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## LAW AS A SOCIAL SYSTEM

*Niklas Luhmann\**

In the classical division of labor between jurisprudence and sociology, jurisprudence is concerned with norms, and sociology, in contrast, with facts. The jurist's task is to interpret norms and apply them. The sociologist may concern himself only with the existing context of the law, with its social conditions and consequences. But this classical view was already out of date, if not anachronistic, even at the time when Hans Kelsen gave it its most precise formulation. "Social-engineering" approaches and the jurisprudence of interests had tied the application of law to facts that had not been taken into account in formulating norms but instead had to be ascertained subsequent to the formulation of the legal text. Pragmatism had postulated that all practical application of the law should consider how different constructions of the law would affect legal outcomes; it was concerned not only with the impact on future decisions within the legal system but also with controlling actual consequences within social reality.

The resulting dissolution of the sharp demarcation between jurisprudence and sociology has given rise, since the beginning of this century, to the hope that sociology will be able to make a contribution to the administration of justice. From the perspective of the law, however, sociology's function remains more that of an auxiliary science. Aside from a few exceptions (the concept of an institution, for example), sociology has had no influence on legal theory and scarcely any impact on legal doctrine. Nor is it clear whether a special discipline called "legal sociology" can provide the law with information, or whether all branches of sociology would be available to do so. And there is still no adequate sociology of legal doctrine or legal theory.<sup>1</sup>

There has not been much movement on any of these questions in the last two decades. It is clear, however, that the quite optimistic expectations for a sociological contribution to the administration of justice have

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<sup>1</sup> For some recent studies, which do not, however, share a common theoretical basis, see *HISTORISCHE SOZIOLOGIE DER RECHTSWISSENSCHAFT*, *IUS COMMUNE SONDERHEFT* 26 (E.V. Heyen ed. 1986) [Historical Sociology of Jurisprudence, special issue on common law].

diminished and become more realistic. At present, moves toward a radical alteration in the way these questions are posed can be expected neither from jurisprudence nor from sociology. To the surprise of scholars of both disciplines, they are coming from elsewhere—from research that is attracting more and more attention under such names as general systems theory, cybernetics (of the third or fourth generation), multivalent logic, theory of automata, information theory, and, recently, as a general theory of self-referential “autopoietic” systems,<sup>2</sup> with which we shall be concerned here.

This detour by way of general autopoietic theory is currently producing more confusion than clarity and more problems and open questions than answers. The confusion is closely related to the fact that the offerings of existing theories have their origins in mathematics, biology, or neurophysiology, and do not take matters of psychic or social fact into consideration. As yet there has been no place in this discussion for systems that conduct their operations with the aid of the medium of “meaning.” The new discovery is that biological systems, if not physical systems in general, are characterized by a circular, recursive, self-referential mode of operation. The mode of analysis that has emerged from this discovery has dethroned the “subject” in its claim to be unique in its self-referentiality. This does not have to mean that psychic and social systems are now to be interpreted in terms of the model of biological systems. A mere analogy between them would miss the mark, as would a merely metaphorical transfer of biological terms to sociology. The challenge is rather to construct a general theory of autopoietic systems that can be related to a variety of bases in reality and can register and deal with experiences deriving from such diverse domains as life, consciousness, and social communication. Current uncertainty is due primarily to the fact that a general theory of this kind does not exist, and consequently one is frequently working too directly with concepts borrowed from mathematics or biology, without adequate concern for the appropriateness of the transposition.

In the application of the theory of autopoietic systems to the specific case of the law, there is an additional problem of coordination among multiple levels. One can conceive of law as a social system only if one takes into consideration the fact that this system is a subsystem of society, and that there are other subsystems as well. To conceive of society as itself a differentiated social system presupposes a general theory of social systems that can deal not only with the comprehensive system of society as a whole but also with other social systems, such as face-to-face

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<sup>2</sup> An autopoietic system is a system that “produces and reproduces its own elements by the interaction of its elements.” See Teubner, *Introduction to Autopoietic Law*, in *AUTOPOIETIC LAW, A NEW APPROACH TO LAW AND SOCIETY* 1-11, at 3 (G. Teubner ed. 1987). See also, N. LUHMANN, *RECHTSOZIOLOGIE* (2d ed. 1983) (English translation, *A Sociological Theory of Law*, E. King & M. Albrow trans. 2d ed. 1985).

interaction, or organizations. Theoretical decisions must therefore be distributed across several levels and must be checked to see whether what is asserted of the law does not hold for society as a whole, or even for every social system or every autopoietic system as well.

The following reflections focus on the legal system and must therefore largely disregard these problems of coordination among multiple levels.<sup>3</sup> In the treatment of a relatively concrete subject, this omission will produce the appearance of excessive abstraction. The reader should not let this intimidate him; nor should he see it as proof, in and of itself, of the scientific character of the treatment. In fact, it is only in this way that one can confront general theories with the realities of concrete areas of investigation to see whether the theories are functional and what modifications they might need.

## I.

There are two innovations that especially lend themselves to use in a theoretically grounded sociology of law: (1) the theory of system differentiation, inspired by general systems theory, which conceives of differentiation as the establishment of system-environment relationships in systems; and (2) the assumption that such differentiation is possible only through the establishment of a self-referential closedness in the systems becoming differentiated. Without such closure, the systems would have no way of distinguishing their own operations from those of the environment. With the aid of these two concepts we can achieve an understanding of the social character of law and, at the same time, the legal system's own reflective accomplishments. In other words, doctrine or legal theory can be better understood as one formulation of the legal system's self-referentiality. This understanding does require, however, a much more precise mode of presentation than has tended to be customary, a presentation that is consistent with systems theory.

Formulations such as the statement that there are "connections between" law and society (which presupposes that law is something outside of society) especially must be avoided. The legal system is a differentiated functional system *within* society. Thus in its own operations, the legal system is continually engaged in carrying out the self-reproduction (autopoiesis) of the overall social system as well as its own. In doing so, it uses forms of communication that, for all their esoteric quality, can never be so abstract as to be completely removed from normal, comprehensible meaning. This means not only that the legal system fulfills a function for society—that it "serves" society—but also that the legal system participates in society's construction of reality, so that in the law, as everywhere in society, the ordinary meanings of words (of names, num-

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<sup>3</sup> See N. Luhmann, *SOZIALE SYSTEME: GRUNDRISS EINER ALLGEMEINEN THEORIE* (1984) [Social Systems: Outline of a General Theory].

bers, designations for objects and actions, etc.) can, and must, be presupposed. In the legal system, then, Mr. Miller is still Mr. Miller. If he is only claiming to be Mr. Miller, and this question must be examined within the legal system, then a language that is generally comprehensible is indispensable for resolution of that question as well.

The legal system, however, is distinct in many ways from law's environment within society (and of course from its extra-societal environment as well). The law is not politics and not the economy, not religion and not education; it produces no works of art, cures no illnesses, and disseminates no news, although it could not exist if all of this did not go on too. Thus, like every autopoietic system, it is and remains to a high degree dependent on its environment, and the artificiality of the functional differentiation of the social system as a whole only increases this dependency. And yet, as a closed system, the law is completely autonomous at the level of its own operations. Only the law can say what is lawful and what is unlawful, and in deciding this question it must always refer to the results of its own operations and to the consequences for the system's future operations. In each of its own operations it has to reproduce its own operational capacity. It achieves its structural stability through this recursivity and not, as one might suppose, through favorable input or worthy output.

In this conceptualization both the dependence and the independence of the law are more strongly emphasized than in the customary expression "relative autonomy." When sociological theory is used to formulate a theory of the legal system, it reveals many more aspects of dependence and many more aspects of independence than one tends to notice in the normal activity of the law, and consequently theory has to abandon the amorphous formulation "relative autonomy." Differentiation gives rise to an escalating relationship in which aspects of dependence and aspects of independence both increase, because differentiation leads to greater complexity in relationships between the system and the environment. For this reason, the concept of the autonomy of the legal system cannot be formulated on the level of (causal) relationships of dependence and independence. Rather, the concept of autonomy refers only to the system's operative closedness, as a condition for its openness.<sup>4</sup>

A theory of this kind, however, is convincing only if it succeeds in precisely defining the elements of the closed character of the system and how those elements determine the system's openness. This can be done by describing more precisely the components of the particular elementary operations peculiar to the law (those which occur nowhere else but in law) and how they are reproduced through reference to one another.

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<sup>4</sup> See generally I E. MORIN, *LA MÉTHODE: LA NATURE DE LA NATURE* (1977) [Methodology: The Nature of Nature]. For a biological perspective see F. VARELA, *PRINCIPLES OF BIOLOGICAL AUTONOMY* (1979).

In a way that no other system does, the law processes normative expectations that are capable of maintaining themselves in situations of conflict.<sup>5</sup> The law cannot guarantee, of course, that these expectations will not be disappointed. But it can guarantee that they can be maintained, as expectations, even in case of disappointment, and that one can know this and communicate it in advance. From the sociological point of view, then, normativity is nothing but counterfactual stability. To formulate this differently: in that it protects expectations, the law frees us from the demand that we learn from disappointments and adjust to them. It thereby holds out the prospect of resolving conflicts (and at the same time makes it possible to seek out and withstand conflicts), for it contains a preliminary decision (however unclear it may be in the individual case) about who has to learn from disappointment and who does not.

Processing these expectations requires a binary code that contains a positive value (justice) and a negative value (injustice), and that artificially excludes both contradictions (justice is injustice, injustice is justice) and other values (utility, political expediency, and so forth). This coding is of decisive significance for the differentiation of the legal system, as it provides the system with its own internally constituted form of contingency. Everything that enters the law's sphere of relevance can be either lawful or unlawful, and anything that does not fit into this code is of legal significance only if it is important as a preliminary question in decisions about justice and injustice.

One could show through more detailed analysis that this coding fulfills a dual function. The first function of the code serves to differentiate the system for the specific task of the law. It simulates the problem of the disappointment of expectations by providing that either the expectation or the conduct that disappoints the expectation will elicit either the positive or the negative evaluation. To this extent, the coding is tied to the law's function. At the same time, however, the coding also serves the system's ongoing process of checking for consistency, that is, the actualizing of its memory. For memory is nothing but checking for consistency, and to this end it presupposes, presumably even on the neurophysiological level,<sup>6</sup> a binary coding that can ascertain both consistencies and inconsistencies and can link them to further operations. Thus, the second function serves the autopoietic reproduction of the system—the closure of the system's reproduction complex. It makes it possible to examine all processing of normative expectations in terms of the key question whether or not the processing is compatible with previous processing.

Once this dual function, and with it the law's autopoiesis, has been

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<sup>5</sup> For a more detailed discussion of this point see N. LUHMANN, *supra* note 1.

<sup>6</sup> See Foerster, *What is Memory That it may Have Hindsight and Foresight as Well?*, in *THE FUTURE OF THE BRAIN SCIENCES* 19-64 (S. Bogoch ed. 1969).

assured, the system can develop reflexive processes and, ultimately, self-reflection. It can regulate its own regulation, and thereby also regulate, legally, alterations in the law. Further, it can evaluate the system as a whole from its own perspectives (e.g., in terms of the idea of justice).

## II.

The next sections of this essay will deal with some of the consequences of this theoretical point of departure. Especially important here are aspects in which this theory leads to views that are new or that differ from ones previously accepted.

### A.

An especially important implication of this theory of the law's autopoietic character is that the boundaries of the system must be drawn differently than has been customary (even in the way sociologically oriented systems theory has dealt with law). Up to now the law has been treated either from the perspective of jurisprudence, as a complex of norms, or as a system of knowledge, in abstraction from real social behavior. Jurists saw the legal system as a macro-text. Or, as is customary in sociology, the focus was shifted to institutions that are concerned with law on a full-time basis, whether those institutions were organizations (primarily the courts), or the legal profession. This perspective permitted empirical treatment of such problems as "access to the law." Yet distinguishing between the legal system and the state as the basis for organizations and the source of power was difficult. Political influence on the law was conceived as a kind of input (of the law into the law). Alternatively, the legal system as a whole was even conceived from the standpoint of the political system, as an "implementation" of politics. For all its ambivalence, this perspective has left a definite mark on jurists' attitudes toward the relationship between law and politics.<sup>7</sup>

Assuming that the system has a self-referential, closed character leads to completely different notions about the boundaries of the system. They are defined not at the institutional but at the operative level. And, as is evident to the sociological observer, the system's boundaries are defined by the legal system itself, with the aid of a recursive referral of operations to the results of (or the prospects for) operations by the same system. In these terms, every communication that makes a legal assertion or raises a defense against such an assertion is an internal operation of the legal system, even if it is occasioned by a dispute among neighbors, a traffic accident, a police action, or any other event. It is sufficient that

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<sup>7</sup> One significant consequence is that jurists, more than other professionals, have an understanding of the political context of their own practice. See Lange & Luhmann, *Juristen—Berufswahl und Karrieren*, 65 VERWALTUNGSARCHIV 113-62, 157 (1974) [Jurists—Choice of Profession and Careers. Archives of Administration].

the communication be assigned a place within the system, and that has already occurred with the use of the code lawful/unlawful. Of course, the law can also be observed from the outside, as in a news report in the press. And within the educational system there is also a didactic treatment of law that only simulates legal cases and thus does not aim at a decision. Consequently not every reference to the law is an operation internal to the legal system. But whenever a communication occurs in the context of the administration of justice, the context of providing for conflicts within the law, or the context of an alteration of the law—that is, in the processing of normative legal expectations—we are dealing with an operation internal to the legal system, and this operation simultaneously defines the boundaries between the legal system and the everyday life context that occasions the posing of a legal question.

These system boundaries are a good place to study the filtering effect of the legal system. One sees clearly, for example, how difficult it can be in ongoing life relationships (marriages, work relationships, relationships between neighbors) to resort to the law to give force to one's own views. The rigidity of the binary code makes the reasons for this difficulty clear: asserting one's own legal position is tied to designating opposing views as unlawful. A look at the legal cultures of the Far East also shows that recourse to the law can be interpreted as an intention to engage in conflict, and consequently it is institutionally discouraged.

Clearly there is a connection between the complexity of the law, its resulting opaqueness, and how high this threshold of discouragement is. Corruption, which a look at various civilizations will show to be a normal phenomenon, has an equally discouraging effect on potential users of the legal system. Corruption in law is a normal phenomenon: it is only realistic to assume that the law accommodates dominant interests; it could not conduct itself otherwise and still be accepted. (This does not mean, however, that corruption is a part of official legal policy or that it is consciously cultivated). Rather, what is amazing is the degree to which the law can be purged of corruption in spite of this. With a decrease in corruption, the threshold of discouragement is thereby lowered; people have confidence in a judge who is impartial. Yet, this relief itself leads to an increase in the complexity of the law. With less corruption to filter people out of the legal system, the number and diversity of cases increases, and as a result there is increased need for regulation. With this increase in complexity, the threshold of discouragement shifts its location from corruption to complexity. It thereby acquires a form against which the legal system itself is powerless and which is the subject of recurrent complaints throughout the history of law.<sup>8</sup>

If one adopts a self-referential autopoietic theory, it no longer makes

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<sup>8</sup> An example is the *discourspréliminaire* [preliminary discourse] in S. LINGUET, 1 THÉORIE DES LOIX CIVILES, OU PRINCIPES FONDAMENTAUX DE LA SOCIÉTÉ (London 1767) [Theory of Civil Law, or Fundamental Principles of Society].



sense to assume that the structures of the legal system, which themselves regulate the production of its operations, can be specified as input and output. The specification of structures always presupposes operations of the system itself. This does not contradict the assumption of a normal complicity with dominant interests on the part of the law. Nor does it exclude the possibility that an outside observer could describe the legal system with the aid of an input-transformation output model. But such a description would be compelled to give the transformation function the form of a "black box," and to take into consideration the fact that the law adjusts its reactions to its condition at any given time, that it can change even if external interests do not change, and that it thus does not function as a "trivial machine." To the degree to which these factors are taken into consideration, however, it makes sense to move from an input-output model to the theory of self-referential systems.<sup>9</sup> It is better suited to the existing state of affairs.

### B.

The most important advantage of this theory of a closed self-referential legal system may lie in its close resemblance to the notions of legal doctrine and legal theory, a closeness which by virtue of its alienation effect proves surprising and irritating at the same time.<sup>10</sup> Sociological theory attempts to reconstruct not only jurists' actions, but also their conceptions, or at least the way the legal system generates self-observations and self-descriptions. We are not concerned here with a "critique of ideology" or a sociology of knowledge in the classical manner in which modes of thought are linked to interests or social positions and explained in those terms.

Our starting point is the thesis that a self-referential system can link its operations together and reproduce them only through concurrent self-

<sup>9</sup> See also the distinction between *couplage par input* and *couplage par clôture* [coupling through input; coupling through closure] in Varela, *L'auto-organisation: De l'apparence au mécanisme*, in *L'AUTO-ORGANISATION: DE LA PHYSIQUE AU POLITIQUE* 147-64 (P. Dumouchel & J. Dupuy eds. 1983) [Auto-organization: From Appearance to Mechanism, in Auto-organization: From Physics to Politics].

<sup>10</sup> A parallel problem arises in the relationship of law to theology, and it has been more extensively discussed in the literature. See D. POLLACK, *DIE RELIGIONSTHEORIE NIKLAS LUHMANNS UND IHRE SYSTEMTHEORETISCHEN VORAUSSETZUNGEN*, (1984) [Niklas Luhmann's Theory of Religion and Its Systems-Theoretical Presuppositions]; F. SCHOLZ, *FREIHEIT ALS INDIFFERENZ: ALTEUROPAISCHE PROBLEME MIT DER SYSTEMTHEORIE NIKLAS LUHMANNS* (1982) [Freedom as Neutrality: Old-European Problems with Niklas Luhmann's Systems Theory]; *THEOLOGIE UND FUNKTIONALE SYSTEMTHEORIE: LUHMANNS RELIGIONSZOLOGIE IN DER THEOLOGISCHEN DISKUSSION* (M. Welker ed. 1985) [Theology and Functional Systems Theory: The Reception of Niklas Luhmann's Systems Theory by Theology]; Moritz, *Religion und Gesellschaft in der DDR*, 110 *THEOLOGISCHE LITERATURZEITUNG* 573 (1985) [Religion and Society in the German Democratic Republic. *Journal of Theological Literature*]; Pannenberg, *Die Allgemeingültigkeit der Religion*, 11 *EVANGELISCHE KOMMENTARE* 356-57 (1978) [The Universal Validity of Religion. *Protestant Commentary*].

observation and self-description. To put it very simply, one needs "reasons" in order to be able to deal selectively with the multitude of possible internal connections, and to check for consistency and inconsistency. Consequently, all processing of expectations is always accompanied by a supervisory observation through which the way the world is observed is itself observed—that is, the way one communicates correctly or incorrectly within the system is itself the subject of communication. From the sociological point of view one would speak here of "redundancy," of a diminishing of the surprise effect of individual operations.<sup>11</sup>

Every complex system must balance variety, that is, the number and diversity of its basic elements, against redundancy. In a complex environment it is not possible to operate in a completely rigid fashion, without surprises. Rather, the system must be open to irritations that disrupt the usual practice. If the law, however, is to provide security, this openness cannot be carried too far. There must be a provision for redundancy so that knowledge of one or more elements (knowledge of important court decisions, for example, or knowledge of decisions about laws) can be relied upon to permit inferences about how the system will behave in concrete instances.

This issue of the relative degrees of variety and redundancy is closely connected to the system's relationships with its environment. One can proceed on the assumption that in interactions between elastic and rigid systems the elastic systems will adapt to the rigid ones, just as sand conforms to stone but stone does not conform to sand. A legal culture of argumentation that produces a high degree of variety, that emphasizes the individual nature of each case and is content with vague general formulas like "proportionality" or "balancing interests," will tend to open the legal system to adaptation to rigid environmental systems such as large-scale organizations whose form is set by technology or capital investment. Whereas a rigid, highly redundant legal system will be able to maintain itself, whatever the social consequences may be, in the face of the more elastic systems of its environment and to turn such highly elastic communications media as money or political power to its own ends.

This is only one of many examples of the way sociological analysis produces an "alienation effect"<sup>12</sup> through its special understanding of the way systems observe and describe themselves. Reconstructing argumentation as the management of redundancy does not grasp argumentation the way it is intended; it understands argumentation not as a search for convincing rational grounds but as a way of mastering contingency

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<sup>11</sup> On the reconstruction of argumentation as the management of redundancy see N. LUHMANN, *DIE SOZIOLOGISCHE BEOBACHTUNG DES RECHTS* 31-38 (1986) [Sociological Observation of the Law]. See also G. Lazzaro, *Entropia della legge* (1985) [Entropy in Law].

<sup>12</sup> An example of this effect is found in Brechtian theater, where the spectator is prevented from identifying with the characters in the play—translator.

and as a condensation of the systemic context. The sociological description of the system's own self-description could not be accommodated within that self-description (although there is more to be said on that point). For that reason, in observing the legal system, sociological description always uses the schema manifest/latent as well, and with the help of this schema it also sees that the system does not see that it does not see what it doesn't see.

But in contrast to the aims of a critique of ideology, no unmasking or enlightening effect is intended here. Rather, this way of seeing things follows logically from the assumption that every autopoietic system differentiates its own operations with the aid of its own distinctions, and thus, if it wants to preserve this differentiation it is prevented from distinguishing itself in turn from these distinctions.

How far into legal doctrine this impossibility extends shall remain an open question here. Certainly it applies to the code itself. To deal with the question whether the distinction between justice and injustice is being used justly or unjustly would lead the system into paradoxes and block at least the operations based on this question. Observation and description of the legal system in terms of legal theory must presuppose the acceptability of the code. It may proceed neither on the basis of a tautology (justice is what is just) nor on the basis of a paradox (what is just is what is unjust). It has to "tune out" this possibility of defining the unity of the system within the system itself; it has to de-tautologize and de-paradoxicalize the description of the system and at the same time make the operations through which this is done invisible.<sup>13</sup>

If it is important to him to do so, the sociologist can observe, with the aid of the schema manifest/latent, legal theory's efforts to de-tautologize and de-paradoxicalize the system; he locates the latent functions of the manifest intention of the legal discourse, which will be directed elsewhere. In doing so, he can make use of general systems theory's distinction between natural and artificial necessities.<sup>14</sup> The operations that serve to de-tautologize and de-paradoxicalize the system will seem to the system to be naturally necessary. An observer, in contrast, can recognize the function of these semantic efforts and speculate about other, functionally equivalent possibilities; to him, every specific semantic solution to this problem appears historically determined and contingent, depen-

<sup>13</sup> See also Y. Barel, *Le paradoxe et le système: essai sur le fantastique social* (1979) [Paradox and System: Essay on the Fantastic in Society]; Barel, *De la fermeture à l'ouverture en passant par l'autonomie?*, in *L'AUTO-ORGANISATION*, *supra* note 9, at 466-75 [From Closure to Openness by Way of Autonomy?]. As a case study in the history of legal theory see Luhmann, *Die Theorie der Ordnung und die natürlichen Rechte*, 3 *RECHTSHISTORISCHES JOURNAL* 133 (1984) [Natural Rights and The Theory of Order. *Journal of Legal History*].

<sup>14</sup> See Löfgren, *Some Foundational Views on General Systems and the Hempel Paradox*, 4 *INT'L J. GENERAL SYS.* 243 (1978).

dent on the supply of plausibility in the specific sociohistorical circumstances.

### C.

Finally, with the help of a general theory of self-referential autopoietic systems it is possible to connect systems theory to a theory of evolution more adequately than before. What results is a weakening of the concept of "adaptation" to the environment, a concept that cannot adequately explain either the high degree of form constancy in natural evolution nor the accompanying tempo of innovations. This is true for the theory of the evolution of living systems, but even more true for the theory of social evolution.

Special evolutionary paths become possible when the differentiation of particular autopoietic systems is successful; for as soon as this occurs a system can vary its structures, insofar as this is compatible with its continued self-reproduction. In constructing and altering structures, autopoietic systems can make use of contingent impulses from the environment that occur and disappear again, as well as of errors in the reproduction of their own operations. The possibilities are often restricted more by the demands of internal consistency than by problems of survival in the environment. In other words, very often a system fails to make full use of the degrees of freedom the environment permits it and restricts its own evolution to a greater degree than would be ecologically necessary.<sup>15</sup> Even with this modification to the theoretical apparatus of classical Darwinism, however, it is still correct to characterize evolution as an unplanned (not coordinated and in this sense making use of "accidents") differentiation in variation, selection, and restabilization.

Accordingly, a theory of the evolution of law has to clarify two primary questions: (1) what problem leads to the differentiation of a particular evolution of law within a general social evolution, and (2) what is the nature of the autopoiesis of law that allows it to be maintained even when structural alterations take place? The answer to these questions must start from the principle of variation, for a specific selection mechanism can be formed only if the pertinent variation manifests specific peculiarities.

The problem that gives rise to a special evolution of the law must lie in uncertainty about whether expectations, and which expectations, can be maintained, or at least be proven to be counterfactually justified, in the case of conflict. This problem becomes relevant, if it was not so from the outset, because a segmentary social structure establishes who is to be on what side, who is to confirm claims, to take oaths, and if necessary, to fight. The evolution of law then begins with the loosening of the struc-

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<sup>15</sup> On this point, with regard to a broadly conceived concept of organizations, see K. WEICK, *THE SOCIAL PSYCHOLOGY OF ORGANIZING* (2d ed. 1979).

tures of segmentary societies, and especially with the introduction of a sufficient measure of uncertainty into social conflicts. For it then becomes a question of how this uncertainty is to be resolved, and selection criteria can be developed for that. A certain independence of religious or tribal political roles from preexisting ties of kinship or proximity was probably decisive for this development. In any case, whether or not an evolution of the law is set in motion does not depend on the prior institutionalization of the competence to make legally binding ("judicial") decisions. Such an arrangement is still inconceivable in fairly well developed late archaic societies, and presumably even for Mycenaean culture. It presupposes a critical mass of already existing, already evolved legal rules that make it possible to think of this judicial competence as connected with law. Thus, in theoretical terms, the autopoiesis of law, the production of law by law, must already be possible for the central institution of a court that makes binding decisions, the institution that in turn makes possible the autopoiesis of law, to be possible. Evolution does not work directly; it works epigenetically. Only in this way can innovations that presuppose themselves arise. This is why contemporary observers give a mythic or religious interpretation to the paradox of the asymmetry in the origin of this circle: The Areopagus, for example, is instituted through divine intervention. Or, God puts the law under the bush. Or later, and in more civilized form, law is created by God in the form of human nature.

Only when adequate differentiation in variation and selection has been established, and when every legal claim is no longer both lawful and unlawful at the same time, depending on the person involved, can criteria for selection among selection criteria be developed. A long period of practicing law and observing its transformations over time is required before possibilities for distinguishing between selection and restabilization arise. The legal system that has already evolved develops possibilities for reflection, puts its own "justice" into question, and has recourse to moral ideas in order to protect a subsistence economy (limiting tax levies and debt collection, for instance, as in the reforms of the lawgiver Solon in classical Athens).<sup>16</sup> Religion and morality place limits on the structure of argumentative justification in the law, and thereby also limit the possibility of giving law the stability of tradition. In addition, due to peculiarities of its organizational practice, the law can become so complex that legal knowledge can no longer be taken for granted as part of the normal knowledge of the aristocracy. Thus there arises a need for special educational arrangements. We are familiar with the result of this process in the concept of an institution (which originally meant "teaching"). The function of stabilizing the law is transferred to processes of

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<sup>16</sup> For modern perspectives see J. SCOTT, *THE MORAL ECONOMY OF THE PEASANT: REBELLION AND SUBSISTENCE IN SOUTHEAST ASIA* (1976); Thompson, *The Moral Economy of the English Crowd in the 18th Century*, 50 *PAST AND PRESENT* 76 (1971).

doctrinalization and systematization, which then in turn outlast changes in society by virtue of their own potential for innovation, which is inherent in their concepts.

When the peculiarities of modern positive law are considered against this background, it becomes obvious that in many respects this kind of evolution no longer functions. Perhaps it is too slow for our circumstances. At any rate, the impetus to variation no longer lies in anticipating conflicts that can be expected; instead, the law regulates modes of behavior that are themselves provided with the capacity for conflict. The law itself creates the conflicts that it needs for its own evolution, and thereby perfects its own autopoiesis. It ordains, for example, that only a limited amount of wine is eligible for subsidy, and in doing so it gives rise to problems that can in turn be fed into the legal system as legal problems.<sup>17</sup> As a consequence, the law evolves—there is no question of planning here—so rapidly that traditional means of stabilization no longer come into play. The law evades the control of doctrine. Nor can it any longer properly be described as a system of norms, to say nothing of a system of “knowledge.” At this point it can only be described as a social system defined by its own code. Stabilization now lies only in the positive character of legal validity—in the fact that specific norms are given force by decisions (whether it is the decision of the legislator, the judge, or the current opinion of the commentators), *and have not yet been changed*. For this reason the stability of the law must be understood as something completely temporal, and objective questions come into the picture only from the standpoint of complexity. They make alterations difficult, and as a result, the law, despite its accelerated tempo of change, remains by and large the same. Here we could also cite Odo Marquard’s remark about the functional concept of religion and the possibility of religion being exchanged for any other functional equivalent: Don’t worry, given the complexity of the process, it would take so long that we would always die before the exchange had been completed.<sup>18</sup>

### III.

Legal theory has found it difficult (and perhaps it always will) to grasp this positive quality of the law in the absence of any conception of an external (especially a moral) justification. The 19th century’s attempt to understand law as a guarantee of freedom (and that means freedom for

<sup>17</sup> To show that the phenomenon is not so new, an example from the 18th century: For the sake of the button makers, the law ordains that buttons may not be made out of the same fabric as the clothing. See *V. de Riqueti, Marquis de Mirabeau, l’ami des hommes* 90 (Paris 1883) [The Marquis de Mirabeau, Friend of Man].

<sup>18</sup> See Marquard, *Religion und Skepsis*, in *DIE RELIGIÖSE DIMENSION DER GESELLSCHAFT: RELIGION UND IHRE THEORIEN* 45 (P. Koslowski ed. 1985) [Religion and Skepticism, in *The Religious Dimension of Society: Religion and Its Theories*].

irrational and immoral conduct) and thereby to accommodate it to the disintegration of the traditional unity of reason and morality, did not succeed. Even Kelsen still needs a fundamental norm, even if it is one with the ambivalent status of an epistemological hypothesis. And for the normal jurist, the idea that even good, pertinent arguments lead only to the confirmation of argumentation itself—to the strengthening of its redundancy—must still be completely unacceptable. In this situation the theory of autopoietic systems offers at least the possibility of an adequate description. Whether this description can be introduced into the legal system itself (*i.e.*, used as its self-description) must be left an open question (which means, left to evolution). In this situation the theory of autopoietic systems can only make use of its own autopoiesis as clearly as possible.

At this point the question of the basis and the justification for legal validity leads us to assume an escalating relationship between closedness and openness in a system. Only as a self-referential closed system can the legal system develop "responsiveness" to social interests.<sup>19</sup> Viewed in this way, evolution selects (on the level of organisms as well as on the level of social systems) forms that permit greater complexity in combining closedness and openness. But that certainly does not mean better adaptation to the powers that be; it does not mean more efficient corruption.

A second, related point concerns the creative character of paradoxes.<sup>20</sup> The term "paradox" signifies here a phenomenon of observation or description—that accepting a description has as its consequence the acceptance of the opposite description. The observation of paradoxes, something which occurs, for example, in the application of the code to itself,<sup>21</sup> blocks the system's observation and description, even though at

<sup>19</sup> Responsiveness in the sense discussed in P. NONET & P. SELZNICK, *LAW AND SOCIETY IN TRANSITION* (1978). See also Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 *LAW AND SOC. REV.* 249-284 (1983).

<sup>20</sup> See K. Krippendorff, *Paradox and Information*, in 5 *PROGRESS IN COMMUNICATION SCIENCES* 45-71 (B. Dervin & M. Voigt eds. 1984). The assumption of the fruitfulness of paradoxes corresponds, moreover, to the old rhetorical practice of demonstrating, by turning customary opinions and preferences into paradoxes, that their opposite also admits of truth—an undertaking that can also render itself paradoxical. See for example the two works by Ortensio Lando, *PARADOSSI, CIOE SENTENTIE FUORI DEL COMMUN PARERE . . .* (Vinegia 1545) [Paradoxes, or Statements Beyond the Pale of Common Sense], and *CONFUTATIONE DEL LIBRO DE PARADOSSI NUOVAMENTE COMPOSTA, IN TRE ORATIONI DISTINTA* (n.p., n.d.) [Refutation of the Recent Book of Paradoxes, in three separate orations].

<sup>21</sup> But it can occur in many other cases as well, where distinctions are used as justifications. Thus, for example, every justification of the law in terms of transcendental theory must answer the question whether the distinction between transcendental and empirical is itself transcendental or empirical. If the distinction is a transcendental one, then the empirical is also something transcendental. But the distinction itself may be an empirical one, since Kant, an empirical individual, introduced the distinction at a specific time in history, namely at the end of the 18th century (in his *CRITIQUE OF PURE REASON*).

the same time the observer must concede that the system's own auto-poiesis is not blocked by the paradox. In other words, the system can simultaneously both be observed and not be observed as a paradoxical system. The observer must then transform this self-paradoxicalization into a quality of his object by asking how the system de-paradoxicalizes itself.<sup>22</sup>

These reflections hold both for outside observation and for self-observation. Consequently, they state the problem in such a way that sociology and legal theory could collaborate on it. That would presuppose, of course, that legal theory reconceived things it had previously taken for granted and saw them now as functions of de-paradoxicalization, thus making the transition from natural to artificial necessities.<sup>23</sup> And such reconceptualization will probably become possible only when sociology can offer a good deal more theoretical certainty for this step into the unknown, this illumination of what has been latent, than it has hitherto been able to do.

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<sup>22</sup> See *supra* note 11.

<sup>23</sup> See *supra* note 12.