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Systems Theory and Puzzles of Legal Culture

Abstract

Legal culture is a concept as central to legal studies and sociology of law as difficult to define. It aims to serve important theoretical needs but it is also responsible for some puzzles that trouble legal and socio-legal scholars. Some of them are quite famous: the puzzle of the nature of Japanese litigiousness, the puzzle of differing German and Dutch legal cultures, or, recently, the issue of cultural defence. Some are lesser known, like the multitude of courts' adjudicating strategies in Poland's allegedly unitary legal culture. The paper argues that the problems of such nature are a conceptual artefact, a result of objectifying understanding of legal culture as a phenomenon. It is stressed that in such studies more weight should be put on the immediate, procesual nature of investigated phenomena. In order to support these claims, conceptual machinery of systems theory is utilised. First, a general view of N. Luhmann regarding the notion of culture is accepted and applied to the idea of legal culture. Further it is demonstrated how the aims served by the notion of legal culture can be achieved by appealing to such theoretical concepts as structural coupling, first- and second-order observation, and above all - temporal nature of social systems. A general conclusion of the paper is that in the study of "legal culture" an evolutionary perspective is unavoidable.

1. Introduction

Legal culture is indeed a puzzling concept. First and foremost because it lacks clarity. The relationships between law and culture are investigated in many studies located at the border zones of sociology of law, anthropology of law, legal theory, history of law, and comparative law. They serve different purposes, rely on divergent presuppositions and utilise a variety of research methodologies. One effect of this intense interdisciplinary interest is the plurality of concepts of legal culture, and its consequent vagueness. The diversity of definitions justifies the impression that C. Kluckhohn and A. Kroeber's famous 1952 observation that culture happened to be defined in more than hundred and fifty ways¹, also aptly describes contemporary studies of legal culture. Worse, even

¹ C. Kluckhohn, A.L. Kroeber, A.G. Meyer, W. Untereiner, *Culture: A Critical Review of Concepts and Definitions*, New York 1952. See also M. Borucka-Arctowa, *Kultura prawna na tle myśli filozoficznej i społecznej o kulturze* [Eng. *Legal Culture against a Background of Philosophical and Social Notions of Culture*], "Studia Prawnicze", 2002/151/1, pp. 5–24.

a brief survey of the literature reveals that many authors coin definitions of their own, even though they acknowledge the existence of many earlier accounts of legal culture.

This notwithstanding, the predominant usage of the term in legal literature is intuitive, not theoretical. The notion of legal culture is used in it to distinguish law “as such” (most likely: black letter law) from “non-legal” factors relevant for its social working. Once social correlates of law are separated from law in the strict sense, they become an object of criticism and evaluation or serve as a reference in postulates addressed to legal professions, lawmakers or the populace at large. This terminological convention makes itself particularly visible whenever legal culture is discussed as a reason for law’s ineffectiveness or as a necessary condition for its proper working. Do not blame the law, blame the context – it is implied. As a result, a limited juridical definition of law is saved at the expense of vague, “*ubi leones*” understanding of legal culture.

In more theoretically-aware writings, particularly in many incarnations of socio-legal studies, the approach is more analytical and more precise. Yet, also in such literatures, descriptions of legal culture vary. The term happens to be defined as views about law², attitudes and views³, attitudes and behaviour⁴, attitudes, behaviour and their effects⁵, legal values⁶, legal values and attitudes⁷, values, ideas, opinions and attitudes⁸, symbolic actions⁹, demand for law generated by value-hierarchies, a system of values and norms¹⁰, a system of values and practices¹¹, legal consciousness¹², a collection of discourses on law¹³, material and symbolic conditions of communication necessary to create law, as well as the relationships between these conditions¹⁴, norms, institutions and views related to law, pertaining to values and methods of action¹⁵, and a pattern of practices and processes.¹⁶ More systematic definitions distinguish between various types or levels of phenomena encompassed by legal culture.¹⁷ On the other hand, legal culture is some-

² See W. Gromski, *Kultura i kształtowanie autonomii prawa* [Eng. *Culture and Shaping of Legal Autonomy*] in: *Autonomia prawa ze stanowiska teorii i filozofii prawa* [Eng. *Autonomy of Law as Seen by Legal Theory and Legal Philosophy*], edited by J. Helios, Wrocław 2003, pp. 59–77.

³ W. Szubert, *Uwagi o kulturze prawnej* [Eng. *Remarks on Legal Culture*] in: *Naród, kultura, osobowość* [Eng. *Nation, Culture, Personality*], edited by A. Kłosowska, Wrocław 1983, p. 577.

⁴ See D. Nelken, *Using the Concept of Legal Culture*, “*Australian Journal of Legal Philosophy*” 2004/29, pp. 1–28.

⁵ See S. Russocki, *Wokół pojęcia kultury prawnej* [Eng. *Discussing the Concept of Legal Culture*], “*Przegląd Humanistyczny*” 1986/11–12, and *Wokół pojęć “kultura polityczna” i “kultura prawna”* [Eng. *Discussing the Concepts of “Political Culture” and “Legal Culture”*], “*Państwo i Prawo*” 1981/3.

⁶ J.L. Gibson, G.A. Caldeira, *The Legal Cultures of Europe*, “*Law & Society Review*” 1996/30, pp. 58f.

⁷ L.M. Friedman, *Legal Culture and Social Development*, “*Law & Society Review*” 1969/1/1, p. 35.

⁸ See K. Pałeczki, *O użyteczności pojęcia “kultura prawna”* [Eng. *On the Utility of the Concept “Legal Culture”*], “*Państwo i Prawo*” 1974/2.

⁹ L.M. Friedman, *Is There a Modern Legal Culture?*, “*Ratio Juris*” 1994/7/2, p. 118.

¹⁰ G. Skąpska, *Kultura prawna w procesie tworzenia wolnej gospodarki* [Eng. *Legal Culture in the Process of Free Market Shaping*] in: *Buddenbrookowie czy piraci* [Eng. *Buddenbrooks or Pirates*], edited by G. Skąpska, Kraków 2002, p. 103. See also G. Skąpska, *Źródła kultury antylegalizmu* [Eng. *The Sources of the Culture of Antilegalism*], in: *Teoria prawa, filozofia prawa, współczesne prawo i prawoznawstwo* [Eng. *Legal Theory, Contemporary Law and Jurisprudence*], Toruń 1998, pp. 273–290.

¹¹ P.B. Potter, *The Chinese Legal System: Globalization and Local Legal Culture*, London – New York 2001, p. 2.

¹² So, apparently, E. Markowska-Gos, *Kultura prawna młodzieży studenckiej* [Eng. *The Legal Culture of the Student Youth*], Rzeszów 2002, pp. 28f.

¹³ M. Chanock, *The Making of South African Legal Culture, 1902–1936: Fear, Favour, and Prejudice*, Cambridge 2001, p. 23.

¹⁴ P. Guibentiff, *Rechtskultur und Rechtsproduktion. Das Beispiel Portugal* [Eng. *Legal Culture and the Making of Law. The Portuguese Case*], “*Zeitschrift für Rechtssoziologie*” 1989/10/2, p. 155.

¹⁵ V. Gessner, *Europäische Rechtskultur* [Eng. *European Legal Culture*] in: *Prawo w zmieniającym się społeczeństwie* [Eng. *Law in a Changing Society*], edited by G. Skąpska, Kraków 1992, p. 290.

¹⁶ N. Mezey, *Law as Culture* in: A. Sarat, J. Simon, *Cultural Analysis, Cultural Studies, and the Law. Moving Beyond Legal Realism*, Duham and London 2003, p. 43.

¹⁷ Such as law, procedures, legal institutions and behaviour – see E. Blankenburg, *The Infrastructure for Avoiding Civil Litigation: Comparing Cultures of Legal Behavior in the Netherlands and West Germany*, “*Law and Society Review*” 1994/28, p. 792.

times juxtaposed with “legal practice” or “legal engagement”¹⁸ of laypeople, without much regard for diversity of phenomena such a label presupposes.

A separate category of studies comprises less analytical ones, taking their cues from the study of “civilisations” or “traditions”, and thus treating legal culture as a broad cultural complex, encompassing, among other objects, law as such. In this sense one speaks of “western”, “European” or “Islamic” legal cultures. Methodologically similar (since they reduce all legal phenomena to a more general category of phenomena) are normative treatments of legal culture, which define it as a system or a set of norms.¹⁹ On the other hand, in many legal and comparative works, legal culture is understood very narrowly – it is identified with the families of law²⁰, up to the point of equating law with legal culture.

There are also relational concepts, describing legal culture as a relationship between certain legal phenomena or their “levels.”²¹ In newer anthropology of law, a tendency is visible to perceive culture as a dynamic and porous phenomenon²² interacting with equally fluid law. In a similar vein, a postulate to radically operationalise legal culture has been formulated. According to it, legal culture should not be defined *a priori*. Its actual contents should be determined only after suitable empirical material is gathered and examined, pertaining to local conditions of how the law works. Until then the term should be considered empty.²³

If this dizzying array of definitions constitutes the first puzzle of legal culture – the unclear meaning of the term – the second one has to do with its explanatory power.²⁴ There is little doubt that in the social sciences, vagueness of basic concepts is a common, if not normal, phenomenon (take, for example, “law”, “society”, and “law and society”). This state of affairs is often accepted as unavoidable. Yet, the limits to this tolerance are clearly reached whenever notions and theories make explaining some phenomena more difficult rather than more convincing or more sophisticated. There might be no agreement as to what law is, but as long as it is possible – under a given definition of law – to say that the social working of law results from some other phenomenon, vagueness of this central notion is acceptable. Yet, a common feature of many concepts of legal culture is that they fail to produce just that effect. Relying on them as an explanatory device, one runs the risk of producing confusion and doubt rather than certainty and clarity.²⁵

One reason for this is that the notion of legal culture inherits much of its meaning from the concept of culture, yet it differs from it in one important aspect. With the exception of the abovementioned definitions referring to such broad terms as civilisation,

¹⁸ J. Burbank, *Russian Peasants Go to Court: Legal Culture in the Countryside 1905–1917*, Bloomington Ind. 2004, pp. 5, 10.

¹⁹ See M. Borucka-Arctowa, *Kultura prawna...*

²⁰ See for example L. Leszczyński, *Gyoseishido w japońskiej kulturze prawnej* [Eng. *Gyoseishido in the Japanese Legal Culture*], Lublin 1996, p. 31.

²¹ See A. Kojder, *Dysfunkcjonalności kultury prawnej (polskie doświadczenia końca lat osiemdziesiątych)* [Eng. *Dysfunctionalities of Legal Culture (Polish Experiences at the End of 1980s)*] in: A. Kojder, *Godność i siła prawa* [Eng. *Law's Dignity and Power*], Warszawa, 2001, pp. 317–335.

²² See S.E. Merry, *Human Rights Law and the Demonization of Culture (and Anthropology along the Way)*, “PoLAR: Political and Legal Anthropology Review” 2003/26/1, pp. 55–76.

²³ M. Chiba, *Legal Cultures in Human Society*, Tokyo, 2002, chapter 15, particularly p. 237.

²⁴ See G.A. Caldeira, J.L. Gibson, *The Legal Cultures of Europe*, “Law and Society Review” 1996/30, pp. 55–86.

²⁵ T. Rasehorn, *Kulturlose Rechtssystemkultur oder gesellschaftsbezogene Rechtskultur? Zu den Ausführungen von E. Blankenburg und H. Rottleuthner zur Rechtskultur* [Eng. *Culture of Legal System without Culture or Legal Culture Linked to Society. On Contributions of E. Blankenburg and H. Rottleuthner to the Study of Legal Culture*], “Zeitschrift für Rechtssoziologie” 1986/7/1, pp. 61–66 and E. Blankenburg's reply, p. 69.

the notion of legal culture is rarely holistic. As opposed to social-scientific definitions of culture, it does not encompass everything what can be said about “the activities of man”, but singles out a certain – “legal” – aspect of such activities, and in so doing separates it from the rest of the social context.

Yet, like any notion akin to “culture”, the term “legal culture” is indexical. It is not self-sufficient in that using it as an explanatory device requires a reference to further phenomena. At the core of this concept, there is a presupposition that some aspects of legal consciousness, attitudes, norms, etc., are never shaped just by respectively other legal consciousness, attitudes or norms, but that they are a result of “more general” consciousness, attitudes and norms, located outside of legal culture as such. Whenever one speaks, for instance, of broadly anti-legalistic Polish legal culture, one is unlikely to stop at just this point. It is highly probable that one also refers to broader roots of observed phenomena. Thus, such elements of Polish culture are likely to be mentioned as experiences of noble freedom, repressive rule at the times of the partitions or communism or even simpler, general lack of trust and low levels of social capital in the Polish society.²⁶ Hence, in order to provide insights on what a particular legal culture is like and why, one needs to reach beyond one’s initial interests.

Such indexicality does not pose a problem for sociological or anthropological studies of culture. They have a tendency – like in older anthropology – to conceive of it as a relatively stable and unified whole, where every phenomenon is eventually connected to every other one. In said more recent studies the concept of culture is reformulated in anti-systemic terms of procesual liquidity and immediacy, and is perceived as a resultant of many parallel, interconnected and rapidly changing factors and processes. In both cases, indexicality is a presupposed feature of culture – the term either refers to the whole web of stable meanings and objects or an array of quickly passing, yet interrelated, events.

Yet, as far as legal culture is concerned, application of either strategy is difficult because of the initial conceptual detachment of legal phenomena from social phenomena. Due to this division, there is no conceivable cultural unity that could be referred to in the final instance – *explanans* is artificially separated from *explanandum*. Conversely, the procesual notion of culture cannot be used because the fluidity it implies is excluded in the first place when the sharp distinction of law and legal culture is established.

In other words, at the foundations of the concept of legal culture there exists a duality, if not a contradiction. Unless the opposition of particularity of legal culture, limited to narrowly defined social correlates of legal phenomena, and indexicality imbued in this notion, suggesting a much broader reference, is resolved, doubts will multiply. First, a question will arise as to in what sense legal culture is culture²⁷, and second, what justifies calling it “legal”. In order to show that a relationship exists between these three phenomena, one must demonstrate how “culture as such” penetrates “legal culture” and what “extralegal” factors influence “law”. If that is impossible, one has to contend that there is no link at all between legal culture and law. Conversely, if it is claimed that these factors do exist and are decisive or perhaps just relevant, one must conclude

²⁶ For many such insights see for example J. Kurczewski, *Prawem i lewem. Kultura prawna społeczeństwa polskiego po komunizmie* [Eng. *Either Rightly or As a Crook. Legal Culture of Polish Society after Communism*], “Studia Socjologiczne” 2007/185/2, pp. 33–60.

²⁷ See R.A. Posner, *Law and Legal Theory in England and America*, Oxford 1996, pp. 106–107.

that the term “legal culture” lacks any referents of its own because either no palpable difference between “legal culture” and “culture” exists, or that “law” includes all that can be said about “legal culture”.

Furthermore, one must also be careful with the concept of law. It is dubious if a culturally-neutral concept of law exists, which, in turn, leads to doubts regarding “lawfulness” of “legal culture”.²⁸ If it is true that legal cultures differ, it might also be true that so do respective concepts of law and, consequently, division lines between “laws” and their “legal cultures”. For that reason it is reasonable to believe that the very meaning of legal culture, and not just empirical correlates of legal cultures, differs in different groups or societies, effectively leaving the concept empty.²⁹

As a result, until the relationship between legal culture and the external world is clearly determined and yet not deterministic enough to endanger the supposed independence of each of these spheres, the subject-matter of legal culture remains unclear. In the final instance, separation of law from culture in legal culture seems unavoidable and so does preservation of the close relationship between them. But how to achieve these two conflicting aims at the same time?

Exemplary of such problems are two well known themes of research on legal culture in sociology of law, both connected to the problem of litigiousness: Japanese and Dutch legal cultures. It has been argued that legal cultures are responsible for lower litigation rates in the Netherlands, compared to neighbouring Germany, and very limited utilisation of courts as a method of conflict resolution in Japan. Although both interests belong to the classical topics in sociology of law, it has been noted they leave it unclear if it is legal culture that is explained in them or if it is legal culture that is supposed to explain.³⁰

Furthermore, even if one agrees that it is legal culture that makes the Dutch less litigious than the Germans and the Japanese not litigious at all, or that the litigiousness or lack thereof is an important element of respective legal cultures, one is unable to show why. On the one hand, indexicality of the concept of legal culture encourages seeking broader cultural grounds for these characteristics of both societies. On the other, the cleavages it presupposes prohibit just that under the threat that this very notion loses its specific meaning.

All in all, the decision on the exact limits of legal culture is arbitrary and intuitive, not theoretical, and the explanatory power of the term is limited. One is left either with a multitude of potential referents to social factors outside of legal culture – which

²⁸ C. Pennisi, *Sociological Uses of the Concept of Legal Culture* in: *Comparing Legal Cultures*, edited by D. Nelken, Dartmouth 1997, p. 108.

²⁹ This conclusion may be particularly problematic for comparative law. A standard objection against naive attempts to compare law in different countries or legal systems is that compared institutions derive from different cultural and social contexts, which in effect leads to comparing completely different phenomena (even if they are, as legal texts, quite similar). This is, as it seems, one of the motivations behind the study of legal cultures. It may seem that including legal culture in the interests of comparative law allows to refute this objection: the phenomena compared are not mere provisions or legal institutions, but provisions and institutions contextualised. Yet, if a claim is correct that legal culture denotes different phenomena in different cultural settings, the objection recur, only on a higher abstraction level. D. Nelken admits this indirectly when he says that lack of clarity on the borders between *concepts* of “culture” and “legal culture” is a reflection of diversity of *empirical* forms and types of these borders. See D. Nelken, *Comparative Sociology of Law* in: *Introduction to Law and Social Theory*, edited by R. Banakar, M. Travers, Oxford 2002, p. 334. Yet, it cannot escape notice that in this way the theoretical problem is reduced to an empirical issue, and once this is done, a theoretical concept is to be devised based on the findings, which in turn is supposed to be used as an explanation for the same empirical research. Such reasoning cannot escape logical fallacy of *ignotum per ignotum*.

³⁰ See D. Nelken, *Using...*

cannot be effectively used as an explanation – or with a few referents, arbitrarily included in the explanatory scheme. The former option renders the explanation of legal phenomena extremely weak. The latter is usually confronted with many alternative possibilities – which, too, makes the explanation extremely weak. Therefore, one should not be surprised that “legal – cultural” explanations are effectively challenged by other types of explanation (like in case of competing cultural and institutional explanations of the alleged low litigation rates in Japan). It is also little wonder that the choice of indicators of legal culture appears not rigorous and not systematic enough, which is an ailment of the abovementioned study on Dutch legal culture. Depending on the situation, the indicator can be anything from mechanisms of recruitment to legal professions to the activity of labour unions as conflict-solving agents.

Speaking somewhat ironically, the most interesting puzzle of legal culture as a fundamental concept in socio-legal studies is why, granted all said problems, it is commonly used. Hitherto observations do not support optimism, as far as chances for coining a precise definition of the term are concerned, not to mention its satisfying operationalisation. A belief is therefore justified that enough reasons exist as to justify abandoning the concept altogether. This is indeed the conclusion of Roger Cotterrell, who postulates replacing the notion of legal culture with such concepts as legal ideology and legal communities.³¹

Yet, criticism of legal culture limited to mere demonstration of its imprecision, vagueness and lack of empirical adequacy is as right as somewhat shallow. By undertaking it, one also runs the risk of overlooking many problems to investigation of which this notion is used. The attempts to replace the concept with similarly vague terms may also turn against the proponents of such solutions unless it is absolutely clear if their ideas may indeed achieve desired definitional progress. A good example might be the criticism of Cotterrell’s proposal³² or Teubner’s criticism of the unclear idea of a culturally embedded concept of legal transplant and further criticisms of this criticism.³³

2. Luhmann’s razor and the pragmatics of legal culture

Thus, before rendering judgement on the plausibility of legal culture as a theoretical concept, it is reasonable to turn to other possibilities of dealing systematically with phenomena described under this label. N. Luhmann’s version of systems theory is a good option, as it is one of the most elaborated theories in the social sciences today. Much of it is significant for socio-legal studies and enjoys substantial attention in the field. Yet, it is common knowledge that N. Luhmann rejects the notion of culture altogether and that the design of his theory leaves little room for that concept. With a noteworthy exception of D. Baecker³⁴, the term is also next to inexistent in the works of other authors utilising systems theory.

³¹ See R. Cotterrell, *Law in Culture*, “Ratio Juris”, 2003/17/1, pp. 1–17.

³² C. Pennisi, *Sociological uses...*, p. 107.

³³ See G. Teubner, *Legal Irritants in: Good Faith in British Law or How Unifying Law Ends Up in New Divergencies*, “Modern Law Review” 1998/61/1, pp. 11–34, and D. Nelken, *Beyond the Metaphor of Legal Transplants? Consequences of Autopoietic Theory for the Study of Cross-Cultural Legal Adaptation in: Law’s New Boundaries: The Consequences of Legal Autopoiesis*, edited by J. Priban, D. Nelken, Aldershot 2001, pp. 265–302. See also L. Friedman’s remarks pertaining to R. Cotterrell’s criticism in L. Friedman, *The Concept of Legal Culture: A Reply in: D. Nelken, Comparing...*, pp. 33–41.

³⁴ See only D. Baecker, *Wozu Kultur? [Eng. Why Culture?]*, Berlin 2003.

The reason for this is that systems theory is highly reductionist, takes a monist stance on the nature of social phenomena and sharply separates individual levels of theorising. N. Luhmann begins with a limited number of basic concepts and derives most of his other notions from them.³⁵ Only infrequently does he make concessions to more traditional sociological theorising and translates some classical concepts into the language of systems theory. His standard mode of forging ideas is yet a dismissal of, as he famously puts it, “old-European” thinking. This strategy, apart from assuring conceptual coherence, leaves little room for attaching additional notions to the structure of theory.³⁶

For the same reason, many concepts utilised in his theory are just analytical, lacking any meaning of their own. They could be viewed as differentiating particular phenomena for the purposes of a given observer, without loading the notions with much ontological substance. As K. Ziegert puts it (somewhat excessively), N. Luhmann’s theory can well be conceived as a mere grounded methodology.³⁷

Even without going into unnecessary details, particular reasons supporting abolishment of the notion of culture can be identified on all three basic levels of systems-theoretical account of social phenomena. On the highest, most abstract level of theory – systems theory in the strict sense – the basic concept is “distinction”.³⁸ Everything that is theorised can eventually be reduced to a distinction and anything that is observed by the system itself is also a distinction because systems are constituted as – and by – a distinction. Thus, systems accept the distinction, to use G. Spencer Brown’s expression, as form.³⁹

On the intermediate level of theorising – the theory of social systems – the concept of distinction is supplemented by a theory of communication, effectively reducing all social phenomena to “communications”, defined as a triad of information, utterance and understanding.⁴⁰ Already at the level of a circular definition of communication (to understand is to consider uttered information as information) another fundamental assumption of systems theory, regarding social-systems, is visible: their self-referentiality. This culminates in the description of social systems as evolving systems.⁴¹

In this way, the notion of culture turns out to be redundant as a tool for denoting the basic fabric of society. On the one hand, social systems are similar to all other (biological, mechanical, psychological) systems in that they produce and reproduce distinctions. On the other, such classical sociological notions as culture and structure are spurious because they *both* denote mere configurations of communication at different stages of evolution.

On the least abstract level of N. Luhmann’s theoretical enterprise, the reasons for abolishing the concept of culture as a means of describing the variability of social life in time and space stem from his strong assumptions concerning historically contingent fea-

³⁵ This idea, as well as all other system-theoretical concepts mentioned in this paper receive more extensive treatment in: J. Winczorek, *Zagnięcie dwunastego wielbłąda. O socjologicznej teorii prawa Niklasa Luhmanna* [Eng. *Demise of the Twelfth Camel. On Niklas Luhmann’s Sociological Theory of Law*], Warszawa 2009. For clues in N. Luhmann see *Soziale Systeme: Grundriss einer allgemeinen Theorie* [Eng. *Social Systems*], Frankfurt am Main 1984, p. 16; N. Luhmann, *Die Gesellschaft der Gesellschaft* [Eng. *Society of Society*], Frankfurt am Main 1997, p. 79.

³⁶ As A. Schütz and M. King put it, N. Luhmann’s theory is not a shopping list. See M. King, A. Schütz, *The Ambitious Modesty of Niklas Luhmann*, “Journal of Law and Society”, 1994/21/3, pp. 261–287.

³⁷ K.A. Ziegert, *The Thick Description of Law: An Introduction to Niklas Luhmann’s Theory*, in: *Introduction to Law and Social Theory*, Oxford 2002, pp. 55–76.

³⁸ N. Luhmann, *Die Gesellschaft der Gesellschaft*, chapter 1.IV; N. Luhmann, *Soziale Systeme*..., p. 111.

³⁹ See N. Luhmann, *Soziale Systeme*..., p. 11; G. Spencer Brown, *Laws of Form*, Portland Oregon 1994, p. 1.

⁴⁰ N. Luhmann, *Die Gesellschaft der Gesellschaft*, pp. 81ff; N. Luhmann, *Soziale Systeme*..., 196ff; N. Luhmann, *Was ist Kommunikation?* [Eng. *What is Communication*] in: *Aufsätze und Reden* [Eng. *Papers and Speeches*], Stuttgart 2001, pp. 95–110.

⁴¹ See N. Luhmann, *Die Gesellschaft der Gesellschaft*..., chapter 3.

tures of social systems. First, he claims that the only society that exists today is the single world society, and argues that conceiving of societies in national terms is a gross misunderstanding.⁴² Second, he maintains that society is functionally differentiated and that it consists of cognitively open and operatively closed subsystems, capable of observing their environments by changing their own structures and monopolizing communication of a particular kind.⁴³ In this vein N. Luhmann argues that no social phenomena are common to all subsystems, and that no centre of society exists. In his technical formulation (borrowed from a German logician G. Günther), modern society is thus polycontextural – it consists of a series of holistic self-descriptions produced independently in many individual functional subsystems.⁴⁴ This excludes the possibility that such entities exist as national cultures or cultures of particular social groups, spanning across the boundaries of functional subsystems. These assumptions also render locating the isolated cultures within particular subsystems a highly unconvincing theoretical undertaking.

Finally, N. Luhmann has at his disposal the concept of semantics, effectively competing with the concept of culture when it comes to discussing (also in respect to societies preceding functionally differentiated societies) symbolic forms of communication. This term denotes a “condensation”⁴⁵ of distinctions, such that a reference to a particular semantics evokes a series of distinctions.⁴⁶ In many works, N. Luhmann investigates the evolution of so conceived semantics: the sedimentation of new distinctions, altering previous meanings and their usages in new contexts.⁴⁷ The examples include such notions as “identity”, “modernity”, “time” or “ontology”. Thus, in his view, semantics are both results of the evolution of social systems and factors perpetuating this evolution.

R. Helmstetter is therefore right when he compares N. Luhmann’s dealings with culture to Ockham’s razor.⁴⁸ In systems theory, culture is but an unnecessary theoretical being. It is also clear that Luhmannian deconstruction extends to “legal culture”. All said factors have their relevance for socio-legal studies, subverting the centrality of legal culture. A fundamental claim of N. Luhmann’s sociological theory of law is that modern law is a functional subsystem among many, founded upon a binary distinction (code) of lawful and unlawful.⁴⁹ Thus, the legal system evolves just like all other social systems, by developing new distinctions from the old ones, and that reflecting the observations it makes on its environment. In this way, the legal system differentiates and organizes itself, develops “programmes” steering the usage of the code, produces self-descriptions, and, above all – reproduces the code. The study of social working of law is thus translated by Luhmann into the language of internal evolution of the communication in the legal system and its dealings with its evolving environment.

⁴² See N. Luhmann, *Globalization or World Society. How to Conceive of Modern Society?*, “Revue Internationale de Sociologie”, 1997/7/1, pp. 67–79.

⁴³ For an exhaustive explanation of the concept of social differentiation see N. Luhmann, *Die Gesellschaft der Gesellschaft*..., chapter 4.

⁴⁴ N. Luhmann, *Die Gesellschaft der Gesellschaft*..., p. 39.

⁴⁵ A term coined by G. Spencer Brown.

⁴⁶ See N. Luhmann, *Gesellschaftliche Struktur und Semantische Tradition*” [Eng. *Societal Structure and Semantical Tradition*], in: *Gesellschaftsstruktur und Semantik: Studien zur Wissenssoziologie der modernen Gesellschaft* [Eng. *Structure of Society and Semantics: Studies in Sociology of Knowledge of the Modern Society*], Bd. I, Frankfurt am Main 1980, pp. 9–71.

⁴⁷ See many essays published in the series of volumes entitled *Gesellschaftsstruktur und Semantik*, as well as many examples in *Die Gesellschaft der Gesellschaft*..., particularly pp. 400ff.

⁴⁸ R. Helmstetter, *Der gordische Knoten von Kultur und Gesellschaft und Luhmanns Rasiemesser. Fragen einer fluchenden Ruderers* [Eng. *The Gorian Knots of Culture and Society and Luhmann’s Razor. Questions of the Cursing Oarsman*] in: *Widerstände der Systemtheorie* [Eng. *Contradictions of Systems Theory*], edited by A. Koschorke, C. Vismann, Berlin 1999.

⁴⁹ N. Luhmann, *Das Recht der Gesellschaft* [Eng. *Law of Society*], Frankfurt am Main 1993, p. 66.

As a result, the distinction of law and legal culture, playing a fundamental role in the cited definitions, has no equivalent in N. Luhmann's writings. His concept of legal system encompasses all types or forms of legal communication: from black letter law, through legal decisions, to opinions on legal matters held by laypeople.⁵⁰ The only condition for including a communication in the legal system is that it reproduces the binary code lawful/unlawful.⁵¹ This, in turn, allows N. Luhmann to include in the notion of system everything that is mentioned in the context of legal culture, at least as long as it can be described as a communicated distinction. The legal system thus encompasses phenomena described in legal culture as official and unofficial norms, institutions, behaviour, shared attitudes and beliefs towards law, symbolic actions, etc. Because of that, the concept of legal system also includes the specificity of local structures of communication referring to the legal code. It also makes it possible to observe the relationships between law in lawyers' sense and any other communication.

As a consequence (slips of the tongue notwithstanding⁵²) the author of *Das Recht der Gesellschaft* does not use the notion of legal culture at all. Yet, it would be premature just to accept the view that the concept of legal culture could be easily replaced by the notions of systems theory. Hitherto discussions of legal culture suggest that the criticism of the term should be undertaken carefully. To avoid throwing out the baby with the bath water, it can be asked whether N. Luhmann's theory proves its utility when it comes to resolving problems expected to be resolved by studies of legal culture. In other words, the question begging an answer is whether conceptual tools delivered by systems theory are able to reflect the pragmatics of legal culture.

Even though many such questions are addressed in the socio-legal literature, four topics come to the foreground. First, it is the problem of comparing law in diverging cultural circumstances, of differences and similarities between various legal cultures. This also includes a variegated theme of legal pluralism.⁵³ Second, it is a matter of relationships between legal cultures and "national cultures" of particular societies.⁵⁴ Third, the notion of legal culture has been used to study differences in views, opinions or values of legal professionals and laypeople, or to explore the particularities of legal subcultures of specific social groups.⁵⁵ Fourth, it has guided inquiries into consequences of law transplanted from one cultural area to another, and, conversely, the issue of legal-cultural aculturation.⁵⁶

All these uses revolve around the same, already described, feature of legal culture. This notion allows students of said problems to conceive of law as a contextual phenomenon,

⁵⁰ The belief expressed sometimes both in socio-legal and legal-theoretical literature that N. Luhmann's sociological theory of law refers only to black letter law is thus based on gross misunderstanding.

⁵¹ See N. Luhmann, *Das Recht der Gesellschaft*..., p. 60.

⁵² See for example N. Luhmann, *Soziologie des Rechts* [Eng. *Sociology of Law*], p. 72.

⁵³ See for example V. Gessner, *Global Legal Interaction and Legal Cultures*, "Ratio Juris", 1994/7/2, pp. 132–145; M. Chiba, *Legal pluralismus*..., pp. 27ff; M.M. Feeley, *Comparative Criminal Law for Criminologists: Comparing for What Purpose?* in: D. Nelken, *Comparing legal cultures*, Dartmouth 1997, pp. 93–104; H.M. Kritzer, F. Kahn Zemans, *Local Legal Culture and the Control of Litigation*, "Law & Society Review" 1993/27/3, pp. 535–557.

⁵⁴ See for example G. Bierbrauer, *Toward an Understanding of Legal Culture: Variations in individualism and collectivism between Kurds, Lebanese and Germans*, "Law & Society Review" 1994/28/2, pp. 243–264; L. M. Friedman, *Republika wyboru* [Eng. *The Republic of Choice*], Warszawa 1993, pp. 71ff.

⁵⁵ For example J. Heilmann, T. Aigner, *Streitkultur und Wirtschaftsunternehmen. Zur konzeption eines abgestuften Konfliktmanagements* [Eng. *Dispute Culture and Enterprisership. On the Concept of Gradual Conflict Management*] in: D. Stempel, *Empirische Rechtssoziologie. Gedankenschrift für Wolfgang Kaupen* [Eng. *Empirical Legal Sociology. Memorial Volume for Wolfgang Kaupen*], Baden-Baden 2002, pp. 223–250; P.P.C. Lewis, *Lawyers and Legal Culture*, "Zeitschrift für Rechtssoziologie" 1985/6/2, pp. 291–298.

⁵⁶ See D. Nelken, *Towards a Sociology of Legal Adaptation in: Adapting Legal Cultures*, edited by D. Nelken, Oxford, 2001, pp. 7–54 and other works in this volume.

not just a set of norms or actions, but also as an assembly of attitudes towards these norms, methods of using them, views about them, etc. In this way, the studies of legal culture supplement research on law “as such”, adding to it a local and a historical dimension, demonstrating law’s social embeddedness and showing the uniqueness of particular societies.⁵⁷

The remaining part of this paper aims to demonstrate that the same objectives can be reached by using conceptual devices of systems theory and that without drawbacks plaguing the research on legal culture. Thus, it is argued that even though N. Luhmann does not directly consider any of said problems, they can be theorised also with such concepts as legal system, its evolution and semantics.

3. World society versus legal culture

Any attempt to address such issues with system-theoretical tools must first deal with what may appear a major preliminary issue.⁵⁸ As it were, systems theory elevates the notion of world society to the central position. According to N. Luhmann, there exists only one, world subsystem fulfilling each function: one system of politics, economy, art, religion, etc. The same holds for law, even if the establishment of a single global legal system is a relatively young phenomenon. This strong notion of functional differentiation of the world society thus suggests that national differences in legislation, judicial systems, legal professions or even linguistic barriers do not outweigh the fact that there exists only one, global legal system. In other words, N. Luhmann claims that *all* legal communication contributes to the reproduction of the single legal subsystem, even if it occurs in the most geographically, socially and organisationally isolated places and circumstances.

Viewed simplistically, such statements may appear as an unsophisticated attempt to debunk the comparative enterprise altogether – they may seem to assume a unified global legal culture. Obviously, such a claim is not only false, but it also contradicts basic intuitions behind cultural research on law. It suggests that the specialization of communication leads to levelling out of all cultural differences, so that the emergence of a global legal system brings unification of law in a global scale.

In reality, this extravagant conclusion is merely an uninformed critics’ vision of systems theory, and it finds no support in N. Luhmann’s own writings. Instead, he maintains that the world legal subsystem is internally differentiated⁵⁹ and that this is a continuing product of national and state boundaries. By no means does the systematic nature of legal communication presuppose its unification. To the contrary, apart from established sub-subsystems, the legal subsystem comprises conflicting claims, differentiated and reproducing theories and opinions, or even legal pluralism.⁶⁰ Viewed in this way, the idea of functional differentiation offers more possibilities to explain the problems addressed in the research on legal cultures than does the original treatment.

One advantage of systems theory over studies of legal culture is that it is truly and radically historical. It suggests that the explanation of the relationships between indi-

⁵⁷ See C. Pennisi, *Sociological uses...*, pp. 105f.

⁵⁸ So D. Nelken, *Beyond the Metaphor...*, p. 284.

⁵⁹ N. Luhmann, *Die Gesellschaft der Gesellschaft...*, pp. 67ff; See also generally N. Luhmann, *Globalization or World Society. How to Conceive of Modern Society?...*

⁶⁰ Congruencies of legal pluralism and systems theory are explored in J. Winczorek, *Zaginięcie dwunastego wielbłąda. O socjologicznej teorii prawa Niklasa Luhmanna*, pp. 175ff, as well as J. Winczorek, *Between Triviality and Triviality. Legal Multicentrism from System Theoretical Point of View in: Multicentrism as an Emerging Paradigm in Legal Theory*, Frankfurt am Main 2009.

vidual legal cultures should be undertaken in terms of differences in evolution of particular legal systems (and, once the world legal system is established, its subsystems) rather than rely on their immediate similarity or dissimilarity *hic et nunc*.⁶¹

In this vein, the current configuration of communication in a legal system must be viewed as a temporary result of the system's earlier evolution. Since systems theory maintains that all communication is a distinction made from within already existing distinction, the past distinctions are always reproduced and can be forgotten only in the process of producing new distinctions out of themselves. This also concerns legal communication – all doctrines, theories, views or legislation are merely sets of distinctions, “crossing”⁶² previously existing ones. Apart from that, the evolution of the legal system is also a result of established relations between all elements of the subsystem, which determine the possibilities of drawing a particular distinction. Conversely, all existing distinctions bear the heritage of the earlier ones, even if they do not exist anymore. In other words, systems theory presupposes a path-dependency of legal systems, such that may lead to grand differences between them, even if at some stage their many features are identical.

Although it stresses the necessity of a historical study of the legal system, such an interpretation may also be disappointing, because it evokes the old⁶³ problem of equifinality. Comparisons between structures of legal communication or subsystems are thus impossible or at least risky, if they are performed “synchronically”, by means of crude indicators and without regard for a temporal, evolutionary dimension. As a result, systems theory is not compatible with statements that “legal culture X” differs from “legal culture Y” by immediately observable features “A” or “B”. Instead, the comparative undertakings in systems-theoretical spirit shall focus on how differently “culture X” and “culture Y” evolved and if they can further bifurcate. For that reason, explaining the differences between individual legal cultures – like in the case of Dutch and German legal cultures⁶⁴ – can only be achieved by means of empirical, meticulous studies on history of both cultures. It is not possible to resolve this problem *a priori* or by a simple comparison of their immediate features.

Furthermore, this perspective allows to separate the immediately observable features of legal systems from the problem of their reproduction. Systems theory does not suggest that legal subsystems, apparently similar because of their synchronically observable features, are indeed identical.⁶⁵ As a consequence, it allows for finding differences and unexpected similarities between legal subsystems that appear very similar or very different – like continental legal systems whose history and practice is differ-

⁶¹ See M. King, *The Quest for Law's Identity in: Comparing...*, p. 128ff and examples cited therein.

⁶² As G. Spencer Brown puts it, see *Laws of Form...*, p. 2.

⁶³ The term itself was coined by father of systems theory, L. von Bertalanffy, who believed that under certain conditions different systems may evolve into the same end state in different ways. Conversely, the same initial state may lead to different end states because of the different ways that led to reaching that initial state.

⁶⁴ See E. Blankenburg, *Indikatorenvergleich der Rechtskulturen in der Bundesrepublik und den Niederlanden* [Eng. *Comparing Indicators of Legal Cultures in German Federal Republic and the Netherlands*], “*Zeitschrift für Rechtssoziologie*” 1985/6/2, pp. 255–273; E. Blankenburg, *The Infrastructure for Avoiding Civil Litigation: Comparing Cultures of Legal Behavior in the Netherlands and West Germany*, “*Law & Society Review*” 1994/28, pp. 789–809; E. Blankenburg, F. Bruinsma, *Dutch Legal Culture*, Hague 1996.

⁶⁵ In this vein it has been argued that harmonization of European law (as opposed to its unification) will be achieved only when legal cultures (as opposed to law itself) become similar, including interpretation and argumentation, sources of law, its legitimacy or very concept of law. See M. Zirk-Sadowski, *Prawo a uczestniczenie w kulturze* [Eng. *Law and Cultural Participation*], Łódź 1998, pp. 108f. This argument obviously assumes the possibility of convergence of legal cultures ignoring the issue of their path-dependency.

ent. This rests on an evolutionary point of view – N. Luhmann’s theory suggests that different paths of getting to particular evolutionary achievements might exist, and that regardless of “the point of arrival”, further evolution may go in diverging directions. The same evolutionary achievements might serve different aims, or – more precisely speaking – might be specific elements for every legal subsystem, which means that they are differently related to other elements of these subsystems.

This can be illustrated by a handful of observations on the evolution of the doctrine of the rule of law (or state governed by law) in the context of Polish judicial thinking. Despite the fact that formally the semantics does not differ significantly from similar concepts in established democratic states of Western Europe, it perpetuates an idiosyncratic practice of legal interpretation. As exemplified in empirical studies⁶⁶, as well as lawyers’ and legal scholars’ many own observations, judicial and administrative application of the law is highly formalistic, relies on a limited set of interpretive techniques or is pursued with a conviction that in the process of application of the law, legal interpretation is needed only rarely or even not at all.⁶⁷ This is rooted in an implicit conviction that excessive judicial activism is by necessity arbitrary and thus political and for this reason contradicts the basic tenets of democratic states.

A systems-theoretical interpretation suggests that these differences can be traced to evolution of legal doctrine and practice before the year 1989. Communist rule obviously relied on a particular set of assumptions regarding the rule of law, initially clinging towards legal nihilism or outright exploitation of the law for political purposes. Yet, it evolved over time and eventually produced its own, somewhat crooked, variant of the concept of rule of law, dubbed “socialist legality”. For most part, it remained a mere ideological mouthpiece, but in some usages it turned out to have a symbolic, if not real, value, and delivered fuel in legal arguments pursued by more democratically inclined lawyers. Of particular importance is the practice emerging throughout the 1980s of using the formal wording of the law as a means of resistance against excessive demands of the ruling party, eventually institutionalised towards the end of the regime when administrative courts and the Constitutional Tribunal were established. Since democratic state was recreated in 1989, such experiences have been translated into generalised distrust towards free judicial interpretation and then further reinforced by a formalist reading of an “actual”, newly introduced concept of rule of law.

If this very brief reconstruction of the doctrine of rule of law is empirically correct, it aptly illustrates the system-theoretical take on the evolutionary diversity of legal system. From this perspective, the reference to the concept of rule of law, even if it is on its face identical with the established practices of Western European judicial application of law, is in fact different, given relationships it bears to other elements of the legal system and its history. It carries a different symbolic load (or different set of distinctions) – which, even if it is not directly pronounced, is recreated whenever the term “rule of law” is used. What is more, further evolution of the semantics of rule of law is likely to follow this idiosyncratic path, such that may or may not lead to convergence with its Western European meanings.

⁶⁶ See D. J. Galligan, M. Matczak, *Strategie orzekania sądowego o wykonywaniu władzy dyskrecyjnej przez sędziów sądów administracyjnych w sprawach gospodarczych i podatkowych* [Eng. *Strategies of Adjudication in Execution of Discretionary Powers by Justices of Administrative Courts in Business and Tax Cases*], Warszawa 2005; J. Winczorek, T. Stawecki, W. Staśkiewicz, *Between Polycentrism and Fragmentation. The Impact of Constitutional Tribunal Rulings on the Polish Legal Order*, Warszawa 2008.

⁶⁷ See M. Zieliński, *Osiemnaście mitów w myśleniu o wykładni prawa* [Eng. *Eighteen Myths in Thinking on Legal Interpretation*], “Palestra” 2011/3–4, pp. 20–31.

4. Legal culture versus culture

The second of four notable themes in the studies of legal cultures – the relationships between legal culture and general culture – is more suitable to be considered *a priori*. N. Luhmann's theory suggests that in functionally differentiated societies the links between law and its social context should in principle be analysed as relationships between individual systems. Thus, as opposed to "mirror theories of law", systems theory does not describe the law as an epiphenomenon of social life or culture. Still – adverse claims raised sometimes in critical literature notwithstanding – the assumption of autopoietic character of legal system does not suggest its autarchy. Legal system, although "operatively closed", is "cognitively open"⁶⁸ and interacts with other systems in its environment (including other functional subsystems of society) by altering its own internal communication, and that depending on observed changes in operations of these other systems. In some spheres, the legal system is also coupled to other systems by means of structural couplings.

As opposed to many studies of legal culture, this way of thinking does not presuppose causal relationships nor any other unidirectional explanatory links. It is also more fine-grained. It allows for a more specific insight into the environment of law, without artificial presuppositions regarding its role in the functioning of that system, and without ascribing very general or abstract qualities to a society's "culture".

In N. Luhmann's terms, legal system's interactions with its environment are thus described as polycontextual observations of second order. Legal system's observations of other systems' observations are reflected in observations of those other systems, which may in turn alter the observations of the legal system. This multiplicity of independent, yet interconnected perspectives allows to dissect the broad object-matter otherwise described as "culture" into more specific elements – communications within particular systems.⁶⁹

Moreover, systems theory suggests that the relationships between separate subsystems may evolve into organized patterns. Interactions between systems are also aptly described by N. Luhmann as "irritations", or situations where observations are triggered by particular operations of other systems. This is supposed to mean that observations performed by a particular system are only possible when existing communication in that subsystem allows it to observe other systems in a particular way. Consequently, certain automatisms in observations performed by two or more subsystems may emerge as a result of evolutionary processes certain automatisms emerge in observations performed by two or more subsystems. Such automatisms are called, as it were, structural couplings – in legal system they are, for instance, constitutions or contracts.⁷⁰

One can illustrate possible usages of this terminology with another simple example, pertaining to the "culture of anti-legalism", distinctive for some "post-communist" societies and having to do, among other things, with economic activity.⁷¹ This phenomenon might be interpreted in systems-theoretical terms of mutual observation

⁶⁸ N. Luhmann, *Das Recht der Gesellschaft*..., p. 77.

⁶⁹ M. King, *The Quest*..., pp. 126–127.

⁷⁰ N. Luhmann, *Das Recht der Gesellschaft*..., pp. 440ff.

⁷¹ See G. Skąpska, *Kultura prawna w procesie tworzenia wolnej gospodarki* in: G. Skąpska, *Buddenbroowie czy piraci*, Krakow 2002, pp. 97–128. For a broader approach see A. Kojder, *Prawo w impasie* [Eng. *Law in Deadlock*], in: *Polska. Ale jaka?* [Eng. *Poland. But which one?*], edited by M. Jarosz, Warszawa 2005, pp. 156ff.

of the legal and the economic subsystems (that is, observations reproducing binary codes of lawful/unlawful and profitable/unprofitable, respectively). In the economic system, anti-legalism is a generalised expectation⁷² that a strategy of apparent obedience to the law, combined with its actual infringements, is more profitable than a strategy of a long-term compliance. The source of this conviction might be the collision of the economic rationality of unofficial circulation of goods with the realities produced by socialist law, oriented at aims by far diverging from effective production and exchange of goods (like maximisation of political control of said processes or simply political corruption and clientelism). On the other hand, this expectation is observed by the legal system as unlawful, and impugned according to the (institutionally corrupt) programmes of that system. This, in turn, leads to the confirmation of the expectation in the economic system that obedience to the law is unprofitable, to the repetition of the entire sequence, and finally to reinforcement of the anti-legalist sentiment.

In N. Luhmann's technical terms, this can be described as succession of evolutionary mechanisms of variation, selection and recombination. A peripheral semantics can be elevated to a central position in an initially variegated economic system due to the fact, that communication in the legal system works as a selector. Conversely, the reinforcement of this semantics in the economic system may be observed in the legal system as illegal, which may lead (depending on initial conditions in the legal system) to establishment of a particular semantics aimed at dealing with such irregularities. In this way, two parallel-running processes of observation in two separate systems may serve as selectors for each other. The results of such selection may further be recombined with other elements of respective systems, due to other processes of irritation from their environments, which may or may not lead to the distortion of the initial relationship between both subsystems.

This may be further illustrated by the same example of anti-legalism. Any regulation (or deregulation) of economic activity in the conditions of systemic change, perpetuated by liberal or any other political semantics, is doomed to be treated instrumentally due to the existing communication in the economic system. Thus, the semantics of anti-legalism persists, unless it turns out that the change of the law allows for more profit in short term. This pertains also to such (de)regulatory decisions that may appear rational in the light of legal systems' existing semantics.

Yet, meeting exactly this condition is problematic – the emergence of legal communication that can both be reproduced in the legal system and is observable as economically profitable is not obvious because evolution of both the legal system and the economic system happens “blindly”, that is without taking into account the results in the other subsystem. This is due to operative closure of the systems – in N. Luhmann's view, they only reproduce the distinctions they have at hand and are unable to step out of the process of their differentiation.

Thus, it is by no means certain that certain steps of law's general evolution towards economic effectiveness will be observed as profitable, that negative expectations regard-

⁷² In Polish language such a generalized expectation is semantically reflected by an informal, idiomatic and largely untranslatable term “kombinować”, which conflates a largely positive reference to unrestricted entrepreneurial spirit with many negative undertones, pertaining to such side effects of excessively non-conformist business activity as tax evasions, readiness to exploit illegal opportunities for profit and to abuse the trust of third parties, as well as the utilization of unreasonably sophisticated methods in solving simple problems.

ing the law are not reinforced, nor that the attempts to adjust economic communication (undertaken in hopes to change the established semantics of the law) are not observed as illegal (which in the end renders them a self-destroying prophecy). In this interpretation, the persisting “culture of anti-legalism” can therefore be conceived as a process of mutual irritation of subsystems, which may lead to establishment of a structural coupling, supporting the earlier reproduction of both systems, or to changes in both of them and stabilisation in a different way. Both resolutions depend on hardly observable marginal conditions (catalysts).

This example suggests further that “culture of anti-legalism” is a phenomenon consisting not just of legal or just economic communication, but also communication in the environments of both of these subsystems, and their interaction. What is more, even though this discussion omits – for brevity – other possible systemic interactions, particularly with the political or the media system, systems theory implies that obtaining a full picture of culture of anti-legalism requires studying their role in an analogical fashion.

Importantly, as illustrated by this problem, N. Luhmann’s take on the question of the relationships between law and its environment pertains both to semantic and structural dimension. It thus deviates from both older functionalist sociology with its preponderance towards the latter type of explanation, and the culturalist stance of anthropology. Finally, it proves its utility not only in that it challenges synchronous presuppositions of the concept of legal culture, but also because it demonstrates that the notion juxtaposes extremely different modi of communication.

5. Professional versus lay legal culture

Having observed this, one can undertake the third of said problems, pertaining to a division within legal culture itself, rather than to its relationships with external world – the links between legal cultures of professionals and laypeople. The far-reaching and systematic diversity of attitudes and opinions about law is well known.⁷³ Many works on this phenomenon explore the differences between particular groups, conditions on which they depend and the effects that they have. In sociology of law, the most famous theoretical attempt to systematize these matters with reference to legal culture is perhaps L. Friedman’s distinction of internal and external legal culture.⁷⁴ It suggests that a legal system is more strongly perpetuated by professional ideologies and doctrines rather than laypeople views and demands. This account is taken here as exemplary.

To begin, it should be pointed out that in terms of systems theory, drawing a distinction between internal and external legal culture is artificial because it cuts across the boundary of the legal system. From this point of view, “external legal culture” is not truly external. It does not belong to the environment of the legal system because by definition it refers to the binary code lawful/unlawful. Whenever a legal claim is raised by a layperson (acceptable, unacceptable or plain nonsensical in the light of internal legal culture, and motivated by whatever grounds), the legal code is mobilised. Thus,

⁷³ For a review of older literature – see A. Podgórecki, *Zarys socjologii prawa* [Eng. *Sociology of Law. An Outline*], Warszawa 1971, pp. 29ff.

⁷⁴ L.M. Friedman, *The Legal System*, London 1975, pp. 223f. Another example is provided by A. Podgórecki’s concept of legal subcultures.

systems theory suggests that the referent of the term “external legal culture” is communication within the legal system, such that remains at system’s periphery. Consequently, the distinction of external and internal legal culture may be seen as corresponding to N. Luhmann’s proposition that the legal system is primarily differentiated into centre and periphery.⁷⁵

Yet, a conclusion that legal communication can either be in the centre of the system or in its periphery (or that this distinction is a binary opposition) is premature. The “exclusiveness” of legal communication, suggested by L. Friedman’s insistence on centrality of “internal culture”, is viewed in N. Luhmann’s theory as a matter of the system’s autopoietic nature – the presupposition that the system reproduces only the elements of which it consists. From this perspective, all communications in the legal system have an individual capacity to last over time, dictated by their relation to system’s other communications. Thus, even though every communication based on the binary code lawful/unlawful is an element of a legal system, not each of them is bound to be reproduced. If it turns out that a legal claim made at the periphery is inconsistent with semantics dictating the usage of the code in the centre, it will not be reproduced or it will last for a minimal time.

In other words, the difference between legal communication in the periphery of the system and its centre (or external and internal legal culture) is its ability to last while the system reproduces. The former is more likely to continue than the latter. In this way the idea that some actions supported by external legal culture are simply not allowed (and consequently labelled unlawful) is transformed into likelihood of them being reproduced. In yet other terms, while L. Friedman’s account of legal culture assumes it is split into just two types, N. Luhmann’s theory suggests that legal centre and periphery occupy extreme ends of a continuum and thus should be analysed in much more fine-grained detail.

Also further observations by Friedman, based on this typology, are inconsistent with system-theoretical deconstruction of legal culture. The author of *The Legal System* claims for instance that the distinction of internal and external legal culture allows for explaining the actual role of interests and claims in the legal system.⁷⁶ He believes that not all interests are inherently legal because officially they are not always considered as such by law and legal officers – and that even if the general public maintains otherwise. Successful claims, by contrast, always meet the first of these two conditions and may (but not always do) meet the other. Hence, the chances of legally satisfying individual interests depend on the structure of legal system and the exact relationships between internal and external legal culture. It is therefore possible that legal claims exist that are not representative for any interests, as well as interests that are not officially recognized because they cannot be transformed into claims.

One product of this thinking is the typology of four types of legal systems, established by cross-tabulating the distinction of open and closed systems (systems admitting extralegal arguments in legal argumentation, or not) and innovative and non-innovative ones (taking into account novel circumstances in legal proceedings, or not). Viewed in this way, internal legal culture determines the conditions of official recognition of external culture. In other words, the relationships between external and

⁷⁵ N. Luhmann, *Das Recht der Gesellschaft...*, pp. 299ff.

⁷⁶ L.M. Friedman, *The Legal...*, p. 226.

internal culture, determined by the latter, are the main factors decisive for the type of the legal system.

The main difference between these statements and N. Luhmann's theory is that the latter suggests that communication coded by the code lawful/unlawful is considered an element of the legal system, regardless if it is articulated officially or not. It may be evaluated differently in the periphery of the system and in its centre, but the very fact of coding it with the legal code, is a sufficient condition to consider it legal. On the other hand, the fact that some communication is coded differently than by means of the distinction lawful/unlawful (or is not coded at all) is decisive for the fact that it is observed as the environment of the legal system and that it has no direct impact on legal communication.

It follows that what L. Friedman describes vaguely as "interests" might be perceived in N. Luhmann's theory as communication in the environment of legal subsystem (i.e. "interests" expressed by means of economic code profitable/unprofitable), but also may be viewed as legal communication. Systems theory thus suggests that the very fact of communicating the code, even if such usage is not recognised in the centre, contributes to the reproduction of the system. *Both* selection of communication in the centre of a legal system and lack of such selection on some occasions transform the legal system. In contrast, L. Friedman appears to say that the fact that internal legal culture sometimes does not allow for transforming interests into successful claims has a consequence of the legal system not being changed. It thus remains constant regardless of how many such attempts of formulating claims it "turns down". In yet other words, L. Friedman's concept of legal culture leaves little room for a "legal protest movement" while N. Luhmann's theory allows that.⁷⁷

This, in turn, suggests that N. Luhmann's theory is able to effectively explain the phenomenon of differentiation of legal culture, as well as both the difficulties to obtain official recognition for some interests and success in this respect (or, in terms of systems theory – selection and stabilization of communication in the peripheries of the system). It also avoids the coherence problem, produced by the assumption that interests and claims are produced by interaction of "external" and "internal" "legal culture".

6. Legal transplants

The fourth of the problems studied under the label of legal culture pertains to legal transplants.⁷⁸ Of course, it is also addressed in other theoretical perspectives, including the ones hostile to the legal-cultural paradigm. Yet, it is common to observe that culture is an important factor influencing the acceptance of a legal transplant. It is legal culture that determines if a transplant successfully fulfils the objectives which motivated it. Legal culture is also capable of modifying the real content of the formally enacted transplanted law. Some authors remark that even the very initiative to make a transplant requires some cultural congruence between "the donor" and "the recipi-

⁷⁷ In this light L. Friedman's concept of "Total justice" is in odd contrast to his own concept of legal culture.

⁷⁸ It has been argued that legal culture is a bridge between sociology of law and comparative law, or a common denominator for them. See D. Martiny, *Rechtskultur – Berührungspunkte zwischen Rechtssoziologie und Rechtsvergleichung* [Eng. *Legal Culture – Tangent Points of Legal Sociology and Comparative Law*] in: D. Stempel, J. Brand, *Soziologie des Rechts: Festschrift für Erhard Blankenburg zum 60. Geburtstag* [Eng. *Sociology of Law: Festschrift for Erhard Blankenburg on 60. Birthsday*], Baden-Baden 1998, pp. 421–430. See also D. Nelken, *Comparative Sociology of Law...*, p. 332.

ent". According to the most radical position, legal transplants are necessarily futile because all legal cultures differ.⁷⁹ In this vein, effective reception of law is not possible because any attempt to implant a foreign body of law into an existing legal culture leads to the transformation of the donated part by the recipient. In other words, legal cultures have an "immune system" of sorts, defending them against transplants.

As opposed to other research topics akin to cultural studies of law, the problem of legal reception has been investigated in the context of systems theory. G. Teubner studied it with respect to a European Union directive on consumer law, introducing the continental – and thus foreign to common law – principle of good faith.⁸⁰ In the best tradition of ironic conservatism (an attitude shared also by N. Luhmann), he claimed that attempts at such transplants must be perverse. They will not contribute to the expected unification of the law, but instead will increase its differentiation.⁸¹ Thus, for the existing British legal system, the introduction of the principle of good faith will at best be a source of irritation.

Relying on his notion of production regime (a multi-sided structural coupling), G. Teubner further claimed that an institutionalised link exists between semantics utilised in a national legal subsystem and the features of local economy that is regulated by this legal system. Regulation thus evolves to fit with the subject matter to which it relates, but also perpetuates it and contributes to its specificity. Consequently, differences between British and continental transactions are the reason for which it should not be expected that bureaucratically imposed regulations effectively introduce the mechanism of good faith to British legal practice so that in its substance it becomes identical with the continental practice. Instead, legislative action in this respect will only institute double irritation, forcing the legal system to transform its "episteme" and consequently influencing economic mechanisms, which will in return irritate the legal system. In this way, an evolutionary mechanism of larger segments of the social system will be started, irritating the legal system even more. It should therefore be expected that as a result of introduction of directive in question, a brand new legal institution will emerge, resembling the original "good faith" only by its name.

D. Nelken raises many objections pertaining to this interpretation. Most of them will not be considered here because they address specific details of G. Teubner's theory. Still, one of them is worth considering, as it might also apply to N. Luhmann's version of systems theory. D. Nelken claims that systems theory is unable to deliver interesting observations about legal transplants because proper consideration of this problem requires a hermeneutic approach, foreign to this paradigm.⁸²

In his view, at the bottom of the problem of transplanted law there exists a necessity of interpretation. Successful transplants are culturally grounded practices presupposing a hermeneutic approach, such that takes into consideration possible meanings of the transplanted law, stemming both from the original and new cultural contexts. For that reason also the theory of legal transplants must be hermeneutical – it must interpret culturally rooted processes of interpretation. This in turn implies that such a theory is

⁷⁹ P. Legrand, *What "Legal Transplants"?* in: D. Nelken, J. Feest, *Adapting Legal Cultures*, Oxford 2001, pp. 55–69.

⁸⁰ G. Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergencies*, "Modern Law Review" 1998/61/1, pp. 11–34.

⁸¹ For a similar take on European law in general, see J. Winczorek, *Socjologia prawa a integracja europejska*, [Eng. *Sociology of Law and European Integration*] in: *Teoretycznoprawne problemy integracji europejskiej [Legal-theoretical Issues in European Integration]*, edited by L. Leszczyński, Lublin 2004.

⁸² D. Nelken, *Beyond the Metaphor of Legal Transplants?...*, pp. 293ff.

itself rooted in the local culture undergoing interpretation. Systems theory obviously does not meet this requirement because it aims to deliver an explanation of all possible social phenomena and thus ignores local particularities.

Whether this criticism really holds against G. Teubner's specific claims (which is not completely clear) or not, it must be stressed that in fact systems theory rests on fundamentally hermeneutic presumptions. It operates in a hermeneutic circle, assuming that the basic notions of the theory are at the same time the most fundamental features of all systems.⁸³ "Distinction" is here both the basic term of theory and basic stuff of all social systems, to which all social phenomena can be reduced. In other words, systems theory is developed from within a social subsystem of science, which renders this theory one of many systemic observers of social phenomena, having no privileged access to the observed reality whatsoever. While this position has grand consequences, for instance pertaining to a naturalized epistemological status of systems theory, it tends to be overlooked by critics, often ascribing to systems theory an objectifying, external, positivistic or epistemologically privileged perspective. All this obviously exceeds the scope of this paper.

This observation, however, sheds new light on Teubner's interpretation of the good faith question. If the problem of transplanted law is to be seen – as it were – in terms of operations of the subsystems of a global legal system and take into consideration their internal characteristics and interactions between them, and if it is tackled from within the social system, by one epistemologically unprivileged observer among many, it is very difficult to provide predictions on whether a particular transplant will be accepted or rejected in a new context. The degree of complexity is here as large as in a case of any other legal innovation, forcing any *a priori* theory of legal transplants to consider a dizzying number of factors. "Legal culture" is by no means satisfying here, as it only conceals this variety.

Thus, a legal transplant will transform the semantics and other forms of communication in the legal system, it will be observed in a specific way – or it will not. Even a well informed expert, rooted in a local "legal culture", will find it difficult to predict the direction of the system's reproduction. It is a consequence of the fact that the meaning horizon of a legal system at one point does not determine the consequences of introducing "new" elements to communication in the system. If Teubner's predictions of the reaction of the British legal system to introduction of the principle of good faith were right, it was so not only because he used systems theory but also because he had enough knowledge about private law.

This brief consideration of the issue of legal transplants, together with earlier observations, leads to a more fundamental (and more general) conclusion. The expectation that much can be said about cultural factors influencing law without empirical investigation is by far too optimistic. Theory alone is unable to produce judgements on conditions of reproduction of the system because they require throughout knowledge of immediate features of the communication in the system, as well as its history. Similarly, theoretical condensations of empirical data might not always increase this potential, and the term "legal culture" is a very crude condensation.

⁸³ It often escapes notice that N. Luhmann's argument in his groundbreaking work *Soziale Systeme...* is purposefully circular. The argument of the book begins with "an assumption" that "there exist systems", which then turns out to be a condition of formulating epistemological assumptions regarding the conditions of possibility of making such very assumptions. In this way N. Luhmann's line of inquiry both justifies itself and reveals its own contingent nature.

7. Legal culture and “the sociology of the social”

This paper aimed to demonstrate that objectives motivating references to the concept of legal culture can be better met thanks to systems theoretical vocabulary. It first criticised the notion of legal culture as being unclear and failing to provide expected explanations of legal phenomena. Second, it briefly discussed the reasons for which the notions of culture and legal culture are abolished in N. Luhmann’s version of systems theory. Third, it provided some clues as to how certain deficits of hitherto studies on legal culture can be resolved, suggesting that the notion should be replaced by such terms as semantics, evolution, observations and structural couplings. In doing so, it stressed the necessity of a diachronic, historical study of legal system and downplayed the possibilities of *a priori*, theoretical explanations of the studied phenomena.

These points should ring a familiar tone and probably belong to a more general trend in the contemporary social theory. To refer to one of the proponents of such thinking by his name, B. Latour is well known for his criticism of the current status of social sciences. In his many books he argues that social phenomena are objectified by sociology and neighboring disciplines. “The social” is thus treated as an object in reality, similar to material objects with fixed characteristics. It lasts over time and thus can be characterised once and for good. In reality, according to B. Latour, no such object as “the social” exists, and it can only be described as a result of a local comprehensive study.

Although not all his points are fresh and convincing, and his reading of systems theory is clearly superficial, B. Latour’s elaborate critique of the social sciences is instructive for the problem of legal culture. This concept – in its many uses and definitions – is a fine example of exactly such objectifying understanding of respective phenomena as criticised by the French sociologist. It is used as a very general, meaning-laden description, artificially singling-out certain legal phenomena from all other and ascribing them a stable, ahistoric, synchronical nature. In this way, the purpose underlying the term – to contextualize law – is highly compromised.

Certainly, the solution offered in this paper comes at a cost. N. Luhmann’s theory has a complexity of its own. Before it can be sensibly used it must be mastered. Furthermore, it does not allow for spectacular explanations by reference to legal culture. Still, it may resolve the puzzles of legal culture.

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