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# The Negative Dialectics of Law: Luhmann and the Sociology of Juridical Concepts

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**Abstract**

This article proposes to read Niklas Luhmann's sociological theory of law from the perspective of what may be called the negative dialectics of law: namely, the irreconcilable tension between law as a mechanism that reproduces institutional orders and stabilizes normative expectations, and law as a medium that empowers transformative action and motivates social innovations. Drawing on this tension, the article advances an interpretation of the critical potential of Luhmann's conceptualization of law by pointing out that the *normative* form of society emerges out of conflicts about the *form* of the normative within society. This formulation supposes that the unfolding of law is not the rational completion of higher principles into unified social structures, but a contradictory outcome semantically produced through endless iterations of the difference between what is legal and what is illegal. In doing so, it argues for a sociological reconsideration of the work of juridical concepts in the everyday operation of legal communications, as well as in the normatively guided search for what is non-actualized within the existing scope of positive legal forms. By reading Luhmann along the lines of a critical engagement with the law, the article further calls for exploring constituent moments as instances of reflexive instability that signal the unmarked space of normativity and bring the politicality of concepts to the fore.

**Keywords**

Critique, dialectics, Luhmann, legal system, norms, sociology of concepts

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# I

In this article, I intend to read Niklas Luhmann's sociological theory of law from the perspective of what may be called the negative dialectics of law. The dialectic refers to the idea that the development of normative forms of modern society is crossed by a contradiction that is integral to the *concept of law*, that is, the fact that law serves as an instrument to stabilize existing political arrangements and social imaginaries that reproduce forms of rule and domination, as well as a medium of protection that empowers possibilities of action and critical transformation of the self-affirmative operation of normative orders (Fine, 2001, 2014). This dialectic is negative to the extent that law can never reconcile the paradox of being 'a motivator for innovations' that exceeds the existing normative structure of society, and at the same time a mechanism that 'encourages the rejection of innovation for the sake of stability, consistency and justice' (Luhmann, 2004: 259). The concept of law is thus defined by the conflictive tension between both impulses but also by the way in which the paradox that constitutes law as law is rendered invisible in the ordinary operation of juridical concepts within and beyond the legal system.

A sociological engagement with law cannot avoid but must deal with this equivocal form of law in society. To do so, sociology should find a space to empirically explore the configuration of normativity as a contradictory sociohistorical achievement, as well as the critical edge to recognize the radical absence of fixed principles and the impossibility of the normative closure of society. My argument in this article is that Luhmann advances an innovative way to meet this challenge by transforming juridical concepts into primal objects of sociological analysis. This essentially means to understand juridical concepts as concrete social abstractions and observe how they play out in events, practices, and institutions by transforming nonlegal entities into legal forms and making them subject to contradictory normative determinations. The development of a sociological approach to concepts is consistent with a central feature of Luhmann's overall theoretical framework, namely, to account for the emergence of social systems as the result of a complex interplay of social-structural differentiation and semantic change (Stäheli, 1997; Stichweh, 2016).

Be that as it may, I think that reconstructing Luhmann's sociology of concepts may also be a fruitful resource for critical theory if one acknowledges, as Adorno remind us, that a critique of society cannot do without a critique of concepts (Adorno, 2005; see Cordero, 2017a; Cordero et al., 2017). The motif that underpins this endeavor is that, if we are ever going to reach what is beyond the reassuring form of concepts, we must liberate ourselves from the ontological treatment of concepts so as to follow their contradictory movement in social life. For it is in the form of concepts, I would like to contend that society sustains the contingency of norms and encodes them into a form of existence. What is at stake here is the attempt to unlock the experience of nonidentity between conceptual forms and social reality, the constitutive gap from which actors may defy the closure of the social world as a unity without question as well as recognize the realm of possibility.

From the perspective of Luhmann's theory of the legal system, the claim of a sociology of concepts may be translated as follows: concepts are 'building blocks' for the

construction of law as a social system and the evolution (stabilization and variation) of the normative observation of society. For the legal system *constitutes* its very form in the process of codifying the difference between what is legal and what is illegal in society. The historical emergence and reproduction of this basic *conceptual code* carries a number of theoretical, methodological, and normative implications for a sociological engagement with law and legal institutions. Let me phrase these considerations briefly as guideposts for my reading of Luhmann.

- First, the differentiation of legal semantics is a condition of possibility for the constitution of the legal system and the reproduction of legal communication. *Theoretically* speaking, juridical concepts are not mere tokens for the expression of interests or dogmatics that project onto empirical reality but social attractors of meaning that create a space of intelligibility for the emergence of legal objects, the articulation of legally binding social relations, and the counterfactual stabilization of normative expectations. As such, juridical concepts are to be understood as modes of connection and observation of the legal system that emerge out as responses to problems of social complexity.
- Second, juridical concepts generate a body of knowledge, reservoir of terms, and repertoire of practices that can sustain a sense of unity of legal texts and legal practices. In this way, juridical concepts open a *methodological* path for sociology to bring into focus the historicity of the legal system and the normative memory of society. Distinct from the approach of history of ideas and legal theory, a sociology of juridical concepts in Luhmann's sense is first and foremost a mode of observation of the formation of semantic institutions that follows the traces left by the paradoxical unfolding of juridical concepts in relation to social forms.
- Third, juridical concepts are societal constructs that make available generalized forms of meaning for law to function as law and for society to represent itself as an objective form with normative foundations. From this perspective, the claim to validity of law is not naturally or logically derived from higher principles, but the result of an operation of *social abstraction* that, despite appearances, is always equivocal and incomplete. The incompleteness of law lies in the fact that what becomes encoded as positive law is inevitably tied to what the concept is not or lies beyond its reach (the extralegal). For this reason, the identity of the legal system is not founded on the facticity of unity but on the facticity of difference: namely, on the production of successfully instituted self-descriptions that aim at covering up the contingency of the legal system's foundations, which can be abstractly identified but not actually 'found' (Luhmann, 2004: 262); and also on the generation of alternative attempts of self-description that revalue law and expand *normative imagination* in struggles for the definition of the form of society.

In what follows, I would like to specify my reading of Luhmann in three steps. In the first part, I situate his work in dialog with Schmitt's political theory and Koselleck's conceptual history. I wish to show the extent to which these authors are sources for Luhmann's own sociological thinking about concepts but also highlight some of the

sociological deficits that Luhmann aims to address: crucially, the politicized nature of conceptuality. In the second part, I reconstruct Luhmann's sociological approach to juridical concepts as a way of comprehending and coming to terms with the negative dialectics of law: the irreconcilable movement between law as a mechanism of *social abstraction* and law as a boost for *normative imagination*. Based on this reconstruction, in the concluding part, I draw a few lessons for the sociological consideration of 'constituent moments' as instances of semantic uncertainty that bring the negative dialectics of law to the fore.

## II

The sociological concern with concepts and conceptual practices that I hereby propose is not, in principle, focused on the strictures of theory construction, in the sense of developing criteria for the selection, evaluation, and utilization of adequate theoretical concepts in sociological explanations (Blumer, 1931). This conventional view, as important as it may be, usually takes a narrow understanding of concepts as formulations of thought intended for scientific precision in the definition and description of empirical objects. A sociology of concepts is rather an effort to reinsert concepts as organs of social reality (Cassirer, 1946). The premise is that concepts are concrete abstractions produced by and embedded in a plurality of social practices. Thus, concepts do not simply operate as the symbolic wrapping of social structures, but as the very matter that makes possible the constitution, self-description, and observation of society *as* society. In essence, this means that the *form* of society is always something to be constructed by its own conceptualization (self-abstraction), insomuch as social reality itself has and reproduces a conceptual existence in the *form* of theories, norms, experiences, and practices (Cordero, 2017b).

The key question for a sociology of concepts then is how the *form* of society is actually produced. As Luhmann says, if a 'form' is the mark of a 'distinction' that always leaves an 'unmarked space', society then cannot be a closed totality but the unity of a difference between itself and its environment. Thus put, society is, strictly speaking, a conceptual form (i.e. system) constituted by the paradox of being an object that 'observes and describes itself' but which can never coincide with itself (Luhmann, 1998: 53–54, 58). Certainly, 'sociology of concepts' is not a label that Luhmann ever uses for describing his work and yet, in my view, it conveys well the idea that sociology's task is to comprehend the paradoxical incompleteness of society, by retracing how its form is coded and deployed through a plurality of distinctions without a concluding formula. After all, society is 'observable *because* it is unobservable' (Luhmann, 2002: 87).

The term 'sociology of concepts', as far as I can tell, was originally coined by Carl Schmitt. In chapter 3 of *Political Theology*, Schmitt outlines a methodology for the study of concepts that places itself in opposition to the Marxist and Weberian variations of sociology of knowledge as well apart from traditional philosophical analyses. It basically consists in the observation of the relations between the prevalent 'semantics' (*Grundbegriffe*) through which an epoch describes itself and the 'structures' that shape the political organization of social life. In so doing, Schmitt attempts to provide a methodological

point of entry for the study of juridical concepts, which rejects the reduction of legal forms to epiphenomena of economic determinations, subjective elaboration of specific individuals, or a positive expression of jurisprudence and normative philosophies (Schmitt, 2005: 42 and 43). His sociological approach to juridical concepts is thus conceived as an investigation into the structural interdependence between 'the metaphysical image that an epoch forges of the world' and 'what the world immediately understands to be appropriate as a form of its political organization' (Schmitt, 2005: 46).

The sociological appeal of Schmitt's description, I must admit, is difficult to take at face value. For the attempt to link 'metaphysical images' and 'political organization' through the study of juridical concepts supposes changing not only our methodological standpoint but also our ways of understanding what concepts do in our observations of social reality and in the actual historical development of social life. For Schmitt, the assumption that it is enough for a sociological explanation 'to trace a conceptual result back to a sociological carrier' (Schmitt, 2005: 44) is misguided, because it remains entrapped in a narrow understanding of conceptuality as a reflex of material determinations, as well as a narrow understanding of social reality as the direct ideological projection of a particular kind of thinking and acting. It is not that material determinations and ideological projections are irrelevant for the emergence of concepts, but the causal logic that such reasoning appeals to is unable to comprehend the 'systematic structure' of concepts (the distinctions they internally enact: friend/enemy, internal/external, right/wrong, legal/illegal) and the constellation of semantic connections they produce between different fields of meaning (the cross-fertilization of a variety of societal domains, such as theology, jurisprudence, politics). Thus put, the gist of Schmitt's sociology of juridical concepts lies in mapping the coordinates of the 'conceptual field' that brings these concepts about, so to be able to observe the mediated and mediating nature of concepts, that is, their constitutive impurity and lack of ontological meaning. This allows Schmitt to assert the relational structure that defines the existence of all juridical concepts in relation to a 'style of political existence' (Schmitt, 2011: 119) and, at the same time, identify what may be called their 'parasitical function'.[1] This function, as Luhmann later recognizes, becomes more evident and relevant in a functionally differentiated society, insomuch as a number of concepts (e.g. *Rechtsstaat* or Constitution) begin to operate as coupling mechanisms: that is, concepts that make possible for an autonomous social system to benefit from 'an external difference' as a means to its everyday operation (Luhmann, 2004: 371).

Surely, Schmitt is not primarily interested in the advance of sociological theory and methods but in confronting the sociological blindness produced by a 'positivist age' that qualifies as 'metaphysical derailments' (Schmitt, 2005: 39) any concern with the basic conceptual structure which dominates the spiritual organization of society in a given time. Accordingly, Schmitt states with Weberian confidence that, in the absence of foundational values, modern society does not move away from metaphysics but reproduces it. It does so via the exteriorization of images of itself which then are internalized through concepts that make possible to distinguish and enforce 'what is accepted as obvious and what is unaccepted or incomprehensible' (Colliot-Thélène, 1999: 143).

All things said, Schmitt's sociological consideration of juridical concepts is concerned with advancing a perspective to observe the role of jurisprudence and juridical

semantics in the self-understanding of modern society. For the purposes of our discussion, I wish to highlight two elements that resonate across Luhmann's work. On the one hand, the *methodological idea* that a sociological take on juridical concepts is defined by a noncausal understanding of the relations between the conceptual structure and the social structure of a certain era. The point of the analytical distinction between semantics and structures is not to say that juridical concepts are stylized symbolic projections of social-structural determinations, or *ex nihilo* creations of a sovereign will that harmonizes differentiated social orders. The idea is rather to use the distinction as a device to capture the complex web of historical co-determinations between legal communications and social-political forms.

On the other hand, there is the *theoretical claim* that juridical concepts are entangled in what may be called the paradox of normativity: they produce *faith* in the quasi-transcendental reality of norms, the assurance of unassailable validity, by making invisible the *contingent* choices that lay the ground for the institution of those norms within society. This paradox is the signature of law and the hidden force of juridical concepts, insomuch as 'the process of abstraction upon which the medium of law rests . . . always carrie[s] with it the seed of impossibility, or the germ of self-representation of law within law' (Fischer-Lescano and Christensen, 2012: 99). The 'germ of self-representation' means that, in the absence of 'pre-constituted social signifiers for what is law', the legal medium constitutes itself through endless iterations of legal self-descriptions rooted in 'a complex network of power-knowledge relationships'. While such self-descriptions stabilize legal operations symbolically, they also disclose the structural instability of the borders of law in conflicts about the appropriate articulation of a legal order (Ibid).

The aspects I just referred to are central for Luhmann's sociological effort to understand the factual and conflictual nature of normativity in modern societies, that is to say, 'norms as social facts' (see Thornhill, 2008). So, he writes in relation to how sociology can deal with conceptual constructions that work under the presumption of an 'origin without precedent':

> As a sociologist, one may suppose that unfolding of paradoxes of this type – that is, the substitution of distinctions with fixed identities – owe their plausibility to their social-structural adequacy. This demands analyses by way of the sociology of knowledge. For this we no longer use the Marx–Mannheim diction that resorts to class or position and thus ultimately to (conscious or unconscious) actor-specific interests. We replace this by presuming a connection between a society's semantics and the currently prevailing form of system-differentiation. (Luhmann, 2008: 24)

If we read Luhmann's statement as a self-description of his sociological method, it is possible to contemplate what, in his eyes, may be unsatisfactory in Schmitt's sociology of juridical concepts: namely, it is not sociological enough. From Luhmann's perspective, Schmitt lacks an adequate theoretical understanding of society, insomuch as the concept is always read through the lenses of metaphysics and predicated upon the centrality of political forms in the articulation of social life (Thornhill, 2007). This partly explains why Schmitt sits comfortably within the borders of the history of political ideas, as well as why his decisionist model is unable to identify a sociological mechanism (such

as self-description in Luhmann's case) that may explain the consolidation of semantics into social structures and the translation of functional differentiation into the semantic reorganization of society. Accordingly, even if Schmitt's sociological approach to juridical concepts is critical of subjectivism, in the last instance, he tends to interpret the emergence of legal forms (the distinction between legal and nonlegal) primarily as the achievement of intellectual operations. As a result, he loses sight of 'the circularity marking the relationship between semantic and social structure' that internally constitutes law (Fischer-Lescano and Christensen, 2012: 105).

Another important point of reference for a sociology of concepts, and for my reading of Luhmann's sociology of law of course, is Reinhart Koselleck's conceptual history. The relation of influence between one another has been documented, especially Luhmann's borrowing from Koselleck the notion of 'semantics' for his own theoretical edifice (Andersen, 2013; Stäheli, 1997). Elsewhere, I have discussed at length a number of contributions that Koselleck's work can make to sociology and critical theory (Cordero, 2016). Drawing on such analysis, here I will stress a few elements that may be equally relevant for understanding Luhmann's exploration of the complex semantic fabric of modern societies. A first general consideration has to do with the leitmotiv of Koselleck's critique of philosophies of historical progress that transpires in his account of the dialectics of enlightenment social criticism and its main political forms: namely, the defense of the constitutive openness and plurality of history against the conceptual mystifications promoted by political ideologies (Koselleck, 1989).

Koselleck's critique is an argument against 'moralization' which is empirically grounded in a rich historical examination of the semantic innovations and normative contradictions that the language of enlightenment brings about in the political anatomy of modern society. The methodological path Koselleck chooses to follow carries the footprints of Schmitt's influence but also of his creative appropriation of hermeneutics in order to overcome the limits of the traditional field of social history (Koselleck, 2004a). This path is defined by the idea that the dissolution of the old society and the structural transformations of the modern world could be comprehended through its conceptual traces. This stance on the relations between language and society supposes introducing an inflection in the way we engage with concepts: from coherent unities of meaning that identify and represent objects externally to a complex web of heteronomous significations that have the semantic capacity to 'register' social-historical experiences (*sites of inscription and repetition*), as much as the performative capacity to 'participate' in shaping the direction of social-political transformations (*agents of interpretation and projection*). The combination of these two levels of analysis becomes central for the examination and deconstruction of the dominant concepts that modern society forges and applies to itself. Most importantly for our discussion, it allows Koselleck to distill the 'time binding' function of sociopolitical concepts, which will become pivotal for Luhmann's theorizing of the function of law and juridical concepts in terms of *stabilization of normative expectations*.

The time binding function is related to the difference between 'experience' and 'expectation' that constitutes the operative structure of every concept (Koselleck, 2004b). Koselleck understands the development of such difference as immanent to the transformation of historical experience and temporal disharmony that modern society

produces. Yet, he also argues that the distinction experience/expectation configures a structural condition of possibility for the existence of temporal layers in which the novelty of unique events coexists with the persistence of structures of repetition. In this way, the time binding function of concepts in modern society not only mobilizes the memory of past selections in present actions and communications but also activates symbolization of potential experiences and descriptions that are not immediately available. In doing so, it enables a number of things to be said, thought, visualized, and connected but also to be silenced, hypostasized, divided, and even forgotten. This configures a scenario in which concepts are deprived of any claim of completion, as they literally become fields of struggles between what is actual and what is possible (Cordero, 2016: 63).

Despite Luhmann's great appreciation for Koselleck's pathbreaking work, he is rather uneasy about how politically loaded is the prism of observation of his conceptual history (Stäheli, 1997: 129). For Luhmann, the generalization of meaning that concepts perform in society is a poli-contextual function distributed nonhierarchically among social system. From an evolutionary perspective, it is functional differentiation and not sociopolitical struggles which stabilizes, reproduces, and eventually transforms in paradoxical ways the semantic organization of society: 'it is the form of differentiation that controls which semantics achieve plausibility and which do not and thus lose it' (Luhmann, 2004: 292). By wishing to exorcise the political dimension of concepts in this way, however, Luhmann risks losing sight of the fact that even in highly pluralized and contingent societal communications (or precisely because of that), concepts cannot be stripped of their 'eminent politicality'. The persistence of politically loaded struggles across social systems (triggered by the structural plurality of observers) shows that modern society cannot be adequately comprehended without moments of 'political convergence', that is, without moments in which society as a whole opens up to the question of what defines it as society. In such contexts of political self-thematization, or *dialectical disidentification* with what appears self-evident in its concept, it reemerges 'the submerged sense that society is never just society' (Thornhill, 2007: 512–513).

Identifying the nonidentical in the conceptual order of society – that society *is* never just society, that its normativity *is* never just normative, and that its functional differentiation *is* never just functional differentiation – is not an act of formal epistemology or logic but rather a concrete operation of description that deploys the relational force of concepts to seek out the trace of what exceeds the frame of what exists. Or, as Adorno (2008: 95) brilliantly put it, it is about how 'to use the concept in order to reach beyond the concept'.[2] The potential politicality of concepts plays out, ironically enough, in not being essentially political but in being forms of marking meaning that always leave something 'unmarked'. This *something* (it is not nothing!) remains invisible in societal communications by the very movement of concepts, and yet it is opened to be conceptually occupied and interpreted in a different manner. In this regard, the 'parasitical function' (Schmitt) and the 'time-binding function' (Koselleck) that I mentioned before attain a significant role for the enactment of other forms of symbolization that thematize the 'and' or 'is' that defines an identity (e.g. 'legal *and* illegal'; 'law *is* law'); for instance, when actors borrow notions from one systemic domain and translate them into another in order to dispute the value of dominant meanings and norms or when

previously silenced experiences recast the horizon that delineates the margins of what is accepted as right and imagined as possible. And yet, the said politicality of concepts should also consider that actors frequently put concepts at work as instruments to reinforce existing political arrangements and social imaginaries that, rather than challenge, reproduce the exclusion of possibilities.

Applied to our concern with law, the insight of these observations points out in the direction of recognizing that the expanded scope of positive law in modern society does not have to mean that we cannot see other than codified legality. Crucially, along the semantic stabilization of *normative expectations* attributed to the operative closure of the legal system, we also need to account for the expanded scope of *normative imagination* that transcends the consolidated forms of legal texts and legal practices. Without this imagination, I contend, existing juridical language would have no appeal to orient actions and decisions in the face of 'disappointments', nor would we be able to dare to take the risk of observing the contingency of particular events in a new light. The locus of normative imagination, as I understand it, is not the search for actualizing normative principles or regulative ideas within the supposedly unity of a better society, but instead 'the normatively guided search for the non-actualized' in constellations of conflicting norms (Mascareño, 2006: 282).

Having said this, I would like to stress an important difference with Luhmann's emphasis on normative expectations: normative imagination does not wait to be activated by the 'dynamic stability' of functional differentiation; it is rather actualized as a 'reflexive instability' in multiple struggles to define the form of society (Mascareño, 2006: 291). For the purposes of a sociology of concepts, observing the plurality of these struggles – that is, turning them into an object of theoretical reconstruction, empirical exploration, and reflexive critique – is key to comprehend those instances in which the workings of society become distilled and known, where its tensions are documented and expressed, and its institutions are tested and contested. For it is through these moments that the gaps, frictions, and contradictions between semantics and structure can be visualized, thematized, and dealt with.

## III

I hope the previous considerations have contributed to and prepared the ground for reconstructing Luhmann's sociology of the legal system in terms of a sociology of juridical concepts. Hereby, my intention is not to develop a full assessment but focus on unpacking two aspects: (1) the theoretical claim that the legal system is a conceptually structured space of self-referential communications and (2) the empirical observation that juridical concepts shape the normative description of society.

1. The first claim refers to the idea that the *law is a social effort of abstraction*. It condenses in a nutshell Luhmann's general description of the legal system as a conceptually structured space of normative communications (Luhmann, 1983: 102–105). The necessity of abstraction is relevant for the operation of all social systems in order to make possible improbable communications through specific 'codes'. Yet, this functional demand is even more demanding for the legal

> system, insomuch as law and legal operations have to deal with the *questio juris* of grounding valid norms for the binding of (unknown) future decisions, actions, and cases in the generalized, highly abstract *form of law* (Luhmann, 2004: 342). Seen through the lenses of this problem, the self-formation of the legal system is nothing more, but nothing less, than the *structural effect* of the *semantic stabilization* of counterfactual, normative expectations.

The formation of concepts is, therefore, not a superficial effect but a functional need for the legal system in order to become a system: that is, the formation of an abstract world for the operation of legal communications. According to Luhmann:

> This reference of the function of law to the future explains the need for the symbolization of all legal order. Legal norms are a structure of *symbolically* generalized expectations. In this way, not only are generalized instructions issued which are independent of given situations but also symbols always represent something which is invisible and cannot become visible here – that something is the future. Using symbolization society produces specific stabilities and specific sensibilities. (Luhmann, 2004: 146)

The production of these specific 'stabilities' and 'sensibilities' in relation to expectations is, to my mind, a defining attribute and achievement of juridical concepts. As self-reflections of how the system codifies what is legal and what is illegal, 'legal concepts are nothing but distinctions' (Luhmann, 2004: 342) that make possible for the legal system to 'take an open future into society and bind it there' (Luhmann, 2004: 475). In virtue of their repeated used and semantic sedimentation of meaning, legal concepts have the capacity to 'transform a tautology into a sequence of arguments and make something that is seen as highly *artificial and contingent* from the outside appear quite *natural and necessary* from the inside' (Luhmann, 2004: 445, emphasis added). From this point of view, legal concepts are not mere symbolic figures which refer externally to some prior ontological nonlegal reality, but they are immanent forces that produce and posit a legal world of its own. They contribute to create a quasi-representation of the *normative* form of society out of conflicts about the *form* of the normative within society.

So, to say that law is a social effort of abstraction is a way to stress the unfolding of the legal system's self-reference through conceptual forms: 'legal', 'justice', 'rights', 'validity', 'delegation', 'crime', 'state', 'citizenship', 'property', and so on. The meaning of such concepts is not given by an essential value or principle that defines their unity in advance; they are rather formed, enriched, and consolidated through 'a great number of rules that are formulated with the help of these concepts' and 'by legal problems which arise through the use of these concepts and which are solved in a particular way' (Luhmann, 2004: 341). In this dual process of rule formation and problem-solving, Luhmann suggests that legal concepts, and the practices of conceptualization through which they unfold in time, achieve something that neither God nor nature can: real abstractions. That is to say, the constitution of conceptual forms that produce unity while reproducing differences, alleviate the burden of reflection while furthering reflections, and offer responses to problems while giving rise to new problems.

The challenge this places for a sociological approach to juridical concepts is to find a form of observing abstractions non-abstractly, even if this paradoxically means to draw on further conceptual abstractions.[3] To do so, 'we cannot stop at the surface of the history of words and concepts – although this material provides the basic elements that articulate our evidence' (Luhmann, 2007: 763).

2. This leads us to consider juridical concepts not as individual unities of observation but as being entangled in a semantic field of relations weaved by the legal system's own descriptions. The sociological study of self-descriptions is a landmark of Luhmann's methodological constructivism, insofar as they are discursive mechanisms that make possible relations between semantics and structures within a social system. In the case of the legal system, this function is primarily performed by legal theory; in such capacity, legal theory works as *a historical machine of conceptualizations* that achieve structural value (Luhmann, 2004: 54). By placing the methodological emphasis on legal theory's descriptions of the legal system, Luhmann seeks to move away from the customary idea that the validity of legal concepts is determined by the 'contexts' in which they are used or by 'principles' that secure uncontested unity (Luhmann, 2004: 341). A sociological explanation of the legal system must begin by recognizing that 'all efforts to know and understand the law are made in society' (Luhmann, 2004: 423). These efforts, Luhmann argues,

> are tied and remain tied to communication, and thus also to language [ . . . ]. This reference to language [ . . . ] implies that all communication in legal theory is historically conditioned. Legal theory must make itself understood under its given social conditions. It is legal theory's object, law, but also legal theory itself, that varies with the structures to which societies subject their communication about law. [ . . . ] A sociological description must include legal theory's efforts at clarifying the basic issues of law. (Luhmann, 2004: 423–424)

In order to produce such descriptions, legal theory must differentiate and organize concepts (establishing 'consistency', probing the degree of 'generalization', and introducing 'corrections') for the purposes of two particular forms of legal communication: legal education and legal practice (Luhmann, 2004: 54). These domains are of relevance insomuch as they are objects of legal theory's descriptions and, at the same time, engine rooms of conceptual production and interpretation. Within these coordinates, legal concepts form a 'meta-textually security net' of meanings that boost the 'redundancy' necessary for the legal system to work but also create the conditions for a 'variety' of selections to be made according to different situations and changing horizons of meaning. For legal concepts actually help to 'store' and 'make available' distinctions in processes of argumentation and situations of decision-making (Luhmann, 2004: 340–343). But the unfolding of this potentiality is not the immediate result of acts of conceptualization. As Luhmann suggests, it becomes societally real only through the *inscription* of legal concepts into texts: 'Legal concepts develop in the process of

working with texts, as the distinctions which define them are made more precise, that is, are distinguished themselves' (Luhmann, 2004: 340). This means that legal concepts do not exist in the abstract space of pure ideas (metaphysics), disembedded from socio-material supports. Rather, they become 'historical artefacts' in concretely performed operations of self-description that retrieve past experiences in order to deal with legal cases, or cast doubts on 'whether a case can be decided appropriately by subsuming it under the usual meaning of a concept' (Luhmann, 2004: 341).

From Luhmann's perspective, if the operation of self-description of the legal system creates texts that stabilize structures of expectations, the placement of concepts in those texts must be an important locus of empirical sociological enquiry. This is a key methodological consideration for a sociology of juridical concepts because the articulation of legal *concepts-in-texts* seems to provide an unparalleled point of access to observe the way the normative memory of society evolves with, and sometimes in spite of, the form of differentiation of society. Be that as it may, there are two necessary qualifications to be made here.

The first one is the rather one-directional understanding of self-descriptions that Luhmann entertains, insomuch as the link between semantics and structure that this mechanism presupposes always begins on the same side: social structure. This means that changes in social structure generate particular semantic inscriptions but semantics themselves do not have any power to generate social structures, only the soft capacity to visualize structural possibilities that arise when problems have to be solved and which therefore can instantiate 'preadaptative advances' (Stäheli, 1997: 133–134). If this appreciation is right, I wonder how much room there is for thinking the other way around, that is: the power of semantics to shape social structures and, therefore, the very form of society, especially when the existing contradictions between social structures and semantics become thematized by what I would call a *semantic uncoupling* that can eventually trigger structural transformations. Or, to put it differently, by the creative forging of new semantic connections that, in the mode of a 'sequence of occurrences', trigger the 'practical dislocation' and 'transformative rearticulation of structures' (Sewell, 1996).

This leads me to a second observation: the fact that Luhmann's account of the legal system relies heavily on the official self-description of the system, namely, those descriptions that have acquired hegemony to enforce their claims to validity in the course of systemic evolution. This is in my view a methodological bias that Luhmann reproduces from Koselleck's conceptual history, which is often criticized for relying too much on written records of prominent social and political actors/thinkers. To be sure, from Luhmann's point of view, this is actually not a problem but a way of being methodologically faithful to the form in which the legal system in modern society reproduces itself and writes its own history through expert knowledge and the specialized language of legal professionals. In other words, it is the evolution of the legal system through the positivization of law (and not a methodological option of systems theory itself) that relegates to the environment those unofficial, subaltern, and nonspecialized forms of communication about law. Still, one should not renounce to enquiry about and trace out the role played in the legal system by descriptions of law produced by actors who raise legal claims in everyday situations and who in doing so contribute to transforming

prevalent understandings of juridical concepts and expand the normative imagination of society (Breaugh, 2016; Forment, 2015; Lovera, 2016). Following Urs Stäheli's formulation of the problem, it is also a matter of putting attention at the role of 'popular' legal semantics in the making of the unity of the legal system (Stäheli, 1997: 134–137).

Of course, a proper Luhmannian response to this concern could always argue that this happens anyway in the mode of a 're-entry' in the legal system or through the regular 'irritations' provoked by external descriptions of law. However, for a sociology of juridical concepts, the question of the becoming of the semantic field that law itself has constructed (and somehow rendered necessary in the form of positive norms) still remains a fundamental object of scrutiny and deconstruction.

## IV

As we have seen so far, one of the aims of Luhmann's social theorizing on law, the way I describe it, is to liberate sociology from the ontological treatment of legal concepts and provide sociologists with a way of engaging with normativity non-normatively. In this sense, his approach is unequivocally post-foundational, as for Luhmann at the origin of law *there is no foundational value* but contingency and difference. To put it in his own words: 'The foundation of law is not an idea that functions as a principle, rather its foundation is a paradox' (Luhmann, 2004: 227). The absence of proper foundations means that the legal system can only operate if it hides the paradox that constitutes its form (i.e. the unity of difference between legal and illegal which reenters in the form of law) by drawing on the stabilization of meanings produced in time by the reassuring form of legal concepts. Without external or metaphysical guarantees of validity, legal concepts contribute to making invisible the existence of a 'first distinction' by producing a binding sense of identity that can be semantically asserted (by means of a new distinction) but which can never be found (Luhmann, 2004: 262).

Drawing on this premise, a sociology of juridical concepts, in the Luhmannian sense, does not aspire to be understood as a 'deconstruction of all legal principles' (Luhmann, 2004: 460). By picking up the semantic 'traces' left by the paradoxical unfolding of law's incompleteness, it seeks to understand the normative achievements of society not as reflexes of our 'human nature' or the progress of reason (Luhmann, 2004: 477), but as the contradictory outcome of a form of society without higher forms to sustain its law. After all, law can become law because it sustains a faith in norms as protective umbrellas that stabilize expectations against disappointment and also because it keeps the future open to the interpretative force of legal texts. The issue then is not to iron out these inconsistencies but to use them as productive means to liberate the critical potential of legal concepts to dispute and recast the field of our normative imagination.

In my view, this supposes a reconsideration of the place of 'constituent moments' as instances of semantic uncertainty that bring the negative dialectics of law to the fore. Semantic uncertainty is a phenomenon that captures the experience of unease about the validity of 'what is' within the sphere of law (i.e. what is legal and what is not). Even if uncertainty is constantly present in the course of social life, the practical work of determining 'the whatness of what is' (Boltanski, 2011: 56) is forcefully expressed in moments where the semantic coordinates of the space between words and things that

ordinary citizens inhabit are dislocated, and the constitutional value of the principles of vision and division (i.e. the unity of difference) that give form to the social world is disputed. From this perspective, if it is correct to say that Constitutions and other legal institutions need to obscure 'the societal and, in a broader sense, ecological dependencies of the legal system' in order to sustain the 'autological' operation of law (Luhmann, 2004: 451), then constituent moments may well be understood as instances that bring to a halt the fiction of the legal system being transparent to itself, letting the radical contingency of its foundations appear (Mascareño, 2018). Simply put, constituent moments mark the semantic excess of law, the unmarked space of normativity that dwells within legal concepts; more poignantly, these moments make manifest the impossibility of the normative closure of society: the fact that the *normative* form of society emerges out of conflicts about the *form* of the normative within society.

As society is brought closer to the experience of nonidentity, it becomes the locus of endless conceptual struggles about the legitimate definition and operation of the social world. The fact that descriptions of society are formulated, tested, contested, and deployed in moments of constitutional creation does not mean that society can be fully accessible, known, or regulated. It only entails the critical recognition that society is not a constitutional given, as it were, but an unsettled space of constitutional possibilities and impossibilities.

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## Notes

1. Schmitt's secularization thesis ('all significant concepts of the modern theory of the state are secularized theological concepts') can certainly be read along this line of interpretation. This means that a sociological consideration needs to account for the historical genealogy of concepts – that is, the way in which they transfer and adapt meaning from one domain (theology) to another (politics) – as well as for the systematic structure of such concepts – that is, the way in which they internalize an external reference and make it work for their own benefit.

2. Besides the anecdotal fact that Luhmann taught in Frankfurt in 1968 as a substitute for Adorno, the affinities between Luhmann's sociologic of paradoxes and Adorno's negative dialectics are something still to be further explored. Attempts at producing such a dialog have been mostly concerned with making the case for the critical potential of Luhmann's system theory (Fischer-Lescano, 2012). Hauke Brunkhorst is one of the few that, pace Habermas's mischaracterizations of both Luhmann and Adorno, has consistently tried to establish a fruitful dialog between negative dialectics and systems theory. His *Critical Theory of Legal Revolutions* (2014) is a case in point of such an innovative intellectual effort.
3. In the Hegelian tradition of critical social theory, Gillian Rose captures the problem with great lucidity when she writes: 'The abstract rejection of abstraction is the only way to induce abstract consciousness to begin to think non-abstractly' (Rose, 2009: 160).

## References

Adorno TW (2005) *Negative Dialectics*. London: Routledge.

Adorno TW (2008) *Lectures on Negative Dialectics: Fragments of a Lecture Course 1965/1966*. Cambridge: Polity.

Andersen NA (2013) Luhmann and Koselleck: Conceptual history and the diagnostics of the present. In: la Cour A and Philippopoulos-Mihalopoulos A (eds) *Luhmann Observed: Radical Theoretical Encounters*. Basingstoke: Palgrave, pp. 203–224.

Cordero R (2016) The temporalization of critique and the open riddle of history: On Reinhart Koselleck's contributions to critical theory. *Thesis Eleven* 137(1): 55–71. DOI: 10.1177/0725513616674400.

Cordero R (2017a) *Crisis and Critique: On the Fragile Foundations of Social Life*. Abingdon: Routledge.

Cordero R (2017b) In defense of speculative sociology: A response to Simon Susen. *Distinktion: Journal of Social Theory* 18(1): 125–132. DOI: 10.1080/1600910X.2017.1310664.

Cordero R, Mascareño A and Chernilo D (2017) On the reflexivity of crises: Lessons from critical theory and systems theory. *European Journal of Social Theory* 20(4): 511–530. DOI: 10.1177/1368431016668869.

Blumer H (1931) Science without concepts. *American Journal of Sociology* 36(4): 515–533. DOI: 10.1086/215473.

Boltanski L (2011) *On Critique: A Sociology of Emancipation*. Cambridge: Polity.

Breaugh M (2016) *The Plebeian Experience: A Discontinuous History of Political Freedom*. New York: Columbia University Press.

Brunkhorst H (2014) *Critical Theory of Legal Revolutions: Evolutionary Perspectives*. London: Bloomsbury.

Cassirer E (1946) *Language and Myth*. New York: Harper and Brothers.

Colliot-Thélène C (1999) Carl Cchmitt versus Max Weber: Juridical rationality and economic rationality. In: Mouffe C (ed.), *The Challenge of Carl Schmitt*. New York: Verso, pp. 138–154.

Fine R (2001) *Political Investigations: Hegel, Marx, Arendt*. London: Routledge.

Fine R (2014) Hauke Brunkhorst: Reflections on the idea of normative progress. *Social and Legal Studies* 23(4): 547–563. DOI: 10.1177/0964663914544206.

Fischer-Lescano A (2012) Critical systems theory. *Philosophy and Social Criticism* 38(1): 3–23.

Fischer-Lescano A and Christensen R (2012) *Auctoritatis Interpositio*: How systems theory deconstructs decisionism. *Social and Legal Studies* 21(1): 93–119. DOI: 10.1177/0964663911423698.

Forment C (2015) Ordinary ethics and the emergence of plebeian democracy across the global South: Buenos aires' la salada market. *Current Anthropology* 56(11): 116–125.

Koselleck R (1989) *Critique and Crisis: Enlightenment and the Pathogenesis of Modern Society*. Cambridge: MIT Press.

Koselleck R (2004a) *Begriffsgeschichte* and social history. In: Koselleck R (ed.), *Futures Past: On the Semantics of Historical Time*. New York: Columbia University Press, pp. 75–92.

Koselleck R (2004b) Space of experience and horizon of expectation: Two historical categories. In: Koselleck R (ed.), *Futures Past: On the Semantics of Historical Time*. New York: Columbia University Press, pp. 255–275.

Luhmann N (1983) *Sistema jurídico y dogmática jurídica*. Madrid: Centro de Estudios Constitucionales.

Luhmann N (1998). El concepto de sociedad. In: Beriain J and García Blanco JM (eds.), *Complejidad y modernidad: De la unidad a la diferencia*. Madrid: Trotta, pp. 51–67.

Luhmann N (2002) The paradox of observing systems. In: Rasch W (ed.), *Theories of Distinction: Redescribing the Decriptions of Modernity*. Stanford: Stanford University Press, pp. 79–93.

Luhmann N (2004) *Law as Social System*. Oxford: Oxford University Press.

Luhmann N (2007) *La sociedad de la sociedad*. México: Herder.

Luhmann N (2008) Are there still indispensable norms in our society? *Soziale Systeme* 14(1): 18–37. DOI: 10.1515/sosys-2008-0103.

Lovera D (2016) The Right to Social Protest: Negotiating Constitutional Meanings. PhD Thesis, York University, Canada.

Mascareño A (2006) Ethic of contingency beyond the praxis of reflexive law. *Soziale Systeme* 12(2): 274–293. DOI: 10.1515/sosys-2006-0206.

Mascareño A (2018) Constituent crises: The power of contingency. *Revista Brasileira de Sociologia do Direito* 5(1): 24–45. DOI: 10.21910/rbsd.v5n1.2018.236.

Rose G (2009) *Hegel Contra Sociology*. New York: Verso.

Sewell WH (1996) Historical events as transformations of structures: Inventing revolution at the Bastille. *Theory and Society* 25(6): 841–881. DOI: 10.1007/BF00159818.

Schmitt C (2005) *Political Theology: Four Chapters on the Concept of Sovereignty*. Chicago: Chicago University Press.

Schmitt C (2011) The *Großraum* order of international law with a ban on intervention for spatially foreign powers: A contribution to the concept of Reich in international law (1939-1941). In: Nunan T (ed.), *Writings on War*. Cambridge: Polity, pp. 75–124.

Stäheli U (1997) Exorcising the "Popular" Seriously: Luhmann's concept of semantics. *International Review of Sociology* 7(1): 127–145. DOI: 10.1080/03906701.1997.9971228.

Stichweh R (2016) Estructura social y semántica: la lógica de una distinción sistémica. *Revista MAD* 35: 1–14. DOI: 10.5354/0718-0527.2016.42794.

Thornhill C (2007) Niklas Luhmann, Carl Schmitt and the modern form of the political. *European Journal of Social Theory* 10(4): 499–522.

Thornhill C (2008) Norms as social facts: A view from historical political science. *Soziale Systeme* 14(1): 47–67. DOI: 10.1515/sosys-2008-0105.