LUHMANN, Niklas, "Positive Law and Ideology" *in*: ID. *The Differentiation of Society*, New York, Columbia University Press, 1982, pp. 90-121 (publ. orig. em alemão : 1967).

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Positive Law and Ideology

I. Action Theory and Systems Theory

During the last two hundred years, our confidence in the ability of the law to order social and political reality has decreased to a surprising extent. The grand age of natural law, with its attempt to depict the relation between man and society as basically a legal one, now lies far behind us. Not even Marx's ambivalent attitude toward the problem of law and ideology can be adopted with any conviction. Marx viewed law as the tool of an ideology, as an expression of the economic interests of a ruling class, and yet he believed that simply by altering the law and permitting expropriation a social revolution could be achieved and a social order free of ideology could be established. Since then, sociological theory and research have greatly enhanced our insight into the complexity of social systems—so much so, in fact, that it is now almost impossible to locate the essence and the distinctive features of different social orders in particular aspects of the law. Too many variables are involved, of which law is only one. A sociological theory of law is thus long overdue. Clarifying the relation between law and ideology could be one of its main tasks.

In order to get at the origin of this development, in which law has dwindled to being one source of order among others, we must look back at the period before the heyday of natural law. We must ask whether at the beginning, in the legal thought of classical Greece, decisions were not made that today make possible an opposition between law and ideology and that let the relation between them appear as one of either causal or normative domination. Greek thought went beyond traditionally sanctioned law by looking for its underlying principle, and this principle of justice was characterized, mythically but also rationally, as equality. This was an idea of great indeterminacy, leaving wide latitude for interpretation. It could have led to a structural theory of society. But with Aristotle the path from mythical to rational thought took a different turn. Both the theory of justice and the theory of society were worked out on the basis of a theory of right action, and the rightness of an action was judged according to its culmination, its goal.* The detailed development that the concept of justice then underwent depended upon its having been made a part of ethics. This explains why the description of politically constituted society was approached from the viewpoint of a theory of action: only in relation to the goal of an individual's action do other men appear as threatening or cooperative. On the basis of this approach, traditional political philosophy acquired its two chief problems of "threat" and "dependence," its conception of needs (*metus et indigentia*) and its conception of the corresponding goals of politically constituted society (*pax et justitia*). With changing emphasis, these conceptions have shaped the history of legal and political thought and are still to be found in sociology as in the contrast between cooperation and conflict. Binary concepts of this sort betray an approach based on a theory of action.

Nevertheless, even this narrowing of focus allows more complexity into social theory than can be handled with strictly logical means. As a result, the significance and the goals of human action have for a long time formed an object-domain unamenable to treatment by the exact methods of scientific knowledge. Finally, in modern times, under the pressure of increasing demands for intersubjective verifiability, the possibility of acquiring truth in this area has been altogether lost: the goals of human action cannot be

* With a few exceptions we have translated "*Zweck*" by "goal" in this essay. [translators' note]

proven true or false. In place of ethical theories of society that attempted to attribute to the agent goals and right action there have arisen new theories that seek to show that the existence of society is independent of the "subjective" goals of individuals. In addition, theories have been proposed that seek to explain causally the positing of goals, and thus to unmask them as ideological. The aim of this line of thought is to reduce the orientations of the individual agent to his economic interests or his "objective situation," and to explain law in a given society as a product of ideology.

However, no essential progress is made by causal explanations of this sort. Even if particular causal dependencies can be established, with some degree of plausibility, between ideas and their material situation, the form of these dependencies (i.e., the statement of an invariant relation between particular causes and particular effects) is much too simple to do justice to the very complicated structure of modern societies. The critique and unmasking of someone's naïve faith in his own goals does not suffice, when it consists only in uncovering latent causes: a simplified idea of one's plans and their justification is indispensable for all action. Its naïveté—that is, its capacity to obscure other possibilities—provides an equally indispensable defense for the motives of action. The reason for this lies in man's limited capacity for processing information, in his limited potential for grasping and reducing complex situations.[1] Once we accept this, we shall no longer be tempted to base legal and social theory upon a concept of action, for this concept offers only meager resources for handling complexity. Instead, a theoretical framework must be sought which will allow us to overcome the experiential limits of the individual agent and to grasp a higher degree of complexity. The modern theory of social systems seems to have been moving in this direction.

By employing ideas worked out in the general theory of systems and in cybernetics,[2] we can define social configurations as systems that, in an inordinately complex environment, hold constant a less complex network of expectations and that are thereby able to orient action. Because of the way actions are meaningfully related to one another and reinforce one another's selectivity, systems can be maintained as frameworks for orienting action, even though their complexity is less than that of the environment. In social systems thus defined, positive law and ideology acquire the function of reducing the complexity of the system and its environment. They form a system-structure complex enough to enable the system to survive in its environment. At the same time they make possible a meaningful orientation of experience and action along the lines laid down by the structure.

We have now established an analytical perspective within which positive law and ideology may be compared. But we have still said nothing about the relation between them. We shall go on to assume that this relation hinges on their both being problem-solving institutions, but we have yet to settle how these institutions function and what systems they require and develop. These last questions must be answered first. We must clarify the functions and modes of functioning that belong to positive law and ideology, as well as the preconditions for these mechanisms, before we can decide what relations obtain between them.

II. Positive Law

It is probably no accident that at the same time as the concept of value began its philosophical career, the suspicion of ideology arose to become nearly universal *and* (for the first time in history) law became positive, or in other words was handed over to the decisions of the political system. The simultaneity of these events suggests the hypothesis that connections may be found between ideology and law, or more exactly, between the ideologization of what today are called "values" and the positivization of law.

Such a connection cannot consist in any thorough-going identity in their content, for this would imply a fusion of law and ideology. One need only select a legal document at random and try to tease out of it, paragraph by paragraph, its ideological content. The difficulties encountered would make the difference between law and ideology painfully obvious. What is common to both law and ideology must be sought at a much more abstract level. It lies not in their content, but in their form. Positive law and ideology resemble each other in that each naturally implies a characteristic distance toward itself. This formal equivalence or structural analogy must

now be worked out in detail. Only in this way can we hope to understand why both arose, and arose at the same time. For it may well be precisely this self-distance that was needed in society and was thus created.

Positive law is made valid by decisions: a law of any content whatsoever can gain legitimate legal validity; and the same decision that makes the law a valid one can also withdraw its validity. At first sight this seems a rather implausible postulate—not only for jurists, but most of all for sociologists.[3] Nonetheless, it has become so much a reality that it dominates and characterizes our law.

For this reason, it is extremely interesting to ask how in general positive law is possible and under what preconditions a society can run the risk of making its law positive. For us, the foundation of law can no longer be located in a supreme natural law that exists objectively and through its objective truth is permanently binding. The stability and validity of the law no longer rests upon a higher and more stable order, but instead upon a principle of variation: it is the very alterability of law that is the foundation for its stability and its validity.

Accordingly, we cannot properly grasp the nature of positive law, if we continue to conceive of it as the lowest rung in a hierarchy of legal sources and materials, as what is left over now that the higher levels have fallen away. The concept of legal positivity must instead be based on a theory of the decision-processes involved.

When we analyze the decision-process underlying positive law, it is at first surprising to note that to a significant extent decisions are made not only about actions, but also about decisions themselves. Obviously it is not possible to take account of all necessary considerations within a single decision, however difficult or protracted. Decision-making procedures get divided up into a number of decisions, some of which provide premises for the others. Decision-making is distributed through a division of labor. That makes sense, of course, only if the burdens of decision-making are also distributed, so that each decision does not require a reprise of the previous considerations. Thus, for example, in enacting a law all the situations in which it is to be applied do not have to be foreseen and thought through, and likewise in the interpretation of a law all

the alternatives considered while the law was being passed do not have to be reviewed once again.[4]

Cooperative decision-making is always advantageous, or even necessary, when decisions must be made in highly complex environments. This is so for a variety of reasons: when a choice must be made from among a great many possibilities, when the necessary conditions for consensus among a large number of persons are unclear, when long-term decisions must be made without examining all relevant factors and without excluding possible changes that may become necessary, or when material, social, and temporal complexity all come together. Such environments demand that the decision-making process have a complex organization, just as only systems with such an organization are in the position to have a very complex environment and to survive in it.[5]

To master a high degree of internal complexity, the effectiveness of social processes must be strengthened by having them applied to themselves or to processes of a similar kind. For example, such a system must be able to define concepts (thus to speak about words), to use money (thus to exchange possibilities for exchange), to learn how to teach or to learn itself, to overpower the holders of power, to do research into the nature of research and, as already mentioned, to make decisions about decisions. Processes that are applied to themselves and whose effectiveness is thereby reinforced can be characterized, by virtue of this common structural feature, as reflexive mechanisms (Luhmann, 1966a). Making decisions about decisions, in other words, is only a case of applying a much more universal structural principle. And within the framework of this reflexive sort of decision-making we meet an even more restricted case of application in the normative regulation of the formation of norms. It is this last form of self-reflexivity that makes possible the positivization of law.

In social orders with positive law there must be a layer of norms addressed to the decision-making organizations and that regulate the process of formulating norms. (They cannot, however, either shape or justify the content of the norms produced.) These are, for example, procedural norms or norms stipulating the minimal conditions under which an emerging legal idea can become a norm.

Even these procedural norms for formulating norms can and must become part of positive law. Once the principle of variability begins to dominate the legal order and the structures of the affiliated roles, a guarantee for the validity of law can no longer be found in norms having an unalterable traditional or natural validity.[6] The structuring function of norms for formulating norms demands only that these procedural norms be treated as constants in the course of the procedures that they regulate—even if at another time they could be replaced or altered.

Under these circumstances the stability of a social order secured by law must be ensured, above all, by political processes. Stability becomes a permanent problem. Therefore, politics can no longer be conducted haphazardly, by amateurs, or on the basis of a heterogeneous status-system (e.g., familial, religious, or economic). It must be organized through political parties as a form of professional work. Whenever the decision-programs of a state bureaucracy as well as the conditions for political support are institutionalized as variable in principle, their coordination becomes a problem that can no longer be solved solely through institutional guarantees. Instead, it remains a continual task that requires a very special institutional order.[7]

An additional stabilizing factor can be found in the discrepancy between the complexity of the whole legal code and the scope of individual decision-making processes. Complex legal orders exclude the possibility that everything can be altered at once.[8] Every meaningful change in the law must take existing law into account. Every innovator, so long as he does not turn as a revolutionary against the whole order, must set aside time to learn about the legal system. And these learning periods are periods of socialization, in which the existing order is by and large accepted.

As a third stabilizing factor we should mention the fact that subjective rights (or at least a monetary compensation for their violation) are guaranteed. This is what makes the rapid fluctuation in legislation tolerable in the first place. The independence of this guaranteed protection of rights from the mode in which law is grounded (subjective rights remain valid in both natural right and positivistic legal systems) belongs among the decisive achievements of modern legal thought. Without it, a full positivization of law would not have been possible.[9]

Nonetheless, despite all this, the continuity of particular values in a stable legal and social order is not guaranteed. Here we come upon the problem of ideology that must be clarified before we can pose more fundamental questions about the character and the conditions for stability of a social order employing reflexive mechanisms.

III. Ideology

Whereas the positivization of law is made possible by a normative regulation of norms, the function of ideology has to do with an evaluation of values. A value can be defined very generally as any point of view specifying which consequences of action are to be preferred to others. Values become ideological once this selective function in the orientation of action becomes conscious and is used in turn to evaluate values.[10] Values are then evaluated according to what specific action they select, and in this function they themselves appear to be substitutable (Luhmann, 1962; Friedrich, 1963). As soon as we have understood this function of values, it becomes a standard for evaluating values themselves. "Absolute" values are now conceivable only as values without a function. Thus they discredit themselves.

Just as in legal theory we must free ourselves from the prejudice that the permanent is better than what is subject to change and that natural law is better than positive law, so in value-theory we must free ourselves from the prejudice that permanent values are more valuable than those which can be cited only as a temporary basis for action. The former are supposed to take precedence in cases of conflict. But why? An evaluation of values according to an intrinsic and stable hierarchy of values is impossible (Braybrooke and Lindblom, 1963). Who can claim, unconditionally and universally, that culture is a greater value than hygiene, or freedom a greater value than peace? If an ordering of values is going to cross the lowest threshold of minimal complexity, it must become opportunistic. It must foresee the possibility of varying the order of values according

to what actions are possible or urgent and according to how much the various values have been realized. The function of ideology is to make these variations possible. This function corresponds to the normative regulation of norms in the legal domain. It is structurally analogous and necessary for similar reasons.

On a closer inspection, it becomes clear that at least two things are required. An ideology must be able, first of all, to direct the choice of value-programs and the corresponding sacrifices and renunciations as well as to regulate the substitution of these programs. To this extent ideology has a pragmatic or instrumental function. In addition it must secure the consensus of those who will have to wait with their own values. An ideology must provide them with the certainty that they, too, will get their turn. To this extent ideology has a symbolic or expressive function.[11] In complex systems that can satisfy many values (although not all at the same time) these two functions tend to diverge.[12] They must then be reintegrated through the symbolic structure of an ideology, so that the long-term and roundabout realization of values can be both regulated and legitimated on this basis. Ideology differs from rationally developed decision-programs in that it seeks to orchestrate the distribution and redistribution of benefits and burdens by appeal to a symbolic system that is both strongly expressive and open to consensus. This is how it tries to evaluate values. In other words, ideologies are to be understood as symbolic structures that allow the formulation of values to become reflexive and thus increase the scope and the complexity of this aspect of the decision-making process. These symbolic structures must, therefore, allow room for change both in values and in actions, and indeed each must be changeable in relation to the other. This reflexivity is most clearly established in Marxist ideology with the principles of dialectic and the unity of theory and practice.[13] On the other hand, the dangers of unlimited complexity implicit in all mutually variable relations, must be mastered; into an ideology must be incorporated symbols, which are themselves immune to the change of values and which can channel and legitimate such change, without impairing it. Such a foundation, itself not subject to evaluation and so not needing to be reevaluated, can be found in a materialistic philosophy. Not by chance is this ideology par excellence a combination of dialectic

and materialism. Furthermore, the open-endedness and variability of Marxism as an ideology is ensured through the collateral legitimation of an organization, the party, whose job is to continually reinterpret the ideology.[14]

This best known of all ideologies is not the only one in which the problem of the reflexivity of evaluation can be solved. When we submit a problem to functional analysis, we usually come upon other possible, functionally equivalent solutions. A very successful alternative ideology has been developed by many multiparty systems. They have turned upside down the reigning value conceptions by reversing political ends and means. It is generally believed that political activity should strive for goals with a definite content. Power, in the form of the competency to make decisions, is given to politicians so that they can realize these goals. The goal of political parties by contrast is to acquire and to hold onto this power, so the content of political programs is chosen in order to bring the party nearer to this goal. The political program is thus viewed as a means subordinate to this end (Downs 1957). This "perversion" makes all values variable and evaluation itself reflexive. It fixes a standpoint from which all values can be understood functionally, that is, from which they can be instrumentalized.

Here, too, the chief problem for such a political order lies in the dangers of an unlimited complexity that (in the end) allows everything to appear possible. These dangers can be circumvented by keeping particular symbols, norms, and institutions politically neutral and aloof from the struggle among political parties; examples would be the organizational foundations of state power, the decision-making activity of the courts, and (of increasing importance) the central banks. An important condition for maintaining the reflexivity of evaluation is that these neutralizations remain formal and do not hinder opportunism in the political readjustment of values. Another surety against the range of possible decisions' becoming completely arbitrary lies in elections. Political parties must adapt, not of course their political calculations, but rather the public presentation of their goals to the presumed will of the electorate. Because they do not know what the will of the electorate is and cannot even shape it ideologically, they interpret it on the basis of the lowest common denominator—materialistically. Thus, a polit-

ical materialism fulfills here a function similar to that of the ideological materialism of socialist systems.

The crucial differences between these two very roughly sketched political orders are of interest in this context only as means of showing how they both institutionalize the political formulation of values as a reflexive process. What seems open to choice is only how this reflexivity is established, and not whether it is established. There must be profound reasons for this fact. To discover them would enable us to clarify why law had to be positivized, that is—why it had to become reflexive.

IV. Reflexivity

The success of a process is enhanced when it is applied to itself, or to processes of a similar kind, before it fulfills its proper function.[15] Social processes capable of becoming reflexive in this way are always based on a selective manipulation of information, and the success of this selection can be increased once the selective mechanism is itself preselected through a second mechanism of the same kind.[16] Along with this increase in selectivity is an increase in the complexity of the situations that a mechanism can handle—precisely because it distributes the reduction of this complexity into two or more sequential stages. Everyone realizes that the number of possible consumer choices is enormously increased through the mechanism of money (the possibility of exchanging possibilities of further exchange). It is equally clear that more decisions can be made when we can decide in advance what decisions will be permissible. Even the power of a system increases when the system can apply power to power, or make the power of some utilizable for the power of others. We can observe this same phenomenon of enhancement in the mechanisms that interest us here: positive law and ideology.

Traditional legal orders, including those based on the idea of natural law, were only able to legitimate decisions that could be represented as an unfolding of previously existing law. It is well known that a demand for this sort of traditionalist foundation does not rule out innovations in the body of law; new law can, for example, be instituted as the restoration of the good old law. But it is equally certain that such traditionalism severely limited the range of possible legal decisions, and thus too the range of possible domains covered by the law. The immense extension of the competence of the law in the nineteenth century could have been attained only through the positivization of law. This development made it possible to bring rapidly fluctuating situations and behavior within the scope of the law. The significance of positive law does not, therefore, lie only in the temporal dimension, in the possibility of replacing old law by new law; instead this very possibility leads to a further restructuring of the content of law. These are, in fact, two different aspects of the same development—an increase in the complexity of the law.

We find the same function in the way the formulation of values has become reflexive: it increases the range of values that can be taken into account in decision-making. The more the elementary needs of life are allayed and the more differentiated society becomes, the more values can and must be satisfied. But then the multiplicity of possible values can only be mastered opportunistically. However, such opportunism should not become an excuse for arbitrariness. It presupposes a conceptual and organizational mechanism for ensuring, among the numerous changes in orientations and preferences, an adequate consideration of *all* values and, to that extent, a minimum of consistency. At the same time, such a mechanism must secure the consensus of those who will have to wait for the realization of their values.

These considerations suggest that the reason for the positivization of law and the rise of ideologies lies in one and the same situation: in an increase in the range of possible actions among which choices can be made, and thus in a heightening of the complexity of society—a heightening that, in turn, is attainable only when more effective mechanisms for the reduction of complexity can be institutionalized. A larger range of possible actions means that a social system has a greater chance for survival, *if* this range of possible actions can be made accessible in an orderly fashion—i.e., if the complexity of the system does not exceed its capacity for processing information. In order to ensure this, numerous social mechanisms must become reflexive.

This thesis is closely related to those theories of social evolution which construe the increasing functional-structural differentiation of society as a key variable for the progress of civilization.[17] But system-differentiation is not, as such, the ultimate, or even a sufficient, explanation. It serves only to increase the range of possible actions in society and, in spite of this higher complexity, to make meaningful action possible. It is a necessary mechanism, but not the sole mechanism that brings this about. The equation between complexity and system-differentiation[18] defines the problem of complexity by referring to a particular way of solving it. This could block inquiry into functionally equivalent mechanisms for the heightening and reduction of complexity. It would be an unfortunate loss for our topic in particular. Reflexive mechanisms, in fact, are just such a functional equivalent. Together with and parallel to social differentiation they fulfill the identical function of heightening the complexity of the social order and, in spite of the inborn narrowness of human perspectives on experience and action, of making meaningful orientation possible.

V. Conditions for Stability

In many cases (e.g., power, money, norms, and values), when a social mechanism becomes reflexive, it leads not only to a heightening of efficiency but also to an increase in risk. That is why the development we have been tracing has usually been accompanied by a concern for the risks involved. Both the positivization of law and the spreading suspicion of ideology were initially perceived as highly dangerous. Indeed, this was the predominant reaction to the problem. Typically evasive responses were the appeal to mysteriously preexistent legal principles (as a flight from the blatant positivity of law) and to nihilism or the renunciation of all values (as an escape from the revisability of values). The underlying worry is comprehensible: how can we trust a corpus of law that can be altered from one day to another, or an order of values that demands a continual reordering of relative preferences?

Nonetheless, once we have recognized that reflexive mechanisms are indispensable for maintaining the present level of social complexity, it becomes questionable whether the particular risks involved can be mastered through recourse to such prereflexive conceptions of order as natural law or eternal values. Indeed, how can conceptions of a lower and rather indeterminate complexity regulate ones of a higher and determinate complexity? In view of the wide range of actual values and norms now involved in practical decision-making, it is increasingly questionable whether principles and ultimate perspectives that can be withdrawn from all variation and relativity will indeed provide an apt instrument for stabilization and control. The expectation that the standard for movement, which itself guarantees movement, is to be found in what is fixed or unmoved becomes itself an ideology.

It is much more important to analyze thoroughly the ways reflexive mechanisms can function and can be stabilized, and thus to locate the risks and problematic consequences that are connected to them. In this way, remedies become visible, or at least a quite acute sensitivity to the problem can be cultivated. We shall then recognize that the dangers in positive law are no longer resolvable in strictly legal terms and that the dangers associated with the relativity of values cannot be absorbed by means of overarching values. For the root of the problem lies precisely in the application of a mechanism to itself. Thus, the question must become one for sociology, which must be capable of determining under what general conditions societies are able to institutionalize reflexive mechanisms.

At the present time, such a question would overtax sociology. Nonetheless, various facets of this issue have been discussed—for example, the problem of how the reflexivity of experience, or subjective self-consciousness, can be institutionally accommodated.[19] The preference accorded this topic stems from the traditional prejudice that thought is the only process that can be applied to itself. Only if the concept of self-reflection is broadened, as it has been here, can we decide in what theoretical framework to pursue answers to our questions.

We can assume that only social systems having a rather high complexity of their own can transform social processes into reflexive mechanisms and stabilize them so that other processes can rely upon them. A high complexity presupposes, for its part, functional-

structural differentiation. A considerable differentiation between functionally specific subsystems in a society—for example, between systems having to do with production and exchange, with religion, with culture and education, with politics, with leisure and entertainment, with the use of force, with health-care, etc.—and the solution of the problems resulting from such a social order, seem to underlie the need for reflexive mechanisms and for their institutionalization. The different reflexive mechanisms presuppose, however, different levels of system-complexity and thus can arise sequentially. A conceptually articulate language is possible before the study of education, money is possible before ideology, bureaucratic decisions about decision-making are possible before positive law, and these last two both presuppose, to some extent, the existence of reflexive mechanisms. Even the reflexive interiorization of subjective experience, so that belief becomes an object of belief, knowledge an object of certainty, and the sentiments an object of feeling, presupposes a certain level of complexity in the social order, for example freedom from fear and need by virtue of reflexively centralized power and money (Elias 1939). Such a sequence of stages is itself an essential precondition for development. If every mechanism presupposed the existence of every other as well as an extremely differentiated society, such a society could never arise. No transitional stages could be stabilized; instead, development could take place only in one impossible leap from a simple to a complex system.[20]

Considerations of this sort have to be pursued, in order to provide an overview of the general social preconditions for the stabilization of positive law and ideology. But this alone is not sufficient. It is also necessary that the subsystem of society that supports and administers both of these mechanisms, namely the political system, be organized around reflexivity.[21]

When a political system admits a high degree of variability in the premises of its decisions, the demands and risks then increase with respect to both of its essential functions—the building of political support and the preparation of binding decisions. Social mechanisms that serve the construction of power positions, the testing and confirming of leadership talent, and the procuring of consensus, as well as processes for readying, issuing, and controlling binding

decisions have to be oriented toward variable premises. Connected with this is a profound restructuring of the political domain as well as important changes in the bureaucratic activities of the legislative, executive, and judicial branches of government. It is not by chance that these changes in the traditional hierarchical structure of the political system have been introduced at the same time as the spread of suspicions about ideology. They are all closely linked to the fact that the political system now claims full authority over positive law.

Because political support now depends on *variable* decision-programs, it can no longer be institutionally guaranteed; traditional or religious forms of legitimate domination can no longer be presupposed. Political support must be continually cultivated, and this work must be organized and its institutional framework secured. This is why political parties arise. On the other hand bureaucratic administration, in the broadest sense (encompassing all powers of the state), must be specialized and rationalized for the carrying out of politically chosen programs. These two demands force a functional and structural separation between politics and administration, since maximal performance can be attained in both areas only through building systems and functionally specific organizations. Such a separation can be quite clearly observed in all multiparty systems: not only roles, but also goals and behavioral expectations are separated in this way, and even the style and criteria of rationality differ in politics and in administration. Indeed, even one-party systems of an ideological stripe, which emphasize the unity of the social order and thus place limits upon differentiation, do not return to the old type of unified social hierarchy. Instead, they consciously separate the party from the state apparatus. Only in developing countries is this separation of roles within the political system feebly developed. A shifting back and forth between political and administrative functions among politicians, the administration, and the army is an everyday occurrence. The diffuseness of this internal differentiation means that such reflexive mechanisms as law and ideology are fragile achievements and fall apart quickly in practice.

We cannot here enter further into the particular problems resulting from this separation between politics and administration.[22] It must be emphasized, however, that both new forms for mobiliz-

ing political support and the variable programming of decision-making must be accommodated by a functional differentiation within the political system. Functional differentiation increases the complexity of the political system. Complexity requires the differentiation of a system from its social milieu and a relative autonomy in the way it governs itself and alters the premises of its own decisions. This leads to a reflexivity of the decision-process and of the processes of formulating norms and values that flow into it. This reflexivity, in turn, requires and reinforces the functional differentiation of the political system. Ultimately, the preconditions for stabilizing positive law and ideology must be located in this circle of interdependence, which lifts the social order (and the political system with it) to a higher level of complexity.

VI. Values and Programs

Whenever law and ideology confront one another in a conceptual vacuum, they inevitably fall to fighting. A battle ensues about which is causally or normatively prior. Moreover, there is then no theoretical framework in which this argument can be settled or simply allayed. In order to avoid the stagnation of such a conflict, we have abandoned this narrow view of the topic and instead traced law and ideology back to what they share in common—their status as reflexive mechanisms. This does not absolve us, however, from the problem of describing more closely the relation between law and ideology.

Here there arises a new difficulty. Within the framework of traditional theories of action it is not easy to draw a sharp distinction between values and norms or between values and goals. The ethical tradition could content itself with a simple distinction between the concrete agent and the normative essence of his action, since its ultimate concern lay with fostering right actions. Within the sphere of the "ought," it could utilize concepts like essence, telos, goal, norm, duty, and goodness in order to designate the standpoints governing action. Although philosophical traditions (and the concepts and theories of action they used) might differ from one another, the working out of a nuanced categorical description of action

remained unnecessary. Fundamentally, it was always a matter of fixing the correct aims of action as invariant with respect to the vicissitudes of actual behavior, and of justifying this invariance.

If we transpose this discussion into the conceptual framework of systems theory (and otherwise we can understand neither the function of reflexive mechanisms nor the function of functional differentiation), we cannot retain this simple division of the subject-matter. Systems theories are not concerned with encouraging right actions, but rather with the meaning-based system-building connections among actions; these connections are in no way exhausted by the intended and conscious meaning of the actions involved. Such a theory must distinguish more carefully the variety of meaning-based relations among actions than was previously necessary for theories of action.

One such distinction is of especial importance for our problem of demarcating law from ideology.[23] It has to do with the different levels at which the content of a set of actions can be generalized. We can roughly distinguish four levels of generalization, depending on whether the meaningful interconnections among different[24] actions are established by reference to a person, a role, an action-program (norms or goals) or a value.[25] A concrete person serves for all who know him as a guarantee of the consistency of a specific set of actions and thus makes it possible to formulate accurate expectations about future behavior. The same is true, on a more abstract level, for roles, and on an even higher level for norms or goals, which dictate only a very few actions. Finally comes the level of values which lump together a wide (and indiscriminate) range of actions as choiceworthy. Every social system probably has to utilize all these levels for the generalization of meaning in order to integrate actions. But the precision with which the individual levels are distinguished varies from system to system and increases with the complexity of the system (Parsons 1966a, p. 11). Only in very complex systems can we count on roles being separated from persons and values from norms and goals. When this occurs, however, a four-part schema must replace the two-part schema that sufficed for ethical theory.

The underlying reason for this development is that a high degree of social complexity can be symbolized neither through concrete

personal patterns of expectations nor through merely evaluative ones. Instead, it must be anchored at the intermediate level of roles and programs. Persons are too concrete, while values are too abstract. Thus, it turns out that as the complexity of the social order increases, roles and programs begin to support structural differentiation. The lowest and highest levels of meaning must then be functionally varied vis-à-vis this intermediate level. Persons must be mobilized and values must be ideologized.[26] It then becomes necessary to distinguish clearly between roles and persons as well as between values and programs of action.

While the relation between roles and persons has been the subject of a vigorous discussion in contemporary sociology—although not from this particular theoretical perspective (Dahrendorf 1964; Plessner 1960; Tenbruck 1961; Claessens 1963)—the more abstract yet parallel problem, the distinction between programs of action and values, has remained neglected. Consequently, crucial preliminary work is lacking for an analysis of the relation between law and ideology.

Values (for example, life, hygiene, freedom, social responsibility, wealth, salvation) are symbols for the preference accorded to actions that, thus far, remain indeterminate. At this level of abstraction they can all be affirmed without hesitation; they thus serve as synthetic and integrating formulae for evoking social consensus. On the other hand, when it comes to planning particular actions or programs of action, conflicts between values must be resolved; and at this level of abstraction there are no universally valid rules for such a purpose. We cannot give an eternal ranking to all the values cited above.[27] Only the values themselves, and not any fixed relations among them, can be generalized.

Since all action, if it is thought through carefully and its consequences seen far enough ahead, is caught up in conflicting values, our analysis yields an unavoidable conclusion: no action can be justified by an ordering of values. In other words, decisions about actions have, with regard to any order of values whatsoever, an irreducibly independent significance. Only a foreshortened view of the consequences can obscure this fact. Wundt's well-known concept of the "heterogony of goals" is another name for the same idea.

Looked at inversely, this means that concrete action cannot uni-

vocally support, stabilize, and symbolize any fixed ranking of values.[28] Instead, there must be an ambivalent relation between them. Similarly between values and programs of action there can be no rigid relations which order them invariantly with respect to one another (this, too, compels us to distinguish the two levels). In a highly complex situation, an ordering of values can no longer be translated into (and anchored by) an unalterable program of action. The inverse strategy forces itself upon us. When the alterability of programs of action becomes a principle, it is evident that neglected values have only been shelved temporarily and for the particular case at hand, while their inherent validity is not in dispute. They are not repudiated as values, nor their advocates and adherents disqualified as persons. They can be held in abeyance and brought forward all the more convincingly at the next opportunity. After being repeatedly passed over, they are stored up with all the more urgency. When values and programs are successfully separated in this way, the *variability of programs* can even serve to ensure the *stability of values*. The "enduring" can be grounded on the "changing"—an inconceivable idea for the ontological tradition. Value conflicts are allayed, and only temporary priorities have to be established (Friedrich 1963, p. 335f.). We can be tolerant toward adherents of other values and ask of them only patience.[29] To this extent, the positivization of law gives indirect support to the integrative function of ideological value orderings.

Stabilization through variability naturally does not mean that in practice values possess no significance for action; it means only that this significance cannot be deduced from the values, but must be filtered through intermediate achievements of an innovative sort. Here we find a reference point for grasping more clearly the function of ideology and the function of law and for demarcating one from the other. Ideology fills such an intermediate role by making possible an evaluation of values and thus an opportunistic treatment of them. Law accomplishes something similar by programming action. The discrepancy between abstract values and concrete actions is narrowed to a distinction between ideology and law, and over this smaller gap bridges can be built.

For this purpose it is essential that ideology not be set up, as a pure order of values or law, as a concrete prescription for action. Ideologies are not only constellations of values, but at the same

time world-views, interpretations of history, interpretations of facts, as well as confirmations and distributions of competencies and duties. They must assimilate values and at the same time provide a basis for the evaluation and opportunistic treatment of these values. The possibility is thereby created of selecting values that can be taken over into a program of action, and neutralizing other values (hence, setting them aside temporarily while a specific program is being pursued).

Nonetheless, establishing programs for action remains a decision in its own right. The rather indeterminate complexity of what can be defended ideologically must be transformed into pointers for action, whose determinacy must satisfy strict requirements, especially when they are to become law backed up by sanctions. One cannot formulate legal regulations by direct appeal to Marx and Lenin. The more stringent the requirements become for consistency between ideology and decision-programs, the more need there is for intensive communication. Therefore, in many states the interpreters of the ideology must apprise the administrative apparatus (responsible for formulating and executing decision-programs) of which interpretations of certain situations are acceptable, which account of past history is still utilizable, how the priorities look at the moment, and who must be regarded as a renegade.

The vast range of possible conflicts among the profusion of accepted values is of constant concern in establishing programs for action. For decisions to be possible, a limited selection of relevant values must be made, and this selection must secure a certain amount of consistency with other decisions. The problem of value conflicts is brought nearer to a solution by a process of selecting values that are pertinent to the particular program at hand and that satisfy certain minimal conditions of consistency. Now there are two different forms for planning programs as well as for ensuring consistency. We must pursue this point further, since the way law depends upon ideology varies according to which form is chosen.

VII. Goal Programs and Conditional Programs

We must think of social systems as action contexts that are linked to their environment by causal connections, but that are not directly

determined by that environment. Accordingly, a cause in the environment that affects a system does not immediately prompt a particular response to it by the system. Instead, the system has time to set into motion internal processes for selecting and manipulating information. In this way a system can combine various causal factors and thereby collaborate in determining the nature of its own response. The pattern involved in this selective processing of information is what we shall call a "program."

According to the "input/output model," by which this sort of open and relatively autonomous system is usually represented (Parsons and Smelser 1956; Parsons 1960a, pp. 17, 59f.; Herbst 1962, p. 141f.; Easton 1965b; Almond 1965), such a program has available only two points of approach. Programming can begin either with the output or with the input. *Either* a desired response can be taken as invariant and used as a rule for selecting causes that can bring it about (then the response becomes a goal, and the program is a goal program); *or* the program holds constant a particular cause which, whenever it occurs, must trigger a particular type of action. In this case we have a conditional program. These two fundamental types of program are jointly exhaustive (Luhmann 1964a; 1966a; Eckhoff and Jacobsen 1960). But they can be combined in numerous ways and embedded in each other, so that it is often difficult to assign concrete programs to the one type or to the other.

Each type of program has its own relation to ideology and to law. Goal programs are better justified ideologically, while conditional programs are more suited to the legal system. By combining both types of program, law and ideology can be married, just as, on the other hand, political systems which opt basically for one or the other type of program thereby take on either a primarily ideological or a primarily legal orientation in problem-solving.

Ideologies are closely allied to goal programs because values typically refer to the effects (or goals) that actions try to achieve, and not (although this is possible) to particular causes or to the action itself. At any rate, in the age of ideologies, ascribing values to causes or to actions as such, irrespective of their effects (for example, as rituals, convictions, or pure activity) seems the exception. Values have to be understood more abstractly, so that a number of possible actions can be left open. That can only come about when actions are selected according to the (positively valued) effects they

produce, when these effects can be achieved in different ways, and when they can then serve to select the proper means to attain them. As a result, ideologies usually get translated into action by means of goal-programs that specify what goals under what circumstances can guide and justify the choice of means.

On the other hand, the means/end schema poses considerable difficulties for jurists who are faced with increasing demands for the security of law and for the calculability of decisions. This is so precisely because of the openness of the schema described above.[30] The inference from the end to the means—in the sense of the old maxim that a right to the end entails a right to the means has lost its importance for law.[31] As programs, goals lose their preeminent status as the linchpin of the legal system. That is why, when legal regulations are at issue, conditional programs are preferred. They connect specific (or specifiable) legal consequences with clearly defined states of affairs; whenever such states of affairs are known to exist, correlated actions or decisions are set into motion (Luhmann 1966a, p. 38f.). This preference for conditional programs cannot be regarded as an essential feature of law *per se*. Traditional European natural law, for example, was based on a teleological conception of action. However, to the extent that law is made positive and delegated to the decision-processes of enormous bureaucracies, conditional programming stands out as a planning technique that can bind action in two ways: by a relatively centralized and precise determination of "if/then" correlations and by a delegation of responsibility whereby whoever can show that the "if"-clause is true can activate what the "then"-clause prescribes.[32]

Depending on whether a political system resorts chiefly to goal programs or to conditional programs, the techniques vary with which (at the level of programs) the bureaucracy making decisions pursues and checks consistency in its decisions. Indeed, even the concept of consistency, the style of rationality, the kind of mistakes that can be made, and the excuses that are available all depend upon the type of program. Goal programs are rationalized in the following way. Through taking secondary conditions into account and through efforts to economize, the greatest possible care can be taken and expenses can be kept to a minimum so that a maximum number of goals can be pursued simultaneously. Rationalization

thus reduces the extent to which value conflicts will occur. The indispensable precondition for this sort of calculation is the mechanism of money (once again a reflexive mechanism). In contrast, conditional programs are tested for consistency by means of the construction of legal concepts and by efforts to provide fundamental justifications for particular verdicts. This takes place above all in the decision-making processes that apply the law, in a continuing effort to make a symbolic presentation of the law. Here the consequences for decision-making of specific definitions, distinctions, interpretations, and arguments are considered. And here, too, it is clarified what future possibilities of decision-making are opened up or blocked by a particular ruling.[33]

VIII. Ideologically Integrated States and Constitutional States

We have already emphasized that neither type of program ever appears in a "pure" form. Both offer such eminent advantages in reducing a high level of complexity that no complex political system can renounce either of them. Nonetheless, political systems often give a pivotal role to one type or the other. Thus, we must ask what the reasons are for emphasizing one or the other and what political and social structures are connected with such a choice.

General systems-theoretical considerations suggest that we should begin the analysis with the problem of the complexity the political system is meant to reduce. If it is correct that the complexity of a system must correspond to the complexity of its environment (see note 5), we can imagine that with the increasing complexity of a society the complexity of its political system increases too, and that too slight a problem-solving capacity in the political system stymies the development of society to a higher level of complexity and differentiation. Rising demands on the political system and on the capacity of its political and administrative decision-making processes require that the political system be differentiated from the rest of society, that its roles and decision-programs be separated from those of other social domains (e.g., the economy, religion, culture, the family) and their moral codes. The separation of law

and morality is a typical consequence of this development of civilization. In the same process of differentiation, the political system attains an autonomy in deciding about the premises of its own decision-making which is necessary for dealing with a higher level of complexity. The complexity of a system and its environment, the internal functional and structural differentiation of a system and its differentiation from the rest of society, the relative autonomy of a system in relation to its environment—these are different variables that only can increase together.

It is obvious that with increasing complexity the need increases for structures and processes that reduce complexity, and thus for reflexive mechanisms. Accordingly, our problem can be made more precise by means of the following questions. What are the effects upon the heightening and reduction of complexity when a political system tries to achieve reflexivity at the level of society's overarching values (i.e., through ideology)? What consequences follow when a society orients its law toward planning and the attainment of goals? Or, on the other hand, what happens when a society relies instead upon positive law and utilizes ideologies only in order to sanctify the conditions underlying the process of positivization and to shelter them from political struggles? These alternatives seem to capture some of the differences that today separate the industrial states of the world into an East block and a West block.

Societies to be integrated politically through an ideology are typically planned with a concern for the "output" of specific, politically desirable effects. For example, planning takes place with an eye to the goals of power politics or today especially with an eye to the goals of economic development. Such societies favor goal programs. Goal programs can be meaningful and successful only if the input of the political system can be varied and selected in conformity with the desired results—that is, only if the political system is relatively free to determine what kinds of information will influence it. The social expectations, demands, and conditions of political support must then be regulated ideologically, as soon as they are loosened from the unchanging bonds of tradition through the process of civilization and freed for a greater mobility. "Public opinion" must be regulated in such a way that the dominance of ideological values and goals is not put into question and that there

is only a technical and instrumental discussion about the best means by which to realize them.

Ideology claims to be binding for the whole society. This development leads to typical problems. As the complexity of society increases, so do the demands upon ideology as a schema for solving problems; in particular, there occurs an unsurveyable increase in the interdependencies among the individual components of an ideology, whose consistency must continue to be maintained. Changes, accommodations, and renovations in an ideology become markedly difficult, because every small step can have unforeseeable repercussions upon the premises appealed to.[34] The burdens upon the reflexive and opportunistic mechanisms anchored in ideology then become excessive. A party organization capable of making decisions can lighten this burden to a certain extent, but here, too, the organizational capacity for processing data has its limits. The usual ideologically polished formulae serve internally as a means for facilitating mutual comprehension, and externally as an organizational framework for perceiving and making selections in the environment (March and Simon 1958, p. 164f.). The political sensitivity of these formulae is itself a problem. Of course, a limited political pluralism can be tolerated or even planned, in order to bring more exploitable complexity into the scope of the political system (Wiatr 1966). But within the framework of an ideology such pluralism cannot be so enlarged as to incorporate into the political system and submit to political arbitration radical structural conflicts between family life and economic development, religion and culture, personality and the need for governmental administration, or between the expected motives of agents and the methods of recruiting. In such states, political pluralism remains on a technical and instrumental level; the problem-solving capacity of the political system is built on the premise that, in the last analysis, all critical problems can be reduced to economic problems. For this reason (and because of the political ideologization of all public life) limits are set to the level of complexity such a society can reach.

In contrast, political systems that we can call constitutional multiparty democracies are oriented primarily toward "input." In the realm of party politics they leave open what expectations and demands will be expressed and how political support will be created,

even if—here, too—the political issues of the day are expressed politically and proffered to the public in the form of value-symbols, possible demands, practical alternatives, and so forth. In the realm of bureaucracy conditional programs play an essential role. They lay down fixed conditions about how the administration performs and intervenes in the society. Thus, such programs allow the public to prompt or hinder bureaucratic decisions according to stable rules, without their suitability as a means for achieving specific goals becoming paramount. Thus, both for politics and for bureaucracy incoming information—in the form of articulated interests and demands or in the form of legal claims—has a major regulating function. Hence, such a political system is in danger of losing authority over what problems are posed and of thus surrendering the future to the "chance" of an unplanned social development, in favor of a past expressed in consolidated interests, investments, and legal claims.

Further dysfunctional consequences of this kind of social order arise with the problem of "input overburdening" (Easton 1965b, pp. 58f., 64f., 82f., 119f.). Since this kind of political system sets no limits to the complexity of society and there is no preselection of permissible political themes, it is overwhelmed with a plenitude of unharmonizable demands. Here the problem is not political sensitivity, but rather a political din.

This overburdening with many opposed and yet exactly articulated and consequential demands provides the decisive test for pluralistic or multiparty political systems that are unified not by ideology but only by specific rules for political competition and for recruitment into official positions. The conflictual structure of this party system makes it possible to absorb conflicts in the society at large. At the same time it cannot be expected that all the problems in this area can be solved politically before binding decision-programs are fixed—that is, before laws are established and goals are defined. The responsibility for a good many unanswered questions gets passed on in the form of vague or contradictory legislative programs to the authorities actually concerned with applying the law (Werner 1960). The law becomes inflated to an unimaginable level of complexity. Like ideology in an ideologically integrated system, here juristic techniques for solving problems become over-

worked. Some of the consequences of this sort of pressure are the deluging of administrative bureaucracies with impracticable laws, the rediscovery and legitimation of judicial discretion, the increasingly abstruse taxonomy of legal subject-matter and of legal knowledge, the use of looseleaf collections and commentaries for special laws, and a noticeable lapse in conceptual style and the presentation of verdicts.

However, we should also attend to the advantages that accompany this shifting of responsibility onto the law. Politically insoluble problems are depoliticized while still being treated in another institutional context. Unquestionably, a large amount of power (that is, a reduction of complexity binding upon others) thus falls into the hands of legal authorities and the courts. But this power is institutionally too fragmented to be consolidated into political power. It cannot be exchanged and thus accumulated. It is always limited to groups involved in specific proceedings—and they are not able to form broad political coalitions. It can be used only for making decisions about individual questions, whose premises are always so exactly formulated that a thoroughgoing political ideology can no longer be developed from the operations of the legal system. The administration of a constitutional state has a compensatory (not adversary) relation to politics: it unburdens it. Political programming can thus limit itself to central governance, legislation, and budgeting.

The foregoing comparison between ideologically integrated political systems and constitutional multiparty democracies teaches us that the relation between law and ideology cannot be definitively examined at the level of abstraction where we began our investigation. Depending on whether positive law or ideology assumes the function of reducing the complexity of a political system, a different structure of society and different forms of problem-solving arise, as well as different problematic consequences and a different distribution of pressures and burdens. Such systems, in their full concreteness, as well as the relation between law and ideology in them, are therefore to some extent incommensurable.

Only at an extreme level of abstraction can we claim that (as reflexive mechanisms) law and ideology fulfill identical functions, and are therefore interchangeable or capable of easing each other's

burdens. To the extent to which system-structures are constructed and institutionalized, particular forms of posing and solving problems become fixed and other mechanisms become adapted to the focal points of power, to the prevalent ways of reducing complexity, and to the kinds of problematic consequences that must be faced. For this reason, such a system loses its functional elasticity and can win it back only at considerable cost (Selznick, 1949, 1957). Actual systems cannot take advantage of the highest levels of functional abstraction. Sociological analysis, however, achieves its characteristic insights by virtue of laying out precisely those abstract viewpoints that remain inaccessible to concrete human action.

IX. Truth and Justice

Systems-theoretical analysis is a new idea. Traditionally, in Europe the ultimate standards have been sought in the criteria of truth and justice. Even today we are tempted to measure the concepts we have been discussing by these criteria, to examine ideologies for their truth and positive law for its justness. It belongs among the great, imperishable accomplishments of Western thought to contrast these concepts as critical standards with given beliefs and norms. It has become essential to ask whether the way something appears is the way it actually is, and whether, in a framework of traditional expectations, the way an action takes place is just. Yet, such questions ignore all established forms for reducing complexity and finally, in the form of universal skepticism, they lead to a discovery of the subjectivity of self-consciousness and of the contingency of the social world.

Originally, this critique of what exists was conceived as a guide to action in the undifferentiated sense by which traditional European thought contrasted the essential and the just with whatever is expedient. A trace of these efforts still lingers about contemporary attempts to understand truth and justice as values. However, the radicalization of this critique on the one hand and the increasing complexity of social reality on the other make it questionable whether such a critique is still a prescription for right thinking and right action. The century-long discussion about the concept of ideology and the concept of positive law, at least, has given no indication that this could be done. To insist upon truth as a value when confronted with ideology and to insist upon justice as a value when faced with positive law make little sense if it cannot be known what precisely should be preferred and if every attempt in this direction turns ideological. The old criteria have lost their critical and innovative function, not least of all because critique—as a reflexive method for formulating values and norms—has itself been institutionalized. They retain only symbolic functions: they serve to express good intentions, to appeal to good will, to express a presupposed consensus, and to postulate the possibility of mutual understanding.

In addition, the multitude of values and the impossibility of giving them a universally valid ordering make it impossible to express man's highest possibilities and his position in the world through value-concepts. What truth and justice once meant for man's self-understanding has been corrupted through their interpretation as values. For example, Aristotle believed justice was equidistant from all values, and thus was itself not a value at all; only so could it signify the highest good, human perfection. Given the increased complexity in thought and in reality, we find it difficult to attain once again the lofty level of Aristotle's conception of law. It is no longer possible to find a point for man's highest fulfillment that is equidistant from all values and is at the same time an ethical maxim for action. We have to think in a more differentiated manner. We have to separate the levels of values, norms, and goals from one another. Moreover, we have to give a dynamic quality to the idea of equidistance. On the basis of the conceptual alternatives available today, a theory of organized and reflexive decision-making processes that treat values opportunistically and view programs as capable of yielding decisions seems best able to satisfy these requirements.

If this assumption is correct, then we must realize that concepts such as opportunism, decision, positivity, ideology, and function—which measured by traditional lights are untenable, if not disreputable concepts—are precisely what can bring our thought back to the level and the systematicity of traditional European efforts to interpret political society and its legal system. This cannot be ac-

complished, of course, by a transvaluation or positive valuation of these concepts. We can gain a proper basis for a dialogue with the tradition only when we understand the meaningful interconnection between these concepts and their functions. To this end, sociological systems theory, the basic principles of which are already developed, offers some hopeful prospects.

In view of the ever increasing complexity of our social order, we are compelled to revise the traditional models for interpreting and explaining human action. Their potential for handling complexity is too small—because they deduce means from ends, explain effects on the basis of causes, or try to fix invariant relations among particular factors. A theme such as the relation between law and ideology cannot be adequately addressed by means of such models. Ideologies as well as systems of positive law are highly complex symbolic structures. Moreover, they can become stable social institutions only when society itself attains a high degree of complexity. In the face of such a social order, idealistic concepts like truth and justice lose their instructive function and degenerate into ciphers for indeterminate and unspecifiable complexity. A high level of complexity, if it is not to remain unspecified, presupposes the construction of systems that not only recognize complexity by name, but also understand it and reduce it—that is, make it exploitable within the domain of action. This can take place through structures, subsystem-building, compartmentalization of meanings, reflexive mechanisms, communication nets, cybernetic regulations, and so forth. All of these allow action to be effectively oriented toward a multitude of alternative possibilities.

If we measure such systems with formal, idealistic criteria, we shall fail to recognize this problem of complexity. We shall then lapse into ineffective appeals, or fasten onto a particular interpretation of these criteria—for example, onto the concept of truth in logical positivism or the concept of justice in communism. This would entail a drastic reduction of complexity. In both cases our thought about complexity would remain altogether inferior to the level of complexity already present in action-systems. A meaningful critique of what exists is possible only as an immanent critique of systems—especially of the all-encompassing system of society it-

self. Critique is possible only as the analysis of systems, as the reexposing of problems that are solved by means of familiar norms, roles, institutions, processes, and symbols, and as the search for other, functionally equivalent possibilities. It is in this sense that we can speak of sociological enlightment (Luhmann 1967a).

LUHMANN, Niklas, "The Autonomy of the Legal System" *in*: ID. *The Differentiation of Society*, New York, Columbia University Press, 1982, pp. 122-137 (publ. orig. em alemão : 1976).

6

The Autonomy of the Legal System

I

The legal system consists of all social communication that is formulated with reference to law.[1] It is not confined to communication occurring within legally regulated procedures, but also includes that of daily life insofar as it raises legal questions or otherwise registers or repudiates legal claims. The legal system, in other words, is not exhausted by processes of "applying the law" in the narrow sense. The circumspection of lawyers, the negative orientation of those seeking to violate legal norms, precautions necessary to avoid being caught, preliminary probing into the feasibility of risky operations, decisions not to go to court, to proceed with a test case, or to renounce plans because of juridical difficulties—all this takes place *within* the legal system, to the extent that it is communicated about or that individuals anticipate communicating about it. The legal system, one might say, includes both right and wrong, legal as well as illegal behavior. In fact, its identity as a system hinges precisely upon this disjunction.

In modern legal systems, to be sure, special importance is conceded to organizations where legal questions are handled professionally, uninterruptedly, and—whenever necessary—by means of a division of labor (e.g., law firms, courts, legal advisory boards, or legislative bodies). Equally characteristic of modern noncorporative society, however, is the fact that none of its primary subsystems can be reduced to the compact unity of an organization. The religious system cannot be exclusively identified with the church, nor the political system with the apparatus of government, nor the educational system with schools and universities, nor the economic system with organizations of production. Similarly, the legal system cannot be reduced to the organizations which operate within it.

Historically, it might be added, the establishment of legal jurisdiction (under the auspices of a political authority capable of making and enforcing binding decisions) is only *one* of several preconditions for a differentiation of the legal system from its social environment. This *organizational* innovation, indeed, is a sort of "preadaptive advance" that might conceivably be arrested and does not necessarily lead to the society-wide differentiation in question. Classical China is a paradigmatic example here because of the way legal decisions were permitted while being culturally and counterinstitutionally devalued and discouraged (Escarra 1936; Cohen 1966; Bodde and Morris 1967). As a result, general social problems stemming from the uncertainty of expectations and the danger of unlimited conflicts simply reappeared in different guises within the jurisdiction of law. They were only partly mitigated by recourse to extralegal means such as institutionalized expectations of compromise, power and status differences, personal and professional relationships, organized guilds, and so forth. Moreover, analyses of those relatively advanced developing countries which already possess industries, communication systems, and political bureaucracies, show that this arrest of organizational development at the "preadaptive" stage, and the resulting diversion of problems into other social channels, remains now as before a real possibility (Cohn 1965; Aubert 1969, 1972; Gessner 1976; Luhmann 1975f). Neither the existence of organizational centers to which appeal can be made nor the capacity of these centers for handing down decisions makes it unnecessary to ask the following questions: What are the social preconditions for the emergence of a functionally specific and "autonomous" legal system? And what are the consequences of this differentiation?

This is the rewritten version of a lecture originally presented on May 12, 1976, to the Göttingen Rechtswissenschaftliche Gesellschaft.

As already suggested, questions about the differentiation of the legal system from its surrounding social milieu cannot be adequately answered by reference to particular institutions or organizations. In order to develop a serviceable concept of the legal system, social theory must adopt a broader approach: the formation of organizations should be viewed as only one factor among many. Social systems in general, and therefore society *tout court*, consist of "acts of communication" (and not of concrete "men"). Thus, we have to begin with the assumption that formation of systems is rendered possible by various "constraints" on processes of communication. This fits a general pattern, at any rate, since we know (for example) that the combinatory freedom of language is made possible by constraints on the use of sounds, while the combinatory freedom of scientific theories is made possible by constraints on use of language.[2] Law itself, as a way of constraining behavioral expectations, is found in every society. Without it, social interaction would be impossible.[3] The functional specialization of a discrete legal system, however, presupposes certain peculiarly law-related constraints. These necessarily preexistent constraints can be applied in two distinct ways within processes of communication. My thesis, stated succinctly, is that the successive separation and recombination of these two applications ushers in the process whereby a legal system can become relatively autonomous.

Whenever individuals can explicitly appeal to constraints on behavior, they can also consider whether or not they want to do so. As a result, everyday processes of communication have an ineliminable power over the law: the power to decide if law is to be invoked or not. Here lies what I want to call *invocation sovereignty*. It remains an open question whether or not preferences, expectations, refusals, or conflicts are to be discussed with reference to law. This must be decided in elementary interaction. The freedom either to "juridify" or "not to juridify" events increases when there is a universalistic web of norms that can in principle subsume every elementary transaction of daily life, thereby making it possible to stipulate for every state of affairs whether it is lawful or not.[4] Such freedom depends (as every freedom does) on a prepatterning of behavior. Individuals can either build upon this basis or not. The

validity of law, in other words, cannot be separated from the fact that the application of law is contingent: we can either appeal to it or not, as the case may be. We have this choice. We can invoke or not invoke the law, "juridify" or "not juridify," do this or that. And the option itself could not exist without the law. Like all social behavior, contingent decisions to invoke the law have numerous preconditions. Such choices always depend upon diverse social variables such as age, sex, education, and social status—to mention only those easy to inventory empirically. As a result, decisions are "processed" in interaction in such a way that even the sequence with which acts of communication follow one another has an influence on whether or not laws are mentioned, and finally, on whether or not the courts get involved. In all this, of course, law remains a *causa passiva*. It can make available its capacity to be cited, but it cannot, on its own, determine what decision will eventually be made.

This is one way to make use of legally valid constraints or regulations. The other possibility involves the content of norms. We try to discover norms, formulate them, interpret them or modify them, change them or multiply them. In this case, law is viewed as material upon which to work. And here again constraints generate freedom and possibilities for control. As a logical consequence, they also produce an additional problem: invocation sovereignty (sovereignty to decide whether to invoke the law) is confronted with *lawmaking sovereignty* (sovereignty to decide *what* the law is to be). Our freedom to transform and reshape the law increases proportionally with the number of legal restrictions, constraints, or regulations—especially if there is a high degree of interdependence between regulations. This is the case because opposed to any single set of legal rules there are always others to which appeal can be made. If necessary, one set of constraints can be played off against another set. After a certain "critical mass" is surpassed, in fact, the form of relationship established between general legal premises and particular legal cases changes (Luhmann 1972c). Eventually, law becomes dynamic. That is to say, it becomes quite normal for an application of the law to trigger clarifying interpretations or even a thoroughgoing critique of the law (Nörr 1974). In

the end, law is made "positive." We claim an inalienable sovereignty to decide what the law is to be and even to vary the premises according to which such legislative decisions are made.

The clear separation of these two forms for treating law as contingent (of these two forms of structurally produced freedom) creates a novel situation that does not emerge in every society. The separation itself can function as a kind of evolutionary catalyst accelerating the differentiation of the legal system from its social environment (Luhmann 1970b). If everyday interaction generates both frequent appeals to the law and a sufficient diversity of legal cases, legislative bodies and higher courts will be stimulated to formulate guidelines for consistent decision-making which cover a wide variety of cases. Such institutions will become increasingly conscious of their own premises. Conversely, the more thoroughly articulated law becomes, the easier it is to "discover" legal problems in numerous situations of everyday life and to rely upon a background awareness of possible decisions (transmitted by the law) as an instrument in private dealings. This routine grouping of contingent decisions into general or typical cases promotes the discreteness or relative autonomy of a special subsystem for communicating about law.

For the sake of analysis, we must draw a distinction between genetic and functional methods of inquiry. Origins and initial developments present a separate and very special set of problems. They can, of course, be analyzed within our general theoretical framework. Nonetheless, we should never lose sight of the fact that the original genesis of institutions demands special structural preconditions both in the social system and in its environment. The initial emergence of agrarian economies, for example, was linked to specific environmental conditions, which later became unnecessary. They were outgrown as soon as such economies became more mature and well entrenched. So too, the city-states of early Mesopotamia and again of the ancient Mediterranean world presumably provided special preconditions for formulating and recurrently appealing to commercial law and (later) to constitutional law. This law was "independent" in the sense of not needing to be deduced from religious axioms. The original preconditions for institutional "take off," of course, do not have to remain in place. The

maintenance of an autonomous legal system, for example, does not require the continued existence of its initial preconditions. What does remain necessary, however, is the fundamental fact of dual sovereignty, a differentiation between the input of cases (invocation) and the input of decision-premises (lawmaking). It is this differentiation which first produces what can be called the "relational" problem. If sociostructural changes ever affect this fundamental condition, processes of dedifferentiation will set in. Law itself, of course, would survive as a structure necessary in every society. But the legal system would be transformed into a "specification mechanism" for other social sectors, if no longer for religion, then for the organizations of production or for politics.

As a result of the emergence of a discrete or specialized legal system, the society-wide function of law is reconstructed with reference to the unmistakable separation between the legal system and its environment *within* society. The function of law and the problem it solves remain relevant to all of society. Law can be presupposed and appealed to everywhere, though only by crossing a clearly demarcated boundary.

II

The emergence of a separate and functionally specialized legal system has enormous consequences not only for law itself but also for the other sectors of society. When necessary, other social systems can now employ specifically legal means, without thereby landing in incalculable entanglements or diffuse relations of dependence. For this purpose, law provides an instrument which has relatively precise contours, even if it may also have limited effectiveness. For instance, capital accumulation (and attendant possibilities for rational economic calculation) is based on *property law*. This legal principle, of course, does not guarantee that capital will actually be accumulated nor that rational economic investment (whatever criteria we use to define it) will take place. This depends upon other facets of the economic system. Without property law, however, capital accumulation could not be sheltered from a diffuse social pressure to give up one's surplus. This is equally true for

private ownership and for collective ownership. In its classical form, to be sure, the legal principle of property ownership simultaneously guaranteed that law would not interfere with economic calculations. In the modern welfare state, by contrast, we find law employed for the direct and indirect burdening of property. As a consequence, we also find here, for the first time, that a structural influence on the economy (for example, on the relation between capital costs and personnel costs) can be achieved through legislative and judicial stipulation. This influence, however, is neither politically intended nor economically preferred. That is to say, it is nowhere desired, nowhere controlled, and nobody in particular takes responsibility for it.

We can take another example from the field of education. Here the correspondingly central "legal principle" lies in *universally obligatory public schooling*. So far as the technicalities of law are concerned, this is a straightforward and unproblematic principle. From the viewpoint of educational politics, by contrast, it is the fundamental condition for establishing a large, differentiated public school system comprising the entire population. At the same time, it has a dramatic impact upon education within the family. Universal obligatory schooling was likewise a precondition for secularizing the educational system, that is to say, for differentiating it from religion. The pedagogical import of universal schooling, in other words, is next to incalculable, even though legal techniques and educational practice do not interfere with one another in a noteworthy way.

From these two examples we can see how the development of a separate legal system not only ensures a degree of rationality and independence in the application of norms, but also provides legal "instruments" necessary for the functional and structural differentiation of society as a whole. For this reason, the autonomy of the legal system is significant for the entire social order. Other, more complicated relations should be added to those already mentioned. Since the seventeenth and eighteenth centuries, for example, *constitutional law* has made it unnecessary to offer theoretical arbitration for disputes between orthodoxies making moral and religious claims. It has achieved this by guaranteeing a *modus vivendi* instead. This, in turn, prepared the way for a differentiation between religion and science (Specht 1972, esp. p. 91). In a similar

fashion, *civil law* rendered largely superfluous the political arbitration of conflicts of interest. This immediately reduced the political functions of the community to the extent that a "state" could be separated out of it, then constitutionalized, and eventually even democratized.

Perhaps even more important, a sufficiently distinct legal system was the prerequisite for a high degree of individualization in decisions having structural importance for society. The category of "private," as we all know, was valued upward. Personal or individual freedom was designated a legal norm. Decisions about ultimate belief, about filling certain political offices, about choosing a spouse and begetting children, about investing capital and lengthening school attendance, about selecting intellectual and political issues for research, are all now left up to individuals, even though the aggregation of the consequences of such decisions can have a profound impact on the structural development of society. This sort of radical privatization, in point of fact, was a precondition for the transition to a society differentiated primarily along functional lines. Only in this way could functional sectors for religion, politics, economics, and family life become more clearly compartmentalized than before, and their mutual connections left up to private role-management. Only in this way was it possible to undercut the old stratified or feudal ascription of the entire person or household to specific subsystems of society, and for everyone to achieve access to all functional domains of society.[5] And only in this way was it possible in a relatively short span of time (that is, with relative independence from demographic developments) to reach that degree of size in single sectors necessary for a functionally differentiated social system.

When a single functional domain radiates in all directions and becomes the structural condition for the differentiation of society itself as well as for the degree to which society's various subsystems can become autonomous, we can expect its special status to be recognized openly (note that it is not merely a question of the distinct functional requirements of diverse sectors of society or of the special relevance of law for guiding and regulating the legal system itself).[6] Beyond all this, at least during a specific historical stage in the evolution of society, the emergence of a functionally specific legal system appears to possess special significance as an

achievement of social evolution: it is a condition for all further social evolution. Hence, to some extent at least, even the hypostatization of law within political philosophy had a certain foundation in reality. The new, society-wide importance of law, in other words, may explain why law played such an important role in the concept and theory of "bourgeois society." This, indeed, seems to be the reason why, in the late theory of natural law, society came to be conceived precisely as a "contract," and why later, at the hands of Hegel, social theory was developed within the framework of a philosophy of law. And this also seems to be the reason why, on the level of real processes of social communication, lawyers have moved into a position of society-wide responsibility far outstripping their special function and competence. And this may even explain why lawyers tend to be progressive rather than conservative.

The foregoing analysis, however, fails to answer the question of whether the special preconditions for the initial emergence of an autonomous legal system must continue to exist (Unger 1975, pp. 192ff). In other words, we have not yet determined whether the special sociostructural preeminence of law and its philosophical hypostatization were only conditions for the transition from a stratified to a functionally differentiated society or if they also belong to the ineliminable prerequisites for the continuance of a society differentiated primarily along functional lines. If the preeminence and hypostatization of law are necessary conditions for functional differentiation, they could be dropped only at the cost of de-differentiating society. This would entail the structural transformation of the entire social order—the "socialist" restructuring of society as a large-scale organization and the reintroduction of stratification in regard to careers. We do not know, in other words, if this preeminence of the legal system must also be listed among the conditions necessary for maintaining a functionally differentiated society after it has emerged.

III

This sort of question can by no means be answered by analyzing only the legal system. Nonetheless, by attending to developments

within the legal system, we can discover problems of stress as well as processes of self-restructuring with which the system (so long as it operates in a relatively autonomous fashion) reacts to transformations in the same way a changing social environment handles the law. This is why, in the theoretical model presented in the opening section, I tried to give special weight to transformations influencing either the presentation of legal cases to the system (that is, the readiness to juridify situations of daily life) or the legislative formulation of new "constraining decision premises" or the process of putting these two forms of legal input into relation with one another.

Relevant transformations of considerable importance concern (1) political control over introducing decision premises into the legal system; (2) an increasing "consequentialism" (or attention to expected consequences) within the decision-making practice of judges, and even in the "dogmatic" formulation of decision patterns; (3) the predecision to invoke the law on the basis of extralegal variables; and (4) differentiations within the field of the legal profession. One can assume that each of these specific changes has distinct causes and authorizing grounds. They are, however, closely interrelated because of the unity of the legal system, and they certainly influence one another. Their combined effect, as a result, is very difficult to calculate or appraise.

(1) The constraints on judicial decisions introduced by way of lawmaking sovereignty make possible a complex (though limited) sort of argumentation in the legal system: argumentation that aims at excluding the irrelevant.[7] This, in turn, makes possible a narrowing of issues and a specification of problems. And these in turn allow for the autonomy of legal decisions. Only in this way can "pertinent" criticism be identified and "extraneous" criticism warded off. Of course, none of this implies that such constraints could be conjured up magically, on the very highest level of abstraction, with all-inclusive vagueness or in a social void. Today, in fact, constraints on judicial decision-making are typically furnished by political agencies and processes. Freedom in handling or manipulating these constraints, on the other hand, is a subsequent gain. It only emerges after they begin to function routinely within the legal system.

Political systems have their own particular circularity in their roundabout flow of influence on decisions running between political processes in the narrow sense, the state bureaucracy, and the public.[8] In this circle of influence, political systems always react primarily to themselves and only in so doing do they also react to their social environment. Politics, in accord with its specific function, aims at producing collectively binding decisions even without consensus, and along the way it makes use of some of the same organizations as the legal system. Nevertheless, its "selectivity" is oriented differently from that of the legal system. As a consequence, the fact that parliaments enact legislation is a constant problem for the legal system—a problem, moreover, that cannot be banished from the earth by the legal "binding" of politics to constitutional law, and that also does not vanish suddenly with the introduction of a purportedly all-inclusive concept of "the State." This problem is made manifest, for example, in the massive quantity and poor quality of incessantly produced legislative norms and in that political processes often react most vigorously to pictures of the real and the desirable which are, in fact, produced within these processes themselves. This means that politics is not necessarily suitable for clarifying legal problems, especially on a level where many decisions are aggregated together, or even to function there as a source for forming and stabilizing expectations.[9]

No functionally specialized system can operate efficiently in contact with neighboring sectors of society without making decisions at levels of high aggregation.[10] It must be possible to predecide large clusters of particular decisions by selectively neglecting most of the details. The legal system has created this possibility partly in the concepts and theories of its juristic "dogmatics," and partly in the "casuistics" of guiding principles contained in the legal pronouncements and opinions of the highest courts. Legislation, by contrast, has in practice ignored this task. It cannot be offered up to the electorate as a "reform"; moreover, it contains the danger of increasing public awareness of problems that cannot be solved politically. The question, then, is how legal "dogmatics" and the "casuistics" of guiding principles are related to legislation which has at its disposal the resources for binding legality. In reaction to this situation, judges assume conspicuously broad freedoms in dealing

with the law.[11] Indeed, judicial discretion is provoked simply by the technically mediocre quality of legislator-written law. But how does "dogmatics" handle this inadequacy?

(2) It tilts *forward* to meet the flight into the future: it attends to consequences. Ostensibly, the calculation of consequences serves as a kind of norm-independent test of the *social relevance* of legal cases and legal positions. Social relevance, as a result, is not specified exclusively by the evaluative content of norms. Instead, it is "temporalized" or revealed by a detour through the dimension of time.[12] One of the central theoretical questions for today's jurisprudence, it seems to me, concerns the extent to which this is possible for legal decisions.[13] What no one disputes is the actual prevalence of the phenomenon, this is, of the fact that lawyers and judges argue by appealing to consequences and believe in the decision-making value of this style of argumentation. On the other hand, it is equally correct that we can *pretend* to foresee and calculate consequences—on the basis, for example, of rational scientific models—in a way that no one in practice, and *a fortiori* no judge or lawyer in the decision-making situations typical for them, could actually do. To be sure, the horizon of the future cannot simply be screened out or banished from decision-making procedures. On the other hand, no one seriously considers revising a particular decision or verdict when the foreseen consequences do not in fact follow or when the consequences that were to be prevented nonetheless take place. So what is actually at stake here?

For sociologists, in the first place, there is a problem that must be seen in historical or dynamic perspective—a problem of the degree to which a further extension of legal consequentialism is possible. For processes of judicial decision-making, the questions are these: How far into the future is it possible to pursue an orientation toward consequences and how multifaceted and precise can the classification of relevant consequences be, without having the decision process become overburdened and thereby corrupted? How, in other words, does the breaking down (some say factorization) of the decision-making process take place, and how justified is this analysis of the relevant elements and relations, this "defiguration of facts?"[14] And finally, to what extent is this analysis process still controllable? If we momentarily overlook the technical

difficulties and costs of decision-making, the tendency toward an increasingly unlimited pursuit of future consequences produces the following three problems:

First of all, attention to consequences in situations of high interdependence tends to erode social differentiation. It threatens to conflate and confound specifically juristic decision-making activities with general social engineering of a welfare-state variety. Whenever a lawyer is primarily concerned with promoting satisfactory life conditions, specifically juristic decision-making procedures slip into a marginal position: at best they signal limits of the possible.[15] The various consequences of the slippage must be studied in a theory of professions. For jurisprudence the result is a tendency either to argue with naïve overestimation of its own conceptual apparatus or to end up being incorporated into capacious organizations for the planning and shaping of all social life.

Secondly, heightened pretensions of taking consequences into account tend to loosen, subjectify, and politicize the bases of judgment in single decisions. "The major consequence of a heroic conception of the consequences of action is a distrust of judgment," or so say political scientists working within the framework of decision theory (Cohen and March 1974, p. 204). Such a development not only affects public confidence in the administration of law, but also changes techniques for procurement of information, argumentation, and the presentation of evidence in court. The growing burden of decision-making is unloaded onto the parties involved, who (in the meantime) have less and less trust in the official bases of judgment. The moment arrives when we are most willing to risk litigation in cases where *a literal application* of the law would foreseeably lead to farcical or scandalous consequences.

The third problem of unlimited consequentialism is this: one must also *justify* the rules for where to stop, the foreshortenings of vision, and the numerous abridgements which identify *what* consequences can be legitimately introduced into the reasons for a decision. Justification by reference to consequences then becomes self-referential, circular, autonomous, or "sovereign." There is nothing intrinsically wrong with this. In a functionally differentiated society, in fact, such circularity can be routinely tolerated and limited, *so long as* self-reference is tied down to the specific

function of the system in question. Precisely this, however, becomes difficult when orientation toward consequences (because in itself unlimited) provides no solid foothold, and when, in addition, the introduction of constraining premises is thoroughly politicized. But does not the fact that decisions are made in a case-by-case fashion provide at least some inherent limitation or structural support? And might this not penetrate to levels of highly aggregated decisions, and adequately guarantee that, through the selection of justificatory consequences, decisions will be made according to specifically legal rather than extralegal standards?

(3) The "legal case," too, presents a multifaceted problem. Lawyers themselves, and more quickly than others, become aware of the methodological problems involved in applying general rules to particular cases. The fact that legal problems arise in a case-by-case fashion, however, has a more profound significance. Even before being handled in a methodologically correct fashion, "cases" have already helped filter out inequalities from processes of applying the law (Aubert 1963). Situations are simplified, idealized or "reconstructed" into cases allowing for identical treatment. By means of such constructions, specific components of a case are generalized. This process, in fact, is a precondition for decidability and justice. At the same time, it implies that other components belonging to the concrete case are to be treated as fluke accompaniments (Ray 1926, p. 154). Most important of all, the actual occurrence of the case is regarded as a sheer accident. It is in no way regulated by the underlying structures of law or the legal system. This is a mirror image within the legal system of the sovereignty to invoke or not invoke the law in situations of daily life. Unfortunately, we know very little about its preconditions.

To all appearances, the probability that law will be invoked depends upon "proximity" to law as well as on earlier experiences with legal decisions (Cartwright and Schwartz 1973; Carlin et al. 1967; Koch and Zenz 1972). How does it come about that certain interactions veer "close" to the law and others not? The boundaries of the legal system, it is worth noting, must not be conceived as sharply etched, unambiguous lines of demarcation which can be "stepped across" or not. Instead, they must be conceived as zones of an incremental probability of citation. The manner in which such

gradated proximity to law comes about depends on numerous factors that cannot be easily controlled within the legal system. If this is the case, then one can say that these structures are bound to influence the legal system in an uncontrolled and differentiation-eroding way. This phenomenon has been discussed in relation to stratification, the urban/rural distinction and (in the United States) with reference to race. However, it presumably has a much more general significance which involves a prestructuring of the very subject matter of decisions themselves (Mayhew and Reiss, 1969; Abel-Smith, et al., 1973). Within its own organizational domain, to be sure, the legal system has several strategies available for neutralizing or weakening its passive dependence on the "input" of cases. For instance, it can pick out certain cases for special publicity or it can misuse one case in order to make it known how other cases will be decided in the future. Besides these, even more aggressive strategies can be imagined by which the legal system might reach out into its environment to enhance or equalize public readiness to invoke the law. What patrons in stratified societies did for their dependents or retainers and what occurs today through (sometimes extralegal) personal contact (Merton 1968, pp. 126ff; Rosenn 1971) could well be pursued more vigorously by officially promoted legal consultation. The success of such actions, however, would depend on nonorganizable environmental conditions.[16] And most unsettling of all, such efforts (tending toward "social work") collide head-on with the self-understanding of lawyers and judges, with their education and income.[17]

(4) The professional consciousness of those who practice law, the cohesion of the legal profession as a result of a shared education, pressures to make abstractions typical for the entire group, and a functional interdependence of roles all first became possible through the differentiation of the legal system from its social environment. Today, moreover, such factors belong among the most important conditions for the continued existence of a legal system that manages to function in a relatively autonomous fashion. Here too, however, we can discern structurally significant changes that threaten to fracture the cohesion of the legal profession (Luhmann 1975d). The most important of these are the dizzying proliferation of texts to which lawyers constantly have to refer and the multi-

plication of reference groups (courts, organizations, interest groups, customers, and so forth), with which lawyers have to coordinate their careers and attitudes.[18] As a likely point for professional reforms in this area only education comes into the picture. Educational reforms, however, tend under pressure to split the profession along political and generational lines. In the near future, then, it is not to be expected that a new centralization of the entire profession around the concept of professional work could either inhibit or reverse the erosion of a group cohesion. But perhaps a weakening of cohesion is one way to allow systems to survive in extremely complex and rapidly changing environments.

There are no doubt additional factors significant for continuing or abolishing the relative autonomy of the legal system—for example, changes which undermine the distinctness of legal norms themselves and cause them to be reintegrated into moral, scientific (social scientific?), or pedagogical contexts (Luhmann 1972a, pp. 222ff). More important than lengthening this list, however, is drawing an inference from the very multiplicity of the factors which in fact work together.

Structural changes in the social environment of the legal system obviously affect this system in a variety of ways. They affect "invocation sovereignty" and "lawmaking sovereignty," which in turn regulate the entrance of cases and constraining decision premises through the gateways of the legal system. Furthermore, such environmental changes can affect professional consciousness as well as "dogmatics," which in turn represent the relative autonomy of the legal system against the claims of the two "sovereignties." The mixture and interaction of these factors inside the legal system can either increase or weaken the influence of environmental change upon the system. So long as we still do not understand the rules according to which this occurs, we can only try to break down the general problem of the autonomy of the legal system into smaller ones. My point is that, in so doing, we must pay especially close attention to structurally relevant occurrences in the fields of political legislation, daily interaction, "dogmatics," and the consciousness of the legal profession.