

A Systems Approach to Society and Law

Niklas Luhmann as a sociologist made big claims about the importance of law stating that 'all collective human life is directly or indirectly shaped by law'.² His special interest in law is not surprising regarding that he studied law however this professional career was not unusual in the history of sociology.³ Born in 1927 in Lüneburg, Germany, he obtained law degree from the University of Freiburg/Breisgau in 1949. Working in public service, he spent his free time reading Descartes, Kant, Husserl, and the functionalist theories of Malinkowski and Radcliff-Brown. In 1960, he won scholarship to Harvard and was instructed by Talcott Parsons. Returning to Germany Luhmann started his sociological research at the Academy for Administrative Sciences in Speyer, than at the Institute for Social Research in Dortmund later at the University of Münster. He was invited by the German sociologist Helmut Schelsky to join the University of Bielefeld, and from 1968 until his retirement in 1993 Luhmann held a chair in Sociology at Bielefeld University. Monitoring the results of modern science, Luhmann intended to map the boundaries of sociology by linking social theory to recent theoretical developments in scientific disciplines as diverse as modern physics, information theory, general systems theory, neurophysiology, cognitive science and so on. At the beginning of the 20th century the well-ordered, machinelike Newtonian view of universe definitely became superseded. Supremacy of the linear paradigm characterised by utter certainty and predictability was replaced by a recursive universe, in which disorder, unpredictability and non-linear complexity are the rules.⁴

While mechanistic linear systems change gradually and orderly, the change of nonlinear systems is more random and less predictable involving discontinuities. Nonlinear entities are defined by complexity. Complex or complexity do not mean difficult or complicated, but serves as a distinction between the more familiar mechanistic systems and nonlinear systems. Regarding that the theory of non-linear systems emphasizes continuity, and focuses not on the 'beginning' or on the 'end', it has not ontology moreover has not an idealised end-state to which the system progresses. The purpose of the complex systems is the long-term survival including particular evolution. Evolution of complex systems are characterised by variety, and flexibility. The results in research of complex systems had big impact on Luhmann's societal theory. Through his thirty years theoretical project for reconceptualising sociology Luhmann developed a highly original form of non-linear systems theory which offers a comprehensive description of modern society. Developing his complex theory of society, Luhmann applied the results of cybernetics of Heinz Von Foerster⁵ the

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² Luhmann, N. (1985): A Sociological Theory of Law, p. 1. Routledge and Kegan Paul

³ Max Weber one of the most significant sociologist was also trained as lawyer. He earned his law doctorate in 1889 by writing a dissertation on legal history titled *Development of the Principle of Joint Liability and the Separate Fund in the Public Trading Company out of Household and Trade Communities in Italian Cities*. In 1891 Weber completed his habilitation thesis titled *Roman agrarian history and his significance for public and private law*, which is essential to the study of Roman law even today.

⁴ Inter alia: Einstein (1879-1955), Bohr (1885-1962), Schrödinger (1887-1961), Heisenberg (1901-1976) and Dirac (1902-1984) played a decisive role in pushing conventional wisdom within the natural sciences beyond the Newtonian limits.

⁵ Heinz Von Foerster was instrumental in creating an interdisciplinary center for cybernetic research at the Biological Computer Laboratory at the University of Illinois at Urbana.

evolutionary biology of Humberto R. Maturana and Francisco Varela⁶ and mathematics of George Spencer Brown.⁷ Luhmann presents a general theory of social systems⁸ more precisely he elaborates the general conceptual framework for such theory which can be applied for description of modern society. 'He wanted to avoid above all else the idea that one could capture 'the truth' or essence of modern society in one theoretical account. No theory, not even closed systems theory or autopoiesis, can have the last word or give an exclusive or true account of what society, in its totality, is and how it operates.'⁹ According to Luhmann modern society is differentiated into a network of equal social subsystems. Each of subsystem has self-organising, self-reproducing character and uses system-specific operations. The subsystems observe themselves and their environment, and are capable to make a difference between their own system and their own environment. In Luhmann's world 'there are systems' and it means only that there are objects of research to abstract facts in order to compare with each other and with other kinds of facts within the perspective of same/different.¹⁰ If we say 'there are systems', we say 'there are environment' at the same time, because systems cannot exist without environment. Environment is an open horizon, without self-reflection, or capacity to act. Systems constitute and maintain themselves by creating and maintaining difference from their environment. Systems use their boundaries to regulate the difference between themselves and their environment. 'General systems theory, as well as cybernetics, replaced the classical conceptual model of a whole that consists of parts and relations between parts, by a model that focused on the difference between system and environment.'¹¹ Being observer of observations we can observe both territories: system as a marked state or actuality and environment as an unmarked state or potentiality. Difference therefore is the functional premise of self-referential operation. The thesis, namely, that there are systems, can now be narrowed down to: there are self-referential systems.¹² Functional differentiation is the form that dominates modern society. Modern society 'is differentiated into the political subsystem and *its environment*, the economic subsystem *and its environment*, the scientific system *and its environment*, the education system *and its environment* and so on'.¹³

The only way to define modern society its primary mode of internal differentiation, the way in which system builds subsystems Each of society's subsystems represents a closed entity existing in an environment constructed from the system own operations. 'For highly differentiated societies the world can be meaningful only as an indeterminate horizon for further explorations and not as a finite set of things and events (in the classical sense of *universitas rerum* or *aggregation corporum*).'¹⁴ In Luhmannian world society is a kind of social system based on communication, which continuously creates social structures. Social systems distinguish and evolve as they communicate in three separate dimensions: in social, in temporal, and in functional dimension. Social systems make sense of their environments through their communications, moreover, states Luhmann, society consists of the totality of

⁶ In collaboration with Varela, Maturana developed a theory to account for the self-reproductive operations of organisms introducing the term 'autopoiesis' to describe these operations.

⁷ G. S. Brown, student of Bertrand Russell, developed a mathematical calculus that has been instrumental for Luhmann's formulation of second-order logic of observation.

⁸ Luhmann, N. (1995): *Social Systems*, Stanford University Press

⁹ King, M., Thornhill, C. (2003): Niklas Luhmann's Theory of Politics and Law, p.1. Palgrave Macmillan NY

¹⁰ Luhmann, N. (1995): *Social Systems*, p.2. Stanford University Press

¹¹ Luhmann, N: 'Differentiation of Society' in *Canadian Journal of Sociology* Vol. 2. No. 1. Pp. 29-53
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¹² The recursive self-reproduction/self-referentiation is referred by the systems theory as autopoiesis

¹³ Luhmann, N. (1982): 'The World Society as a Social System' in: *International Journal of General Systems* Vol. 8 (8) p. 132.

¹⁴ Luhmann N. (1977): Differentiation of Society in: *Canadian Journal of Sociology* Vol. 2. (1) p. 32.

all meaningful communications. The process of communication in this theory is not the transmission of messages, information, or understanding expectations. In the systems-theoretic approach it is the very emergence of communication that is emphasized. 'Just like life and consciousness, communication is an emergent reality, a state of affairs *sui generis*. It arises through a synthesis of three different selections, namely, selection of information, selection of the utterance of this information, and a selective understanding or misunderstanding of this utterance and its information.'¹⁵

Luhmann was concerned principally with the pivot of our time. To uncover the basic and essential structure of modernity he outlined a broad evolutionary trajectory investigating system differentiation. 'The evolution of society has often been described as leading to increased system differentiation. This statement is true but needs clarification. It would be difficult to compare all kinds of societies as to their degree of differentiation, assuming a common measure they are too heterogeneous because they use different forms of differentiation.'¹⁶ However, referring to Goldenweiser *principle of limited possibilities*¹⁷ Luhmann states that the society operating under such a premise would have to use and combine only a very few forms of differentiation namely: segmentation, stratification, and functional differentiation. Evolution expands with the constantly changing flow of actual communication. With greater differentiation, there is more communication. Modern society is characterized by its functional differentiation into autopoietic subsystems such as law, politics, economics, science etc. Subsystems operate self-referentially according to their own codes. According to Luhmann, coding and programming are closely linked operations of any social system. Systems distinguish themselves and make sense of their environments through their own particular binary code, which are the symbolically generalized media of communication. According to this model, each subsystem interprets the world in its own terms. Economy, for instance, uses the medium of money, law the medium of legality, politics the medium of power, science the medium of truth, religion the medium of faith.

While these media exist as ways of understanding events throughout society, they are specifically developed within individual subsystems as binary codes.¹⁸ It is important to note that Luhmann does not use the word *development* describing the process of differentiation. He consequently speaks about *evolution* towards higher complexity. Modernity in his theory is not only a quantitative increase in differentiation (of subsystems, division of labour, rationality, etc.) but a qualitative change in social communication. Without hierarchy, without centre, systems¹⁹ have higher possible degree of freedom to organise themselves according to their self-referential logic.

Luhmann considers legal system as a social system²⁰ within the societal system, as a differentiated subsystem of society. In pre-modern societies the legal system was not differentiated from other systems of society, from personal-hierarchical traditions of rule. The validity of law was demonstrated *inter alia* by reference to divine law, by Reason, than, with the emerging reality of the 'State' the validity of law was granted by the State itself. It is only in modern societies, however, where the legal system stands independently as an autonomous and fluctuating system of communication, where the specific reference to validity is required for the continued operations of the system itself. Luhmann's system theory specifies law as an

¹⁵ Luhmann, N. (1992): 'What is Communication?' in: *Communication Theory* vol.2-3 pp 252

¹⁶ Luhmann N. (1977): *Differentiation of Society* in: *Canadian Journal of Sociology* Vol. 2. (1) p. 32

¹⁷ Goldenweiser, A. (1937): *Anthropology*, Crofts NY

¹⁸ Binary codes used by subsystems for example: Law: legal/illegal, Science: true/false Politics: government/opposition, or to be in power/not to be in power, Religion: immanent/transcendent, Economics profitable/not profitable, Morality: good/bad esteem/diseesteem, etc.

¹⁹ Luhmann identifies three types of autopoietic systems: living systems, psychic systems, and social systems

²⁰ Devoting special volume to the issue see: Luhmann, N. (2004): *Law as a Social System*, Oxford University Press

autopoietic subsystem. 'When legal system become differentiated as special functional system of society, this occurs on the basis of a special *binary code*, by which the operations of this system are oriented.'²¹ This code, in which legal communications are expressed, is the binary code of legal/illegal, namely 'this is the line which the discursive practice of law draws between itself and its environment. If we are interested in a theory of law as a self-organising social practice, then it is not up to the arbitrary research interests to define the boundaries of law. Boundaries of law are one among many structures that law itself produces under the pressure of its social environment. And only a clear delineation of the self-produced boundaries of law can help to clarify the interrelations of law and other social practices.'²² Therefore the legal system operates with the code of legal/illegal and has a program: the existing legislation or the applicable law. Only the legal system operates with this code, meaning that no other system is able to state what is legal and what is illegal. The legal subsystem can be observed as the positivation of the law, meaning that the law is determined by the law itself and not by political, economical, moral, etc. actions. For the question: what is law? Systems theory gives a paradox answer: the law and only the law can define what is, and what can be law. In this sense law is a tautology: Law is what the law says it is. Although Luhmann uses the term 'positivation of law' and 'legal positivism' he cannot be labelled simply as a 'legal positivist'. He does not follow the traditional path characterised by the schism of *IS* and *OUGHT* or of fact and norm. There is a basic difference between Luhmann and the representatives of legal positivists, namely he examines law in a general theoretical concept of society, in the context of system theory. In this concept law is not a privileged realm of validity and has not a central role in society. According to Luhmann, law is one of the autopoietic subsystems of society, where only law can generate law. And this law – by the nature of the operational process – is positive law, positive products of legal process. In this sense Luhmann can be labelled as a legal positivist indeed. The study of legal paradoxes have distinct role in Luhmann's research, namely: how can one ever be sure that the true is not untrue and the right is not wrong? How can we – rightly or wrongly – differentiate the right and wrong, the just and unjust, the contradictions of property, the tension between general and special, legislation and adjudication and so on. The paradoxes are trapping because they seem to be obstacles to the continuation of communication or thinking. Observing paradoxes we have to differentiate observations, namely self-observation and external observation, 'because for the self-observer things may appear as natural and necessary whereas when seen from outside, they may appear artificial and contingent.'²³ Creative use of paradoxes can be fruitful to observe the differentiation of legal system. In antiquity the paradox of right/wrong, just/unjust first had to be generated, then had to be institutionalized. According to the era's view, all multiplicity came out from Unity, so natural law copied divine law, the eternal law of order. The rigidity of the legal order derived from eternal law, was released in different ways. Religiously, referring to the Gods for instance: 'Athena intervenes, establishes the Areopagite Council and retains for herself the right to decide *hard cases* (as Americans would say in their inimitable fashion)'²⁴. Or morally, with *epikeia*, proposed by Aristotle, emphasizing that: 'epikeia is the correction of law where it is defective owing to its universality'²⁵ Therefore *epikeia* is a better justice, a virtue with the aim of ethically optimising human activity regardless of generally-defined standards. Another paradox was 'the urgent necessity', cases *excessum iuris communis propter bonum commune*, namely decisions against the valid law.

²¹ Luhmann, N. (1992): 'The Coding of the Legal System' *European Yearbook in the Sociology of Law* p. 145

²² Teubner, G. (1992) 'The Two Faces of Janus: Rethinking Legal Pluralism' *Cardozo Law Review* 13 p. 1443

²³ Luhmann, N. (2002): *Theories of Distinction: Redescribing the Descriptions of Modernity*, Stanford University Press p.79.

²⁴ Luhmann, N. (2008): Are There Still Indispensable Norms in Our Society? in: *Soziale Systeme* 14. p. 18-37

²⁵ Aristotle: *Nichomachean Ethics* V. 10.

To justify the neglect of the valid law – copied by divine law – derogation was invented. 'This distinction of cruelty and leniency (*crudelitas/clementia*) served to reject the legal code of right and wrong and to re-incorporate the law into the human society... The distinction which first articulated the paradox of rejectable law is finally transformed into a device for creative social learning within the legal system.'²⁶

Over time new paradoxes had occurred. The 16th -17th centuries were the centuries of Reason. Reason was the centre and the very essence of human existence. Law started to release from theological supervision, and divine law was replaced by natural law of reason. Reason could appeal only to Reason as the last court, so the reasonable reason became the new paradox. According to Thomas Hobbes, law must be made by man to protect man from his own natural brutality. The hard case of the time was the question of *property*. All men were born free and equal²⁷ but the right of the property was sacred and inviolable. Those, who took seriously the truths of philosophy and wanted to restore the natural equality of men – for instance the True Levellers, or The Diggers²⁸ – violated the law of property therefore were arrested and imprisoned even executed.

'And again, the paradox reappears, being more sophisticated than reason itself. In practical affairs of acquisition and use of property, reason argues with equal voice for equality and inequality. The desire for property and its accumulation is clearly wrong, violating the natural (and the created!) equality of human beings. And the demand for equality is clearly wrong, violating the law of property. How, then, to drive the paradox back into its invisible retreat?'²⁹

In the 19th century new attempts were made to solve the paradoxes of the law. The new solution was the constitutional state. According to John Austin the purpose of law and government is the greatest advancement of human happiness, or as Jeremy Bentham stated the purpose of law and government is to provide the greatest happiness for the greatest number of people on the base of the constitutional state. But the paradox of just/unjust, right/wrong had occurred over again. It was the tension between legislation and adjudication, between the general and special, between the statue and concrete case.

Can we unfold the paradoxes of the law at all? Luhmann's suggestion for 'de-paradoxication' is *time*. 'Paradox does not prevent the operation of a system. On the contrary, it is the condition of its possibility because its autopoiesis requires continuing actuality with different operations actualizing different possibilities.'³⁰ Legal system operates by hypercorrection, by being constantly in repair. The paradoxes – promoting the differentiation of the system – remain invisible and law as a sub-system emerged in the course of the evolution of society's internal differentiation, as an answer to the problem of legality.

²⁶ N. Luhmann (1988): The Third Question: The creative use of paradoxes in law and legal history, *Journal of Law and Society* Vol. 15. N. 2. Pp. 156

²⁷ The 'immortal declaration' of the Enlightenment was incorporated into the United States Declaration of Independence, 1776

²⁸ See for example: G. Winstanley, (1649): *The New Law Of Righteousness*

²⁹ N. Luhmann (1988): The Third Question: The creative use of paradoxes in law and legal history, *Journal of Law and Society* Vol. 15. N. 2. Pp. 157

³⁰ N. Luhmann (2002): *Theories of Distinction: Redescribing the Descriptions of Modernity*, Stanford University Press p.84

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