# Law as a Social System (Oxford Socio-Legal Studies)

*Niklas Luhmann*
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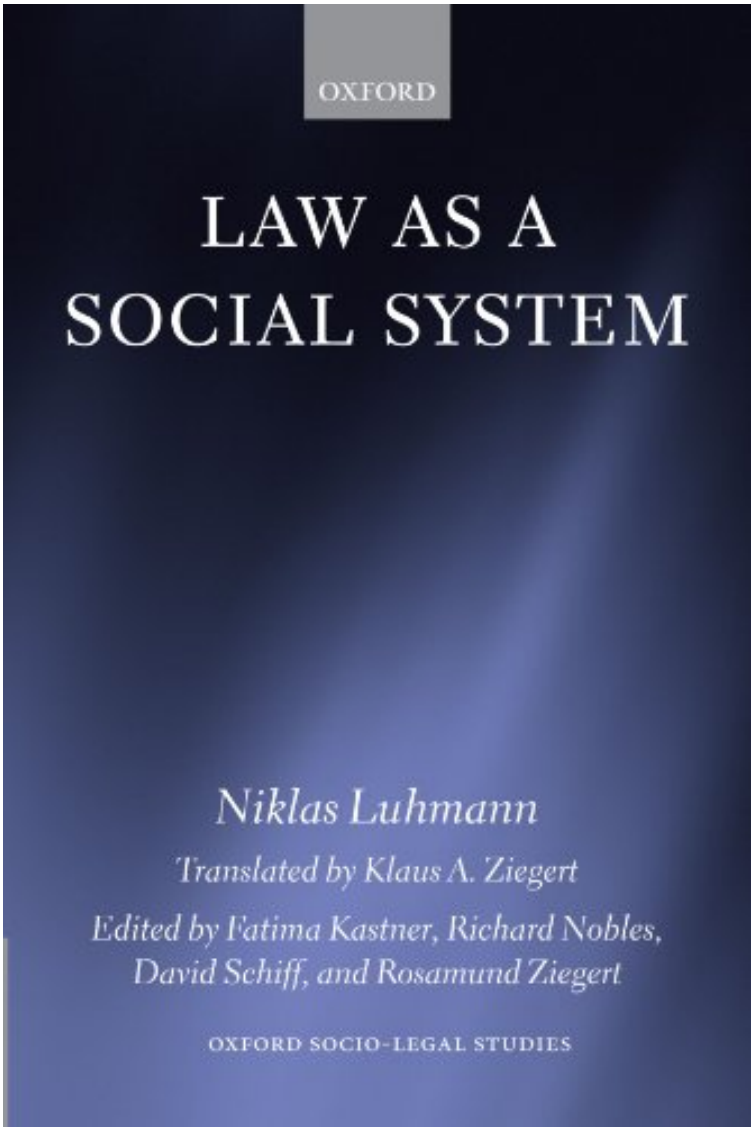




#1888658 in Books 2008-09-15Original language:EnglishPDF # 1 6.30 x 1.10 x 9.10l, 1.67 #File Name: 0199546126512 pages | File size: 44.Mb

**Niklas Luhmann : Law as a Social System (Oxford Socio-Legal Studies)** before purchasing it in order to gage whether or not it would be worth my time, and all praised Law as a Social System (Oxford Socio-Legal Studies):

3 of 3 people found the following review helpful. Law as ParadoxBy W. Weaver[Please note that footnotes have been omitted from this review, which is an excerpt from my own short paper. This is a great book and I heartily recommend it for anyone interested in legal theory, information theory, and especially the place where the two intersect.]In Law as a Social System, Luhmann proposes to provide a (relatively) complete description of the law based on systems theory

and consequently conceived as a subsystem of the larger social system. The complexity of Luhmann's case in many ways demands a map as large as the territory to be covered, but as Luhmann himself admits, such is impractical. As "[w]e know nowadays that a text is only the result of an interpretation which must, however, in its turn, be shown to be necessary on the basis of the text[,]" an admittedly imperfect sketch of Luhmann's theory follows.Systems theory is noted for its somewhat pronounced removal (even so far as theories usually go) from the dirty facts of individual existence. As Thomas Beebee describes the approach: "[F]or adherents of ST, societies do not consist of persons, but rather of communications." In discussing Luhmann's work generally, Beebee goes on to note that "the concept of societies as sets of communications both narrows our field of focus, noticeably excluding individuals with their intentions and aspirations, and at the same time widens it beyond concrete institutions to the whole field of communications surrounding social subsystems." Though the approach "often appears counterintuitive, . . . the insight that societies have their own reasoning and logic that does not correspond to those of the individuals who inhabit them virtually defines sociology." This is a "premise . . . basically unchanged since the days of Marx and Engels[.]"Luhmann dismisses "crude concepts of the `power' of the ruling classes[,]" but is willing to admit that more refined disciplines, though useful in other contexts, do not serve his ends here. Luhmann defines the subsystem of law as consisting "purely of communication and of structural deposits of communication[.]" He goes on to emphasize that the structures he is discussing are not physical in the broadest sense of the word: "[N]either paper nor ink, neither people nor other organisms, neither courthouses and their rooms nor telephones or computers are part of the system. . . . Those who try to communicate with their telephones (`stop ringing, phone!') misunderstand systems; one can communicate not to but only with the help of a telephone."Central to Luhmann's definition of the law as a system are the related concepts of autopoiesis and operative closure. Autopoiesis, a concept borrowed from biology, is described simply enough by Luhmann as "self-production." Because there is no way to distinguish law as "an object of observation and description[,]" law must be described as a system which "produces by itself all the distinctions and concepts which it uses[.]" Operative closure is closely related and "means only that the autopoiesis of the system can be performed only with its own operations." Finally, as all systems are defined by the system itself and the system's environment, society is defined by Luhmann "as the environment that makes such a self-production of law possible and, moreover, tolerates it."In order to communicate with its environment, the legal system (or any system) must resort to what Luhmann calls "structural coupling," a process that triggers "irritations, surprises, and disturbances[.]" Luhmann notes that the term "irritation" is "mutually inclusive" with the term "structural coupling." He compares the idea of structural coupling to sensory structures in biological organisms, and further illustrates the concept by describing how these structures reduce complexity to allow for an organism to function in its environment: "Brains with their eyes and ears are coupled with the environment only in a very narrow physical range of frequencies within a given band (and at any rate not by their own neurophysiological operations). And that is exactly why they sensitize the human organism to the environment to an improbably high degree. Reduction is a necessary condition for the ability to resonate; reduction of complexity is a necessary condition for building complexity." For Luhmann, complexity and modernity are inextricably bound with the legal system: "Here, as in so many other functioning systems, the detour via the separation of `persons', and the semantic correlates of modern individualism, prove to be a precondition for the formation of complex functioning systems and their ability to control decisions of inclusion and exclusion." In discussing the improbability of these developments, Luhmann describes a process of alienation / reconciliation whereby the law, in order to become a functioning subsystem of society, must compensate (through procedural and substantive mechanisms) for systemic effects that deprive "the individual of all social support by possible allies, friends and relatives, or associations (for instance, guilds) to which he belongs and in which he can earn respect and merit[.]" Evoking the spirit of Kafka, Luhmann illustrates that "[i]n legal proceedings, the individual is at first isolated, confronted with the court, and then referred exclusively to the legal system for assistance." Though the system provides "[c]orrective devices" such as legal aid (procedural) and spendthrift trust funds (substantive) to personalize the law, Luhmann argues that "[t]he differentiation of the legal system cannot be achieved without the decomposition of social ties, obligations and expectations of help." In keeping with this modern sensibility, Luhmann maintains that these developments are strictly evolutionary, random, and without purpose:"Evolution leads--without any particular purpose or telos--to the morphogenesis of systems, which can proceed with their autopoiesis, even when there is a high degree of structural complexity and requisite multiplicity and diversity of operations. . . . Hence, what stands out, quite clearly, is that the development of higher complexity is triggered off unwittingly, and that the evolution of the legal system is a good example of this process."Despite his denial of any telos to society's or the legal system's development, Luhmann's discussion of the traditional conflict between theories of natural and positive law is more nuanced than one would at first imagine. Luhmann clearly dismisses natural law as both an actual or theoretical possibility: "[A] legal system that acknowledges another law that does not need to be grounded in positive law, alongside positive law, provides a reason for resistance to positive law. Understandably, most refrain from such a proposition--with the exception of some extreme theories." Yet despite Luhmann's claim "that the conditions for an idea of justice based on natural law have vanished" and that "the glance heavenwards . . . has lost all meaning[,]" Luhmann refuses to fully embrace legal positivism: "The concept of positivity suggests that it can be understood

through the concept of decision. Positive law is supposed to be validated through decisions. This leads to the charge of `decisionism' in the sense of a possibility to decide in an arbitrary fashion, dependent only on the coercive force behind such decisions. Thus, this leads in fact to a dead-end; after all, everybody knows that in law decisions are never simply made arbitrarily. Something went awry with this line of reasoning, and we must assume that the mistake is related to the insufficiency of the concept of positivity."Indeed, in distinguishing between legal coding and programming, Luhmann argues that the solution falls outside this natural / positive distinction entirely: "The issue is no longer a hierarchy of eternal law, natural law and positive (changeable) law, but in a way, the theory outlined here offers an alternative to this: invariance and inalienability are represented by the code, changeability--and in this sense, positivity--is represented by the programmes of the system." The concepts of legal coding and programming are central to Luhmann's definition of the legal system. Coding is simply the binary valuation, articulated by the legal system through its own operations, between "legal" and "illegal." This coding produces a paradox that is only resolved through legal programming: "Since the values legal and illegal are not in themselves criteria for the decision between legal and illegal, there must be further points of view that indicate whether or not and how the values of the code are to be allocated rightly or wrongly. We shall call these additional semantic elements (in law and in other coded systems) programmes."Despite the fact that the question of "whether it is legal or illegal to distinguish between legal and illegal" is "trivial" to lawyers and logicians, Luhmann finds this paradox to be "a blind spot, that is, a (non-rational) condition for [the] possibility" of the legal system. For Luhmann, the crucial quality of the modern legal system is that "the question of the unity of the code . . . has been . . . made invisible." Programming, "the other side" of the coding form, compensates for this "non-ambiguity of the code" by directing "the allocation of the values legal and illegal." Luhmann says that "codes generate programmes." Essentially, the law's binary code and its operative closure generate a paradox of ever-receding distinctions: "[C]odes are distinctions, which can only become autopoietically effective as distinctions with the help of a further distinction, namely the distinction between coding and programming." "Trivial" objections from lawyers and logicians aside, this ever-receding difficulty encompasses the fundamental paradox of law, the problem of "decisionism" as alluded to earlier, the invisibility of the code's unity, and the ultimate form which the law assumes as a subsystem of society:"[A] decision is a paradox . . . . Authority, decorum, limitation of access to the mystery of law, texts to which one can refer, the pomp of entries and exits of judges--all that is a substitution at the moment at which one must prevent the paradox of decision-making from appearing as a paradox, so as not to disclose that the assumption that one could decide legally about what is legal and what is illegal, is a paradox as well, and that the unity of the system can be observed only as a paradox."

Modern systems theory provides a new method for the analysis of society through an examination of the structures of its communications. In this volume, Niklas Luhmann, the theory's leading exponent, explores its implications for our understanding of law. Luhmann argues that current thinking about how law operates within a modern society is seriously deficient. He lays out the theoretical and methodological tools that, he argues, can advance our understanding of contemporary society and in particular of the identity, performance, and function of the legal system within that society. In systems theory, society is its communications: they are its empirical reality; the items that can be observed and studied. Systems theory identifies how communications operate within a physical world and how different sub-systems of communication operate alongside each other. In this volume, Luhmann uses systems theory to address a question central to legal theory: what differentiates law from other social practices? However, unlike conventional legal theory this volume seeks to provide an answer in terms of a general social theory: a methodology that answers the question in a manner applicable not only to law, but also to all the other complex and highly differentiated systems within modern society, such as politics, the economy, religion, the media, and education. This sociological approach offers profound insights into the relationships between law and other social systems.

"That a major volume bringing together his [Luhmann's] ideas has been made available in English is both very welcome and potentially influential" -Cambridge Law Journal"..an important analysis about the way in which law operates asa distinctive social system..the analysis of the book illuminates legal practice" -Cambridge Law Journal"..it is a 'must read' for serious scholars.." -Cambridge Law JournalAbout the AuthorPrior to his death in 1998, Niklas Luhammn was Emeritus Professor of Sociology at Bielefeld University. This work has been translated from the original German by Prof. Alex Ziegert, and edited by Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert.