NIKLAS LUHMANN ON THE WELFARE STATE AND ITS LAW

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This paper is intended exclusively as an elementary, summary presentation of its topic. On two grounds do I consider such a modest task worth performing. In the first place, although this situation is now rapidly changing[2], Luhmann is far less well known to students who read only English than to those who can read German (or Italian); besides, few of his writings in English expound his sociology of law and[3] none (so far as I know) address directly and at length the specific theme of this paper. In the second place, Luhmann is a complex and demanding writer, and those not yet familiar with him can probably be helped in making their first acquaintance by the kind of introduction attempted here.[4]

I

This first section of the paper deals exclusively with a single text, Politische Theorie im Wohlfahrtsstaat[5] - a short book written by Luhmann, I believe, at the behest of a German political party, and thus addressed originally to a non-specialist audience. In spite or because of this, this text dispenses with any extensive description of the welfare state phenomenon. Luhmann does say that the phenomenon amounts to more than what Italians refer to as the stato assistenziale - a complex of public operations intended to relieve the economic disadvantage of underprivileged groups - but he is unfortunately unclear as to what else it amounts to. In particular, it is not clear whether the imagery of the welfare state adopted throughout the book does or does not comprise various forms of public intervention in the management of the national economy, from the support of aggregate demand to the financing of corporate Research and Development expenditures - forms which, according to some writers, constitute something like "welfare for the rich", insofar as they contribute to capital accumulation. (The omission of any explicit consideration of such state activities matches Luhmann's total, contemptuous lack of attention to marxisant views of the welfare state, some of which emphasise precisely those activities.)

Against the background, then, of an inadequate descriptive treatment of the welfare state, Luhmann proceeds to the much more congenial task of a theoretical treatment of it. Essentially, he seeks to identify, within the societies in which the welfare state operates, a "principle" - a broad developmental tendency under whose logic those operations themselves might be meaningfully subsumed. In the light of this criterion, he discards proposals advanced by others: neither the principle of solidarity nor that of the moderation of social disadvantage appear to him capable of bearing the conceptual weight required. He accords greater significance to a further principle, that of compensation; but essentially his own argument advances an alternative solution, according to which it is the principle of inclusion that makes the best conceptual sense of the development of the welfare state.[6]

In order to realise what Luhmann means by "inclusion" we must consider however briefly his treatment of a wider problem, utterly central to his whole theoretical enterprise:[7] the problem of the distinctive naure of modern society. For quite a few years now, Luhmann has addressed that problem chiefly by conceptualising an evolutionary sequence in the arrangements whereby broader, more comprehensive social systems (= societies) on the one hand are differentiated into narrower subsystems, and on the other sustain their own identity through those subsystems' operations.

In this sequence come first societies characterised by segmentary differentiation: here the subsystems are very similar to one another, and largely self-sufficient; they only make up a broader, societal system insofar as they share a cultural patrimony; metaphorically, we might say that such (primitive) societies are integrated by virtue of possessing a centre. The next step in the sequence (hierarchical differentiation) concerns societies whose characteristic subsystems are corporate bodies standing in relations of superiority/inferiority toward one another, and where the superordinate bodies impose their own dominance over the subordinate ones. metaphorically, such stratified societies may be said to be integrated by virtue of having a summit. In the final arrangement, characteristic of modern societies (functional differentiation) the key subsystems are no longer "lived-in", "manned", relatively concrete social entities, but much more abstract ones: they consist of sets of differentiated, specialised resources and activities (political, economic, religious, legal, etc.) each of which

presupposes the operation of the others and concurs through its own operation in the functioning of the whole. Such a society cannot be said, even metaphorically, to possess either centre or summit; it represents a distinctive "evolutionary advance" because of its capacity to generate and to make use of much greater complexity than societies characterised by the two earlier patterns of differentiation/integration.

Functional differentiation alters deeply the relationship between individuals and differentiated subsystems (and, through them, the larger society). While under premodern conditions, as we have seen,those subsystems (both the isolated, local communities of "primitive" societies, and the strata constituting more advanced ones) were units within which individuals lived out their concrete existence and from which they unproblematically derived their identities, the subsystems of modern societies are, as I said, abstract entities: their own components are not individuals as such, but "roles", differentiated aspects and phases of the concrete existence of individuals, who are involved in those subsystems only with reference to specific capacities and concerns. This makes particularly problematical the modern relationship between individuals and the larger society, since the latter only exists through the operation of its functionally differentiated subsystems. The "inclusion principle", to which Luhmann chiefly refers for a theoretical understanding of the development of the welfare state, formulates the main tendency associated with the advance of modernity in shaping that relationship:

> As an individual, man lives outside the functional systems. At the same time, each person must have access to each functional system, to the extent that the person cannot conduct its existence without addressing claims to societal functions. The inclusion principle formulates this requirement from the standpoint of the societal system.[8]

Concretely, the principle's realisation is associated with the building up of the modern state and its evolving relationship to the population. At first that relationship concerns mainly the state's jurisdictional activity: individuals as such become vested with generalised legal capacities and thereby become justiciable by the state. Later, the expanding fiscal and legislative prerogatives of the state are brought to bear on the population at large, and with this expansion are associated democratic

participation rights. This development culminates in "the encompassing of an evergrowing range of needs and interests of the population within the domain of possible political themes"[9] through the building up of the welfare state, which thus represents "the full implementation of political inclusion".[10]

This is, however, a dynamic implementation, driven forward to ever new targets, as the welfare state secures the individual's access to more and more aspects and phases of the societal process. This dynamic tendency is interpreted by Luhmann in two ways. He connects it in the first place with a generic feature of social (and perhaps other) systems, labelled "self-reference":

> The demand for welfare can always refer to itself and call itself "welfare". "Welfare is of unlimited scope". It possesses no end, and can itself undertake the production of its own possibilities and of its own problems.[11]

In the second place, Luhmann connects that dynamic tendency to the changing pattern of internal differentiation of the functionally differentiated political system. In the early modern period, that pattern was dualistic: it replicated, at all levels from the system's top down to its base, the asymmetry characteristic of command/obedience relations between parts characterised at each level as respectively super- or sub-ordinate. The later, properly modern pattern, (which still holds in contemporary societies) is instead triadic. Here the key differentiated subsystems of the political system are three: the public, politics in the narrow sense (that is, the party system), and administration (nota bene, this term to Luhmann denotes both legislative and governmental activities); and the (power) relations between these subsystems are not asymmetric but circular. Power does not flow downwards, but circulates backwards and forwards between those subsystems; and, according to Luhmann, its movements trace two power circuits. Within one circuit, as conventional constitutional theory describes it, parliament (as the institutional seat of politics in the narrow sense) "makes laws and grants means for the pursuit of goals; the executive carries out programmes worked out through politics; the public abides by the decisions thus formed and in turn elects parliament". There is however a countercircuit, where

> the administration puts preformed decisions in front of politics. Through party organisations, politics suggests to the public what it should

> vote for and why. In turn the public influences the administration through channels as various as on one hand interest groups and on the other people bursting into tears in public offices.[12]

According to Luhmann, the welfare state's expansive tendencies rest particularly on this second, countercircuit, and particularly on the interface between the public (with its everpresent demand for state action upon its needs) and the administration (with its potentially expandable capacity for intervention according to that demand).

The reader will have noted that so far my account (which follows closely Luhmann's text) has made no mention of law. This is coherent with Luhmann's general view of modern society: for here law figures not as part of the political system, but as another differentiated societal subsystem, parallel with the political system itself, religion, education, the economy. Politische Theorie im Wohlfahrtsstaat introduces law through a rather tortuous argument, the elucidation of which calls for brief reconsideration of two (overlapping) notions already mentioned. internal differentiation, and self-reference.

Each differentiated subsystem of a larger system becomes in turn differentiated, and its tendency to self-reference takes the form of focussing much of its activity on the relations between its own differentiated (sub)subsystems, rather than to its own relations with the original larger system. Somewhat more concretely, this means that although the political system is a differentiated subsystem of society, most political activity tends to become concerned with internal political matters, and particularly with the contingencies of the power exchanges taking place along the circuit and countercircuit discussed above.

This tendency, however, is counteracted at various points, corresponding to the interfaces between each pair within the triad of components we have mentioned, by "externalisations". That is (so far as I understand Luhmann on this difficult point), the components of each pair are kept from becoming exclusively absorbed in their reciprocal relations by having to take account of the demands made by other societal subsystems, which in a sense remind them of the existence of a wider environment. In the present

context, Luhmann introduces law as one such "externalisation device", affecting specifically the public/administration interface. For while law itself, under modern conditions, is formed through legislation, and thus "rests on the political system", yet "specific activities within the relationship public/administration presupposes law as an external fact binding both sides".[13] The law's impact on that relationship is multiple; for instance, reference to law excludes the notion that public and administration either collide or collude with one another solely in terms of their contrasting or converging interests and of the respective quanta of power; law, more particularly, constrains administrative activity by requiring that equal cases should receive equal treatment; its existence makes it more likely that citizens will cooperate or comply with the administration's activities willingly (rather than under compulsion).

Further references to law are made in the context of a major theme of Politische Theorie im Wohlfahrtsstaat - the theme of "the limits of the welfare state". Once more, Luhmann attacks this theme by introducing a wider theoretical notion: the distinction between the function which the political (sub)system performs for the wider societal system as a whole, and the specific performances demanded of it on behalf of the other (sub)systems - especially the economy, education, science, and the health system. Concretely, the political system is being asked to make provisions for (some) requirements of all those other systems, in the interest of (finally) increasing the population's welfare by guaranteeing the inclusion of more and more of its members among those benefitting from those systems' activities. However, the political system also remains bound to its specialised functional concern with securing the executability of binding decisions [Bereitstellung der Durchsetzungsfahigkeit fur bindende Entscheidungen]"[14] by means of dispositions over power and ultimately over physical coercion.

Now, according to Luhmann, this abiding concern of the state limits the extent to which it can reasonably be expected to deliver all of the performances expected of it by the other societal (sub) systems. For, as it seeks to meet the latter's demands, the state can only make recourse to two key "operative instrumentalities"[15] which are compatible with its functional destination: it can allocate money; or it can produce and arrange for the implementation of law. Money and law constitute,

in this context of analysis, the two basic media of communication through which the binding-ness of political decisions can be secured.

Considered as such media, both money and law present considerable advantages. For instance, they are relatively easily deployable on the part of the political centre; they can be used to form lengthy chains of operation (as original allocations of money become a sequence of sub-allocations, and as broader legal directives become specified into narrower rulings); and they can be used to build organisations, specialised agencies. However, there are also difficulties in the use of money and law as means specifically of the state's welfare activities. One may classify the most significant of these difficulties under the following three labels:

- Disadvantages. The formation of laws and the allocation of moneys, when they constitute and are seen as the objects of decisions, tend to enhance the sensitivity to changes both of those benefitting from them and (critically) of those negatively affected by those decisions:

> ... increases or decreases in available moneys, such as one would not normally notice, become noticeable when effected through decisions, equally, changes in one's legal position which normally one would not observe are acutely perceived when enacted through decisions.[16]

Thus, both legal and financial provisions made in the context of welfare state activities tend to produce at best what Raymond Aron once labelled a "satisfaction querelleuse".

- Intrinsic limitations. There are "advanced" forms of welfare activity, particularly those labelled in the U.S.A. "people processing", that is, intending to induce or restore in their addressees a sense of personal worth, a capacity for autonomy and responsibility, whose beneficial effects simply cannot be secured (at any rate directly) through either legal or financial provisions:

> Activities in this realm require resources of commitment, personal involvement, interactional sensibility, which law and money cannot provide for. ... The conditions for success or failure, here, rest on the individuals themselves and their interaction systems: these cannot be

> controlled from the centre or reduced to legal obligations . What cannot be accomplished by means of either law or money is the modification of the people themselves.[17]

- Cost. This difficulty must be understood, widely, as the probability that the extensive recourse by the state to money allocations and legal provisions may overload, respectively, a society's economic system and its legal system:

> In both domains, it should not be forgotten that ultimately the conditions of the possibility of these instrumentalities must be guaranteed outside the political system, and that this limits their availability to that system.[18]

In this context, Luhmann refers critically to a contemporary tendency - labelled in Germany Verrechtlichung (which translates, clumsily, as "juridicisation") - to discipline legally relationships and processes which in the past have dispensed with such discipline.

The welfare state may seek to evade or moderate these difficulties pertaining to the direct employment of money and law as media of communication, by the strategy of using them indirectly to establish and finance administrative agencies which will in turn engage in non-financial and non-legal forms of intervention (for instance, through professional "caring" activities). But this strategy itself has its own pitfalls. In the second place, it unavoidably involves the further expansion of the state's administrative apparatus, with all the attendant bureaucratic pathologies. Furthermore, sometimes the agencies themselves, even when (wo)manned by appropriately qualified personnel, run up against the same difficulty as the state's direct use of law and money (and particularly those labelled above "intrinsic limitations"). Finally, it often leads to the agency-building efforts being mistaken for indications of the agencies' effective incidence upon the "welfare problems" entrusted to them.

These liabilities of the state's most distinctive "operational instrumentalities", when deployed in the context of an expanded and expansive conception of welfare, (together with other critical considerations) lead Luhmann to suggest that it would be wise to adopt instead a more restrictive conception

The argument developed to this effect in Politische Theorie im Wohlfahrtsstaat is interesting in its own right, but for the purposes of this paper's topic that book has no more to offer; we shall thus take leave of it at this point, and look for other relevant texts.

II

It may be seen from the above account that Politische Theorie does indeed deal with law, but in a rather undifferentiated fashion, without any close analysis of the specific legal phenomenon involved in or affected by the state's welfare activities. I know of no further texts of Luhmann's which engage expressly and at length in such an analysis. But there are a few which raise, incidentally to other topics, the question of "law in the welfare state".

The most important such text is a lengthy essay where Luhmann, building upon two earlier essays[19], discusses "Subjective rights: the reconstruction of juridical consciousness on behalf of modern society".[20] Once more (as the title suggests) the essay's broader topic is the nature of modern society, specifically, it investigates one major legal development connected with the transition from hierarchical to function differentiation, and with the associated increased significance of "self-reference" as a mechanism for the production of social and cultural reality. That is, in the same way that in Descartes's cogito the subject's reference to itself becomes the ground of cognitive certainty, in the legal sphere subjectivity becomes the ground of a distinctively modern phenomenon - subjective rights (Luhmann quotes Saleilles's je veux, donc j'ai des droits).

The modernity of the notion of subjective rights appears if we contrast it with the premodern notion of jus it replaces. Jus entailed not only the complementarity of juridically protected expectations (i.e., to the rights of one side correspond the other side's obligations) but also reciprocity (i.e., there are rights and obligations in capo a both sides, though rarely an equivalence in the balance of rights over obligations on each side) However, the modern notion of subjective rights settles for complementarity: each subject may hold vis-a-vis others protected expectations which are not directly connected or commensurate with the former's obligations toward the latter. Furthermore, the latter are mostly called upon simply to register rather than act upon a given subject's rights.

Thus abstracted from a concrete context of mutual obligations, juridically protected expectations become more mobile and fluid; they can be more freely generated, more variously combined, more open-endedly shifted in the intercourse among subjects holding them One might say that subjective rights stand to jus as money exchange stands to barter: they presuppose and sustain a much more complex and flexible universe of expectations and potentialities; not being counterbalanced by reciprocities, they also allow much greater asymmetries in their actual enjoyment to build up among subjects. The control over protected expectations, in turn, becomes much more abstract, detached, and general, as with the progressive modernisation of law it comes to rest more and more upon enacted laws of the state and the latter's monopoly of legitimate enforcement. On the other hand, it is precisely the fastening upon subjects-as-such (as loci of self-referential processes) of entitlements in the form of rights, that diminishes some risks attendant upon the positivisation of law.

What then, one may ask, is the connection between this legal development and the welfare state? That connection is complex and, so to speak, ambivalent. To begin with, subjective rights can be seen as ways of securing the "inclusion principle" which, as we have seen, Luhmann sees as central to the welfare state phenomenon: "Subjective right symbolises man outside the differentiated systems with his claims to inclusion".[21] More precisely, as Luhmann says (developing an insight first developed by Simmel), since under modern conditions each individual becomes more loosely connected with a greater number of differentiated contexts

> the inclusion of the population in the societal system must be brought about in new forms. And since at first this aspiration cannot yet be realised, it becomes vested in the form of subjective rights. The fact that one is dealing with subjective rights (rather than sheer reflections of an objective legal order) symbolises that individuals are now seen as more strongly individualised and more independent of specific social connections. The fact that one is dealing with subjective rights (rather than obligations ... and responsibilities) symbolises that the inclusion of all in all functional domains is still an unfulfilled aspiration.[22]

Thus, the welfare state realises its program "largely by means of an immense number of newly

created subjective rights, transforming into entitlements not all but many social performances [Leistungen]". This development is compatible with the principle of functional differentiation, for it does not closely connect reciprocities with rights (Luhmann criticises the famous formulation of the Weimar constitution, Eigentum verpflichtet, as an anachronistic attempt to make such a connection) Rather, subjective right remains "a matter of subjective arbitrium, founded upon itself and presupposing on the part of others only the complementary registering [Erleben]" of one's entitlements.[23]

However, unlike the paradigmatic subjective right, property, each subjective right associated with the expansion of the welfare state tends to become "hedged in by multiple regulations",[24] to the point where the determination of the concrete significance of the right is no longer vested in its holder but in the state itself as the right's addressee, which itself formulates the conditions for the realisation of the right in the context of its own operations and requirements.

In the long run, this leads to a veritable inversion in the relationship between "acting" and "registering" typical of earlier, "non-welfare" rights. There, most of the acting, if any, was the business of the right-holder, and other parties merely registered it. The typical welfare right, however, shifts the locus of action towards the state, placing the right-holder in the position of a claimant for the benefit of the state's action, or even just its pasive recipient. Thus, while originally subjective rights had served to decentralise the production of legal phenomena, and acted as a counterweight to positive law, welfare subjective rights become themselves an "instrumentality of positive law"[25] Furthermore, the very idea of subjectivity as a self-referential quality of the individual on which his/her right was grounded becomes attentuated, as the individual comes to be seen as the titular of interests rather than as the locus of subjectivity.

This last development contaminates the general notion of subjective right, even outside the context of the welfare state:

> Recent private law doctrine characterises subjective rights as the "assignment" [Zuweisung] of goods or opportunities, and thus thinks itself in agreement with the

> constitutional concept of person and the Wurdegebot But read your Kant, and you realise that the opposite is taking place. For, according to Kant, subjective rights do not "assign" but merely "secure" what pertains to the subject in and of himself [was dem Subjekt von sich aus zusteht]. This "in and of himself" has now been dropped, and replaced with the appeal to "fundamental values" with which the legislator must comply while doing his "assigning".[26]

In other words, law is no longer seen as acknowledging and protecting rights which possess an "inner side" of their own. Rather it becomes the sole fount and ground of rights deprived of any such independent foundation. This development may entail a "threat to human freedom", and by untying legal development from any presuppositions allows it to "go on growing out of control".[27]

III

The previous section has dealt with legal developments associated with the welfare state which affect individual entitlements. One might expect Luhmann to complement his consideration of such developments with arguments concerning the legal aspects of the activation and control of state agencies involved in welfare tasks, and in particular changes in the nature of administrative law. In fact, so far as I know, Luhmann has not discussed the latter topic at length. There is something surprising about this, given the fact that before entering his academic career Luhmann worked as a civil servant, and has since clearly indicated in a number of essays[28] his command of the specialist knowledge required to address that topic. In my view, however, the fact that he has so far failed to address it is not accidental, but expresses what one may call a grounded reluctance, and it can be made sense of in the light of the following considerations:

a) Luhmann has recently insisted on the distinction between three fundamental levels at which social systems are formed and operate: the interactional, organisational, and societal levels. Law, in his view, develops and functions primarily at the societal level. For reasons indicated above, however, the performance of welfare activities is increasingly the concern of agencies operating more and more as organisations, which to that extent are not

as likely to constitute the foci of specifically legal developments as the "classical" state organs were.

b) It is true of course that the structure of such agencies is the proper concern of legislation. However, Luhmann seems to think that by and large existing administrative structures, particularly in the German Federal Republic, are adequate;[29] and, in any case, the legislative decisions concerning those structures are, strictly speaking, matters of policy, and as such not the object of specifically juridical argument.

c) As to the operations of those agencies, these take the form largely of "programmed decisions". Luhmann distinguishes two kinds of programmes. conditional programmes state certain conditions the occurrence of which bindingly commits agencies to certain prearranged lines of activities; while purposive programmes assign to agencies a given task or goal, leaving them largely free to seek the means most conducive to its realisation. Now, only conditional programmes are specifically amenable to close juridical orientation and control, and require agencies to engage in that specific form of juridical reasoning which consists in matching abstractly stated conditions with the factual situations [Tatbestande] at hand. However, such programmes (with which much of traditional administrative law is concerned) are, according to Luhmann, increasingly unsuitable for the orientation and control of administrative activity in a complex, changing environment. Welfare state activities are increasingly of the latter kind, and accordingly require purposive programmes; this makes them relatively resistant to juridical discipline (at any rate of a traditional nature).

d) Besides "conditional programmes", much administrative law details Verfahren, decisional procedures. According to Luhmann, the key function of Verfahren is that of imparting legitimacy to decisions. In his view, however, modern political systems - at any rate those constituted as liberal democracies - entrust the task of legitimation mainly to the spheres of politics and legislation, which perform them through the electoral and legislative Verfahren respectively. Thus the administration ought to be able to proceed in its own activity without much concern with legitimating it.[30] This seems to me an argument (however implicit) for loosening up many of the legal restraints traditionally placed upon the administration, leaving it free to develop and execute

"purposive programmes" which in turn are, as suggested above, relatively free from legal regulation.

e) Luhmann forthrightly opposes the prospect, cherished by others, of modifying the traditional forms of juridical thinking and training by integrating into them conceptual resources and research strategies drawn from the social sciences.[31] "Classical" juridical thinking has a rationality of its own, focussed on the attachment of correct qualifications to past events, the determination of responsibility for past acts, the application of the resulting sanctions. Such a rationality is at bottom incompatible with one aimed primarily at the production of future effects, at the determination and control of the factual (as against the normative) consequences of decisions. The attempt to mix these two rationalities would compromise the rigour and distinctiveness of each, and constitute a form of de-differentiation. Instead, modern social sciences should be juxtaposed to legal studies in the formation of administrative personnel, and the respective orientations should concur in orienting administrative action. But in this inter-disciplinary programme, the specific content of legal studies would remain fairly traditional[32] and they would hold a decreasingly significant position with respect to the programme's other components.

f) At bottom, what for Luhmann (as I read him) essentially disqualifies law from playing a critical role in activating and controlling the ever-expanding activities of public agencies, is the fact that contemporary society requires cognitive expectations, over against normative ones, to play the decisive role in orienting the social process.[33] Law itself, of course, forms the object of sustained and sophisticated cognitive efforts, resulting in knowledge which can be systematised, taught, examined, rationally argued about. Yet when all is said and done such knowledge refers to expectations of a normative nature that is, expectations the frustration of which by the course of events does not lead to these expectations being abandoned or modified, but to their being held counterfactually, and reasserted by means of sanctions.[34] It is this being ultimately grounded on the refusal to learn that condemns bodies of normative expectations to play a recessive role in an increasingly complex and changing society. The significance of the related systems of knowledge (including juridical knowledge) is accordingly reduced

Insofar as these several considerations constitute a plausible (though admittedly selective

and only partially substantiated) rendering of Luhmann's views about law, their bearing on this paper's topic seems clear. For Luhmann, administrative action (including that which performs the state's multiple welfare tasks) must increasingly take place in a juridical vacuum. One might go so far as to say that, at any rate as regards administrative law, the ultimate import of Luhmann's thinking on that topic is a kind of Abschied vom Recht - leave-taking from law.

I am aware of the contrasting view argued by Teubner in a sophisticated paper[35] which draws on Luhmann (and other authors) for the vision of a different kind of law, appropriate to the requirements of contemporary society, and in particular oriented - to use Luhmann's own terminology - more to the "steering of conduct" than to the "securing of expectations".[36] And of course I realise that Luhmann himself could all too easily dispose of my views on the matter by the (for him) simple device of addressing in a sustained fashion those aspects of this paper's topic which I maintain he has so far neglected. Be that as it may, it does seem to me that that neglect is worthy of note, and that it expresses, as I have already phrased it, a "grounded reluctance" to consider at length the developments in administrative law associated with the expansion of the welfare state

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2. There are now two volumes of Luhmann's writings in English: Trust and Power, Wiley, London, 1979, and The Differentiation of Society, Columbia Univerity Press, London, 1982.

3. See Ch.5, "Positive Law and Ideology", and Ch.6, "The Autonomy of the Legal System", in The Differentiation of Society, op. cit., and my own introductory presentation, "Two Themes from Niklas Luhmann's Contribution to The Sociology of Law", Bulletin of the Australian Society of Legal Philosophy, No. 19, p. 4 (August 1981).

4. See also G. Poggi, "Niklas Luhmann's Neo-Functionalist Approach: An Elementary Presentation", Introduction to Trust and Power, op. cit., pp. vii-xix, and Stephen Holmes & Charles Larmore "Translators' Introduction" to The Differentiation of Society, op. cit., pp. xiii-xxxviii.

5. N. Luhmann, Politische Theorie im Wohlfahrtstaat, Olzog, Munchen, 1981.

6. Luhmann refers to writings by T.H. Marshall and Talcott Parsons as proximate sources of this concept.

7. See the opening remarks in Holmes and Larmore, supra n. 4, p.xiii

8. Supra n. 5, pp.27-28.

9. Id., p.28.

10. Ibid.

11. Id., pp. 36-37.

12. Id., pp.45-46.

13. Id., p.64.

14. Id., p.82.

15. Id., Ch. XIII.

16. Id., p.96.

17. Id., p.97.

18. Id., p.99.

19. "Funktionale Methode und juristische Entscheidung" (1969), and "Zur Funktion des 'subjektiven Rechtes'" (1970), both reprinted in Ausdifferenzierung des Rechts: Beitrage zur Rechtssoziologie und Rechtstheorie, Suhrkamp, Frankfurt, 1981, at pp. 273-307 and 360-73 respectively.

20. Gesellschaftsstruktur und Semantik:Studien zur Wissenssozioloogie der modernen Gesellschaft, vol. 2, Suhrkamp, Frankfurt, 1981, Ch. 2.

21. Id., p.98.

22. Id., pp.84-5.

23. Id., p.89.

24. Id., p.88.

25. Ibid.

26. Id., p.91.

27. Id., p.92.

28. See especially Politische Planung: Aufsatze zur Soziologie von Politik und Verwaltung, Westdeutscher, Opladen, 1971.

29. Supra n. 5, p.115.

30. N. Luhmann, Legitimation durch Verfahren, Luchterhand, Neuweid, 1975, Ch. 4.

31. "Funktionale Methode", supra n. 19; N. Luhmann, Rechtssystem und Rechtsdogmatik, Kohlhammer, Stuttgart, 1973.

32. N. Luhmann, "Die Bedeutung sozialwissenschaftlicher Erkenntnisse zur Organisation und Fuhrung der Verwaltung" in Verwaltung im moderen Staat , Senator fur Inneres, Berlin, 1970, p.73.

33. N. Luhmann, Soziologische Aufklarung , 2:Aufsatze zur Theorie der Gesellschaft, Westdeutscher, Opladen, 1975, pp.51-71.

34. N. Luhmann, Rechtssoziologie, Rowohlt, Reinbek, 1972, pp.40-53

35. Gunther Teubner, "Substantive and Reflexive Elements in Modern Law", European Institute Working Papers No. 14.

36 N. Luhmann, "Die Funktion des Rechts: Erwartungssicherung oder Verhaltenssteurung?" (1974), in Ausdifferentierung des Rechts, supra n. 19, pp.73-91.