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The Critical-Systemic Approach to Law in a World Society

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Nowadays, pretentions claiming to have a privileged access to reality and to provide the right solution to the numerous complex questions that we are faced with –are very common. We consider those pretensions to be too ambitious and flawed, thus preferring to adopt an "epistemological democratic" standpoint.[1] This means that we have to promote a wide debate in order to include the greatest number of positions and to gather the best aspects from each one in order to build appropriate answers to those questions.[2] Several social theorists, including K. Popper and J. Habermas, would agree on this assumption too.

As Habermas (1987, 1989) points out, a change in modern moral consciousness has overcome the Kantian straight separation between the fields of law, morals, politics etc., that now (re-)articulate on another level, without losing their autonomy . This new consciousness differentiates norms, justificatory principles and procedures to (self-) regulate and (self-) control their adequacy to each other. So the legitimacy of law depends most of all on the procedures, as far as their outcomes conform to one of the possible contents of the principles and norms, to be compatible with basic values such as rationality, democratic participation, pluralism, economic efficiency. Such values are already pursued in the design of those procedures[3]. At this point, we should mention, with emphasis, the sayings of the Frankfurtian legal philosopher R. Wiethölter (1989) according to whom in post-industrial society we find the most distinctive feature of law to be its "proceduralization" (*Prozeduralisierung*).[4] If we accept this view, it would mean that M. Weber's thesis defending that law in modern society was essentially formal, due to the prevalence of general and abstract norms opposed to more substantive ones in pre-modern societies - is no longer adequate to describe law in today's postmodern society. Nowadays, the major problem is not the protection of individual liberty against arbitrary action of the State, but the enforcement of collective interest by the State and social agencies. In attaining those collective interests, there are also public and individual interests to be respected, but to assure that respect thoroughly by general and abstract statutes in advance is very hard, if not impossible. -. There must be a case-by-case, contextualized consideration. Therefore, the best we can do is to ensure fair procedures, in order to achieve decisions that are shaped to consider all conflicting interests and/or

[1] What I wish to stress here is the fact that in postmodern society there is a plurality of equally valid descriptions of it - and prescriptions based on them -, which to a certain degree can be combined to give a more adequate - by being more comprehensive - solution to social problems. (In this sense, Luhmann, 1991: 44, 55 *et seq*., and Habermas defend that, nowadays, there is a development and improvement of the modernity calling this phase "middle modernity". In fact, they call "middle modernity" to what I consider to be the end of it

[2] What is meant here is not the "end of ideology", but, on the contrary, the assumption of a new type of ideology, a (self-) consciously assumed ideology, opened to include assumptions of other ideologies. We might call this type of ideology a "super-ideology" and correlate it, for instance, with what I called in a previous essay "inclusive theories" in legal epistemology. (See Guerra Fo., 1989.)

[3] (See further R. Alexy, 1987; E. Denninger, 1989: 481; R. Dworkin, 1978: 22 ff., *passim*, 1985: 72 ff.; J. E. Faria, 1991: 143 ff.; Gomes Canotilho, 1990; W. Guerra Filho, 1991: 195, 1992; Ch. Joerges, 1989: 627 ff.; Luhmann, 1990: 192; Rawls, 1972: 197; Teubner, 1984: 109 ff.; and the special issue on "procedural justice" of Zeitschrift für Rechtssoziologie, 1993.)

[4] See here what Roberto M. Unger (1976: 192 ff.) states for the "Postliberal Societies". Notice also the importance that Trubek/Esser (1989: 126 *et seq*.) assign to legal processes in their defense of "Critical Empirism".

values.[5] The concept of "proceduralization" is congenial to Luhmann's thesis on "legitimacy through procedure" and might very well be understood as a "call to judicial responsibility" (Drucilla Cornell, 1992). "The Court, competent because of its expertise, or the highly specialized administrative body, comes to a policy decision only after a thorough discussion of possible consequences with representatives of the interests concerned" (Kübler, 1987: 234). This occurs mainly through "balancing" (*Abwägung*) these interests and/or values according to a "principle of proportionality" (*Grundsatz der Verhältnismäßigkeit*).([6]) As Wiethölter (1986: 66) explains, "[i]n the fundamental legal principle of proportionality I have sought to define the most influential machinery of transformation for the osmosis, translation, and covariance of law and society, as the supreme and most general productive principle of an - admittedly silent, and absolutely unavoidable - justification of conflict rules for the decision of conflicting rights, interests and needs".([7])

The legal system functions with its own (binary) code, that is to say, in the determination of what is legal viz. right (Recht) or illegal viz. wrong (Unrecht), so that there is no need to import criteria from other systems, although those are connected with the legal system by means of procedures of many sorts - legislative, administrative, contractual and judicial -, which are essential to the system's operations of juridical self-reproduction (= "operational closeness", *operative Geschlossenheit*).([8]) The autonomy of the system is a condition for the possibility of its connection with other systems, that is to say, for its "openness" (*Offenheit*). (See Luhmann, 1987: 603 ff.; Neves, 1992: 36 *et seq*.)

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[5] Nowadays, those procedures have to be shaped anew in order to adjust to collective demands presented by social movements, which are so organized that we can speak of them as being a "collective subject" (Souza Jr., 1991: 131 ff. See further Rojas Hurtado, 1992; Paoli, 1992, and, for a support from the autopoietical theory of law, Teubner, 1989).

[6] See, v.g., R. Alexy, *op. cit.* In the self-definied as post-modern legal theory of K.-H. Ladeur (1983, 198 5) the *Abwägung* is considered as the most distinctive characteristic of legal paradigma nowadays, since it permits to bring the (individual) solution that each (individual) case deserves. M. Neves (1992: 43) accurately observes that "in der paradoxen Perspektive des Postmodernismus ist das allgemeine Paradigma (die Abwägung) die Negation von allgemeinen Paradigmen". But Ladeur follows here one of Luhmann's main course of action: the willingness to generate paradoxes to make a theoretical creative use of them, by transforming them in tautologies, in order to make our representation of the already (hyper-)complex reality we are faced with even more complex . (See Luhmann, 1986: 15 ff., 1987', 1988', 1990': 716, and, for the paradoxal viz. antinomic nature of self-referential systems, Varela, 1975.)

[7] This is not the place to develop, in its whole extension, the theoretical features of this principle. A previous study (Guerra Fo., 1989') has shown, for example, that it might be seen as a "principle of principles", since it can equate the problem of conflicting principles in a concrete (hard) case. This means that it can make a "hierarchical loop", i.e. from the highest point in the legal order's "pyramid" it can go to its very bottom and be used to validate different (judicial, administrative etc.) decisions in different situations according to the same set of rules, thus implementing the circular and "topical" kind of legal validation that is needed in today's hyper-complex societies. Last but not least, as Broekman (1992: 178 et seq., passim) asserts, "proportionality", "balancing", equilibrium is congenial to the (legal) understanding of justice and the necessary counterpart of a "poetic justice", to attain the "beauté géométrique" of a "juristic art" (Commaille, 1992: 35).

[8] As G. Teubner (1987: 20) exemplarily formulates, "[t]he more the legal systems specializes in its function of creating expectations by conflicting regulation, the more it develops and refines norms and procedures, which can be used for future oriented behaviour control. This can only be formulated in the following paradoxical terms: *Law, by being posited as autonomous in its function - formality - becomes increasingly dependent on the demands for performance from its social environment - materiality*". (Emphasis as in the original) Proceduralization, toone's view, represents the way out of the aporetical conflict between the modern feature of formality and the pre-modern materiality of law in postmodernity. (See for a dissent understanding Blankenburg, 1984, and the reply of Teubner, *ib*.)

In the maintenance of the legal system's autonomy, the judiciary is above all supported by a "cognizing unit" called legal doctrine.[9] This unit is absolutely necessary to the autopoiesis of social systems, since it is responsible for its self-observation (that is, for instance, what makes social systems differ from biological or chemical ones - Luhmann, 1987: 64) and for the recognition of the elements that are from this specific system - and not from another one, placed in its environment (see Luhmann, 1987: 60 ss.): "Auch die Beschreibung des Rechts muß noch rechtliche brauchbar sein" (*Id.*, 1988: 13). Critical theories contribute to improve and enhance this process of the system's reflexive self-observation, thus contributing to its operational closure. (See *Id.*, 1991: 277.) The same happens with jusnaturalistic and axiological theories, which do not have to be rejected by the (autopoietical) systems theory, but rather included in its more comprehensive theoretical framework.[10] (See *Id.*, 1988: 15 *et seq.*)

Legal theory not only improves the interpretative apparatus used by judicature, but it also furnishes interpretations that can possibly be adopted by judges, and by doing so helps them to fulfill their fundamental task of defining the conflicts and solutions that are to be seen in accordance to the law, by modelling a specific juridical perception of social reality.[11] "These perceptions differ significantly from our day-to-day understanding of these phenomena as well as from sociological or economic theories. The legal system develops certain specific social constructions of reality (Berger and Luckmann) in order to decide social conflicts under the guidance of legal norms. In creating its own reality from the perspective imposed by the exigencies of conflict resolution, the legal system disregards highly selective models of the world, thereby neglecting many politically, economically, and socially relevant elements" (Teubner, 1983: 279).([12])

The legal system appears as one of the "functional systems" of the social system as an all with the task of reducing the complexity of the environment engrossing the entirety of social behavior, by guaranteeing a certain congruence between the expectations of how the individuals are going to behave themselves, and the generalization of these expectations, by being immune to the danger of

[9] Perhaps because he was aware of this state-of-affairs,E. L. Rubin (1988) advances his thesis of the "unity of discourse" between judicature and legal scholarship.

[10] Here we must remind that the conception of "society as a system" is considered by Trubek (1990: 5) as "a major advance in legal thought" brought to North-America by the law and society movement, what makes it congenial also to the critical tradition.

[11] The "alternative use of law" by the *Magistratura Democratica* in Italy and the more recent "Alternative Law Movement" in Brazil are examples of the impulse that a theoretical conception may give to change the legal order through a divergent interpretation by the judicature. (See Arruda Jr., 1993: 169 ff.; Bergalli, 1991: 17 ff.; Capeller, 1992: 370; Faria/Campilongo, 1991: 116 *et. seq.*)

[12] As P. Barcelona (1994: 105) points out, referring to Luhmann's theory, in a critical, but accurate manner, "*non esistono* infatti per il sistema *nessi causali oggettivi*, giaché è `il sistema stesso che sceglie criteri per risolvere i propri problemi interni', formando in tal modo `una certa interpretazione del reale'. Il sistema è una trama d'istituzioni che selezionano le possibilità indeterminate dell'ambiente e le trasformano in alternative e strategie compatibili con gli obiettivi della stabilizzazione e della conservazione". But here is necessary to recall that, according to Luhmann (1982: 137; 1986': 112, note 2), the purpose of autopoietic systems' theory is not to support the static conservation of society's identity, but it rather reaches to stimulate autonomy and evolution to a stage of dynamic stability. And as he also asserts, changes in social systems "will always require operating within, not against `the system'" (*id. ib.*: 135). In this context, might be also of interest to remind that the thesis of the production of reality as being a feature of the law is sustained by Edelman (1973) in a classic work of the French critical tradition. In the North-american critical tradition the notion of "discursivity" (see Trubek, 1990: 34 *et seq.*) could also be correlated to this. The same idea seems to be central in the interpretative approach from the socio-legal research (see Harrington/Yngvesson, 1990: 144 ff.) and from the legal anthropology (see L. Assier-Andrieu, 1989: 29 *et. seq.*; C. Geertz, 1983).

disappointing themselves. The juridical system, for Luhmann, integrates the "immune system" of the societies, inoculating them from the conflicts between its members, already appearing in other social systems (politics, economy, family, etc.). This, however, is done not by the negation of the conflicts, that is to say, against the conflicts, but with the conflicts, just as the living organisms immunize themselves against diseases caused by their germs. Furthermore, the complexity of the social reality, with its extreme contingency, is reduced by the construction of a supra-reality, codified from the "law/no-law" binary scheme, where conflicts which are not conflicts for the law are foreseen and solutions that can form the law are offered. (See Luhmann, 1988: 507, 509 ff.; 1972: 40 ff., 104/105). Gerhard Roth (1987: 414 ff.) shows that this construction of a supra-reality, the Wirklichkeit, of reduced complexity, above the reality itself, the Realität, is already done by the nervous system itself, allowing Man to make prognoses and make complex decisions, "so that he does not work with "raw data" but with already elaborated data..." (p. 415).

Law, then, develops itself by reacting only to its own impulses, although it is stimulated by "irritations" arising from the social environment. "Even the most powerful pressures will only be taken into account and elaborated juridically in the forms that they appear in the internal "screens", where the juridic constructions of reality (rechtlichen Wirklichkeitskonstruktionen) are projected. In this sense, the great social evolutions `modulate' the evolution of the law that nevertheless, however, follows its own logic of development." (Teubner, 1982: 21. See also *id*.,1983: 249.).

In order to develop, Law, obviously, needs elements of the environment just as all the systems do. The existence of a legal order regulating behaviors requires not only norms to regulate the legal order itself but also the behaviors that establish these norms. Naturally, due to the autonomous nature of this order, the behaviors that establish new norms are already regulated by previous ones.

Aware of this circumstance, present in the legal orders of contemporary States, Hans Kelsen, in his influential "Pure Theory of Law" (1960), introduces the difference between “static" and "dynamic" systems in the legal order. The “static” systems would have "norms regulating behaviors" and the “dynamic” ones would have, in return, "behaviors producing norms", observing norms that regulate them, (self-) regulating this normative production. Then, the behaviors that produce norms, are elements of the environment, originating from another system, a conductive system (Handlungssystem), but that obtain objective juridic significance when this conductive system refers itself to a legal norm, meaning that it could have resulted in another norm. Thus, Kelsen (1960: 2) illustrates this scenario as follows: In a room, people are debating; some (the majority) raise their hands while others remain impassive, watching "from outside", this is what happens in a House of Representatives. "Inside" the juridic system, however, it is said that Law was voted, in accordance with the established procedures of the Constitution, in the House of Representatives, etc, and law was then (self-) produced.

There is a legal organization producing the elements (legal acts, legal norms) of its structure, by the relations that are established among them, forming units (the "Federal Laws" of a country, the norms of Private Law, etc.). Thus the legal system is autopoietic and distinguished from the others.

In order for law to come to be constituted as an autopoietic system, the formation of fixed units was of essential importance. These fixed units can generally be called "procedures". One of the great merits of Kelsen's "pure

theory", as Luhmann (1969: 11, note 2) points out, lies in turning the attention from legal theory to the study of this procedural dimension. In fact, it includes these norms which Herbert Hart (1961: 77 ff.) calls "secondary rules", for being norms that refer themselves to other norms, either to determine if a norm belongs to the system, when it is a "rule of recognition", or to discern how to remove or add a norm to the system (= "rule of change"), or even to regulate the application of a norm in a litigation (= "rule of adjudication").

In the society, Law, with great functional differentiation among its internal systems, remains autonomous before the other systems - such as the moral, the economical, the political, the scientific ones - to the degree which it continues operating with its own code, and not by the criteria provided by one of the other systems. At the same time, the legal system is still to achieve its structural union with other social systems in order to adopt others systems of different nature (moral, political, economic, etc…) and this can be achieved without losing its components. , It is necessary to recognize the one that develops the most number of juridical reproduction procedures: legislative procedures, administrative, judicial, and contractual procedures.

Those procedures are instituted for (self) regulation and (self) control on the foundation of some of the possible contents of the legal norms, so they can be appropriate to respond to social needs of rationality, democratic participation, value pluralism, economic efficiency, etc. The juridical procedures shall be structured to meet these needs from the start, because, in today's most complex societies, it is no longer possible for law to limit itself to being formally dedicated to these needs. In fact, one cannot expect that the law will completely fulfill these social needs. (See, v.g., Teubner, 1984: 109 ff.) We mentioned this point already, when examining the role of judicature in the legal system.

The conception of legal order as an autopoietic system does not fit the reality of (semi-)peripheral modern or (peripheral) traditional sectors of societies and/or social groups, (*e.g.*, Adeodato, 1991: 112) and that is mostly because of their low level of social integration (Neves, 1992: 155 ss., 210; Ribeiro, 1992: 79).[13] But as long as a legal order is not only a reality, a *Sein*, but it also builds an ideality, a *Sollen*, the theory of autopoietic legal systems furnishes an important knowledge about the possibilities of law in peripheral parts of the global postmodern society, that is to say, about how it could - and should not be. This may lead to a critical (normative) use of this kind of socio-legal study (descriptive and constructivist).[14]

If, according to C. Geertz (1983: 173), "as any other trade, science, cult, or art, law, which is a bit of all these, propounds the world in which its descriptions make sense", so that it is "a distinctive manner of imaging the real", then the theory of autopoietic legal systems is a way of imaging this "manner of imaging the real". Its universalistic viz. "holistic" (in the sense of "non-redutionistic") nature can easily induce us to consider it as a sort of "Grand Theory" or, using R.M. Unger's terms (1987: 37 *et seq.*), a "deep-structure theory", when our point is that we would do better using it as a "proto-theory", *i.e.*, "a body of ideas that can serve as a point of departure to different views of social reality and possibility" (*id. ib.*: 528). Such a

[13] Luhmann is aware of this circumstance, as he shows when he states that since (post)modern (world) society "depends more on self-regulative processes than any other previous society (...) it cannot afford a high degree of social integration" (1982: 133).

[14] An example might be seen in the work of Marcelo Neves (1992: 182 ss., *passim*), when he identifies the lack of legitimation in Brazilian Constitutional Law for problems in its "self-reflection" and self-reproduction as an autopoietic legal system.

sociological theory of law represents an attempt to escape the present "exhaustion of paradigm" (Abel, 1980: 826) in this field - and, by so doing it opens this paradigm to an unprecedented interdisciplinary dialogue.