Book Reviews

Luhmann on Law and Politics: Critical Appraisals and Applications

Michael King and Chris Thornhill (eds)

Hart Publishing, 2006

A Sociology of Jurisprudence

Richard Nobles and David Schiff

Hart Publishing, 2006

When one thinks of contemporary German social theorists it is not unlikely that the name Jürgen Habermas comes most readily and immediately to mind. That is, until fairly recently, when the trickle of secondary literature in English on Niklas Luhmann has steadily grown into a torrent of articles and books acknowledging his place at the forefront of socio-legal thinking. Such belated recognition—for Luhmann died almost a decade ago—was never an issue in his native Germany, where the Bielefeldian has always been considered the intellectual equal, and often alternative, to the heir to the Frankfurt School. Indeed, the issue was often Frankfurt or Bielefeld; Habermas or Luhmann; enlightenment or post-enlightenment (the latter of which Luhmann terms 'sociological enlightenment'[1]); in summary, a type of normative, socially-committed postmetaphysical humanism versus a purely descriptive, quietist and postmetaphysical antihumanism. And framed in this way, it is hardly surprising that critical theory, which, even in its bleakest manifestations,[2] theorised the possibility of solving or at least confronting the issues of the day, has always tended to trump the more illusive and ambivalent pronouncements of systems theory. And all the more so when systems theory took the autopoietic turn in the late 1970s, which had the effect of intellectually mandating the impossibility of any system—intellectual thinking and social and political action

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1 'Soziologische Aufklärung' is the title of Luhmann's seminal article published in 1967 (18 *Soziale Welt* 97–123) as well as the title to a six volume collection of some of his essays.

2 Max Horkheimer and Theodor Adorno, *Dialectic of Enlightenment: Philosophical Fragments* (first published 1947, Edmund Jephcott trans, 2002 ed) [trans of: *Dialektic der Aufklärung: Philosophische Fragmente*].

included—understanding, let alone solving, problems of general societal import.

Yet as sports commentators like to say, 'cometh the hour, cometh the man', and in these sociologically enlightened times, when all hope of rationally and collectively steering a globalised economy and ecology seem hopelessly and even dangerously misplaced, Luhmann is, as they say, 'the man'. Or so he is, at least, argue the authors of the two books being reviewed here. They argue he's the man because he offers a new paradigm for sociology and jurisprudence befitting the paradigmatically different social conditions of the present:[3] because his hyper-complex and internally differentiated theory does 'justice'— which as we'll see has a very specific and desublimated meaning—to the hyper-complex, decentred, contingent and thus totally foundationless world we currently inhabit. Ultimately, he's the man because, having abandoned the last vestiges of normativism and relinquished social theory's pretensions to be practical, he simply and objectively charts the juggernaut that is present-day world-society,[4] and offers as many prescriptions for steering this beast as proffered by the beast itself— that is, none. In an era *ohne Geist*—where God is dead and our world is totally disenchanted—Luhmann is the *Zeitgeist*. And from the theorist's point of view such quasi-Pyrrhonian detachment is worth affirming, since, as Michael King muses,

> Luhmann's *usefulness* ... might well lie precisely in the *uselessness* of his theory as a blueprint for the improvement of social systems and those who try and make his theory useful in this way may well be contributing to the theory's ultimate *uselessness*.[5]

In a functionally differentiated world, severing theory from practice preserves theory. It also preserves practice, which, depending on your view of the prevailing state of the world, is either a good or a bad thing. Before considering whether it is indeed good or bad, it is incumbent on me to consider the theory as it is depicted in these two books. I intend to move from the general to the particular; that is to say, to consider first King and Thornhill's collection on various aspects of Luhmann's political and legal

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3 The basic premise of Michael King and Chris Thornhill (eds), *Luhmann on Law and Politics: Critical Appraisals and Applications* (2006) and Richard Nobles and David Schiff, *A Sociology of Jurisprudence* (2006) respectively.

4 On globalisation as a juggernaut see Anthony Giddens, *The Consequences of Modernity* (1990) 139.

5 Michael King, 'What's the Use of Luhmann's Theory?' in Michael King and Chris Thornhill (eds), *Luhmann on Law and Politics: Critical Appraisals and Applications* (2006) 37, 52 (emphasis in original).

theory, and then Nobles and Schiff's monograph on Luhmann's sociology of jurisprudence.

Indeed, there is no more suitable place to begin than with what I believe to be the most thought-provoking pieces in King and Thornhill's book; the two separate chapters by the editors themselves. Both authors, albeit in different ways and contexts, bring out the antihumanistic and postmetaphysical dimensions of autopoiesis. Modern humanism takes its *point d'appui* from the founding principle of the Enlightenment as expressed by maxims such as Vico's '*verum et factum convertuntur*'[6] and Feuerbach's '*homo sum: humani nihil a me alienum puto*'[7]. Here the human world is taken to be a human creation and, as such, is inherently comprehensible to its creators.[8] To this Marx adds that it is inherently open to self-conscious and rational steering and reform by its creators. In opposition to this, antihumanism, as first clearly elaborated by Durkheim, takes the social world to be an emergent entity; something that arises from the interaction of human individuals and groups, but is not comprehensible in terms of their aims, aspirations and actions. To understand society one must understand the specific characteristics of 'the social' or 'social facts'; facts whose basic ingredients are of a categorially different order to the atoms out of which they are formed. For Durkheim this means that one 'must explain phenomena that are the product of the whole by the characteristic properties of the whole ... the complex by the complex'.[9] And so it also does for his successors until Luhmann, who radicalises antihumanism to such an extent that corporeal human beings are entirely banished from society. In autopoiesis, the social doesn't even emerge out of human interaction since humans, *qua* humans, are never 'in society', but at all times form part of its environment. Building on the language of system and environment, already nascent in Durkheim,[10] Luhmann gives it a

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6 'The true and the made are synonymous'. This principle actually only appears by name, not in Giambattista Vico's most famous book, *The New Science* (3rd ed, 1744) [trans of: *Scienza nuova*], but in his earlier and less well known *On the Most Ancient Wisdom of the Italians Unearthed from the Origins of the Latin Language* (first published 1710, Lucia Palmer trans, 1988 ed) 45–6 [trans of: *De antiquissima Italorum sapienta ex linguae latinae originibus eruenda*].

7 'I am a human being; nothing man-made is alien to me': Ludwig Feuerbach, *Principles of the Philosophy of the Future* (Manfred Vogel trans, 1966 ed) 70, §55 [trans of: *Grundsätze der Philosophie der Zukunft*].

8 Indeed *pace* Descartes, Vico argues it is more comprehensible than nature, which is not a human emanation.

9 Emile Durkheim, 'Individual and Collective Representations' in Emile Durkheim, *Sociology and Philosophy* (David Pocock trans, 1974 ed) 29 [trans of: *Sociologie et philosophie*].

10 'Society has for its substratum the mass of associated individuals. The

cybernetic twist and conceives these systems as closed networks of communications. Society is the general system of communication, constituted by various specific sub-systems—law, politics, the economy, science, to name a few— each with their own specific form of communication.

Most of the relevant concepts underpinning autopoiesis—including 'communication', 'code', 'program', 'closure', 'self-reference' and 'structural coupling'— are set out in sufficient detail and with due diligence as well as deference in various places in both books.[11] Rather than dwell on them here, I'd prefer to explore the metatheoretical implication drawn by King and Thornhill concerning the place of humans and their *differentia specifica*, reason and rationality, in this schema. And this is that reason becomes the *differentia specifica*, not of humans, but of systems. Yes, human beings *qua* psychic systems promulgate a particular type of reason, but so do legal systems, which have their own rationality, as do economic systems, political systems, military systems and so on. As Thornhill notes, the 'only meaningful rationality is "system rationality"'.[12] Rationality, far from being the specific survival instrument of homo sapiens that enables us to freely and intelligently conduct our own affairs,[13] is so thoroughly desublimated until it becomes the mere 'autopoietic self-reflection of a social system as it reacts to the complexity of its environments and generates adequate levels of internal complexity'.[14] Human reason is thus just one amongst a myriad of functionally equivalent forms of reason, each effective within its own sphere and only effective within its sphere. As such it is purely adaptive and self-referential, and cannot, and indeed should not, try to gain any critical foothold vis-à-vis those subsystems, such as the law and politics, that constitute its environment.

The upshot of this radical decentring of rationality is that all social institutions are neither, first, governed by nor subject to the control of human practical reason, nor, second, subject to steering or guidance from

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system which they form in uniting together ... is the base from which social life is raised': ibid 24 (emphasis added).

11 The most systematic discussion can be found in Nobles and Schiff, above n 3, chapter 2, and Bernd Hornung, 'The Theoretical Context and Foundations of Luhmann's Legal and Political Sociology' in Michael King and Chris Thornhill (eds), *Luhmann on Law and Politics: Critical Appraisals and Applications* (2006) 187–216.

12 Chris Thornhill, 'Luhmann's Political Theory: Politics After Metaphysics?' in Michael King and Chris Thornhill (eds), *Luhmann on Law and Politics: Critical Appraisals and Applications* (2006) 75, 79.

13 Nicholas Rescher, *Rationality* (1988) 1–9.

14 Thornhill, above n 12, 79.

forms of reason emanating from other subsystems. Regarding the first point and taking politics as the example, Luhmann, like most other liberals, argues that nowadays democracy is the most rational and legitimate form of political organisation. Yet, its legitimacy doesn't derive from its foundation in modes of individual or collective practical reason, but from the internal rationality of politics. Here democracy 'is simply a self-reflexive condition of politics itself, in which the political system maximises its own ability to address its own constantly escalating complexity'.[15] As such, democracy's foundation is in politics not human reason.[16] It is simply the most adequate adaptive response to the functional exigencies faced by the political subsystem. When it utilizes the normative language of democracy—deliberation, human rights and the rule of law—it does so merely to generate, what Weber terms, belief in legitimacy.[17] For such norms are nothing other than the self-explanatory constructs produced by the political system by and for itself.[18] In other words, the political system, which politically speaking is infinitely smarter than the humans in its environment, lets us labour under the humanist illusion that we are the foundation of that system. It lets us, nay, *makes* us believe that the norms of democracy are real and efficacious, when all along, it merely produces those norms, or at minimum bolsters belief in them, so as to better go about fulfilling its own function of generating collectively binding decisions.

Which brings me to the second point noted above. For just as politics is not grounded in nor able to be guided by practical reason, neither is law (nor any other subsystem) able to be used as an instrument to steer or guide politics or, for that matter, any other social sphere. As King's chapter argues, a strict application of the principles of autopoiesis indicates that law, which has its own systemic rationality, is completely incapable of purposefully regulating the operations of other subsystems, reliant as they other on other modes of cognition and action. Those who, following Teubner, would attempt to theorise law as an intersystemic regulatory mechanism, therefore do harm both to law and to those subsystems with which it interacts. In this respect, King dishes out a series of polite but destructive salvos against one of his co-authors, John Paterson, who manfully seeks to carve out a normative and constructive role for an autopoietically conceived reflexive law.[19] Despite the fact that Paterson's concept of reflexive law stays much closer to Luhmann's conception of

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15 Ibid 97.
16 Ibid 98.
17 Ibid 83.
18 Ibid 87.
19 John Paterson, 'Reflecting on Reflexive Law' in Michael King and Chris Thornhill (eds), *Luhmann on Law and Politics: Critical Appraisals and Applications* (2006) 13–35.

autopoiesis than Teubner's, and that it often takes us far beyond some of the latter's fairly programmatic formulae such as the 'regulation of self-regulation', King still detects in these efforts a residue of unreconstructed humanist normativism. No matter how much one would *like* to find a normative role for law, democracy and human reason in general, most of the contributors to both books go to great pains to prove that such a role cannot be adduced from a social system conceived in autopoietic terms.[20] So just as democracy does not have a normative foundation in practical reason, neither is it normatively domesticated *to any extent* by human rights and the rule of law. As Gert Verschraegen's chapter informs us, the constitution, *qua* political institution, is simply another mechanism for maintaining functional complexity and social differentiation.[21] Far from imposing normative limits on politics, it is the creature of the structural coupling between law and politics.[22] And this coupling, as Thornhill argues, confers only empirical legitimacy on modern democracy since 'it is legitimate wherever it can propose itself as legitimate, and wherever it finds plausible legal forms for communicating its decisions and power through society'.[23] To expect more of our constitution and the rule of law is hopelessly, even dangerously, unrealistic given the utter contingency and hyper-complexity of the postmodern social reality we inhabit.[24]

To affirm, or at least, confirm, that society is and always has been a runaway train merely brings home just how devoid of foundations our postmetaphysical world is. Individuals acting alone or in concert are not, despite appearances, the foundation of law, democracy or the economy. And the rule of law does not underpin democratic polities. Rather whatever order is generated out of the almost entropic interplay of functional systems is wholly contingent and at the mercy of forces that are by definition above and beyond human control. This means there is nothing in Luhmann equivalent to the overarching concept of the *Lebenswelt* (lifeworld) that both his intellectual progenitor (Husserl) and *bête noire* (Habermas) recurred to so as to avoid this bleak existential predicament. There is nothing for the theorist to fall back on except the observation and description of these forces, and nothing for actors to deploy except the form of technical reason (*techne*) apposite to issues as they arise. Some might find a theory that depicts the social world and our position in it in these

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20 Paterson's piece provides the most obvious exception here: see ibid.

21 Gert Verschraegen, 'Systems Theory and the Paradox of Human Rights' in Michael King and Chris Thornhill (eds), *Luhmann on Law and Politics: Critical Appraisals and Applications* (2006) 101, 103.

22 Ibid 110.

23 Thornhill, above n 12, 95.

24 That this reality can be characterised a 'postmodern' one is a recurring theme in both books.

terms quite disturbing. Some might be even more agitated to discover that such perturbation results from a metaphysical failure of nerve on their part; an inability to, as Weber put it, 'bear the fate of the times like a man'. [25] But by and large the contributors to *Luhmann on Law and Politics* seem to be the intellectual *Übermenschen* requisite to our times. They seem unburdened, even disburdened, by the fact that the world has bid *adieu* to the humanist ideals of the Enlightenment, since for them, as for so many counter-Enlightenment thinkers before them, it is the adherence to and application of these very ideals that is the cause of so many of our problems in the first place.

Although *A Sociology of Jurisprudence* is a far more delimited enterprise—focusing as it does on one social subsystem, law, and within this, one aspect of the subsystem, legal philosophy—it too shares much of the attitude of *amor fati* of King and Thornhill's book. But for legal theorists, the relevant fate to be understood and embraced is law's autonomy in an entirely contingent and foundationless postmodern world. Failure to properly appreciate what this autonomy means for law, as well as for the subsystems with which law interacts has, according to Nobles and Schiff, led legal philosophy up the garden path for the past century.

The central insight that autopoiesis introduces into the hitherto interminable debates concerning the nature of law and its role(s) in society is that 'the world of law, and the world according to (relevant to) law is an outcome of the operations of law'.[26] To put it another way, everything that law touches turns into law. From the point of the view of the legal system, when law deals with moral issues—when it, as Luhmann says, structurally couples with morality— the issues are and remain legal. When law deals with political issues, in any of the myriad of ways it couples with politics, the issues remain wholly legal. And such is the case, *mutatis mutandis*, when law intersects with science, economics and religion. At first glance, this might appear to be just reheated legal positivism but, as the authors argue, things become legal

> not because they are identified as such by legal sources, but because they are selected by the law, from the system where they occur in a manner that gives them quite a different meaning from that given by their

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25 Max Weber, 'Science as a Vocation' in Max Weber, *From Max Weber: Essays in Sociology* (Hans Gerth and Charles Wright Mills trans and eds, 1946 ed) 129, 155.

26 Nobles and Schiff, above n 3, 158.

> original generating system. Morality within law is not morality, just as truth within law is not scientific[.][27]

All the heavy metal theorizing that underpins this position is exposited very adeptly by the authors, and no-one could argue that they have been unsuccessful in fulfilling their stated goals of making legal autopoiesis accessible and demonstrating 'its potential to inform jurisprudential debate'.[28] Together with Klaus Ziegert's excellent translation of Luhmann's *magnum opus* on law,[29] this is the book to which most Anglophone legal theorists must initially turn to gain a foothold in the theory.[30] But what I would prefer to traverse in these comments is not the details of legal autopoiesis, than some of the implications for understanding law and legal philosophy that Nobles and Schiff draw from it. These implications all stem from the way the legal system, as well as those within it (legal actors) and those who observe it (legal theorists) deal with or 'unfold'[31] what Luhmann calls the paradox of law.[32] This paradox—if, indeed, it really is a paradox[33]—is a consequence of the just noted wholly self-referential relation of law to its environment.[34] This being the case, then every aspect of law, including the evolution of its doctrines, institutions, and even those theories about its evolution, doctrines and institutions, can and should be explained by intra-legal factors. Such explanations are part of what Luhmann and his followers like to call making 'creative use of legal paradoxes'.[35] The bulk of Nobles and Schiff's book

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27 Ibid 111.

28 Ibid 228–9.

29 Niklas Luhmann, *Law as a Social System* (Klaus Ziegert trans, 2004 ed) [trans of: *Das Recht der Gesellschaft*].

30 Another recent and important work is Michael King and Chris Thornhill, *Niklas Luhmann's Theory of Politics and Law* (2003).

31 Nobles and Schiff, above n 3, 41, 101.

32 Just how paradoxical Luhmann takes law to be can be empirically gleaned from perusing the index of Luhmann, above n 29. One finds that there are more references under 'paradox' than under any other topic.

33 Despite the centrality of the concept of paradox in the work of Luhmann and the commentators, subject to the present discussion I have found little analysis or argument to prove that what they are talking about is really a 'paradox', as opposed to, say, a conceptual tension or aporia. Even the lengthy footnote in Nobles and Schiff, above n 3, 46 that discusses whether the paradox is real or just apparent skilfully manages to remain ambiguous.

34 As Nobles and Schiff put it, the paradox is 'consequential to the tautology that the law decides what is and what can be law at any time and at every moment; it is the legal system itself that identifies its own boundaries. This way of thinking about the law starts with the simple logical tautology: the law is what the law says it is; the law determines itself—both what is legal and illegal': ibid.

35 There is a lot of writing by Luhmann and his followers on the creative, as

attempts to do just this, as well as show the confusions that ensue for theories of law that have either refused or been unable to confront and utilize the possibilities opened up by contingency. In the refusenik camp the authors place the whole tradition of natural law, as well as, and for different reasons, Dworkin and Critical Legal Studies (CLS). While in the more-or-less-confused camp they place legal positivism.

In relation to natural law, its problem, according to systems theory, is not that it never made any sense, but that it does not make sense now, or indeed since the onset of modernity. Certainly in premodern societies, with their lesser degree of functional differentiation, natural law both made good sense as a self-description of law's operations, and proved effective in helping law fulfil its social function of stabilizing behavioural expectations.[36] However, at a certain point in the evolution of social complexity it no longer adequately describes what law actually does, nor aids it in the performance of its tasks. In modernity, the legal system is simply unable to 'guide its operations by reference to communications about its continuity (unchanging nature)'.[37] Enter legal positivism, which provides a more plausible and effective 'self-description for a legal system which [now] experiences itself (communicates about itself to itself) as being in a constant state of change'.[38] Instead of refusing to go with the flow of social contingency, as natural law does by its recurrence to untranscendable normative constraints, legal positivism creatively embraces the paradox of law. It does so precisely through affirming (instead of resisting) the sociological consequences that flow from law's autonomy; namely, its separation from and closure to all extra-legal communications, including, of course, morality. This is what the authors mean when they state that the 'separation thesis "proves" itself ... sociologically'.[39] Added to this, the demonstration that developments in legal philosophy 'are changes produced by alterations in what is needed to be described in legal practice'[40] proves the value, in Nobles and Schiff's view, of their methodology—which they characterise as the application of systems theory to jurisprudence, or, more

opposed to the destructive, aspect of paradoxes. See, for example, Niklas Luhmann, 'The Third Question: The Creative Use of Paradoxes in Law and Legal History' (1988) 15 *Journal of Law and Society* 153–65, and Andreas Philippopoulos-Mihalopoulos, 'Dealing (With) Paradoxes: On Law, Justice and Cheating' in Michael King and Chris Thornhill (eds), *Luhmann on Law and Politics: Critical Appraisals and Applications* (2006) 217–233.

36 Nobles and Schiff, above n 3, 51–7.

37 Ibid 68.

38 Ibid 70.

39 Ibid 72.

40 Ibid 75.

technically, the second order (sociological) observation of the first order observations on law of those engaged in legal philosophy. [41]

Nevertheless, the sociological demarcation of legal positivism also provides reasons for going beyond this theory in the circumstances of the here and now. But before examining these reasons it would be well to consider the systems-theoretical critique of those other present-day refuseniks, Dworkin and CLS. First, in relation to CLS, the authors note that this theory (or really movement) does grasp one important truth missed by both natural law and positivism, and that is law's meaninglessness or indeterminacy. Having made this correct observation, however, CLS immediately misapprehends its significance and thereby lapses back into metaphysics. For in systems theory's account, law's meaninglessness derives from its very self-referentiality—the way it constitutes its own identity by demarcating itself via the continual and recursive application of the binary code legal/illegal. The distinction legal/illegal has no inherent meaning other than that which the legal system gives it. Thus merely to know that a state of affairs, *X*, is legal tells you nothing about the world other than *X* is not illegal.[42] For CLS, in contrast, the indeterminacy of law, rather than being a function of its own operations, has its source outside the legal system. It is the product of subtle and covert ideological interference from the political and economic systems, which means that, far from being autonomous, law is really grounded in politics and economics.[43] From the point of view of CLS, to accept law's rhetoric regarding its autonomy at face value is to fail to see the true reality. Whereas, from the point of view of systems theory, to search for the reality of law beyond the boundaries of law's own operations is to fall back into modernist metaphysics. It is to fall back onto foundationalism, and the attendant inability to live and work creatively with contingency. In this respect, CLS falls behind the very phenomenon it seeks to explain, and thereby no longer offers a plausible and effective self-description of the legal system in a postmodern world.[44]

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41 See in particular the opening and closing chapters of ibid.

42 Ibid 33, 42 and following pages, 146, 189.

43 For some reason Nobles and Schiff take a foreshortened reading of CLS as only tying law to politics. But given the influence of Marxian and neo-Marxian analysis on CLS, the ideological effects of economics on law are equally, if not more, constitutive of law's indeterminacy than politics for them.

44 As for the sociological moment when CLS would have been true—in the sense of offering a valid self-description of law— the authors don't say. I would speculate it to be in the period in the 1960s and 70s when society evolved from modernity to postmodernity (assuming, as these authors do, that this distinction is valid).

Whereas CLS grasps the contingency of law but resiles from its consequences, Dworkin's idea of law as integrity, as interpreted by systems theory, refuses to admit contingency into contemporary law in the first place. Instead, the indeterminacy of law is really only a superstructural manifestation of an integral base that consists of certain fundamental principles of political morality and justice. Since these principles are immanent with the political community, this does not mark a return to classical natural law. It does, according to Nobles and Schiff, however, mark another attempt by jurisprudence to flee the effects of contingency by artificially domesticating the paradox of law.[45] To be sure, law does employ the idea of justice as equality—conceived as consistency of principle or 'integrity'. But far from importing this notion into its operations from the environment of political morality, law generates it itself out of its own resources and for its own needs. In this sense, justice is, what Luhmann labels, an *Eigenwert* (intrinsic value) of the legal system—'a value that is constituted by the recursive performance of the system's own operations and one that *cannot be used anywhere else*'.[46] Treating like cases alike is, therefore, merely what the legal system does when it decides cases (its own form of self-observation and self-stabilisation). It does so not because of any moral imperatives to be just, but because this way of doing things has been discerned by the legal system, over time, to be the best way of fulfilling its functions for itself and for society. The basis and driving force of justice is contingency, which, as systems theory demonstrates, is no foundation at all.[47]

Not even legal positivism, the theory closest in spirit to legal autopoiesis, has managed to grasp the truth about law's connection to justice and the vast extra-legal sphere of normativity in general. This is because, like all the other theories, it ultimately fails to come to terms with the full meaning of law's autonomy. That is, it fails to articulate accurately the meaning that legal autonomy has for the legal system itself. As Nobles and Schiff's reading of the later Kelsen illustrates, the problem is rooted in the way positivism operationalises the fact/norm distinction.[48] The separation between law and its environment (the very thing that grounds its

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45 What could be more artificial or counterfactual than the idea of an all-wise judge called 'Hercules', of all names?

46 Luhmann, above n 29, 125 (emphasis added). As for the term *Eigenwert*, Nobles and Schiff (above n 3, 115–25) follow Ziegert in translating it as 'eigenvalue', a rather strange Anglo-German neologism. I fail to see why they didn't either stick to the German or translate it fully into English as 'intrinsic value'.

47 The authors cite Luhmann's controversial characterisation of 'justice as a formula for contingency': Nobles and Schiff, above n 3, 92.

48 Ibid 153–8.

autonomy) is taken to be a separation between legal norms and extra-legal facts; between law as a system of norms, and the rest of society. Of course, systems theory does not deny the distinction between facts and norms *tout court*, but merely the ontological manner in which it is drawn by legal positivism (and, indeed, all traditional jurisprudence). Law, as we have continually seen, not only generates its own norms but, like any other autopoietic system, it produces its own facts as well. To repeat a sentence already quoted above, the world of law and the world according to law is an outcome of the operations of law.[49] Because the facts and norms of the legal system are produced by and for that system, there is no 'fact/norm distinction outside of law's operations that allows the legal system to exist as only one part of this distinction'. [50]

Thus even Kelsen, who, among all legal positivists, comes closest to recognising the radical nature of law's closure, was not radical enough. In delimiting law as a pure system of norms he draws the boundaries around the legal system too sharply: more sharply than the legal system does itself. Because legal closure is a process that exhibits the properties of a 'hypercycle',[51] the legal system continually and recursively generates its own inputs (facts) as well as its own output (norms). The authors express this idea well when they say that 'legal organs, using legal procedures, apply legal norms to legally selected facts, to produce legal remedies'.[52] Clearly, our present-day legal system has no problem living and dealing with contingency. It is merely our *theories* about the legal system that are having difficulties creatively unfolding the paradox of law. As I see it, the ultimate aim of *A Sociology of Jurisprudence* is to help legal theory catch up with legal practice in this regard.

And, to be sure, this is a very laudable aim *if* systems theory's description of legal practice and the world in which it operates is plausible, not to mention correct. Which, of course, is the *big* issue for any theory of law that throws its lots in with any general theory of society. Its plausibility is dependent on that of the larger theoretical enterprise as a whole. And this is where the current reviewer has reservations: not so much with the two books discussed here—which I feel are amongst the best yet written on Luhmann in English—but with the whole framework of systems theory itself. This, however, is not the place to air these reservations, for to do so would betray my allegiance to Frankfurt over Bielefeld and thus to the view

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49 Ibid 158.

50 Ibid 214.

51 See Gunther Teubner, *Law as an Autopoietic System* (Anne Bankowska and Ruth Adler trans, 1993 ed) chapter 3 [trans of: *Recht als autopoietisches System*], cited in Nobles and Schiff, above n 3, 159.

52 Nobles and Schiff, above n 3, 159, citing Teubner, above n 51.

that there is much *much* more to theory, and to life, than learning to love contingency.

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