evolution of Law' (Chapter 6) is characterized by the emergence of an internal, self-referential system of rules, legal doctrine (*Rechtsdogmatik*) and the increasing supremacy of courts over the executive and, later, the parliament (Chapter 7), in speaking out what the law is. This is exemplified by the emergence of the constitution as (in

Luhmann's words) an 'evolutionary achievement' (Luhmann, 1989). A constitution puts on paper that which has always been and will for the time to come be the virtual consensus on what the law is. The courts are asked to interpret the constitution, aware of the interpreted text embodying the law as it exists in its intricate relationship to the system of politics to which it is structurally coupled through the constitution.

'Writing', Luhmann notes, 'operates with the advantage that it keeps knowledge readily available for unexpected, optional access' (p. 234). This is further developed in the eminently important Chapter 10 that illuminates the concept of 'structural couplings'. Besides the constitution, other examples of such 'couplings' include contract and property. They occupy specific places within the emerging framework of legal doctrine, and thus have an internal role in the evolution of the legal system while, externally, they carry out a central function for the development of the economy. They operate inside of each system but have an internally different performance in each.

While property as an economic term does have the value of ownership attached to it while lacking the capacity of determining ownership, in the legal system, property reflects the determination of ownership without attaching a more general value to it. This is certainly a problematic demarcation, and Luhmann is well aware of its problems. Earlier, he rejected the reductionist perspectives of the legal theory of the 'economic analysis of law', aka 'law and economics', which he dismisses on the premise that its protagonists too restrictively identify economic motives as the driving forces of the legal system. In contrast, Luhmann underlines the quality of the legal system as able to carry out its function in a highly differentiated, fragmented society, finding application in poly-contextual domains that constantly expose the limits and boundaries of law. Law, then, re-adjusts its borders to these fast-changing, dynamic contexts by further refining its instrumental apparatus.

We are reminded of the painful conversations between Chekhov's (1985) Mrs Ranyevskajya, the dramatically impoverished landlord of an old cherry orchard, and the self-made entrepreneur, Lopahin, about breaking up the otherwise doomed estate into separate entities for lease. While the former clearly hears the message that this move would 'save' her, the business proposition remains entirely at odds with a worldview in which the orchard reflects former, more fortunate times, captured by Chekhov's brilliant exposition of the drama of what Karl Polanyi (1944) has described as the devastating effects of the emerging market society. The separate worlds that are reflected in her respective utterances in this eventually futile conversation about saving the estate, mark the challenge in the face of which the law constantly operates. One should not for a minute underestimate Luhmann's awareness of this world. In defence of the apparently austere and consequentialist style in which he defines legal theory as being about the boundaries of law, one might only point to the many parts in his work where he sincerely questions the very possibility of law's carrying out this function, described by him as no less than the preservation of meaning over time, of the stabilization of expectations of what the law is and what it is not.

The above-indicated tensions unfold fully in his concluding chapter, 'Society and Its Law', where we find a gripping and chilling account of law in times of globalization. This chapter is well worth distributing in advanced university courses on the prospects of the rule of law in an era of dramatic denationalization, deterritorialized commerce, war and transnational societal disintegration. In light of the increasingly questionable ability of the nation-state to define the limits and framework for the economy, science and other spheres of society, its ability to preserve a 'national' legal system is in danger as well.

By raising the question of how the law might at all be able to still *function* outside the confines of the nation-state, with regard to internal, ethnic conflicts, the challenges of

multiparty, post-conflict, nation-building (Markovits, 2001; Gross, 2004), or, international environmental (Ellis, 2006), security (Anderson, 2004) or legitimacy (Perez, 2003; Chander, 2005) concerns, Luhmann puts the finger on the wound of the increasingly ailing and beaten body of law. His treatise lays out in excruciating detail the very fragility and vulnerability of law. Indeed, Luhmann concedes the manifold conditions of embeddedness of the fine-lined, multi-polar body of the legal system. In recognizing that the law has been able to carry out its function over time, he admits that much of this is likely to have been owed to the institutionalization of relatively stable political conditions. All this is in danger today from many sides. Law's increasing fragmentation due to a constantly growing number of norm-producing entities, each with contestable claims to identity, recognition and enforcement, as well as its growing competition with other social systems akin to the law (Teubner, 1997; Calliess, 2002; Fischer-Lescano and Teubner, 2004), creates nothing less than dramatic and, perhaps, apocalyptic challenges to law.

Robert Kagan's (2003) brutalizing indictment of Europe's 'paradise of law' and deliberation in contrast to the United States' 'jungle of danger and decision-taking', could very well exemplify Luhmann's concluding skepticism that what he described as the legal system might, after all, not have been much more than an 'European anomaly, which might well level off with the evolution of global society' (p. 490). Without further exploring the emergence of concepts such as transnational law (Jessup, 1956; Zumbansen, 2002, 2006) or post-national constitutionalism (Tully, 1995), Luhmann's text, 11 years after its original publication, exhibits an extraordinary awareness of the central challenges of law in the world society. Citing his eminent article of 1970 (!), entitled 'The World Society', Luhmann argues that society, today, can only mean world society, a decentred, deterritorialized sphere of human activity. It is against this

background, that not merely the role, but in fact the very *possibility* of law must be reassessed. Just one striking piece of evidence of Luhmann's acute awareness of law's crucial function in the transnationalization of human rights claims, is his laconic mention of the *Alvarez-Machain* litigation, one that has, in the meantime, found a dramatic end in the Supreme Court's 2004 decision not to recognize the US American *Alien Tort Statute* (of 1789) as a basis for suing for a human rights violation initiated by US officials on foreign soil (*In re South African Apartheid Litigation*, 2004; *Sosa v Alvarez-Machain*, 2004).

Law in the world society will be determined by its internal reaction to the challenges brought about by the conflicts that Luhmann already in 1981 in *Political Theory in the Welfare State* aptly identified as bearing the prime responsibility for the assignment of actual rights and entitlements, that is the dynamic between inclusion and exclusion. Identifying exclusion as the distinctive mechanism that determines whether or not individuals will have access to legal decision-making is rendered more dramatic by the amplificatory qualification whereby initial degrees of societal exclusion will likely result in further exclusion. Being excluded from one social system (no passport) will likely further the exclusion from other systems (marriage, housing, education, extended social welfare). In turn, this might reinforce desperate action, deviance, crime, in short, illegality. But, maybe legality might no longer mean a safe haven. Seemingly echoing Foucault's last chapter of the *History of Sexuality* (Part I), where he unfolds the concept of bio politics and the naked body, and even, perhaps, Giorgio Agamben's *Homo Sacer*, Luhmann writes, 'There is nothing to lose in the highly integrated area of exclusion, apart from control over one's own body' (p. 490; see also Neves, 2001).

That there *is* much to lose, is well documented by such a densely argued exposition of law as a social system whose primary function is to provide for a form of societal memory with which meanings of legality are made identifiable, to remind, to haunt, to

inspire us. The contemporary debates over the legality of humanitarian intervention (Koskenniemi, 2002), over the permissibility of torture (Ignatieff, 2004; Taylor, 2005), of pre-emptive warfare in the name of national security – all of them constitute dangerous games with the state of exception, *omnipresent* in Schmitt's metaphor. It has rightly been remarked that the current crisis of international law is a crisis of law *per se* (Koskenniemi, 2005; Anghie, 2005). Likewise, Luhmann's observation that today's society is the world society, makes pertinent the question, 'Which law for the world society?' From a governance perspective, many problems of the world society can in many ways be seen as amplifications or dramatizations of developments that began in the disintegration of increasingly heterarchic national legal and political orders, hence the emerging awareness of the need of a bordertranscending administrative law (Aman, 1997; Krisch et al., 2005). At the same time, while the emergence of new actors and new forms of norm production render the application of our nation-state toolkit redundant and the memory of international law's normative utopia ever more existential (Koselleck, 1979; Zumbansen 2001a, 2001b), our task, time and again, will be to reassess the very boundaries of the law, fragile, vulnerable and invisible as they might seem today.

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