REVIEW ESSAYS

Legal Sociology as General Social Theory: Luhmann's Sociology of Law

A Sociological Theory of Law, by Niklas Luhmann, Boston: Routledge and Kegan Paul, 1985. 421 pp.

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Niklas Luhmann's *A Sociological Theory of Law* (1985) represents one of the few efforts in social theory to examine legal systems conceptually. In order to understand his argument, however, it is necessary to appreciate the larger theoretical project that Luhmann has developed over the last several decades. Thus, before exploring Luhmann's analysis of the nature and dynamics of law, we should pause and outline his "general systems" approach.

LUHMANN'S "GENERAL SYSTEMS" APPROACH

In Luhmann's view, one of the basic functional requisites of all social systmes is to reduce the complexity of their environment. While his terminology has varied somewhat, Luhmann conceptualizes such reduction in complexity as occuring via a variety of "mechanisms" along three fundamental dimensions: the temporal, social, and symbolic. Time is potentially limitless, extending into the distant past and future; and so, in order to adapt to an environment, systems must develop mechanisms for reducing the potential complexity of the time dimension. Similarly, physical space is also vast, and hence, mechanisms for

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ordering social relations along this spatial dimension are also essential. And human's facility for generating and elaborating symbols presents a virtually limitless set of options in creating systems of symbols; and therefore, mechanisms must exist to delimit and organize the use of symbols. Thus, the structure and dynamics of any social system will reflect the mechanisms used to reduce complexity along these three dimensions.

There are three basic kinds of social systems: micro interaction systems or face-to-face encounters among co-present actors; organization systems of coordinated activity with respect to a goal or task; and societal systems of ordered relations among interaction and organization systems. The integration of these system levels is always problematic, with the result that in addition to the need for reducing environmental complexity calls another functional requisite for maintaining some degree of integration within and among interaction, organization, and societal systems. Such integrative problems are intensified during societal evolution as differentiation along several axes occurs: (1) the increasing differentiation of interaction, organization, and societal systems from each other; (2) the internal differentiation of (a) many different types of interaction systems, (b) the specialization of organization systems around different tasks, and (c) the division of the societal system into distinctive institutional domains, such as economy, polity, religion, family, education, science, and law; (3) the differentiation of distinctive symbolic media--money, power, truth, love and the like--for conducting transactions within and between institutional domains; (4) the differentiation of persons from the roles that they play; (5) the differentiation of roles from the larger "programs" for which they are assembled and then disassembled (typically in organization systems); and (6) the differentiation of values from specific persons, roles, programs, and institutional domains by virtue of their ever increasing generalization and abstractness. These axes of differentiation increase system flexibility and escalate its adaptive capacity, but they also compound the complexity of relations within the system as well as between the system and its environment.

It is during this process of functional differentiation and increased systematic complexity that law becomes increasingly important as both a mechanism for integration and for reducing complexity. Legal systems must, therefore, be conceptualized in terms of their functioning to solve these problems associated with differentiation among and within interaction, organization, and societal systems.

How, then, does law help resolve these integrative problems associated with differentiation along these varying axes? The answer to this question is where Luhmann's *A Sociological Theory of Law* begins, but it is an answer that can only be understood within the context of Luhmann's larger conceptual scheme. This situation makes an assessment of Luhmann's analysis highly problematic, because his concepts and generalizations do not

have great meaning outside of the confines of his peculiar conceptual vocabulary. The result is that Luhmann's "theory" is as much a philosophical statement as a hard-nosed and closely reasoned theoretical argument. And even regarding the more historical portions of the book, where Luhmann analyzes various legal systems of the past and present, it is difficult to visualize these as "data" that can be used to "test" the theory. Instead, what Luhmann presents is a philosophy of law that is coupled to a metaphor of human evolution and that is understandable only if one accepts the architecture of Luhmann's conceptual scheme. Nonetheless, it is an intriguing approach and worthy of our more detailed review.

LUHMANN'S PHILOSOPHY OF LAW

Luhmann distinguishes between two fundamental types of expectations. Cognitive expectations--as embodied in science--adapt to the world through learning. In case of disappointment, cognitive expectations are expected to be modified or dropped. Normative expectations, on the other hand, are expected to be maintained even if the world differs from what it was expected to be. Expecting normatively means refusing to learn in case of disappointment; and actors must be encouraged to maintain expectations against a world that disappoints. Encouragement is achieved by institutionalization.

The distinctive medium of law as institutional domain is "normative expectations." All norms reduce complexity and provide a basis for integrating systems, but only those that can be generalized become part of law. For only generalized norms can reduce the complexity in the environment of other institutional domains, while at the same time, providing a mechanism for integrating diverse levels of systems with values, persons, and roles. The early portions of *A Sociological Theory of Law* examine the nature of those normative expectations that can be defined as "law." The basic argument is rather tortuous and philosophical, but we can summarize Luhmann's argument as follows:

1. In a sense, norms are the functional equivalent of genes in lower organisms, because they reduce complexity, coordinate communication, and yet, maintain system flexibility.
2. To be effective, norms need to simplify options and alternatives of experience and action so that interactions among social units can proceed smoothly and quickly.
3. Yet, norms only select from a vast horizon of contingent options and possibilities, as becomes immediately obvious when, in Luhmann's words, "expectations are disappointed." Such "disappointments" reveal that actors can indeed select from many alternative lines of conduct.

4. This vulnerability to "disappointment" is the key difference between the "folk norms" of everyday life and those that become institutionalized in the legal system. In the case of folk norms, deviance is explained away by attributions, rationalizations, and other procedures for sustaining a cognitive sense that most fundamental normative expectations still guide conduct. But, in the case of legal norms, predictble sanctions ultimately relying on coercive force are used to sustain normative expectations.

5. This potential use of sanctions provides for more "confidence" by all parties that conformity to the expectation can be expected; and in so doing, legal norms reduce complexity and promote integration.

6. This reduction in complexity and promotion of integration is achieved through generalizaton of legal norms. Legal norms are abstract and decontextual in the sense that they provide expectations that are divorced from the finite and variable particulars of a situation. To be a legal norm this process of generalization must reduce complexity along the temporal, social, and symbolic dimensions.

6a. Generalization simplifies the temporal dimension by permitting actors to maintain expectations even against disappointments.

6b. Generalization simplifies the social dimension through institutionalization of norms as an external objective force that can order social relations and allow parties to expect that others will similarly order their relations.

6c. Generalization simplifies the symbolic dimension by providing simple criteria for interpretation across contexts, places, and time; and in so doing, it minimizes interpretative misunderstandings of normative expectations.

Legal norms, then, are generalized counterfactual expectations that rely exclusively on sanctions (as opposed to apologies, attributions, and other cognitive or interpersonal procedures) for assuring conformity and that are generalized along the temporal, social, and symbolic dimensions. Sanctions provide increased certainty that actions will be in accordance with expectations, whereas social and symbolic generalization simplify expectations in ways which not only reduce temporal complexity, but also the unavoidable uncertainty and ambiguity that lead to "disappointments." Together, these features of legal norms temporal, social and symbolic generalization—facilitate the integration of differentiating societal systems.

Thus, as societal systems differentiate along the axes summarized earlier, there is ever more "selective pressure" for legal norms that can be used as media to coordinate relations among (a) differentiated system levels; (b) diverse functional domains; and (c) persons, roles, programs, and values. Law thus becomes the major integrating force in modern societal systems; and hence, any theory of modern societies must incorporate a "theory of law."

LAW AND MODERN SOCIETY

Luhmann analyzes the problem of societally generated legal change within the framework of evolutionist theory. Evolution increases societal complexity through functional differentiation. By creating autonomous and yet functionally interdependent subsystems, evolution increases the possibilities for experiencing and acting, but such functionally differentiated subsystems cannot rely on a natural equilibrium governing intersystemic communication. For example, science produces more possibilities than can be financed by the economy; families are endangered by economic crises; and the political system needs more money to implement more economically relevant programs. Thus, functionally differentiated subsystems produce more possibilities for experiencing and acting than can be realized. This increased complexity means increased probabilities for disappointment, conflict, and disagreement.

Yet, at the same time, subsystems are contingent environments for each other: science depends on political decisions that it can hardly control; the family depends on an economy that is subject to fluctuations. Under conditions of increased complexity and contingency, an actor is not sure what to expect from whom. More possibilities for experiencing and acting mean more disappointments of expectations. Functional differentiation thus makes it difficult to assume societal consensus. What "force," then, is to take the place of societal consensus? For Luhmann this "force" is law.

Societal evolution and modernization changes the structure of law, however. Law has to deal with increased complexity, functional differentiation, and opportunities for disappointment; and as it does so, law becomes a structural backbone of society in that it provides (a) fundamental reductions in complexity for all subsystems and (b) basic guidelines for coordinating the actions of these subsystems. For example, law does not tell science what to expect from nature, nor does it formulate standards for aesthetic production, but scientists and artists both can claim the attention of "third parties" as represented by the legal system (as is the case when law regulates problems of copyright and originality in both systems.)

Increased complexity also requires legal production to become professionalized. Differentiated legal subsystems professionalize the creation and enforcement of normative expectations that can substitute for intersubjective consensus. For complexity implies that consensus cannot be produced in simple interaction systems; and so the production of a substitute for consensus is delegated to a particular subsystem, law. The institutionalization of such a system creates the expectation that citizens are to conform to laws about which they may know little but to which they are assumed to agree and conform. In creating this diffuse and generalized commitment to conform to laws, a functional substitute for intersubjective consensus is achieved in modern, differentiated societies.

Such diffuse commitments depend, however, on the full "positivization of law," or the capacity to institutionalize change in the law. Positive law is not valid because of sacred traditions or unchangeable moral values, but rather, by decision. Positive law illustrates full contingency of normative expectations: what is legal today might be illegal tomorrow. The positivization of law thus responds to increased societal complexity, because only the institutionalization of legal change can cope with the continuous production of new possibilities in functionally differentiated subsystems. Only law that is positive can provide fundamental reductions of complexity, without at the same time, excluding possibilities and alternatives for the future. Positive law requires generalized assumptions of consensus over (a) the appropriateness of existing law, and (b) the probability that decisions will declare legal tomorrow what is illegal today, or vice versa. This kind of acceptance of positivization radically dissociates legal from moral validity, for now legal validity depends on decisions made according to formally correct procedures of legislation and jurisdiction. Such procedural legitimacy has the advantage of claiming validity for all norms which are created through formally correct procedures and which are independent of any specific or particular content. Law monopolizes the production of expectable expectations.

Luhmann's position on legal validity continues the tradition of "legal positivism" most strongly advocated by German legal theorists during the Weimar Republic (Schmitt 1976). For these theorists, law is valid *by decision* and it is diffuse commitment of actors to the formal processes of legislation and jurisdiction that accounts for the validity of norms. Opponents of legal positivism claim that there is still a moral base for legal validity. Indeed, this controversy on legal positivism is one of the most important issues discussed in the ongoing dispute between Luhmann and Jürgen Habermas (Habermas and Luhmann 1971). Habermas argues that because normative standards are subject to critical assessment in terms of moral standards, legal validity cannot be due simply to (procedurally correct) decisions. Norms are often criticized as being unreasonable, unfair, or irreciprocal; and this critique reveals an implicit moral basis for the validity of norms. Habermas acknowledges that positive law has, to a certain extent, become dissociated from moral reasoning but he argues that the most fundamental norms as embodied in political constitutions are not themselves valid by pure decision. Constitutional norms are valid only insofar as they express generalizable ethical standpoints whose rationality can be assessed and criticized in ethical discourse. Constitutional norms thus express a societal consensus on their ethical legitimacy, although Habermas is well aware that this consensus does not constitute factual agreement, but only the certainty that these norms would be acknowledged as legitimate *if* they were made the subject of ethical discourse. The moral legitimacy of norms depends on the *idea* of discursive agreements on criticizable validity claims. Norms cannot be valid by pure decision because legal positivism

cannot explain why certain procedurally correct norms are accepted as "legitimate" while others are not. As we will show, however, Luhmann's concept of legal validity is much more realistic than Habermas' idealized notion of consensus.

CONCLUSION

Luhmann and the Durkheimian Tradition

What are we to make of this philosophy of law? As a philosophical scheme it is intriguing, but as an exercise in theory, it is rather vague and imprecise. Yet, Luhmann has recast Emile Durkheim's (1893) ideas in creative ways. Durkheim (1893) recognized that the collective conscience becomes "abstract" or "generalized" with societal differentiation and that, unless some "force" limits people's desires and aspirations, anomie will ensue. Durkheim could never clearly visualize what this "force" would be: initially, he emphasized contractual law (Durkheim 1983), and later, he viewed "occupational groups" (Durkheim 1902) as crucial as a mediating and mitigating force between persons and roles, on the one hand, and generalized values on the other. Thus, Durkheim's argument is recast in a more suggestive way: the generalization of values and their detachment from persons, roles, and organizations is seen as an inevitable part of the division of labor (functional differentiation); the potential for anomie under these conditions is decreased with the differentiation and positivization of a legal system to which people develop generalized loyalties as well as the presumption that this "external and constraining force" (Durkheim 1893) guides all of the conduct; and out of these processes, system pathologies are avoided, especially those associated with unbounded complexity along the temporal, social, and symbolic dimensions.

In recasting Durkheim in this way, Luhmann resolves Durkheim's (and Comte's as well) dilemma: how is moral integration possible in highly differentiated systems? That is, how are (a) individuals to become attached and committed to the social order and (b) how are their actions to be coordinated? Durkheim never really answered these questions because the nature of the "intermediate morality" between abstract values, on the one hand, and people in highly specialized roles, on the other, remained elusive to Durkheim. Parsons (1966, 1971) recognized the nature of the answer—positive and universalistic law as an integrative mechanism—but he assumed societal consensus over values, much as Habermas (1984) has been prone to do. Luhmann's answer, I feel, is more empirically correct: people develop abstract commitments to formal procedures and processes of law production and implementation, because. Social order does not rest on consensus as factual agreement because it is precisely functional differentiation that makes consensus adequate for