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LUHMANN ON LAW AND POLITICS

CRITICAL APPRAISALS AND
APPLICATIONS

Edited by
Michael King and Chris Thornhill

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Luhmann on Law and Politics

Critical Appraisals and Applications

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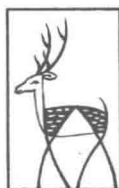
MICHAEL KING

and

CHRIS THORNHILL

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Introduction

MICHAEL KING AND CHRIS THORNHILL

THIS VOLUME REPRESENTS the outcome of a memorable workshop held in September 2003 at The International Institute for the Sociology of Law in Onati, Guipuzcoa, Spain. The theme of the workshop was Niklas Luhmann's Legal and Political Theory. This workshop was conceived as an international forum to facilitate wide-ranging discussion of ways in which aspects of Luhmann's social theory might be applied in contemporary debates in the social sciences, and it attracted participants from Belgium, France, Germany, Holland, Italy, Mexico, New Zealand and the UK. A number of the chapters in this volume were originally presented as discussion papers at this workshop, and others were stimulated by discussions arising during and after the workshop. We are extremely grateful to the staff at the Institute in Onati, particularly Malen Gordo Mendizabal and Volkmar Gessner, for their help and financial support in organising the workshop. We hope that this volume does justice to the quality of the setting in the *Antigua Universidad* and to the debates between participants during the workshop sessions.

CONTENT, THEMES AND CONTEXT

A steadily increasing number of scholars across many different disciplines are now taking Niklas Luhmann's writings as a major theoretical source for their work. The collection of essays in this volume offers further evidence of this increasingly broad and enthusiastic reception of Luhmann, and it includes contributions from several distinct fields of inquiry—including social theory, political sociology, political theory, legal theory and social anthropology. It also marks a growing discrimination in the understanding of the complexity of Luhmann's ideas and a refined critical appreciation both of their breadth and of their limitations.

Perhaps more than any other theorist in recent history, Luhmann's work has aroused extreme responses and stimulated diverse theoretical receptions. At an earlier stage in the appropriation of his work, particularly during the period of his heated debate with Jürgen Habermas in the 1970s, the status of Luhmann's theory was questioned and debated in the starkest and most polemical terms. At this stage attitudes to Luhmann were closely tied to more generally polarised political stances, and it was assumed that readers of his work either fully embraced his anti-humanist view of the world and accepted all aspects of his

systemic sociology, or rejected his work entirely, and opted instead for more normatively inflected accounts of the way that society operates. The publication of this book, however, is a clear indication that times have changed and that the preconditions of debate have been altered. It is certainly not the case that every contributor to this volume would wish to be described as a fervent supporter of Luhmann's theoretical approach, or would express preference for Luhmann's work over all other theoretical perspectives on the social world. Nonetheless, all believe his vision to be original, fascinating and theoretically productive, and all thus insist that it warrants the most committed and detailed consideration. All of them would also accept the view that the theoretical potential of his work can be appreciated and realised without a full subscription to all its implications and preconditions.

We have chosen, for the sake of clarity and thematic coherence, to organise the chapters in this volume according to their thematic focus. The book therefore has three distinct sections: one section comprises chapters that reflect on the relation between theory and practice in law, one section contains chapters that provide commentaries on politics, law and human rights, and one section incorporates chapters that express broader critical reactions to Luhmann's general theory of society.

In addition to the thematic connections between individual contributions, however, many of the chapters in this volume are connected by common methods, concerns and interests, so that three distinct approaches to the interpretation and application of Luhmann's sociology are represented here. First, the volume includes essays which seek to analyse and, in some cases, criticise Luhmann's writings by situating them within the matrix of a particular and distinct academic discipline. These essays also compare his theoretical accounts or methodological principles with those of other writers in order to identify both the strengths, the limitations, and the critical resonances of the theory.

As a sociologist, for example, Bernd Hornung provides a very insightful description of the construction and of the key conceptual features of Luhmann's social theory (or, to use his own terms, *theories*). In so doing, he identifies the concepts and categories which centrally characterise and delineate the four phases of theory building which mark Luhmann's trajectory: these are, Hornung claims, *functionalism, complexity, autopoiesis and selectivity*, and *semantics*. He examines the interactions between these theoretical phases in Luhmann's development and he shows how his sociology is ultimately constructed through a fusion of these distinct conceptual paradigms. He then proceeds to question whether autopoietic theory can legitimately be applied to social systems. He concludes his chapter with a provocative analysis of the different types and levels of 'statement' contained in Luhmann's writings, and he discusses how these might be used in wider sociological research.

In the field of political theory, analogously, Chris Thornhill critically examines Luhmann's self-styled project of elaborating a *Sociological Enlightenment*.

He assesses whether Luhmann makes good his proclaimed intention of moving beyond the classical Enlightenment of the eighteenth century, and of offering a more persuasive basis for understanding or legitimating political action and political institutions within society. Luhmann, as Thornhill explains, argues that the conception of human rationality as a constant normative and transformative force in human society and history relies on a series of unaccountable and metaphysical presuppositions, and so he denies that any theory which posits the criterion of human reason as its legitimating factor can truly account for the social origins and justifiable functions of power. In these claims, Luhmann sets out a crucial challenge for contemporary political theory, and he demands that political theorists should reflect and refine the categories of analysis and argument which they commonly employ. However, Thornhill is also quick to point out the very controversial practical implications of this approach, not only for the future of political theory and political sociology, but also for Luhmann's own political position. Thornhill thus critically identifies the practical outcome of Luhmann's political thought as an 'implicit attachment to nineteenth century models of administrative positivism and limited legal-statism'.

A further example of these attempts to contextualise Luhmann within a particular academic discipline is the chapter by Anne Friederike Müller. As an anthropologist, Müller reflects on the threat or 'irritation' that Luhmann's separation of human consciousness from society presents for branches of the social sciences whose foundations reside in their ability to study societies through observing and analysing individual and group behaviour. However, after grappling with those aspects of Luhmann's theory which are clearly inimical to an anthropological approach, Müller ends on a conciliatory note by identifying in his distinction between *Autonomie* and *Autarkie* (autonomy and self-sufficiency) a possible basis for applying Luhmannian concepts in an anthropological consideration of the relations between mind, body and society.

The second general approach represented by contributors to this volume involves focusing upon a specific substantive social issue contained in Luhmann's writings and subjecting this issue to close scrutiny both in terms of Luhmann's own account, and in terms of how this account relates to other approaches. Gert Verschraegen, for example, focuses on the topical subject of human rights, and he emphasises how Luhmann's approach to the subject differs from that of other political thinkers. 'As a sociologist,' Verschraegen explains, 'Luhmann is interested . . . in linking human rights to specific societal structures. Human rights are not considered in an ethical or juridical way, but seen *as a social institution with a special function.*'

On these grounds, Verschraegen argues that, conceived in Luhmannian terms, human rights always have a paradoxical character. Rights claim to be founded on natural rights or rights that exist in nature, but 'at the same time . . . rights claims have to be enforced by a state in order to be effective' and so they presuppose an established coercive or constitutional order. In his conclusion, he refers to Luhmann's doubts about the tenability of a notion of

'the state': 'the state', for Luhmann, is no more than a construction of a world political system which organises itself in order to give the impression that solutions to global problems are available through concerted political action. The idea that human rights might be globally secured through 'states' appears, therefore, a rather simplistic and self-serving proposition. However, as Verschraegen points out, Luhmann offers no solution to this problem except to say that our understanding of how human rights are preserved and enforced must still await the evolution of 'suitable forms' of global intervention.

Samantha Ashenden looks at the implications of Luhmann's concept of power for broader questions of political sociology. She takes as her starting point his refutation of the central assumption of liberal constitutionalism, namely that 'political power can and must be curtailed, and that this is possible through the separation of powers within the state and through the separation of state and society'. On Ashenden's account, Luhmann sees the classical-liberal attempt to separate the institutional organs bearing power and, in so doing, to place limits on the application of power, as having an effect which is diametrically opposed to its primary intention; this process actually results in a multiplication of power and in an increasingly diffuse dissemination of power through society. Ashenden recognises the originality of Luhmann's analysis and, in particular, she declares sympathy for his argument that causal models of power-formation and power-transmission support hierarchical conceptions of power. Luhmann's systems-theoretical approach, she explains, allows observers of power to move away from causal models, to 'open up the possibility of looking at complex connections between systems', and so to countenance highly pluralistic and multi-focal interpretations of how power is produced and applied. However, she is not entirely won over by Luhmann's arguments, seeing a number of problems and limitations in his theory of power and a number of unresolved tensions and inconsistencies in the categories of his own analysis.

John Paterson's essay, treating Luhmann's sociology as the basis for an instrumental doctrine of law, also exemplifies an approach to Luhmann which applies his general theoretical framework to specific issues. Paterson's analysis differs, however, from the other chapters, in that Luhmann's theory of law is considered in conjunction and comparison with Gunther Teubner's concept of 'reflexive law'. For Teubner, there are clear, if not obvious, ways in which law is able to influence and even regulate other systems: it can accomplish this, for example, by persuading other systems to accept a process of self-regulation based on legal principles adapted to the particular operations of the target system. When Paterson brings Luhmann to the centre of the debate, it is to demonstrate that nothing in Teubner's scheme of reflexive law actually contradicts Luhmannian theory, and that in certain ways it can be seen to develop Luhmann's ideas, albeit in ways which Luhmann himself might not have intended. While Michael King in his chapter in this book queries such an instrumental application of Luhmann's work, Paterson suggests that the concept of

reflexive law may represent a way in which Luhmann's sociology creates options for 'for making better use' of society's as yet untried possibilities.¹

The third of the approaches to Luhmann's writings that we would identify among the contributors here might loosely be described either as critically interpretive and independently responsive, or as an attempt to expand the content and the application of Luhmann's categories beyond the focus which Luhmann himself used. Although they may tackle specific issues, such as power, race or regulation, these essays do not apply Luhmann's ideas in any instrumental or strategic way, and they are not concerned either with the specific application or the immanent elucidation and/or critique of Luhmann's theoretical concepts. Generally, these essays use Luhmann's social theory as the point of departure for wide-ranging discussions of the nature of modern society, or for interpretations of pressing issues and tendencies in modern society.

Jean Clam, for instance, suggests that his use of Luhmann's theoretical elements 'will remain deliberately very intuitive'. He adds: 'I do not intend to engage in a discussion of the theory itself, but I would like to try to work with some of its theorems, to apply them directly to the question of modern power, and to try to obtain descriptive accounts of it through them.' Clam then uses Luhmannian concepts to analyse transformations in the belief structures and political cultures of contemporary society. During the course of this analysis he discusses the crisis in Western liberal democracies brought about by the growth of different types of fundamentalism and by the at times violent political 'recen-tration' of societies that the contamination of political operations with religious vocabularies inspires. He criticises what he sees as the '[h]eavy, excessive re-politicisation of democracy', exemplified by the USA in contemporary world politics, and he discusses this phenomenon as 'mobilising, randomly and arbitrarily, an order of order against another order of order which is perceived to be of minor value and strength'. This tendency towards 'recen-tration', he believes, has destroyed the capacity for 'alterity' which at other times, in other worlds, opened possibilities of social self-reflection, and which allowed societies, through such self-reflection, to accept that its constructed image of 'the other' is precisely merely a constructed image, and nothing more. Although not committed to a literal application of Luhmann's ideas, Clam nonetheless identifies in Luhmann's thought an important set of paradigms for accounting for very recent sociological transformations, and even for explaining the liberating elements which still inhere in modern mental attitudes.

Tim Murphy attempts a similar kind of topology. Taking as his starting point the claim that Luhmann's notion that modern society consists of 'the totality of world communications,' he elaborates a Luhmannian examination of the themes of race equality and human rights. His particular concern is to show that the concept (or non-concept) of 'race' expresses a legal programme which

¹ N Luhmann, 'The Coding of the Legal System' in *State, Law, Economy as Autopoietic Systems*, A Febbrajo and G Teubner (eds), (Milan, Guiffré, 1992), 145-86; 182.

intentionally 'challenges universalism', but which also forms a 'global category or problem'. 'Under the banner of inclusion,' he tells us, 'we are in the process of seeking to carve out equality and sameness on the bedrock of difference. And now the law is being used to valorise this process—to legislate for self-respect.' Murphy deploys a systems-theoretical perspective to confront the paradox which he identifies as race/race. He sees 'the proliferation of racial distinctions' as largely the result of legislative measures and of the monitoring and enforcement methods that have accompanied them. Neither beliefs about identity nor theories of society built on the basis of human nature are able adequately to offer an analysis of this global paradox: a 'sociological enlightenment' is required, using different tools and a different starting point from the universally imputed 'man', commonly posited as the ground of social inquiry. Murphy, following Luhmann's lead, seeks to provide us with the tools and the starting point to see the problem of race with fresh eyes—even if this new vision, unlike the liberal, human-rights perspective, knows no easy answers.

Finally, in this category, Michael King, in his reply to John Paterson's chapter, asks the question: 'What use is Luhmann's theory?' He finds the answer to this question in the paradoxical argument that Luhmann's usefulness lies in his uselessness. He thus maintains that those who attempt to apply the theory 'as a blueprint for the improvement of social systems' and those who try and make his theory useful or practically beneficial may well be contributing to the theory's ultimate redundancy. King clearly endorses an intuitive approach to Luhmann's theory as it relates to law, and he considers this approach more reflective of Luhmann's own intentions than an interpretation which construes Luhmann's work as a set of tools which might eventually lead to the self-improvement of society or to the more effective regulation of social problems. In setting out this view, he makes it clear that the debate about the practical utility of Luhmann's work should not be construed as a debate between 'practice' and 'theory'. It is rather a debate between an instrumental application of Luhmann which emphasises 'the immediacy of autopoiesis as a critical framework for the analysis of current policies and legal decisions' and one which emphasises the abstract, indeterminate quality of Luhmann's writings—which accentuates 'the possibility of seeing things differently, of completely different understandings of events in the world', and which envisions a future which cannot begin as long as events in society continue to be conceptualised and analysed as they are at present. On King's account, it is this distinction, and not the simple distinction between closed and partly closed systems, that marks the difference between Luhmann's approach to the legal system and that of Gunther Teubner.²

In addition to these major categories of analysis and approach, Andreas Philippopoulos-Mihalopoulos' paper is distinct for its performative character and for its interpretation of Luhmann's work as subverting common definitions

² See G Teubner, *Law as an Autopoietic System* (Oxford, Blackwell, 1993).

of the role of scientific inquiry and common understandings of the theoretical division of labour—especially the division between theoretical analysis and aesthetic and literary practice. He adopts an approach to Luhmann's ideas which regards the theory as a 'creative, almost playful and artistic development of different knowledge fields',³ and suggests that the process of concept formation in Luhmann's sociology invariably contains a spontaneous and associative dimension. In this respect, this chapter is an example of a post-modern approach to the study of law and legal texts, which deploys general social and psychological theories in order to render fluid standard preconceptions about legal and ethical categories. Proceeding from the premise that in Luhmann's theory, the traditional question of the fairness of law loses all practical meaning, Philippopoulos-Mihalopoulos considers the fraught relationship between law and justice. In particular, he discusses the propensity of the legal system to deceive or to *cheat* its addressees by promoting fictitious and paradoxical concepts of justice, and exploiting or disclosing the blind-spots of other social systems, while never revealing its own. On these grounds, he also revises and challenges wider conceptions of the role of theory in the law. Theory, he explains, serves both to remind the law of its blind spots and to warn the law not to transgress the limit of the claims which it can make for its own validity. However, theory also does service to the law in providing motives which obscure its blind spots and maintain the paradox and contingency of law's functions. Law, if theoretically informed, thus becomes conscious of the need to cheat without exposing its contingent foundations in public—of the need never to utter the 'unutterable' and paradoxical foundations of its validity.

LUHMANN AND SCIENTIFIC REVOLUTIONS

For all the diversity of their approach and their varying degrees of commitment to Luhmann's sociology as a whole, one conviction which unites all the chapters in this book is that Luhmann's work involves a major change of paradigm in sociology, and in its implications for other fields of scientific inquiry. The question of whether Luhmann's break with the humanist theoretical legacy in the social sciences represents a scientific revolution, and of whether his theory of society contains an entirely new paradigm for sociology, are likely to remain hotly contested issues for some time to come. Some critics deny that Luhmann's work can lay claim to revolutionary status, and they see Luhmann more as an eclectic synthesiser than as an innovator—as one who borrows ideas from others, producing from them a patchwork of different concepts and then claiming that together these represent a radically original social theory. In different ways,

³ G Teubner, R Nobles and D Schiff, 'The Autopoiesis of Law: An Introduction to Legal Autopoiesis', in J Penner, D Schiff and R Nobles (eds), *Introduction to Jurisprudence and Legal Theory* (London, Butterworths, 2002) 925.

however, all contributions in this volume make a strong case for Luhmann's work on the grounds that it challenges the conceptual foundations and implications of all established perspectives in the social sciences and seeks to revise the discipline of sociology (broadly defined) on new preconditions.

To use Kuhn's vocabulary, a theory constituting a 'scientific revolution' is one which proposes a new theoretical paradigm which extends beyond the existing store of ideas and methods underpinning a distinct discipline, and which therefore offers a model for understanding phenomena which breaks fundamentally with the past. In several key respects, we feel that we are entitled to claim that Luhmann's work constitutes one of the major scientific revolutions in the recent history of the social sciences. We believe this to be the case for the following reasons.

First, unlike classical perspectives in sociological and social-theoretical inquiry, Luhmann abandons the human being as the central unit of theoretical analysis: this means that his work renounces and transforms the central foundation of Western European thought—namely the claim that human society is steered and shaped by human beings and that society is residually formed out of human actions. Instead of this, Luhmann argues that society is made up of contingent communications, and that it cannot be made transparent to any stable or invariable attributes of which all human beings are in possession in like manner. This means, for example, that society is not an agglomerate of interactions and behavioural dispositions, but a sequence of communicative exchanges within demarcated, self-referring social systems. On these grounds, Luhmann challenges us to think about society in categories which refuse to view human interests or orientations as the immediate or remote cause of all social events, and which accept that social evolution is stimulated by many different causes, and is ultimately founded only in its own contingency.

Second, unlike all standard positions in post-Enlightenment philosophical reflection, Luhmann denies that human rationality can act as a normative focus for evaluating and guiding processes of social change. For Luhmann, rationality is not an explanatory or normative resource which is inherent in all human beings, and he argues that the rational principles through which human beings claim to judge and affect their environments are nothing more than selective constructions through which systems give plausibility to their operations and communications. There are, in short, *many types of rationality* in modern society, and there are no uniform or perennial criteria to help us determine which rationality produces the most reliable insights and which leads most securely to experiences of progress and social improvement.

Third, although Luhmann has commonalities with Parsonian functionalism and post-1945 German institutionalism, his account of social systems as *operatively closed*—that is, as autonomously constructing their own operations through which they generate both their own environment and their identity, their self-image within that environment—marks a radical departure from previous positions in a functionalist tradition of sociology. This shift of paradigm

has profound implications for our understanding of how society exists and evolves and for our conception of the role of regulation and steering in society.

Fourth, Luhmann's assertion that all knowledge claims must necessarily be based on the drawing of a distinction creating a marked and an unmarked space also fundamentally modifies common socio-epistemological preconditions, and it profoundly challenges the widely accepted cognitive foundations of sociological method. It is true that Luhmann derives this concept from the otherwise little-known mathematician, George Spencer Brown.⁴ However, Luhmann adapts the theory in a way that was never envisaged by Spencer Brown, applying it in particular to 'social and conscious systems' in order to demonstrate their inherently paradoxical nature—their inability to treat as knowledge anything which lies on the unmarked side of the distinction marking their own creation and their utter inability to recognise this limitation. On this principle, only observers of the system are able to see the system operating within its limited marked space and to acknowledge the existence of the unmarked space. Yet every observer needs to draw a distinction in order to observe and in doing so creates his or her own marked and unmarked space. This is what Luhmann means by 'self-reference' and 'other-reference' (or 'external reference'). As Luhmann himself puts it:

If one accepts the distinction of reference into self-reference and external reference, then the problem of reference poses itself on two levels. Reference itself is nothing but the achievement of an observational designation. Each observation designates something (traditionally speaking: it has an object). The opposite concept here is simply operating. In contrast to referring, operating is an objectless enactment. In the observation, the difference between observation and operation can be reformulated in an innovative way as the distinction between self-reference and external reference. Self-reference refers to what the operation 'observation' enacts. External reference refers to what is thereby excluded.⁵

This conception casts deeply questioning reflexes on commonplace accounts of how social observation relates to the objects of its inquiry, it undermines and relativises widely held ideals of objectivity and neutrality in sociological method, and it promotes a multi-perspectival understanding of social communications.

On these grounds, therefore, this book seeks to add weight to the growing conviction that Luhmann's work represents a ground-breaking moment in the broad terrain of social-scientific inquiry. Above all, this volume hopes to correct the belief that Luhmann's works form a monolithic system or edifice, against which readers must position themselves either in total negation or in derivative emulation and assimilation. As with all important theoretical paradigm shifts, naturally, Luhmann's work poses distinct challenges to its interpreters and to

⁴ G Spencer Brown, *Laws of Form* (London, Alan & Unwin, 1969).

⁵ N Luhmann 'The Modernity of Science' in W Rasch (ed), *Theories of Distinction*, K Behnke (trans) (Stanford Ca, Stanford University Press, 2002) 61–75; 65.

those who enter into critical discourse with it, and those participating in the reception of such work have to be able to modify and rethink the categories of their own methodologies. However, this book hopes to promote an engagement with Luhmann's work which will appreciate the resonances of his theory in a multitude of scientific disciplines, which will acknowledge the deep reorientation which his theory stimulates, but which will also test out new theoretical vocabularies against Luhmann and not be fearful of articulating informed critique.

I.

Theory and Practice in Law