COMMENTS ON 'TWO THEMES FROM NIKLAS LUHMANN'S CONTRIBUTION TO THE SOCIOLOGY OF LAW' BY GIANFRANCO POGGI (*ASLP BULLETIN NO. 19*, 1981, pp. 4 - 19)

by

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I must first express our thanks to Professor Poggi for bringing to us for discussion the thought of an important thinker on law much discussed in Germany but so far not familiar to English-speaking lawyers. I must also thank him for rendering Luhmann's complex and not easily expressed ideas so lucidly for us. Luhman, like his master Talcott Parsons, is not easy to read, and Professor Poggi's paper has isolated for us two important strands of his work in a way which, I suspect, most of us would have had difficulty in doing, even if his work were generally available in English.

Secondly, I must disclaim an adequate knowledge of Luhmann's work myself. I became acquainted with his work while I was in Germany between 1971 and 1973, but he is a prolific writer, and I do not claim to have covered all his writings. It is somewhat daunting to discover how much more he has written in the last eight years, and I can only conclude that I have been asked to open discussion on Professor Poggi's paper because other people have read even less than I have. I have based my comments on the two of Luhmann's books which I know best, *Legitimation durch Verfahren* (Neuwied Luchterhand 1969, 2nd ed., 1975) and his *Rechtssoziologie* (Reinbek, Rowohlt, 1972). Fortunately, these two books do, I think, include his major theoretical propositions, on which much of his later work has been an elaboration.

To place Luhmann in the context of modern legal sociology: He seems to me to have two chracteristics which distinguish him from other theorists. One is his preference for macro-theory. Certainly, in

Germany where legal sociology has experienced a renaissance from the 1960's on, he has gone beyond the employment of useful sociological tools such as "roles, "groups" and "deviance" which have occupied many of his contemporaries in order to provide a complete sociology of the legal system. This is something which needed to be done and which has opened up a whole new area of discussion. Another is his use of Parson's "functional" approach to sociology in analysing the legal system which has made the Parsonian theory genuinely relevant to legal theorists, while the few fairly minor attempts to link law to Parsons' "integrative" function seemed somehow tangential to many of their concerns. As can be seen from Professor Poggi's paper, Luhmann makes the legal system a crucial central process in modern industrialized Western society - in fact, as Professor Poggi points out (p. 10), he makes it difficult to see how the basic social processes of such a society could operate efficiently unless it had the kind of legal system which Luhmann is describing.

I want to take up what I find to be one of the most interesting aspects of Luhmann's theory--the idea of "procedural legitimation". According to Luhmann, contemporary legal systems of the Western type produce far more rules than we can absorb, and this carries a risk that there may come to be doubts of their intrinsic validity. There have been developed, to overcome this, certain "procedures" (or processes) which *legitimize* positive legal rules. One is the legislative process, another is the process of judicial decision.[1]

I would like to concentrate on Luhmann's ideas about the judicial process because they have some important implications for theories of legal reasoning. First of all, he points out that litigation has arisen because someone's expectations have been disappointed. Now, there are, he says, two sorts of expectations: *cognitive* expectations and *normative* expectations. Cognitive expectations are those which, when disappointed, one adapts to reality i.e. one learns from the disappointment to amend one's expectations. Normative expectations are those which one contrives to hold even after they have been disappointed. He gives a striking example: one may expect one's new secretary to be young, blond

and beautiful. These are cognitive expectations which will be amended if they are not fulfilled. On the other hand, one also expects a new secretary to be able to type, filter out telephone calls and make appointments. If these expectations are not fulfilled, one continues to hold them. It can be demanded that a secretary learn to type, but not that she dye her hair.[2]

The effect of the judicial decision, says Luhmann, is that the disappointed litigant has to learn, has to amend his expectations. It brings home to him that third parties *normatively* expect all involved in the litigation to *cognitively* adapt themselves to what the binding decision determines.[3]

Now this is all very well, if one agrees that this is the effect of judicial decisions on third parties, i.e. that because a certain legally defined process has been gone through, the resulting norm (decision) is validated and no longer subject to doubt. Luhmann does protect his position here by speaking of acceptance as "a general readiness to adopt decisions not yet taken *within certain limits of tolerance*."[4] I suppose we could say then that either Lord Atkin's decision or Lord Buckmaster's in *Donoghue v. Stevenson* was acceptable within those "limits of tolerance". But it seems to me, this would not have been the case if Lord Atkin had found for the plaintiff on the ground that she had a nice face or because he had a penchant for Scottish widows. I suggest that this means that our acceptance of the decision is still dependent on some kind of *evaluation* on our part and not simply on the recognition that certain formal procedural steps had been followed, issuing in a decision. We do at times criticize decisions as bad decisions, and we are sometimes reluctant to act upon them despite their impeccable credentials as the issue of valid "procedures" in the context of the legal system.

There are perhaps two possible answers that Luhmann could make here. The first might be that giving the right sort of reasons is part of the criteria of the validating process: that the judicial process only legitimizes if reasons are given, and only certain kinds of reasons. But this does not seem to be Luhmann's view, for he says that acceptance

depends not on the reasons given for the decision but on the proper performance of the decision process.[5]

Perhaps another answer would be to say that only a fraction of the population (e.g. professional lawyers) is in a position to evaluate the reasons. But if this is true, it is also true of the ability to appreciate whether the legitimizing process has been properly carried out. It also does not seem to fit with his statement that *no-one* is in a position to form a view on every actual decision.[6]

Luhmann's minimization of the place of judicial reasoning in the acceptance of decisions is related to his view of the positivization of law. . . "Legitimate legal validity can become attached to *any content whatsoever* by means of decision. . . "[7] This has the effect of giving his theory a curiously "disembodied" look: an emphasis on formal validity reminiscent, perhaps, of Kelsen, but rather surprising in a sociological thinker, from whom we might expect an emphasis on the close relationship between the content of the law and the social context.

In short, I find Luhmann's account of the judicial process incomplete and, while his emphasis on the significance of legitimizing procedures in the acceptance of law is clearly significant, it leaves unexplained some important aspects of the proceedings - at least as far as the judicial decision is concerned.[8] Perhaps he will return to this topic in a more detailed treatment at a later date.

NOTES

1. *Legitimation durch Verfahren*, 27-31. My references are to the first edition.

2. *Rechtssoziologie*, 42-43.

3. *Id.*, 265.

4. My emphasis. *Op. cit.* n. 1., 28.

5. *Id.* 31.

6. *Ibid.*

7. My emphasis. "Positives Recht und Ideologie" in *Soziologische Aufklarung* (Cologne, Westdeutscher 1970), 178 at 180.

8. There are at least two detailed criticisms of Luhmann's account of the judicial process: in Esser, J., *Vorverstandnis und Methodenwahl in der Rechtsfindung* (Athenäum, Frankfurt, 1970), 202-213 and Rothleuthner, H.R., *Zur Soziologie richterlichen Handelns* Part II, 1971 *Kritische Justiz*, 60 at 69.