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“CLOSED IN AN OPEN SORT OF WAY”
LUHMANN’S AUTOPOIESIS & THE BORDER CONTROL OF LAW

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Abstract

This article is a version of a paper I gave at the Graduate Conference at the University of Westminster in June 2009. The overall title of the conference was 'The Limits of Law: Justice, Politics, Ethics,' and, in the search for relevance, I took a rather literal approach. The article is therefore concerned with the law's limits or boundaries, both disciplinary and systemic, and is based on a close reading of sections from Law as Social System. (Luhmann, 2004.)

My contention is that Luhmann's text simultaneously enforces and unravels boundaries in a variety of ways. This is evident in its own location between law and a revamped, inter-disciplinary sociology, and in the designation of its theoretical project as 'scientific' despite the obvious utopian impulses. I argue that this movement between ring-fencing and dissolution is also present in Luhmann's discussion of autopoiesis, and can also be seen in its oscillating glory in the passages on legal decision-making.

I. Disciplinary boundaries: a scientific legal theory?

Luhmann starts by locating his theory in disciplinary terms, initially counterposing the ‘world of the law’ and the science of sociology; his explicit, over-arching, just-about-still-sociological project is to reformulate the understanding of the relationship between law and society (2004, pp.59-60), or, to put in another way which more properly emphasises the constructivist remove: to “establish a connection between legal and social theory, that is, a reflection of the law in social theory.” (2004, p65.)¹ This is, after all, the title of the book: law as a social system, not as a jurisprudential or ethical phenomenon.

Although connection is the focus of the book, the text begins with law. Against the general run of a difficult style that manages to be both dense and diffuse at the same time, it opens with the uncontroversial assertion that “Theoretical exercises are nothing unusual in the world of law” (2004, p.53) – and the opening paragraphs go on to concern themselves with different types of legal theory, their general effect, and with what constitutes “the world of law.”

For Luhmann, there are two general types of theories of law: doctrinal theories which arise from reflection on legal practice and education, and a more abstract ‘legal theory’ which attempts to combine a consideration of law with a variety of broader, non-legal approaches. Although this second sort of ‘theory’ – mysteriously personified and oddly singular, despite its evident plurality² – “has no clear profile” (2004, p.55), it seems to be characterised by the simultaneous pull-and-push of a “veiled” or hidden reflexivity that both engages with the law in its own terms (2004, pp.56, 60), and also moves away or abstracts itself from the law, in an attempt to make interdisciplinary contacts. (2004, p.56).

By contrast with these limited and / or haphazard approaches, the text designates its own very different exercise as a “strictly scientific” endeavour, which must therefore start with certainty about its object (2004, p.57). According to Luhmann, it is the function of ‘scientific’ (i.e orientated around the distinction true / false) legal theory to constitute the legal object, or law as an object, by definition and distinction.³ Without this groundwork of definition, there is no chance of meaningful interdisciplinary communication, as, talking about different objects, different disciplines, or even theoretical approaches, will be doomed to forever “miss the other’s point.”

How then does the text set about this project of defining law ‘scientifically’ – that is, in a way that claims about the truth of the description can be made? What is law, for these purposes? And how does one answer that question? Luhmann’s methodological answer, quickly arrived at, is that systems theory, and in particular, theories of

¹ For further discussion on the ‘paradigm shift’ or epistemological clarity to legal sociology that Luhmann brings by this remove, see Nelken, 1988, pp. 207-212.

² Luhmann has been criticised (Cotterrell, 2001, p.87) for his reified view of the internal perspective of law – and certainly, his description of the form and function of legal doctrine is uncritical and highly ideological. (Luhmann, 2004, p.54.) On the other hand, Luhmann is also right to point to the equally reified approach that characterises a wildly diverse set of activities as a singular ‘Theory.’

³ The function of law, as distinct from legal theory, by contrast, is the ‘stabilisation of normative expectations’ – that is, to maintain a stable system of communications about what ought to happen. (2004:147)

autopoiesis or self-production, hold the key to the scientific definition of law. These, and their own theoretical ‘scientific’ moorings, are discussed below in a little detail. It is also noteworthy, however, to chart the almost literary or linguistic route by which the text arrives at its ‘scientific’ method and conclusions – which may suggest the possibility both of another, ‘unscientific,’ rather more aesthetic or performative location for Luhmann’s work,⁴ and / or that, to touch again on a point made above, that there is an ‘against the grain’ subtext under the ‘science’ of the text.

To start, in a characteristic shift to abstraction and in pursuit of the constitution of the legal object, Luhmann reformulates “What is law?” to “[H]ow [can] law ... be conceptualised as a unity?” (2004, p.62.) The text speedily suggests that any attempt at definition by some ‘essence’ or ‘nature’ of the law is an obvious dead-end, and that therefore the “worthwhile question [instead] is ... what are the boundaries of law?” At least so far as doctrinal law is concerned, this is a significant shift of metaphor, as it suggests that the ‘definition’ of law is literally just that: the ‘unity’ of law is created by the constant process of defining, or drawing boundaries around material⁵, rather some inherent quality which marks law.

As part of its inter-disciplinary endeavour, the text is also clear that these boundaries are necessarily created by the object; that is, it is law that decides what is within the world of law and therefore where its boundaries lie. If these were formulated by an external observer, the text playfully observes, it would “..allow each observer to decide his own objectivity⁶,” - which would be the end of the possibility of any, let alone, inter-disciplinary, communication.

Although Luhmann speeds on, it is worth pausing to consider this; in the pictorial logic of a schema or blueprint, Luhmann must be right, or all is solipsism. (Any more empirical or classically sociological stab at what law might be, and the literature predicated on other disciplines’ understanding of law is altogether ignored by Luhmann – entirely consistently with the theoretical position set out above.) However, it is clear that here Luhmann is forging a theoretical link not by describing an observable state of affairs from a particular disciplinary vantage point, but by producing an imperative based only on the logical impossibility of his project if it were not true.⁷ However, perhaps more importantly, this insight of self-creation again effects another crucial, and rhetorical, shift in the formulation of the “What is law?” question, from the passive location of the boundaries of law to the more active variation – “How does the law proceed in determining its boundaries?”

Within a very short passage, then, Luhmann transubstantiates⁸ the classic legal enquiry into the nature of law into a consideration of law’s limits or boundaries, and thence to the production of those boundaries; a fluid shift of language and underlying

⁴ For further on this point, see also Teubner, Nobles & Schiff (2002, p.925).

⁵ This idea is then developed into ‘autopoiesis’ – or self-production through the law’s own operations. (Luhmann, 2004, p.70 and passim.)

⁶ The playfulness, such as it is, lies in the elision of ‘objectivity’ and ‘object-ness’

⁷ See also the criticism that Luhmann makes analytical models and then takes them for reality (Cotterell, 2001, p.90), and, more scathingly, Munch’s critique of Luhmann’s conflation of the analytic and the empirical. (Munch, 1992, p.1463.)

⁸ ‘Transubstantiates;’ see also Kenneally’s self-consciously playful, chapter length, characterisation of autopoiesis as a religion (1988:349-369).

concept from essence to process to self-processing, without necessarily filling in the gaps between those positions. Having characterised the enquiry in this very particular way, systems theory is then triumphantly produced as the answer. That there is some conjurer's sleight of hand in framing the question is evident in the revelatory metaphor:

“Having arrived at the question of how law can be distinguished, we can now lay our cards on the table. The question can be solved if one succeeds in describing law as an autopoietic, self-distinguishing system.” (2004, p.70)]

The text then does “lay its cards on the table,” proposing a distinctively Luhmannian form of systems theory as the most viable starting-point for any inter-disciplinary legal theory, on the basis that it, and in particular its founding distinction between system and environment, gives a conceptual certainty to what we are talking about as law, and deals with many of the key issues that arise in answering his newly re-framed, newly scientific question about law's boundaries.

II. Systems and environments: the boundary enforced?

Put very briefly, Luhmann envisages three types of autopoietic systems – social systems and subsystems, which are made up of communications; living or biological systems, from which the concept of ‘autopoiesis originally comes; and psychic systems of consciousness. ‘Human beings,’ are, if you like, taken out as ontological givens, and three key aspects of human life spread across the systems; as a conceptual starting point, the social sphere, physical existence, and mental existence, in the sense of consciousness, are therefore divided up.⁹

For Luhmann, social systems or consists only of communication and the production of meaning. Communication, for these purposes, is not about any version of Habermasian ‘intersubjectivity’ – for where are the subjects? – but rather is constituted by a message, information and understanding (2004, pp.75,86) – that is, broadly, an act or statement¹⁰, the content and its reception. Or to put it in a way that connects more directly with Luhmann's definition of society, ‘communication’ encompasses all those elements that go towards the production of meaning – the act, the content, and how it is understood, or misunderstood. It is an event, or a chain of events which, in the making sense of its elements, could always be otherwise.

This is therefore a dynamic concept of communication; in a way that brings the autopoiesis that I discuss later to life, it exists in the constant creation of meaning by linkage of new with past communications. It also allows, we should note in passing, for some of the complications and distinctions that beset ‘real world’ communications – the fact, for example, as Christodoulidis draws out, that an understanding may turn on why a belief as to why information is being communicated (rather than the bare

⁹ This is not so strange, and arguably only the ‘operationalisation’ of the widespread insights that ‘we’ are not self-identical with ourselves, that our internal consciousnesses are not unproblematically reflected in our speech, and that we located in a number of different social spheres.

¹⁰ See Christodoulidis, 1998, pp.75-8 for a brief account of the ‘conceptual revolution’ in sociological inquiry involved in Luhmann's move from action to communication, and the circumvention of some of the problems of action theory.

content), or on the difficulties of grasping that content. (1998, p.76.) However, crucially, it does not just encompass easy-to-envisage communications between people; more typically, for Luhmann, communications or communicative events take place within (or through or by) a system. So that, in a basic example given by Mingers, a typical legal communication might be a judgment – the information consisting of the selection of relevant material (summary of ‘facts,’ legal framework and relevant caselaw), the utterance in the oral or written way that the judgment is handed down, and the understanding in the particular ways in which it is interpreted. (Mingers, 1995, p.141.) One conceptual leap in Luhmann’s system of communication is disentangling and then disregarding the inevitably subjective element in the information and the understanding – the input from the individual psychic system of judge or lawyer, which for Luhmann is all part of the environment of law – from the apparently more object-focused approach provided by this more formal level of analysis.

Within – though as we will see below, this is a highly problematic preposition! – this encompassing social system of communications there are various functionally differentiated subsystems, like politics, law, religion or the economy, in addition to less formal ‘organisations’ and ‘interactions’, which is a conceptualisation of essentially private sphere communications. For Luhmann, these subsystems are generally orientated around a binary code, which orders what is part of the system and what is not. So, for example, the code for law is legal / illegal, for politics, it is government / opposition, for science, true / false, and for the economy, payment / non-payment. What distinguishes these subsystems of communication is their functional differentiation – that is, that no other system fulfils the same function (2004, pp.167-70, in the context of the distinction between function and performance or role)¹¹ – and, relatedly, their autopoiesis, or the way in which they are organised, which dictates the nature of their relationships with other systems.

At first sight, this is all breathtakingly different from the usual sociological or sociol-legal concept of ‘society.’ On the one hand, the boundary is vast – apparently with, for example, communications in Newcastle or Nepal equally part of something that could meaningfully be called ‘world society.’ On the other hand, it apparently excludes people, whether as individuals, classes or agents.¹² Of course, social systems of communication may be structurally coupled or ongoingly connected with an individual’s psychic system of consciousness, but ‘society’ is defined as being composed of communications and not individuals.

¹¹ Typically, ‘function’ and ‘functional differentiation’ are slightly more complicated than they appear. Luhmann describes modern societies as ‘differentiated’ in opposition to the premodern segmented or stratified social order. As we will see later, he uses function to capture the idea of what the law does in the course of the autopoietic drive to differentiation. Functional differentiation is therefore not just a distinction based on a vague idea of different sectors playing different roles in society, but is predicated on an understanding of a) Luhmann’s characterisation of social systems as autopoietic; b) the internal drive of those systems towards autopoiesis. See Christodoulidis, 1998, p.86 for a concise summary of the ‘Is Luhmann a functionalist?’ debate.

¹² I think that this criticism has been overstated. To follow the argument, see the criticism in Bankowski (1996), the riposte by Paterson (1996) and Luhmann’s own passionate and accessible account of the importance of human consciousness. (Luhmann, 1997, p.6.) Also, see Lange’s persuasive argument on the space for human agency in systems theoretical approaches. (Lange, 1998, pp.458-63).

By limiting its scope to the consideration of communications, Luhmann's theory of society also appears to exclude any obvious account of power, except that narrowly conceptualised as formal political power.¹³ Society cannot therefore, on this account, be characterised overall by any particular hierarchy, power relation, mode of production, or ideological framework – and so it is impossible to look to these as causal meta-explanations for what happens within a particular sub-system. Luhmann does not say that one subsystem, (or a particular subsystem's environment), does not influence another – in fact, he expressly says that that they do – but his conception is of a plurality of sub-systems, which relate contingently and in a rather complex way, rather than any variant on a base / superstructure model, or through any other pre-determined or constant power relationship between systems.

Luhmann's conception of the social subsystem of law within society is along similar lines and equally unfamiliar: it is “..the system of communications which identifies itself as law and is able to distinguish between those communications which are part of itself, and which are not.” (King & Thornhill, 2003, p.36.)

Typically, this rather spare definitional sentence compresses complex issues of communication, self-identification, process and distinction, apparently placing them within systems theory, but in such a way that their tendrils spread in diverse methodological directions: variously, straightforwardly empirical / socio-legal, complicatedly epistemological / constructivist, and wholly paradoxical. Out go all familiar ideas of court rooms, lawyers, judges and parties, and in comes a definition that nods towards both 'legal internal' ideas of positivism and to linguistics and other extra-legal hyper-disciplines. The loss of familiarity is a gain in a different perspective, as the effect is to open up the semantic field to a wider range of communications, and to allow a welcome – so far as empirical application is concerned - element of conceptual precision about what material falls within the system. (2004, p.142.)

The 'positivist' element of the definition is the wholly circular one of self recognition: a communication is part of the legal system if the legal system says that it is. Secondly, however, the communication must be based on, or relate to, the distinction between legal / illegal or lawful / unlawful – which simply means that law is used as a means of making sense of the topic under discussion. (For surprisingly concrete examples, see Luhmann, 1989, p.141.)

Putting these two elements together, it is the recognition of a communication by a subsystem of law (or politics or economics) that transforms it from something within a personal or organisational interaction to something with societal significance. (As may be obvious: if I am having a drink with workmates, and claim that our employers are negligent, these are potentially 'legal communications,' but remain in the private sphere of interaction. If I say the same thing to an employment tribunal, these communications are recognised and processed by the legal system.)

The key concept in Luhmannian systems theory, however - and in all discussions of boundary or limit - is the very different way it conceives the relationship between 'society' and its subsystems. This based on a founding distinction between a system

¹³ A criticism made expressly in Ashenden, 2006.

and its environment -- rather than, for example, the straightforward 'part and whole' or 'two connected entities' relationship implied by the conjunctive 'and' of 'law and society.' This reformulation is the fundamental task for Luhmann when writing about law (1989, p.138; 2004, pp. 59-60) – and, at least initially, it is helpful to think about this schematically.

One's familiar mental picture of the conjunction of 'law and society' above should therefore be replaced by the mental equivalent of King and Thornhill's very helpful depiction. (2003, p.5.) This shows a series of separate circles, each with a core representing a subsystem, like law or politics, and an outer environment, bounded by the circle, which represents the environment of law or politics. For the purposes of the present broad sketch, this diagram represents certain key points: a) the separation or differentiation of each subsystem; b) that each system has its own environment, or 'otherness'; c) that each system creates its own distinction between itself and its environment, thereby marking its own boundaries; d) that each subsystem is in an ambivalent relationship to 'society.' All operations of a system are also operations in, or of, society; on the other hand, for the system, 'society' is also its environment – hence the rich ambiguity of the phrase 'society's law,' which is Luhmann's own gloss on his title¹⁴. e) And finally - and perhaps most difficult to grasp in its consequences - that there is no centre.¹⁵

At first sight, it appears that all of this enforces the system boundary of law – and, indeed, there is that tendency. As we have seen above, it seems that, for systems theory, law is about law, and not subjects, politics or power. However, I argue that the opposite tendency is also at work, dissolving law's separation from its environment. Even within the diagram, or the idea of spatial representation – though in fact they are unrepresentable in pictures, though expressible in words - there are the concepts of structural coupling, the disruptive fact of re-entry and the conceptual consequences of the radical de-centring envisaged by Luhmann¹⁶. All of these mechanisms are outside the scope of this paper, but are predicated on working through of the connection between law and its environment. Outside the diagram, or the idea of the diagram, however, there also remains the text – and it is also in and through there that the ambiguity of autopoietic boundaries is contained.

III. Autopoiesis: boundary as separation or connection?

“The system is an open-ended, ongoing concern structurally requiring itself to decide how to allocate its positive or negative value. The bifurcation necessitates

¹⁴ See the discussions at pp.59-60, 73, 89.

¹⁵ 'What is perhaps physically unrepresentable, however, is the paradox of re-entry: that, according to Luhmann, the tendency of the [here, legal] "system to accept external or environmental references as part of the operations of the legal system itself." (2004, p.115.) Or, to put it more simply, those occasions when the law itself refers to "external criteria, standards or norms.. for its own internal reasons" – for example, the occasional resort of the law to morality, but a morality projected by the law's internal norms.

¹⁶ By this I mean the loss of the mental vantage point from which everything could be seen, if only we could be clever enough; in a sense, all Luhmann's theories of foundation-less systems, of the necessary implications of blindspots, and orders of observations all flow from a thoroughgoing sense of de-centring.

decisions and thereby further operations, and decisions require the construction of normative rules (programs) to connect them in a network for reproducing decisions. Norms, then, are purely internal creations serving the self-generated needs of the system for decisional criteria without any corresponding 'similar' things in the environment. Nothing else is meant by autopoiesis." (Luhmann, 1992, p.1428.)

i. Autopoiesis: fact, metaphor, value or method?

The passage cited above appears to be part of the tendency to enforce the boundaries of law. Here autopoiesis reflects the disconnection of (or, better, the necessarily dislocated connection between) law and its environment, from where any stimulus or irritation to the system has to be translated through legal norms to be 'read.' When other passages are read, however, the autopoietic relationship is not so straightforward, and is complicated by the ambiguous and unbounded nature of autopoiesis as it emerges from the text.

Autopoiesis is a concept originally from biological systems theory, formulated in that context by biologists Maturana and Varela, to describe how cells produce themselves; or more precisely, how they are both producer and product.

The earlier Luhmann was vexed by the question of how / whether concepts like autopoiesis could be moved from one field to another. Dealing with this issue, he remarks: "The new discovery is that biological systems are characterised 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 mean that psychic and social systems are now to be interpreted in terms of the model of biological systems. A mere analogy 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... [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." (Luhmann, 1989, p.137.)

This is an interesting passage for a number of reasons. The first is how Luhmann seems to characterise his 'mode of analysis' as arising inevitably from real biological 'discoveries'; that is, he slips autopoiesis in as a scientific 'truth' or fact rather than being merely one of number of available system ascriptions. The second is the capaciousness of his idea of self reference. (And we have no space here to consider whether it is really tenable to stretch self-referentiality to cover everything from cells that grow by a biochemical sense of self / other and the general sense of self-reflexiveness of the human subject.) There are, however, two even more basic methodological tensions evident on the face of the text. The first is how a theory can be 'constructed' at all without some primary reference to an empirical object. The second is marked by Luhmann's own slippage between the abstractions of the desired 'general theory' and the unsatisfactory but frequent recourse to the very 'borrowings'

or ‘transpositions’ that he claims may “miss the mark” – and yet seem to be the only available conceptual tools.¹⁷

By the time that ‘Law as a Social System’ reaches book length, Luhmann is more confident in his claims. We already have an inkling of Luhmann’s partial answer to these conundra from the discussions elsewhere on observation / reality: that autopoiesis is an idea of general application to any self-distinguishing system, and – equally importantly – that therefore, whether applied to living or social systems, in both cases it is essentially a second order observation on the world. This is why, for Luhmann here, social autopoiesis cannot be a metaphor; it is not the transfer of a description of a biological object, but when coupled with Luhmann’s own autopoietic theories of observation, necessarily a more generalised phenomenon, described from the same vantage point, or order of observation.

Luhmann’s increasing boldness on the inaptness of characterising autopoiesis as metaphor is evident in the way he deals with it in this later text. There are no more concessions to the difficulties of untheorised borrowings. In *Law as a Social System*, Luhmann tackles the question of metaphor wholly autopoietically – that is, loosely here, in a way that makes sense of, develops and is significant [only] within his own system of thought rather than responding to the terms of reference of the question. In a belligerent footnote, he asserts [autopoietically] that autopoiesis is neither an analogy nor a metaphor, and complains that a) it is pointless to argue whether or not it is applicable to living systems; b) it is ‘invalid’ to argue that to apply it to social systems is to misrepresent its meaning; c) critics have failed to distinguish between an abstract meaning of a term and its materialisation in biochemical or communicative operations;” d) in the sociological context, “all that matters.. is whether ‘autopoiesis’ leads to the formulation of hypotheses, which are fruitful science (and this includes empirically fruitful.)” (2004, p.83)

As an example of an ‘observation,’ this footnote is significant in relation to Luhmann’s concept of how meaning is formulated, and the system of thought within which he or the text is apparently operating – and just how alien or, as he would say, “revolutionary” (2004, p.81), that system is.

To characterise autopoiesis as an analogy or metaphor – see, for example, Rottleuthner, 1988 - is part of a common sense or ‘history of ideas’ view of the formation of meaning. From this point of view, we readily grasp new concepts by a comparison with a known object; there is a ideological or semantic reservoir of meaning within the workings of a figure of speech; in short, it presupposes a ‘we,’ and an understood (even if it is wrong) correspondence of object and concept, from which analogy and metaphor always represent a form of mistranslation (even if it is a fruitful mistranslation.).

Luhmann’s prickly footnote enacts his rejection of this way of being, and seeing / constructing meaning, in a way that is, while being theoretically consistent, both attractively self-reflexive and clear-sighted, and troublingly blind. For Luhmann, meaning is not given or ‘really’ attached to anything – there is no referent that just,

¹⁷ This ambivalence is also evident in the passage from the journal article ‘Law as a Social System’ cited above (Luhmann, 1989, p.137), which moves between a concept of interdisciplinary commerce – i.e, a borrowing or metaphor – and a more general theory of distinction.

knowably and standing alone, just “is” - but rather is realised only by a “communicative operation” within “a social system.” This is part of what he means by ‘materialisation.’ Luhmann develops, to a very high pitch, the linguistic commonplace that meaning lies in difference and context; for him, meaning does not ‘really’ lie anywhere but - as we see in the quotation that prefaces this section - is perpetually being autopoietally created and recreated¹⁸ by the recursive communication of systems. Here, social significance does not lie in the origin or root of meaning or the field in which an observation first came to be made, but only in the significance given through the ongoing creation of meaning within particular observations.

He also takes out the “we” or “I” in assumptions about meaning and substitutes the operations of a system, with which our internal psychic systems may be structurally coupled, but which also determine the observations that can be made. This is at the root of his abandonment of the distinction of true / false, with its implicit claim of access to reality, and his choice of “validity” or “non-validity” of argument – that is, whether the various objections made by his critics are within the terms of reference of the system or not.

The blindness lies in the textual claims for truth that are seemingly being made, perhaps all the more powerfully for being submerged. We have already seen Luhmann slip in autopoiesis as scientifically true. Also, however boldly convincing Luhmann’s footnote is at first reading, if autopoiesis (i.e., a particular form of self-production, which permits the growth of complexity) is not a metaphor transferred from the natural sciences, what is it? If it is across systems, it can only be some sort of transcendental structuring idea – which in turn translates the (for Luhmann, functionally differentiated) late-modern systems to which it attaches into some sort of structural inevitability. Autopoiesis itself becomes less a working model, and more a template. Secondly, Luhmann’s characteristically fraught relationship to ‘scientific’ knowledge is also in play. On the one hand, as we have seen, there is the relativising discourse of ‘valid’ / ‘invalid.’ On the other, however, there is also a claim for truth going on, both by the recourse to an apparently universal idea, and Luhmann’s ongoing but unelaborated commitment to empirical ‘fruit;’ that is, a more productive and therefore better (and not merely different) analysis.

This footnote is also significant for the clue it gives to Luhmann’s aesthetic, or even performative, *modus operandi*. Recasting the argument immediately above, and to pick up an earlier point, it again demonstrates the breadth of his ambition: to single-handedly create an alternative framework for viewing the world, as if old meaning could simply be sloughed off in the writing, and new meaning could be reconstructed by an act of will.¹⁹ Autopoiesis, however foundation-less, is also philosophically attractive in a post-ontological sort of way, perhaps because it is an account of complexity, and a perpetual “becoming,” rather than an account of a static “is.” On the other hand, however, it is literally difficult to ‘think through’ a concept consciously shorn both of a history and a substantive content / referent. Is the hope

¹⁸ And, crucially for law, meaning is stabilised in this very recursivity. (Luhmann, 1989, p.139)

¹⁹ The sheer scale and estrangement of the task can be gauged if one considers Luhmann’s approach as against Rottleuthner’s scrupulous tracing of the use of various biological metaphors, and his suggested programmatic approach to the use of metaphor. In some ways, however, Rottleuthner may be doing no more than attempting to categorise the ways in which autopoiesis might bear empirical fruit, albeit in a way wholly removed from Luhmann’s overarching scheme.

that the mechanism of autopoiesis – that is, in this context, the description of how law produces itself, rather than by being determined elsewhere - will be affirmed by its application? If it then is, does that make autopoiesis “really” true, after all? Or if it isn’t, does that mean that law isn’t really law (but has shaded into some degraded version of politics or ethics) or that autopoiesis isn’t an adequate characterisation of modern law? In short, is autopoiesis a theory, a general structuring descriptive idea, or a submerged value?²⁰ And if it is anything other than the ‘scientific legal theory,’ with which we started, where does that leave the question of its conception of law’s boundaries?

ii. Autopoiesis as relation between system and environment: separation and connection

Having briefly explored the status of the concept of autopoiesis in a footnote, Luhmann prefaces his first discussion of the specific autopoiesis of law by returning to the primary distinction within systems theory of system and environment, and in a point squarely and repeatedly made in this text²¹ and elsewhere, makes it clear that autopoiesis is a concept in which it is a given that there is some form of relationship between a system and its environment - but which tends to focus on the effect on the system. For Luhmann, an autopoietic law does not preclude connection with the outside world, or its environment, but does determine the nature of that connection.

I make this ‘trivial point’ (Luhmann, 1992, p.1431 – possibly in exasperation) here for a number of reasons; firstly, it is often missed, causing commentators a lot of heat, if little light; secondly, for all his express and nuanced recognition of ever-increasing simultaneous separation and inter-dependence between systems (see 1989, p.139; also 2004, pp.80, 368, 380), Luhmann is much less textually interested in the inter-relation; thirdly, it makes sense of the apparently enigmatic, and often-echoed, claim that “open-ness is only possible through closure” (2004, p.105.)²².

After this preface, Luhmann sets out a sketch of previous conceptualisations of the relationship between systems and their environments; describing, essentially, early concepts of systems as open to their environments either in a continuous exchange of input and output – that is, for example, an idea of continuous interpenetration - or by transformation or internalisation of the output, and then the development of that concept via ‘operative closure.’ So, to give a basic example, an input / output model of systems might characterise the relationship between law (taking this as the system) and economics (part of its environment) very directly: economic interests intervene in law, and / or law – perhaps, topically, in the form of financial regulation - intervenes directly in economics. So, in either case, we can look for the presence of the

²⁰ See Ashenden, 2006, on Luhmann’s description of the ‘regression and threat’ of dedifferentiation, and the slide from description to evaluation. Also see Philippopoulos-Mihalopoulos (2007) on Luhmann’s ‘nightmare’ of dedifferentiation.

²¹ See for example, Luhmann, 2004, pp.80, 97, 105-6, 368, 373, 380, 477; 1989, p.136 and 1992, pp.1420, 1431-34. Also see the express discussion within Baxter, 1987:2008.

²² In the same vein, see also the account of the riotous reception given to Teubner’s 1988 conference explication that systems were closed “in an open sort of way,” (Kenneally, 1988, p. 349) and David Nelken’s relatively recent question: “What exactly is meant by law being cognitively open and normatively closed?” (2001, p.15)

intervening system in the workings of the other – either directly in input / output terms, or less directly, in its causal transformation of the ‘output’ of the other system.

‘Operative closure’ takes this idea of the relationship between systems and environment one step further, and also refocuses it from a directly causal relation to one which focuses on the effect on the internal workings of the particular system under discussion. It has created a vast literature of its own, but for present purposes one only needs the gist; broadly, that the “accumulation of internal complexity” within a system²³ - which is how Luhmann describes the trend of the evolution of autopoietic systems - is paradoxically dependent on the system simplifying information from - rather than, as previously envisaged, being open to - its environment. ‘Operatively closed’²⁴ is a rather elliptical way of describing this state of affairs and, in particular, “systems that rely on their own network of operations..” – and so not only any external input – “..for the production of their own operations, and in this sense, reproduce themselves.” (2004, pp.79-80)

As ever, the translation from Luhmann’s compacted machine language is slightly laborious. Overall, as we have seen, ‘operative closure’ is an attempt to capture / describe how the law makes “order from noise” (2004, p.80, citing von Foerster) or, in other words, makes legal sense of the (for Luhmann, differently coded) problems it has to deal with from its environment. So, for example, in a piece about the response of the Court of Appeal and Royal Commission to the string of miscarriages of justice in the 1980s, Nobles and Schiff (1995, pp. 299-320) consider how the law ‘made sense’ of journalists’ or reformers’ claims, which were themselves different from each other, that ‘miscarriages of justice’ had occurred – which was by recasting those various declarations either that factually innocent people had been wrongly convicted (the investigative journalists) / or defendants convicted because of grotesque investigative improprieties (the reformers) into terms that it as a system recognised: here into appeals that convictions be set aside as legally ‘unsafe or unsatisfactory.’²⁵ And perhaps crucially from the autopoietic point of view, when the Court of Appeal responded, it managed to do so via devices that allowed it to retain broad principles of deference to the jury’s verdict, or finality, which also secured the ongoing viability of the system.²⁶ For the autopoieticist, law can only pick up the communications of other systems in a way, or on a frequency, which makes sense in its own terms; here, the long tradition of ‘finality’ within the criminal justice system.

This is a straightforward example of operative closure. It illustrates how even the same phrase of ‘miscarriage of justice’ means different things within different systems, and clearly points to the always inevitable, sometimes productive ‘mistranslations’ that occur between systems. It also illustrates well the key systemic distinction of self and external reference (2004, p.268) that was touched on earlier; that is, the double impulse to cognitive openness – the legal system can / must deal

²³ For Luhmann, ‘internal complexity’ is the hallmark of a modern, functionally differentiated social system: a typical example of sociological considerations of function wholly recast, and additionally reconceived in evolutionary terms,

²⁴ This condensed phrase can be unpacked as denoting operations within a closed system, the effect of which is to reproduce themselves and the closure of the system. Perhaps ‘operationally closed’ might

²⁵ This broad characterisation does not do justice to the detail and complexity of Schiff and Noble’s argument. But I am citing it here for illustrative purposes only.

²⁶ See further Nobles and Schiff’s discussion of finality as the “preservation of legality.” (1995:320)

with or translate the ‘perturbations’ or ‘irritations’ of its environment – and to normative closure; here, that the system processes in its own more limited terms, and in accordance with its own norms.²⁷

Luhmann then proposes autopoiesis as a conceptual ‘innovation’ or development of this idea of the self-reproducing system. Operative closure describes a set of conditions for what amounts to a system’s self-reliance: the self-organisation of structure, plus self-regulation. Luhmann suggests that this analysis of how systems work can be extended via the concept of autopoiesis to the most basic operations or elements of the system and - in an echo of his boundary shift in the earlier chapter - what he describes as to “everything that constitutes unity for the system.”

Autopoiesis is therefore the theoretical concept that moves Luhmann’s idea of law as a social system from autonomy or self-reliance – by whatever undescribed means – to a system where the very processes are geared to and orientated around producing law or legal communications (2004, p.184)²⁸ (rather than, for example, solving problems or resolving disputes) and thereby preserving the boundary between law and non-law. This apparently banal observation – on one level, what else would law be doing? – has the effect, however, of shifting sociological attention towards the actual operations and processes of law as law, at least in the first instance, rather than considering it in relation to another, particular system, or amorphous ‘society.’ ‘Autonomy’ inherently implies another system – things are autonomous from other things, rather simply autonomous. Autopoiesis on the other hand suggests a self-generating system, where, paradoxically, that separation is maintained by the nature of the connection between the system and its outside world.²⁹

iii. Autopoiesis and legitimacy

At first sight, the idea of autopoiesis has nothing to say about ‘legitimacy’ or ‘just’ law: any law, including German law under the Nazis (2004, p.110), which preserves some formal quality of independent determination by a tribunal, will, at first sight, qualify – because it demonstrates that what is lawful is determined by the legal rather than the political system; in other words, “it is clear whom one should observe if one wanted to find out what is legal and illegal.”³⁰ (2004, p.110.)

²⁷ It does not illustrate, however, the other element of operative closure evident in the discussion above, which is Luhmann’s co-option of evolutionary ideas, both of operative closure and the wider concept of autopoiesis, to support his claim that it is the very simplification of operative closure, and the necessity for its constant, revisited drawing of distinctions, which allows ever more complex legal reasoning.

²⁸ See, in particular, later discussions on the development and use of legal concepts and rules as autopoietic condensation and confirmation (2004, pp.340-341) for a more concrete, and perhaps more intelligible ‘application’ of autopoiesis to the legal system.

²⁹ The connection, if any, between the ‘relative autonomy’ of law and legal autopoiesis has been extensively explored, most persuasively / thoroughly by Nelken (1988), Baxter (1988.)

³⁰ This may not be as self-evident as Luhmann claims. In an ameliorating note, Luhmann indicates that this is not rankly amoral or politically regressive; just that “...what matters is political vigilance, not vigilance by legal theory.” (2004, p.110.)

On the other hand, however, Luhmann clearly conceives that there are some limits to autopoiesis, if structural change takes the system away from – or dilutes and dissolves! - rather than condensing and confirming, an autopoietic process.³¹ What Luhmann often calls the ‘recursive’³² quality of law is linked to these ideas of condensation and confirmation; the distinctness of legal reasoning is partly generated by the way judgments reconsider and re-evaluate existing laws, rules and precedents. In that sense, autopoietic law is distinguished from ‘arbitrary’ law – however much the headline definition excludes any normative view of what law is – and so to this extent, at least, there is an implicit value placed on autopoietic law as distinct from law determined by another system.

This point is developed further in the chapter on the evolution of law, in which Luhmann links the development of autopoietic law with its greater internal complexity, which allows it to deal with “more and more varied cases.” He develops an evolutionary analysis of the process of legal argumentation and decision making as the interplay of redundancy – broadly, the continuity of law, or what stays the same; variety – what changes in decisions; and the subsequent stabilisation of the law. (2004, pp. 267-9)³³

Here Luhmann is looking at law through the other end of a Darwinian telescope; although his model is evolutionary, he is not concerned to explain autopoiesis as the mechanism for adaptation to a particular environment. He instead stresses it as a blind process which happens to “free up room for the formation of complex orders” – that is, as we have seen, as a particular sort of operative closure (2004, p.271) – and is therefore part of the functional differentiation which marks modern society.

At this point, however, evolutionary theory takes on a new normative twist, as Luhmann claims that the greatest threat to autopoiesis is that of (implicitly anti-evolutionary) de-differentiation / dissolution of systems boundaries - as when, for example, “the political system attempts to use law as a regulatory instrument,” (2004, p.271), or symbolically inflated and unenforceable ‘human rights’ takes the place of clear and enforceable law. (2004, p.485).

The text has here gone into a chiasmic nightmare – and just as we saw with autopoiesis, Luhmann’s account of law’s ‘law-ness’ has moved from a positivism to a version of legitimacy, from evolutionary fact to apparently given value.

III. The boundaries of law: are judgments always according to law?

³¹ Luhmann makes this point more concretely in the discussion of the structural coupling of law and economics around the idea of property. ‘Property’ is within both systems, but in order for both systems to maintain their autopoiesis, law has to fulfil its own function, not that of the economy, effectively. (2004, p.391.)

³² Recursivity is, for Luhmann, how law maintains its normative quality in the face of factual disregard for it; recursivity here amounting to the constant affirmation of consistency, and yet within a framework that still allows for change. (2004, p.109) See also Rosenfeld, who develops another strain of the argument that autopoiesis is a form of legitimacy, preserving it from either “extra legal norms, or arbitrary subjectivity.” (1992, p.92.)

³³ Elsewhere, Luhmann analyses variation of the elements and selection of structure as leading to a “dynamic stability.” (2004, pp.232-4.) This idea gets a information theoretical twist with a later reading of information / redundancy (2004, p.317.)

i. The role of the courts.

Luhmann starts, as ever, with a concern for system. Where elsewhere his starting point was the distinction between system and environment, here it is internal differentiation. (2004, p.274.) Courts are characterised as the centre of the law's social system, with all other elements, including non-contentious or advisory transactions and the legislature, described as being at the periphery (2004, p.292-6.) Unusually, the terms 'centre' and 'periphery' do not imply any hierarchy, so that courts are 'more important' than legislation for the system. On the contrary, Luhmann sees courts and the legislation as being in a "cybernetic circle" or "circular relationship of influence" where, notwithstanding that courts must follow legislative intention, that intention has itself already been informed by the way in which decisions have been made in the courts. (2004, p.278; p.289)

For Luhmann, courts are taken to be central because they alone must deal with the underlying paradox of law: the unavoidable necessity to make (and, if need be, invent rather than 'find') decisions, even in the relatively few 'hard cases' where there are no rational grounds for preferring one course to another. (2004, p.289.) This is, of course, a very concrete way of thinking about the ultimate groundlessness of law that encountered earlier in the text in the more elegant and abstract guise of the foundational paradox. Luhmann develops this theme, identifying the central effect of courts' decisions in terms of an evolutionary stabilisation for the system, because of the way that decisions act as the system's selective memory. Viewed autopoietically, the memory of the system as set down in judicial decisions does the crucial job of reducing the complexities within any one case to a communication which can be used again or revisited. Or, in other words or lawyers' terms, decisions preserve not the vagaries of contested facts, but what has been selected again as relevant precedent, whether as obiter or ratio. (2004, p.139.)

Luhmann is also illuminating both on the intriguing generality of what is always involved (but usually submerged) in any decision-making, and particularly in the decision-making process in 'hard cases.'

In all cases, he points out, decisions can only be made if [inherent] undecidability is a given, as otherwise they would not be decisions per se, but rather the actualisation of an existing state of affairs. For Luhmann, the judicial discourse of 'findings' is therefore a very basic "evasion" of this paradoxical state of affairs.³⁴ Moving further along what he claims to be law's temporal self-image – in "an analysis...which may be particularly unacceptable for lawyers" – Luhmann sets out his case that decisions are not determined by precedent or the past, but inevitably in the present, "the moment of which, alone, we have direct knowledge." For Luhmann, law cannot see that decisions are made in / by the present, as the present is the distinction that makes past and future possible; present decisions mark "what cannot be changed anymore from the past and what can still be changed in the future." (2004, pp.282-3.) In other words, Luhmann seems to be saying that the present is a or the blind spot of legal decision-making, its own unobservable vantage point. It faces both the past in its resolution of concrete conflicts, and the future, in its "function of enriching the supply

³⁴ If it is a paradox. It is arguable that to characterise the dynamic behind legal decision-making as all about concealing an ultimate 'ungroundability' is a rather skewed reading, and also downplays the significance of Luhmann's own work on how non-arbitrary legal meaning is formed over time.

of legal rules;” simultaneously, it rewrites the past and “disciplines” the future, although, as we saw in the consideration of the ‘time binding’ function of law, even (or especially) a legal future is subject to change. (2004, p.296-7.)

It is in relation to hard cases that Luhmannian paradox comes into its own – those cases where “the existing, doubtless valid legal norms applied with logically correct deductive methods do not lead to unequivocal positions.. in which the knowledge of uncontested and valid law is not enough to state the facts of who is in a legal position and who is in an illegal position.” In these cases, therefore, the court can only resort to invention of principle (rules of decision-making.. and justification) or “the [judge’s] moral conviction of the people’s moral conviction” – though presumably, although Luhmann doesn’t say so here, filtered in and then expressed through all the complexities of re-entry. (2004, pp.287-9.)And as ever, there is a slight tension within Luhmann’s text between the sociological and the legal. Sociologically, there is a recognition that there may be legal decisions which are ultimately legally arbitrary. Nevertheless, for Luhmann, these decisions are still only take place within the closed universe of the law, as all justification for decisions are either by reference to *res judicata*, or [legally given] exceptions to it; law therefore can only refer to itself, and the decision is always couched in these terms, whatever other unknowable and arbitrary factor underlies the final difficult decision. Luhmann then bridges the gap between law and autopoiesis in his further discussion of interpretation – the method by which judges arrive at their judgments or, alternatively, the legal system engages in second order observation on its own decisions. For Luhmann, this process holds the ring between consistency on the one hand and the “integration of new information or a change of preferences” on the other. (2004, p.297.)

ii. Legal argumentation

“An operation of self-observation of the legal system reacting in its communicative context to a difference of opinion as to the allocation of the code values legal / illegal.” (Luhmann, 1995, p.286.)

For Luhmann, legal argumentation is closely connected to decision-making³⁵ – but has the great additional freedom that, unlike decision-making, it cannot change the law or, as he puts, it “alter the symbol of validity of law.” (2004, p.305, p.326.) He conceives of validity and legal argumentation as structurally coupled (and correspondingly, operatively closed – p.315) through legal texts, like statutes, commentaries, judgements and so on, in what amounts to the simplified self-observation of the legal system on itself. The text dealt earlier with levels of observation, and Luhmann revisits this point, with a description of argumentation as a second order observation, centred on distinguishing good from less good reasons for a particular decision, or in other words, supplying the criteria for reasons. (2004, p.309.)

In his now-familiar way, Luhmann then goes onto develop the point in a way that has an eye both to how law conceives itself, and more autopoietic theories. So far as the observable reality of law (at least to lawyers) goes, Luhmann points to Coke’s classic description of legal reason as ‘artificial reason’ – that is not abstracted ‘Reason’ but a

³⁵ Luhmann elaborates the distinction / relation clearly elsewhere – Luhmann, 1995, pp.286-7.

variety “professionally induced through experience and competence” (2004, p.311), and ties that canonical description in to his own observation of the recursive action of caselaw. In a way familiar to any lawyer – especially any common lawyer³⁶ - Luhmann describes how argumentation within cases function. He identifies a high degree of specificity – naturally, given that cases generally arise from some set of new and particular circumstances.

For Luhmann, argumentation is one of the vectors of recursiveness. It works by reconsidering previous cases by distinction and analogy in open-ended ways which can either preserve, reconfirm, alter or extend existing legal reasoning. Complexity is achieved in by this movement in various directions: reasons which are re-used may eventually condense into rules³⁷, which may then be followed. However, rules may also be suspended where exceptions are found – a characteristic Luhmann refers to as developing “on the flip side” [ie of a distinction.] (2004, p.328.) In addition, there is a continual reworking of texts, and changing the limits of relevance; each legal argument that is run may rely on the canonical precedents or a more innovative selection of texts, now newly or arguably newly-relevant. Interpretation within either body of texts may be based either on the ‘authorised reading’ or a revisiting of reasons that had previously, in another context, been rejected. (2004, p.326.)

Luhmann’s description of legal argumentation, as envisaged by the law itself, forms – in some passages at least – a rather lovely picture. Legal reasoning is capable of being subtle, sensitive, flexible and at least potentially innovative.³⁸ Contrary to the usual priorities, rules are a result of, and not a condition for, argumentation. Similarly, although legal reasoning may sometimes be expressed through general principles like fault or liability (though never through the unapproachable generality of ‘justice’), for Luhmann these principles “feed off their repeated use in countless different contexts..” – a very concrete description of the real processes at play in recursivity, and one which also ties in with the theme of legal legitimacy or the specific legitimacy of legal reasoning on which I touched earlier. (2004, pp.311-4).

This reads like an idealised version of law’s self-image. However, elsewhere in the text – and as we saw above in the discussion of ‘hard cases,’ - Luhmann again does not shy away from the ultimate ‘un-law-ness’ of some decisions, where legal reasoning cannot supply an answer ‘according to law.’ In one section, argumentation is “the proposal and justification of a decision,” with all the connotations of densely-established ‘good reasons’ set out above, in another its ‘function’ is to allow participants to “present their case as if what mattered were that the better reasons led onto their victory as interpretations” (2004, p.325, p.330) – an example of Luhmann’s characteristic switch between an attentive reading (and approving endorsement of) of law’s description of its activities, and a cooler and a more distant perspective, which allows one to see law’s blindnesses and [wrong] assumptions. (And, of course, one that makes its observation from an autopoietic position where the ‘better reasoning’ of law is exactly how the paradox of its ultimate unfoundedness is unfolded.) In this section, Luhmann gives the example of how, in the face of a

³⁶ The particular applicability of Luhmann to common law systems has been commented on. See Baxter, 1998.

³⁷ Or, equally, concepts. (Luhmann, 2004, p.341.)

³⁸ Christodoulidis playfully points to the similarities between Luhmann’s account of the creative possibilities of argumentation and the ‘deviationist’ strategies of the CLS. (1998, p.220).

difficult decision, it may be court conventions or tradition which may ultimately carry the day. For Luhmann in this more detached mode, and necessarily, “[T]he ultimate reasons are always only penultimate reasons.” (2004, p.356.)

Luhmann further elaborates this strand of third order observation, or autopoietic analysis, on argumentation. In keeping with his previous framework, an autopoietic theory of argumentation must be concerned with “an enquiry into the conditions and possibilities for, and function of, reason” (2004, p.313) – and, as we saw above, in its recursive workings, or the repetition which is not a mere copying, argumentation is itself a significant contribution to the differentiating mechanism of autopoiesis. (2004, p.313-4.) It is also, as we saw above, in the way that it frames disputes through ‘better [legal] reasons’ for and against a particular proposition, an expression of operative closure – which is how, rather than an as expression of cynicism, I read the “as if it were about better reasons” passage cited above. As we saw in an earlier section, differentiation means that a system must find support in itself, rather than look outside itself for its justifications or dynamic. (2004, p.354.)

The main distinction in Luhmann’s autopoietic account of argumentation is that around redundancy / variety.³⁹ ⁴⁰For Luhmann, a system must keep redundancy and variety in kilter, and it is this distinction which informs the operations of the legal system at a number of different levels. As we saw earlier in a more evolutionary context, redundancy is what stays the same, or “the information that is available for the processing of information” (2004: p.320): so that reasons (in their confirmation through use) are symbols for redundancy, as are consistency of treatment / decision-making and possibly therefore justice - though Luhmann is particularly sibylline on this point and it merits an entirely separate discussion elsewhere! (2004, p.331.) Variety, on the other hand, is “the information that is as yet missing,” and “the number and diversity of the of the operations which a system can identify as its own and which it can execute.” (2004, p.320.)⁴¹ When the system is provoked or irritated, it is the task of argumentation to use variety to turn irritation into redundancy – that is, the smooth incorporation of the interloper into a new and yet always-already-acceptable state of affairs, either by new information or the selection of an operation.⁴² Redundancy therefore needs to be complemented by variety, at least at an “adequate” level, as without it “the system would get stuck in the rut of habit.” For Luhmann, it is the changing relationship between redundancy and variety that “reproduces the adaptation of the legal system to the environment.” (2004, p.332.)

As the argument develops, however, once again we are confronted with a riven text.

³⁹ Luhmann takes the distinction redundancy / information from information theory – where information is what is new – but significantly alters it by the introduction of ‘variety.’ The relation is different to some other structuring distinctions, though, in that Luhmann seems the terms both as in opposition, and in an enabling relationship, so that, for example, both can increase in relation to the other. (2004, pp.320-1.) Cf Luhmann’s discussion of Atlan’s approach. (2004, p.320, fn53.)

⁴⁰ For an elaboration of the original information / redundancy distinction, see Luhmann, 1995, p.291.

⁴¹ Or, with a slightly different slant to be discussed later, “provides a level of complexity, namely the number and multifariousness of events which set off information processing within the system... [It] thereby increases responsiveness to the environment, though this need not mean adapting itself to [its] notions.. or taking over [its] evaluations.” (Luhmann, 1995, p.292.)

⁴² See Baxter’s detailed example of the process of turning information to redundancy: 1998, pp.2027-8.

One move is the positive development of theory. One advantage of the redundancy / variety distinction in the consideration of argumentation is that it goes beyond the claims of both the legal system and, for example, critical legal scholars. For Luhmann, argumentation is about neither the triumph of the best legal reasoning nor its distortion or contradiction in the face of the capitalist mode of production (or another dominant force), though these features may well be present and be of interest. Instead, argumentation is one of the constructivist mechanisms which maintains the complex relationship between system and environment – and so, to return to the terms of previous discussions, between operative closure and irritability, or (as here) redundancy and variety. It is therefore a microcosm of Luhmann's attempt to reconceptualise the law / society relationship, in its attention to the world of law, and how that reads and deals with external stimuli.

The counter-move is equally plain. I have remarked periodically on Luhmann's nightmare vision of dedifferentiation and this is also plain in the way that he develops his hypothesis of redundancy and variety. He points to the tendency of modern law to look to the likely consequences, either for law or policy, of particular decisions as their rationale, or reasons for reasons – a process that the text disapprovingly but memorably characterises as “imagination with a legal effect.” (2004, p.334) He characterises this ‘purposive’ approach as a “responsiveness to changing preferences in place of what is traditionally called justice” – that is, in systems terms, an opting for variety rather than redundancy. For Luhmann, this inevitably leads, in terms of argumentation, from “the certain to the uncertain,.. the past to the future, and.. what can be ascertained to what is merely probable.” (2004, pp.338-9. See also Luhmann, 1995, pp.293-5 in very similar terms.)

This passage sends hares racing in various directions – not least because Luhmann seems to have briefly bought into a strange and unevidenced idea of a golden age of law uninfluenced by social norms, which also seems to run contrary to his previous analysis of law as time-binding, or exactly about binding the present's projection of the future.

However, he then returns to a more measured or at least consistent account of argumentation within the schema of system and environment, positing that all arguments oscillate between self- and other- reference – or in legal theoretical terms, formal as against substantive law, or the jurisprudence of concepts as against interests – and that it is this oscillation within argumentation between two limiting / limited points of view that allow a reasoned decision, within the confines of what Luhmann describes as the “chronic problem of the system, which permit weighting in various ways.” (2004, p. 351.) This account of argumentation then ties in more consistently with the key Luhmannian insight that both self- and other- reference are both internal and necessary to the system.⁴³ It also demonstrates the false opposition between adherents of either form of jurisprudence, in the sense that ‘legal realism’ is as much mediated by law as the most formalist of positions. (2004, pp.343-351.)

But finally, and as ever, there are at least two tendencies at play within Luhmann's text; the Panglossian strand, that Luhmann's attempt to be attentive to the concerns of

⁴³ Christodoulidis develops the inverse of this insight – that political conflict is thematised or worked back into the law through legal concepts like interests, where ‘interests’ is the name that law gives to what has “resonated in [it].. as politics.” (Christodoulidis, 1998, p.157.)

both system and environment “suggests new strategies for legal regulation,” (Baxter, 1998, p.2033-4⁴⁴) and the darker themes that in themselves oscillate between a partisan valuing of an apparently ‘formalist’ tendency in law, and a resigned recognition of ultimate arbitrariness, chronic problems, and the mutual bleed of systems into environments.

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⁴⁴ Baxter is here picking up Luhmann’s own development of the analysis of ‘balancing’ – see Luhmann, 1995, pp.297-8.

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