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Between triviality and triviality. Legal multicentrism from systems' theoretical point of view.

This chapter addresses the problem of emerging legal multicentrism from systems theoretical perspective. I doing that it relies on Niklas Luhmann's autopoietic version of systems theory, as developed in a series of books between 1984 and 1997. It also shares Luhmann's idea of sociological enlightment (Luhmann 1967) and in consequence assumes the perspective of external, sociological observer of the law, attempting to come to terms with what he/she observes as operations of the "legal system". In other words, the observations offered here are made from perspective of sociology of law, not legal theory in strict sense.

To avoid likely misunderstanding it must be stressed that for the lack of space the question of empirical validity of the claim that multicentrism of legal system indeed exists is left unanswered. Although it seems that there is enough evidence to support it (or at least enough to justify taking the effort of theorising the problem of multicentrism) multicentricity is simply taken for granted. The main issue that this chapter tackles with is therefore multicentrism as a paradigm or theory, not factual phenomenon. It is also assumed that empirically verifiable assumptions of Luhmann's theory are true, particularly concerning functional differentiation of social system in world scale. In this sense, this chapter is an exercise in theoretical sociology of law.

In what follows three problems are considered. First, what are the possibilities of describing legal system as multicentric, offered and observed by systems theory. Second, whether the concept of multicentrism can serve as an apt self-description of the legal system. Finally, third, what is the relationship between self-description of the legal system as multicentric and external, sociological observer's observation of legal system as such.

I

Before one proceeds to said problems one must elaborate on a preliminary distinction of fundamental importance. It is the distinction of self-observation and observation of the other

(Selbstreferenz/Fremdreferenz), fundamental to systems theoretical thinking both in theoretical sociology and sociology of law. One should not confuse it (as it sometimes happens) with distinction factual/normative or even factual/theoretical. Both self-observing system and other-observing system can communicate normatively or theoretically but this does not contradict their respective positions. The distinction is based instead on whether an observing system observes its own operations or operations of another systems.

By systems one means here autopoietically reproducing social systems – operatively closed but cognitively open systems that are capable of observing its environments by changing the structure of their own communication. According to this view, social systems are constituted by communications and only communications. They create further communications by referring to already existing communication, so that development of their complexity is driven by their past complexity. (In other words, communication is always a result of self-reference of communication). Their immediate structure is a result of past evolution and a point of departure for further evolution. For that reason, systems construct images of their environments, having no direct ('one-to-one') access to outside reality – the only reality they deal with is themselves, everything else being their own construction. It also follows that they must reduce complexity in order to observe – they are by definition less complex than “objects” they observe, but still their past structure forces them to perform some observations. Every next step in evolution is therefore contingent on the form of reduction of complexity. This mechanism applies also to systems' observations of themselves – because of their complexity, autopoietic systems are unable to create accurate image of themselves, so that they are doomed to reductions of complexity unpredictable and unobservable before they happen.

One such system is society. Historically, it happens to take the form of internally differentiated social system consisting of a number of functionally specified subsystems. This means that every subsystem belonging to society has only one function, characteristic of it and only it. Famously, one such system is the legal system: it's function is to stabilise normative expectations by operating a binary code lawful/unlawful, steered by decision programmes. Every operation of the legal system is thus dependent on reproduction of that binary code – if it does not refer to the code it is not observed by that system as an element of that system. In this sense the legal system is always self-referential, regardless of what “object” it refers to. Other systems described by systems theory (and Luhmann particularly) include the political system, the system of economy, education, art, media, science, etc. Each of them has their function, a binary code and its own programmes,

their reproduction is also subordinated to the same logic of self-reference.

Hence, self-observing social system changes the structure of itself observing its own operations (or not) and producing new communication while other-observing social system changes the structure of itself observing operations (or not) of another system (social, psychic, biological etc) and producing new communication. For instance, the law might observe operations of economic system by considering some of them lawful, some unlawful, which might take a material form of a court judgement or decision, action or motion before court, a contract, communication between attorneys or other persons, etc. It might also differentiate the lawful/unlawful code further, so that it offers the possibilities to distinguish between different types of lawfulness or unlawfulness in the context of economic transactions or production of goods. Similarly, economic system might conceive of operations of the legal system by means of its own guiding distinction. In any case, such observations are just shifts in structures of particular subsystems. Technically speaking, they are re-entries of a binary code that constitutes any given subsystem, into one side of that code.

According to Luhmann, the relationships between all subsystems in functionally differentiated society only take the form of other-references, resulting from self-references of every of them. A particular system has no way of "influencing" systems in its environment other than reproducing its own structure in hopes that its own operations will be observed by these systems and in consequence change their structure. An apt term "irritation" is used in this context, denoting "internal" nature of this phenomenon. Systems might irritate each other by performing certain operations, yet the results of this are unpredictable to them because they depend on other-observations performed by other systems. In functionally differentiated society subsystems remain therefore black boxes for each other. True enough they might create "structural couplings" with one another - for instance legal system is coupled with the economic system by means of "contract" and "property" - so that particular operations of one system give rise to particular other-observations of another. Yet, this does not contradict the fact, that no communication is transmitted from one system to another, and structural coupling remains a "stable irritation".

Importantly in the context of multicentricity of the law, it follows that social system of modern society can be described by referring to a concept of polycontexturality. If conceived of in terms of self- and other- reference, modern society is devoid of centre. Every subsystem is equally competent of observing other systems, even if observations of each of them are different from observations by every other. There's no more "truth" in observations of system of science, performed by means of truth/false binary code than there's in legal system's observation of the same

phenomenon by means of its guiding distinction lawful/unlawful. Functionally differentiated society consists thus of a multitude of self-observations of that society, performed by different observers situated within so-observed society.

In this sense, multicentrism is normal phenomenon in contemporary society. Its very existence is based on abolishment of a single perspective common to all observers. Every subsystem must therefore refer to its own observations and no guiding principle that organizes these processes exists. Each subsystem is a centre for itself, but for the society as a whole they are all equal. This fact has its consequences for each of the subsystems, although it goes practically unnoticed in their self-observations. “Being on their own” systems cannot rely on some external help to organize their observations. They must organize their complexity by themselves. It is important to note, however, that Luhmann stresses the fact that in doing so systems encounter a paradox. It is impossible to observe a whole of a system by using a distinction that distinguishes two parts of that whole. Legal system cannot observe itself as lawful or unlawful, because it is established on a unity of the distinction lawful/unlawful. If it does, it contradicts the conditions necessary to perform such observation. It must base its operations on self-reference but it cannot do that !

In addition to the complexity problem, systems are therefore inherently paradoxical. Any operations of the system can be seen as “unfolding” of the paradox. One way of doing that is to utilise the above mentioned structural couplings. Systems may hide the fact of paradoxicality of their operations by other-referring to operations of another system. Famously, the legal system utilizes this method to hide the fact that it cannot judge about its own lawfulness. This problem was historically resolved by a structural coupling with political system, inter alia by means of constitutions and legislations.

These observations are taken to the extreme when one follows Luhmann's claim that contemporary society is a world society. According to Luhmann, there's only one subsystem of each kind: one world legal system, one world economic system, one system of science etc. Of course, they are not unitary in any sense – they are “loose” entities, internally differentiated on their own. They also differ as far as their organization and ability to organize complexity are concerned. Yet, Luhmann claims, it is justified to speak about functionally differentiated society because all communication is clearly differentiated in functional manner and it might refer to itself, even if it actually does not.

Apart from this general background for multicentrism of law there's also one more

consequence of Luhmann's usage of the distinction of self-observing and other-observing systems that is of relevance here. It's nature is methodological. Above description of self refernece and other reference in modern society leads to the conclusion that multicentrism of legal systems might be observed by two different observers. First, social science might view it as a particular characteristics of communication in legal system, while the second, the legal system, might see it as a feature of its own communication. In the former case it is a special structure of communication of the system of science devoted to specific function of that subsystem (production of truth). In the latter it is a structure of communication within the legal system, devoted to specific function of that subsystem (production of law), so it is respectively a "paradigm" of social sciences or legal system.

II

Let's start by considering the first problem. It must be noted that unlike in law, in social sciences the problematisation of law as consisting of phenomena of differing types is not new. As opposed to most legal theories of last few decades, interested in infallible deductability of legal norms or at least coherence of law and defeasibility of legal norms, they maintain that law is a complex phenomenon. Most prolific themes of social scientific writings about the law are not coherence and logic but discontinuity, exceptions and change. This fissure between social-scientific view of the nature of law and its legal concepts can be best made clear by evoking some of the attempts to bring social sciences to the legal domain.

In early 20th century few, now-classical, scholars challenged the disciplinary distinctions between law and emerging social sciences by pointing at multitude of forms of law. While classical sociological writings of that time focused rather on evolution of the law and appearance of its modern forms, lawyers inspired by emerging social sciences sought to establish new, pluralistic theory of law. Leon Petrażycki differentiated four types of legal phenomena by crossing the distinctions of official and unofficial law and positive and intuitive law. Eugen Ehrlich distinguished state law, lawyer's law and living law while Georges Gurvitch connected different types of the law with different types of social groups, differentiating more than 160 types of law.

The guiding thought behind these attempts was to make legal theory a true science, devoid of methaphysical thinking and relying on empirical premises. The borrowing of terms from psychology and sociology in the works of said authors was an attempt to tune the melody of the law by keys of social sciences, or, in Luhmannian terms, to create a structural coupling between the

disciplines. Although in legal sciences these attempts largely failed in confrontation with more politically useful legal positivism, in social sciences they gave rise – together with new wave of sociology after World War II – to a change in mains tenets of thinking about the law. They sparked the interest in law beyond official legal façades described in great detail by legal textbooks and beyond grand trends of development reconstructed by classical authors like Durkheim, Weber and Spencer. Now the centre of interest became the *true* law as it is for all participants of discourse of law – well informed, wealthy and powerful – or not. This showed, that the juridical reality of law is just one of many – perhaps not the most important one. In this sense, the ideas created by lawyers in early 20th century were re-imported into social sciences, altering the structure of the social system of science.

A similar attempt has been made few decades later by scholars associated with legal pluralism movement. They undertook and still undertake the effort of demonstrating that law is pluralistic because of its cultural rootedness or because of interactions of different legal orders. Their inspiration is more anthropological than sociological, but at least since L. Pospisil's "Kapauku Papuans and their Law" anthropology also viewed the law as a incoherent body of overlapping, instantly changing, context – dependent rules rather than a logically structured, sylogistically applied system of norms. Even though positivistic view of some sociologists is not shared in anthropology, also in anthropology officially maintained view of the law is frequently found unsatisfactory. Anthropologists often aim at discovering actual law beyond what is accessible to their informants[1]. Although it might be too early to judge whether this import/export enterprise might be successful but there's little doubt that so-oriented anthropological interests in law – both in case of pre-modern and post-industrial societies lead to conclusion that law is inherently pluralistic.

To be sure, both in anthropology of law and most of sociology of law the concept of pluralism in law is not just a mere *façon de parler* but a reflection of more fundamental patterns of thought. For a good example one might refer to recent writings of R. Cotterrell. Seeking to explicate a link between the law and different forms of social relations, Cotterrell distinguished four different types of communities: affective communities, value-based communities, rational communities [????]. By integrating their members around different problems and themes of interactions they differ in their social bases, and, consequently, in predominant types of the law. The law is here an important factor facilitating interactions between members of the groups and at the same time a kind of social bond created by these interactions. It depends on the type of social bond between

1 For a good example cf Bourdieu...

individuals in particular groups and it creates the possibilities of trust, facilitating further development of that bond. Consequently, the form of the law usually is and should be adequate to the form of social bond. Whether one finds Cotterrell's theory convincing or not, it shows clearly that pluralism is a necessary condition of very existence of the law. As long as the natural fact of plurality of social groups has its *vis a vis* in the plurality of forms and content of the law, the law will be an effective way of maintaining the existence of the group. In any other case the law will cease to exist as a true social force, remaining just an outsider to the actual social processes of trust-building and integration taking place in the groups.

All in all, there's little doubt that law – as seen by an other-observing observer, be it sociologist, be it anthropologist - is a pluralistic phenomenon that cannot be simply reduced to a form of the law. A social scientific vision of law that maintains that law is simply untrue to the concepts and values that gave rise to it – it ignores "the reality". To borrow a phrase from Adam Podgórecki quoting Leon Petrażycki, any such social-scientific theory of law is lame. It is also clear that the difference between most juridical theories of law and of is a matter of the structure of the observer, not the observed object. It is the structure of communication in the social system of science – the predominant interest in "truth" - that steers social-scientific observation of law, and the structure of communication in the legal system – the predominant interest in "case-solving" - that steers legal communication. After all, monistic, juridical theories of law proliferated, while social scientific ones mostly failed outside of narrow circles of scholars occupied with this problem. One cannot explain that (as some do) by referring to concepts like false consciousness or power relations.

Of course, one has to carefully distinguish between plurality of sources of law and all kinds of legal phenomena on one hand and legal multicentrism on the other. If multicentrism is to be understood as plurality of institutional actors dealing with the same problems (or their spheres of competence overlapping) it is something different from simple legal pluralism. Even the fact – expressed explicitly or implicitly in many legal-pluralistic concepts of law, that unofficial law is a prerequisite of any institutional adjudicating framework does not contradict the fact that legal pluralism might exist despite unicentrism in institutional forms of adjudication. It might be argued that the difference between pluralism and multicentrism is only a difference of degree, not quality. Yet historical examples teach that although legal pluralism is a normal phenomenon, there where periods of history of law where pluralistic law was accompanied by unitary adjudication systems, even if most conflicts were resolved informally outside of them. Thus, it seems justified to view

legal pluralism and legal multicentrism as two independent phenomena, so that in principle one can speak of monist and unicentric legal orders, pluralist multicentric ones, monist multicentric ones and finally pluralist unicentric ones.

Still even if it is true that more clear delineation between pluralism and multicentrism is necessary, it poses little or no challenge to social-scientific view of law. In particular, so-refined distinction of legal pluralism and legal multicentrism seems to be in perfect agreement with theoretical model of law offered by systems theory. Law, as it was already mentioned, is seen in it as a cognitively open and operationally closed social system that maintains its own boundary, reproduces itself autopoietically and in doing so refers to the lawful/unlawful binary code. Finally, it fulfils a function for social system of society. This conceptualization of law leads to three consequences important in this context.

First, it abolishes any distinctions between types of law. Any communication that meets the condition of reproducing the lawful/unlawful code belongs to the legal system, regardless if it is decision of the court or the discussion in the laundry. In this vein, any attempt at classifying types of the law, be it classical distinction of Petrażycki or Ehrlich, be it authoritative, juridical rejection of some sorts of normative phenomena as non-law is futile or at best artificial. Still, systems-theoretical way of thinking is compatible both with early and contemporary pluralism – because it takes it to the extreme. Moreover, it follows that the legal system, as seen by systems theory, is an entity with a degree of complexity – requisite variety – a necessary amount of differentiated communication. If it fails to reproduce itself in a way that allows for differentiation in communication – it looses the footing for any other-observations it might make and thus ceases to exist. On the other hand, if it produces too differentiated communication it will cease to exist as one system. Maintenance of complexity might only be achieved only when official, coherent and logically consistent legal order is accompanied by unofficial, uncoordinated and inconsistent law. From systems-theoretic point of view legal pluralism is thus viewed as a necessary *prerequisite* of the former kind of the law and vice versa.

Second, the legal subsystem, just like any other functionally differentiated subsystem in world society, is a world subsystem. There is only one legal system, one political, artistic, religious, economic, educational or media (etc) system because it is in principle possible to refer to any communication that reproduce binary code lawful/unlawful. There might be no single programme of such system but there is no reason why people in the laundry in Kraków should not discuss legal verdicts in Iraq or China or the results of the arguments over laundry in New York should not

influence people's lives in Korea[2] and still such communication fulfils the same function. It follows that the conditions of global, pluralistic and multicentric legal system have been met long ago. There's nothing strange or unusual in the fact that two or more legal orders of different origins and styles of thought coincide. Even more: this is a normal, standard way of existence of the law since modernity.

Third, most importantly, systems theory offers convenient tools to conceptualize the problem of multicentricty in narrow sense as multitude of adjudicating bodies. An apt device for conceptualizing this problem might be a concept of internal (secondary) differentiation of subsystems. Although functional differentiation of society is a primary form of social differentiation, each functional subsystem might organize its complexity by further differentiation. Apart from functional differentiation within functionally differentiated susbsystems Luhmann is aware of few other possible dimensions of such differentiation: centre/periphery differentiation, stratificatory differentiation and segmentary differentiation. In the first case, a centre of subsystem emerges that controls the way the system reproduces. In the second, system consists of hierarchically organized strata. In the third, system is divided into segments that remain different but equal – no hierarchy between them exists.

In case of the legal system internal differentiation is, according to Luhmann, few-fold. First, it takes the form of center/periphery differentiation. Even though law is endlessly pluralistic, the reproduction of that system is organized in such a way, that a final say belongs to the courts. One can, as it seems, use here the language of probability of reproduction of particular communications in the systems. Even though court decisions can be contested, it's more probable that the communication will be reproduced that emerges in the courts than the communication outside of them. Consequently, the steering if further communications more strongly depends on courts. Second, very important dimension of internal differentiation of the legal system was the segmentary differentiation of nation-states. In the legal system its existence was a result of structural couplings with the political system, which lead to establishment of a distinction legislation/adjudication in the former and eventually structuring its communication into segments. Although Luhmann views legislation as more peripheric than adjudication, it actually helped to develop the closed, functionally differentiated legal system by regulating it relationships with (emerging) political system. As a consequence, in Luhmannian tradition world legal system might be characterised as a

2 In 2007 Roy Pearson, a judge in Washington sued owners of a dry-cleaning laundry, of Korean origin, for 67$ million because his favourite pair of trousers was lost in cleaning. Due to stress caused by legal proceedings and financial losses because of lawyers' fees the owners of the laundry considered returning to their home country.

multitude of segmentary subsystems within legal subsystem, each further differentiated by center/periphery distinction.

It also might be argued that systems theory offers something more than just a simple description of the problem of multicentrism in a complex language. It offers an explanation. Luhmann notes (and it is difficult not to agree with him) that the process of differentiation of global legal system in its current form is delayed in comparison to other functional subsystems in world society and triggered from outside. It is the result of disappearance of state boundaries caused by economic and media globalization, eliminating all-encompassing state, also in relationship to the law – but not caused by the law itself. More technically speaking, the structural coupling with political system persists, but it is not possible any more to identify it with the boundary of the legal "sub subsystem" as it was possible in the times of glory of nation states, because the political system itself is affected by global phenomena. This fact creates the need for re-establishing relationships between the adjudicative centres of former-segments. From this point of view, multicentrism is a relict of the past, a result of structural unfitness of the legal system, false self-description of that systems in conditions where segmentary differentiation are weakened or even cease to exist. The paradoxical name "multicentrism" indeed captures the problem quite well – there might be no single centre of world legal system because of segmentary differentiation, yet there are many entities that consider themselves central and keep on working as if they were.

The problem of delayed differentiation of the world legal system takes one to yet another problem. It is a question of possible shifts in the form of differentiation of world society. There are good reasons to suppose, as well ready theoretical devices, that the weakening of the nation-states might lead to replacement of functional differentiation might by centre/periphery differentiation as a primary form of differentiation. Such centre/periphery division could be based on distinction of inclusion/exclusion of individuals, resulting from cumulating inequalities between individuals in access to different function systems. Luhmann remarks that the fact that nation states are now unable to structure communication in functional subsystems eliminates buffers that allowed poor, undereducated, politically challenged etc., individuals to participate in some of subsystems despite their relative difficulty to take part in other. One might therefore ask if under conditions of "globalization" the logic of exclusion is not superimposed on the legal system, so that the problem of multicentrism is globally resolved by different forms of "gating" the access to some adjudicating bodies, for instance by knowledge, resource and language barriers. It could also be imagined that multicentrism becomes a kind of "negative payoff" in the excluded peripheries whereas centre

would be able to resolve that problem. Verification of such speculations is obviously a matter of throughout, comparative, empirical investigation, but some available analyses might support such claim.

Regardless of conclusion on this particular matter, above analyses show clearly that there is a good deal of concepts that systems theory might offer to analyse the problem of legal multicentrism. The usage of them might be seen as a continuance of older enterprises of sociology of law. One disappointing observation that follows is yet that the idea of multicentrism, as seen by external observer, is not as novel as one might had hoped. It is not really a challenge to social-scientific view of law, but rather it fits nicely within the framework of existing concepts. More than that: similar concepts have already been rejected in law. One can therefore notice the first appearance of triviality.

III

Having said that one can turn to the second problem mentioned above, the question of possibility of self-describing the legal system in terms of multicentrism. It must be repeated here once again that when one speaks about legal system in Luhmann's sense one means an autopoietic legal system based on a binary code lawful/unlawful. The existence of the system is possible only because (and as long as) every operation of the system refers to that code, even if the lawful/unlawful distinction is not directly mentioned. For this reason if one is willing to use the notion of multicentrism in order to perform self-observation of legal system one must show how it squares with that binary code. Thus, before one proceeds with such enterprise one must decide if multicentrism is itself a lawful or unlawful phenomenon. One cannot go another way round and maintain, for example, that distinction multicentric/unicentric is the true legal code and then assess uni- or multicentrism of the lawful or the unlawful unless it can be demonstrated that fundamental structural shifts in legal communication has taken place, reaching as far as abolishment of the code lawful/unlawful. Despite above mentioned evidence that something has changed in law such claim seems absurd.

Obviously, the allocation of multicentrism to particular side of the code is the matter of a contingent and historically path-dependant programme of the system. Traditionally, the strategy of legal system was obviously to conceive of multicentrism as unlawful. In each segment of legal system there was only one system of courts, with their existence was guaranteed by structural

coupling with the political system by the territorial, independent, power-monopolizing state. Federal states maintained unicentrism carefully delineating the competences of federal and local courts by means of norms of competence. To say (for instance, with Eugen Ehrlich or Leon Petrażycki) that law is not unicentric wasn't just a matter of excessive yet excusable eccentricity but a political act. With the appearance of internationally operating courts – and then "internalisation" of international law – this has changed.

Now (one can see that as a fine example of Die normative Kraft des Faktischen, at least inasmuch as this concept can be applied to previously existing state of affairs) multicentrism must not be considered illegal. After establishment of the human rights institutions one ought not oppose to that unless one wants to be counted among the uncivilised or maybe unless one is powerful enough not to care about labels or to create a factual exception for oneself. The same holds for some regional institutions, like European Court of Justice or global adjudicating bodies like some arbitration chambers. If one is unable to do that – because one belongs to political periphery, because one is not rich or competent enough or just because this would cause political or economic turmoil on local level - one must not stick to old habits. New structural couplings of law with politics, economy or education make it impossible and forbidden. For the lack of another option (the code is binary !) one ought therefore observe multicentrism as lawful.

Yet, at the very beginning of that enterprise one faces a fundamental problem. Multicentrism as self-observation of the legal system presupposes "freeing" the usage of the code. Thus it leads to a paradox – first multicentrism is announced as lawful but then it is allowed that the lawful/unlawful code is used independently on two institutionally different but substantially identical occasions. It is therefore lawful that what is lawful might be at the same time unlawful. One cannot refer to the earlier technique of resolving the paradox by differentiating "our lawfulness" from "their lawfulness" as it was possible with the concept of state-law (one might call it *Ubi leones* concept of law). This is, as it was already said, forbidden and now the inexcusable political act is to deny that multiplicity (if one does that anyway it might turn out that in everyone else's opinion *leones* occupy his own bedroom).

One can see this problem – in perfect agreement with Luhmannian tradition – as a generative paradox, that makes things going in the legal system. The history of law, particularly since establishment of functional subsystem of law, as written by Luhmann, might be seen as a series of paradoxes. The paradox of multicentrism would be just one of many, a next step in development of law. One might therefore start looking – as the theory teaches – for de-

paradoxalization. The theory also offers some ready possibilities, which might be considered now.

First, one can think of multicentrism as a programme of the legal system, steering the communication in that system and deciding on usage of the code. Out of two kinds of programmes recognized in systems theory – conditional and goal-programme it should be considered the former, not the latter, because goal-programmes latter were plausibly considered impossible in the legal system. In this sense, the multicentrism as a program means that the usage of lawful/unlawful code is steered in such a way that possible different usages of it are reconciliated *quod ad usum*. It makes the paradox invisible, because it hides the fact that the code *might* be used in inconsistent or even contradictory way. Yet, this solution is highly unsatisfactory because in fact it is a mere repetition of a norm-of-competence method used in federal states or private international law. If introduced consistently it would eliminate problems with multicentrism by putting an end to the "centrism" of particular adjudicating bodies - but still it is highly improbable. Granted what has been said above, particularly given the lack of possibility to establish necessary couplings with other subsystems there's no way of making the legal system use such programme. As a fine example of this impossibility one might use the idea of European constitutionalism that perished together with at least one European government.

Second, one could think of multicentrism as a contingency formula, similar to that of justice. This method of eliminating the paradox of law relies on steering the contingency of the legal system by creating the possibility of reproducing certain communication referring to the lawful/unlawful code and eliminating the possibility of reproducing other kinds of such communication. According to Luhmann, formal understanding of justice is a "selector" of communication in legal system, allowing for larger diversity of communication without the danger of deconstruction of the system. In this sense, multicentrism would be indeed a super-norm imposed on itself by the legal system: allowing only for multicentric operations. In practical terms, one could conceptualise this option by referring to multiculturalism, cultural defences, ecological ethics, morality or discourse ethics as justifications for different usage of the lawful/unlawful code. Everything is lawful, as long as the diversity is maintained ! Exceptions must be accepted in the name of cohabitation ! Let's celebrate the Other !

The problems with formulating legal concept of justice convince one, however, that it is extremely difficult to create a concept of multicentrism that would at the same time conceal the paradox of self-reference and refer to the lawful/unlawful code. Indeed, reference to contingency formulae presupposes external reference which is excluded in principle. System must refer to

concepts created outside of it as if they belonged to it, concealing the fact that they cannot do that. Such attempts are usually quickly identified as such (take the examples of such, highly unpopular concepts, like "Asian values" or, worse, "axis of evil") or converted to the language and logic of the law (as demonstrated by ecological problems and environment protection laws).

Third, one might consider multicentrism as a concept for legal theory, used to produce a self-description of the legal system. It is possible to imagine a legal theory – a novel one, going beyond currently used concepts of legal argumentation, coherentism, institutionalism etc. - that maintains that law is multicentric. Legal theory proved many times that it is able to hide paradoxes by using clever concepts, as it was with the notoriously under-defined "Grundnorm" concealing the problem of legality of the law.

Yet, not everything that is thinkable is necessarily practicable. In this case one can dwell on actual impact of such intellectual enterprise, even if one takes into account the fact that puzzling concepts are usually attractive. First, it is not certain how the paradox could be solved in practice granted limited role of self-descriptions of the legal system. It is complained sometimes that nowadays the practical role of legal theories is not as big as it used to be and that legal practice and teaching takes non-intellectual forms. It might be a consequence of lack of adequate theory of law, but it is not obvious at all if great breakthroughs are achieved by means of new theories or just are just reinforced by them. It could be that such theory already exists but it is not influential among practicioners of law who continue their businesses unaffected by it. It might be argued that weakening of states and disappearance of segmentary differentiation in the legal system makes such form of organization of systems complexity less useful as it used to be, or, to put it differently, that legal theory owed some part of its success to the coupling with politics.

Second, even if new legal theory could influence legal practice, one might doubt if it could influence legal theoreticians. It seems that the idea of multicentrism is at least incompatible with most existing, influential theories in the field (or perhaps simply contradictory with them), from classical positivism to Dworkin, neoinstitutionalism and Alexy. Structure of communication within legal system – at least in these areas, where theoretical self-descriptions are prepared – is oriented rather on older themes and offers no possibility of extending them in a way that could support multicentrism. Systems theory teaches that it is rather unlikely that a claim that is sharply at odds with existing communications will be reproduced. Even if a multicentric legal theory will be developed, its acceptance will be slow and turbulent, as normal way of development of theories of reflection, suggested by systems theory is evolution and piecemeal replacement of themes and

concepts, not revolutions.

By analysing the possibilities of resolution of the paradox of multicentrism one might therefore come to conclusion that the structure of the legal system as it stands now contradicts possible solutions to the problem that might be derived from that structure. This is indeed a problem, because it means that appearance of the problem is at the same time an obstacle to possible solution.

These observations take one to the final and perhaps most controversial issue. If it is true that it is inconvenient to use the concept of multicentrism in self-descriptions of legal subsystem but it still can be seen by external observer, how can it be reflected by that system ? One faces here a famous problem – structural conditions of existence of the legal system contradict the conditions of its social utility. As long as legal system observes itself as unicentric it is unfaithful to itself. It conceives of itself in a false way – and thus it is dysfunctional because it does not contribute to communication in society as a whole. Yet, if it changes its self-observation so that it observes itself as multicentric it looses the footing for any operations – and thus becomes dysfunctional, because it is unable to justify them. It is therefore clear that the problem of multicentrism must be somehow reconciled with the needs and possibilities of self-description.

Perhaps one should consider some less obvious ideas than previously analysed. There's one straightforward, but still classical solution, announced somewhat bombastically by Gunther Teubner his, very well known, paper on Global Bukovina. One should hope, in his view, for abolishment of the existing boundary between legal system and social sciences. This should and will happen because of emerging global legal pluralism, that traditional legal scholarship is unable to deal with. Acceptance of the – "objectively true" – fact that law is pluralistic should eliminate all problems with multicentrism as well. All in all, it is resolution in single cases that counts. Of course, in this way one returns to the idea of Eugen Ehrlich that social-scientific knowledge must be properly reflected in the legal practice, mainatins that the concept of import/export might be dusted and recycled. Or, to refer to Adam Podgórecki once again, that jurisprudence becomes auxiliary science of sociology of law.

Whether one enjoys these prospects or not, it is worth noting that drawing from classical sociolegal authors Teubner also relies on classical, already mentioned tenet of legal theory. He seems to conceive legal pluralism as as a kind of Normative Kraft des Faktischen, the Kraft that is well represented in the legal system by above-mentioned legal-pluralism movement, particularly if supported by the wisdom borrowed from systems theory. Yet, Teubner seems to be overly and

unreasonably optimistic. Indeed, one can see this as one of many scenarios, but only one. If it is true that with weakening of segmentary differentiation of law its structural coupling with politics is not yet complemented by new structural couplings with other systems (elsewhere Teubner indirectly supports this view by postulating "constitutionalism without state" based on future structural couplings of law with other function systems), it is also true that the legal system is left on still waters, not set in motion by the flow of history. The turn towards hypothetical change in self-description of the system depend both on future structural couplings and on the structure of system itself, but in the moment of indeterminacy the future evolution of the system is extremely contingent. It is equally possible that instead of pluralism the already-mentioned emergence of the global inclusion/exclusion regime will take place, that is sharply at odds with both existing self-description of the legal system and ideal of social-scientific steering of the law. Thus, what Teubner presents as an objective necessity is in fact quite voluntary: after all, constitutional moments not always give rise to new constitutions.

On the other hand, one could consider yet another possibility of dealing with the paradox of multicentrism, quite distant from large structural shifts and revolutionary changes. Perhaps it is not necessary to contemplate the introduction of the *concept* of multicentrism into legal theory in order to resolve the *problem* of multicentrism in the legal system. A possibility exists that one can find a solution to that problem by using a contingency formula that does not refer to the multicentrism of legal system directly but is functionally equivalent to it and still compatible with existing structures of legal system. Not all great inventions are intentional, so perhaps the aid to the malaise of multicentrism can be found by the way.

One possible candidate seems the human rights. One can refer here to the famous Solange judgements of German Constitutional Tribunal. As it is well known, they triggered an interest in human rights in the European Court of Justice, effectively bridging the gap between adjudication of German Tribunal and the ECJ. The ingeniousness of Solange shows this way very clearly. It lies however not in the normative reference to the idea of human rights but in the purely factual opening of possibilities of compromise. They constitute a validity condition of law, but being extremely hard to define they allow for interpretation that eliminates conflicts between judicial bodies, and does not exclude the multitude and lack of coordination of adjudicating bodies.

It might be therefore that the solution has already been found – and has gone largely unnoticed. More than that – it has been created precisely when the problem itself was created. One must note therefore a second triviality.