

Normativity's Re-Entry

Niklas Luhmann's Social Systems Theory:

Society and Law



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De terugkeer van de normativiteit
Niklas Luhmanns sociale systeemtheorie: maatschappij en recht

(met een samenvatting in het Nederlands)

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Aan mijn ouders, Ben en Gré

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Waar jij bent, ben ik thuis.

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Introduction

Draw a distinction.

George Spencer Brown¹

Unity and Complexity: Luhmann's Theory of Society

As the complexity of our modern Western society increases, it also becomes increasingly difficult to grasp 'what' keeps society together and *how to describe its unity*. Contemporary complexity is due to achievements within our society such as the establishment of modern democracy, the welfare state, globalization and modern technology. These structural achievements within modern Western society facilitate an abundance of possibilities that are deemed positive in the light of our individual self-realization. This is quite obvious for example in the case of education in all its variety, opening up a multitude of possible job and career opportunities for both men and women, thus granting economic independence. The secularization of our society has also created room for an individual 'design' of life, religious or otherwise. A similar individual autonomy applies to our political preferences and choices, and also to the choice of our personal norms and values. Within the framework of law in modern Western society, our individual autonomy or freedom regarding options and choices is probably unequaled. This magnitude of possibilities comes however at a price: it confronts us with an ongoing necessity of selection without the stability of, or guidance provided by, for example, a dominant religion or restrictions constituted by being born into a certain social class. Our choices are consequently highly contingent: almost everything could be otherwise. Our modern Western society presents itself as fragmented, contingent and complex. This complexity and contingency seem to counter any notion of unity, yet in a way this conglomerate of possibilities and necessary selections is not entirely without direction. Undeniably, law provides for a distinctive normative boundary regarding our possibilities as to designing our lives. And even though we are to a high degree free, within the limits of the law, to choose our own norms and values, a basic normativity enables us to per-

¹ G. Spencer Brown, *Laws of Form*, London 1969, p.3.

ceive our modern Western society as distinguishable from other societies and hence as a unity. Whatever might separate us as individuals, we share some conception of freedom, equality, welfare and certainty, voiced by institutions like the democratic *Rechtsstaat* and human rights. It reveals that normative aspects play an important role in our perception and description of the unity of society.

The above prepares the stage: *the focus of this research is defined by the problem of the description of the unity of modern Western society in view of its complexity and contingency*. Such a research requires in any case a conception of 'society', of its modernity in terms of differentiation, complexity and contingency. And, in view of the above, the function and position of the law and of normative aspects should also be accounted for.

The theoretical offer that, in the light of the foregoing, will be considered is German social theorist Niklas Luhmann's theory of society. During his lifetime, Luhmann (1927-1999) elaborated a comprehensive theory of society within social systems theory in over a thousand publications.² And for some time now, Luhmann's work has entered the ranks of 'modern classics' in social theory: the existence of a vast amount of introductory and secondary literature seconds so.³ Luhmann's theory of society provides an elaborated concept of society as a social system. But, **does his theory account for the unity of modern Western society? And moreover, does his theory of society account for the role normative aspects play in the observation and description of the unity of society?**

More specifically, the reason for the author to engage into Luhmann's social systems theory pertains to the above articulated problem of societal unity in view of the *complexity* of modern society. It is Luhmann's distinctive approach of the,

² Including translations, reprints and interviews. See K. Damman, D. Grunow & K.P. Japp (Eds.), *Die Verwaltung des politischen Systems- mit einem Gesamtverzeichnis der Veröffentlichungen Niklas Luhmanns 1958-1992*, Opladen 1994, see p.285 ff. Luhmann's relentless production continued until his death in 1999. His publications cover an impressive spectrum of theorizing: from formal organizations, art, science, religion, politics, law, love and so on to society *per se*.

³ To mention only a few: D. Krause, *Luhmann-Lexikon. Eine Einführung in das Gesamtwerk von Niklas Luhmann*, Stuttgart 1996; G. Kiss, *Grundzüge und Entwicklung der Luhmannschen Systemtheorie*, Stuttgart 1990; T. Blom, *Complexiteit en Contingentie. Een kritische inleiding tot de sociologie van Niklas Luhmann*, Kampen 1997; D. Horster, *Niklas Luhmann*, München 1997; G. Kneer & A. Nassehi, *Niklas Luhmanns Theorie sozialer Systeme: eine Einführung*, München 1993; P. Fuchs, *Niklas Luhmann beobachtet: eine Einführung in die Systemtheorie*, Opladen 1992; W. Reese-Schäfer, *Luhmann zur Einführung*, Hamburg 1992.

within social theory traditional, problem of social order. This traditional point of departure, the problem of social order, shares Luhmann, among other things, with his predecessor in social systems theory, Talcott Parsons. Parsons, the major exponent of *structural functionalism*, focused primarily on the structural maintenance of social systems. Basically, this maintenance is guaranteed through normative structures. It is only by means of relatively invariable normative structures that social order can come into existence and be maintained. The result is a static conception of social systems and their structures.⁴ Luhmann's early theorizing is characterized by the repudiation of Parsons' static understanding of social systems and structures. To state his own position, Luhmann interpreted his approach as functional structuralism, opting for a dynamic understanding of social systems.⁵ According to Luhmann, *structures and social systems come into existence as a solution to the problem of complexity*. The function of social systems therefore refers to the reduction of complexity.⁶ Since 'society' and 'law' are understood as social systems, they contribute to the reduction of complexity. In fact, this entails the reformulation of the problem of social order in terms of *the problem of complexity*. Luhmann maintained complexity as his problem of reference also after his much discussed paradigm switch, the so-called *autopoietic turn* in the mid-1980's.⁷ The autopoietic turn refers to the introduction of the notion of *autopoiesis* in Luhmann's social systems theory: it denotes the capability of systems to produce and reproduce themselves by means of their own operations. This innovation radicalized Luhmann's conception of social systems regarding their boundaries and unity: social systems constitute their own boundaries and unity, and do

⁴ A. Waschkuhn, *Politische Systemtheorie – Entwicklung, Modelle, Kritik. Eine Einführung*, Opladen 1987, p.65 and further. J.H.Tutner (1974) *The Structure of Sociological Theory*, Belmont, California 1991, 5th edition, p.51 ff. Also see: A.P.J. Van der Eyden, 'Overheid en interdisciplinaire theorievorming – Het werk van Niklas Luhmann', in: A.F.A. Korsten & Th. A. J. Toonen, *Bestuurskunde. Hoofdfiguren en kernthema's*, Leiden/Antwerpen 1988, pp.127-144, here: p.131.

⁵ Cf. H. Willke, *Systemtheorie*, Stuttgart 1987, p.3 ff.

⁶ T. Blom & B. Haas (1996), 'De ondraaglijke lichtheid van systemen – over de grondslagen van het Luhmanniaanse denken', *Tijdschrift voor Sociologie*, vol.17, nr.2, pp.187-204, here pp.188-189.

⁷ See for example: W. Lipp (1987), 'Autopoiesis biologisch, Autopoiesis soziologisch – Wohin führt Luhmanns Paradigmawechsel?', *Kölner Zeitschrift für Soziologie und Sozialpsychologie* 39, pp.452-470; H.-P. Krüger (1990), 'Luhmanns autopoietische wende. Eine kommunikationsorientierte Grenzbestimmung', in: *Selbstorganisation – Jahrbuch für Komplexität in den Natur-, Sozial- und Geisteswissenschaften*, Band 1, Berlin, pp.129-147. This matter is addressed in Chapter 1, which deals with the matter of the autopoietic turn and autopoiesis.

so in an operationally closed mode. Following from this, society, law, politics, economy and so on, are understood as systems with reproductive autonomy.

It is almost a modern platitude to state that our society is a complex one, yet describing and analyzing this complexity is a complicated matter, and requires sophisticated theoretical instruments. The conceptual complexity of Luhmann's theory offers possibilities to observe and describe modern social complexity and is another reason to study Luhmann's theory of society. Its complex and highly abstract apparatus is meant to elucidate more problems and questions regarding social phenomena than the use of a less sophisticated instrument would be able to do. It must be noted then that this approach does not pretend to solve 'practical problems', such as, for example, the decreasing participation and lack of commitment of voters in the elections, the relationship between economical circumstances and the rebirth of political extremism, the rejection of an European Constitution as a symptom of national electorate's dismay with the project 'Europe', and so on. Furthermore, Luhmann's theory of society does not aim at predictions or prognoses of social developments: prognoses attenuate when society becomes more complex and when the domain of research is not limited to very specific phenomena. Complex societies allow for a vast amount of possible connections and many variables have to be taken into account. Furthermore the theory of social systems does not provide a blueprint for, or guide to, a better life or a better society. Nor does it provide for a teleological program or a deontology.

But Luhmann's *theory of society* does constitute a frame of reference for the study of separate subsystems such as law, politics, economy, religion, love, and so on. It also describes a variety of social phenomena such as the differentiation of society, communication media such as power, money, love, societal evolution and so on. All these social phenomena are analyzed in view of their contribution to the reduction of complexity and contingency. Luhmann's theory covers a broad domain and does so with a characteristic understanding of social systems. In a nutshell, *social systems* are conceived of as *systems consisting of communications* that are *operationally closed yet cognitively open* towards their environment. This holds that social systems are capable of reproducing themselves by and through their own operations, i.e. communications, without operational input from or output to their environment. Social systems are at the same time open towards their environment in that the environment provides data that systems transform into information necessary for their reproduction. For example, the legal system produces legal norms based upon developments in society like the 'war on terrorism'.

This cognitive openness presents so to speak ‘the social systems window to the world’, as a counter-balance to what otherwise would be a monadic system.

The foregoing already hints at the fact that the object of Luhmann’s theory encompasses nothing less than everything, ‘the world’. In this sense, Luhmann claims universal applicability of his social systems theory, it is a theory designed to cover the complete domain of sociality. It means that every social phenomenon is perceived as (part of) a social system. Luhmann labels such a theory, claiming universality that implies applicability to a broad if not complete range of phenomena, including the theory itself as an object, as a *Supertheorie*.⁸ Universality, however, does not imply a claim to absolute validity. With an incidental sense of theoretical modesty and relativity, Luhmann presents his *Supertheorie* as one possible option out of many. Other perspectives besides the systems theoretical are, and remain, of course possible. There is no authority asserting that one must adopt the systems theoretical perspective and exclude all others:-

It [Luhmann’s interpretation of *Supertheorie*] claims neither to reflect the complete reality of its objects, nor to exhaust all the possibilities of knowing its object. Therefore it does not demand exclusivity for its truth claims in relation to other, competing endeavors. But it does claim universality for its grasp of its object in the sense that it deals with everything social and not just sections (as, for example, strata and mobility, particularities of modern society and patterns of interaction, etc.).⁹

The main aim of the theory is however to offer a framework or a guideline by which the social domain, or ‘sociality’,¹⁰ can be observed and described adequately. A social ‘super theory’ provides a way to order observations through certain ‘guiding differences’, or *Leitdifferenzen*, of social events that occur within society, without reference to some ‘ideal’ order. To put it differently: the aim is not to improve society itself but to improve the description of society.

Furthermore, the improvement offered by a social systems theoretical approach also relates to, according to its propagators, its proclaimed normative neutrality,

⁸ N. Luhmann, *Soziale Systeme – Grundriß einer allgemeinen Theorie*, Frankfurt am Main 1984, p.19; see also: N. Luhmann, *Social Systems*, (J. Bednarz (translator)), Stanford 1995, p.4.

⁹ N. Luhmann, *Social Systems*, *op. cit.*, p.xlvii. See also: N. Luhmann, *Die Wissenschaft der Gesellschaft*, Frankfurt am Main 1992, pp.412-413.

¹⁰ See Chapter 1.

in contrast to some other approaches, such as the Habermasian strand of thought.¹¹ Normative neutrality should enable societal descriptions to avoid the blind spots of 'ideological' descriptions and theories.¹² The claim of normative neutrality does not exclude, as Luhmann acknowledges, the presence of blind spots in systems theory but these are of a technical rather than of an ideological character, dealing with the theory's specific perspective or guiding difference, that is: the difference between system and environment. Every perspective is a selection out of several options and every selection has its own limitations or, differently, every language game is limited by its own rules. This seems plausible. It blurs however an important distinction, that is: the distinction between taking a normative position – be it liberal or otherwise, say progressive or conservative – and taking into account normative aspects that contribute to the form and contents of a society. Luhmann refuses to take a normative position but at the same time, the latter aspect – taking into account normative aspects – also meets relatively little resonance in his theory of society.

So in its range of applicability, Luhmann's theory may claim universality but provides, with regard to its perspective, a specific and hence well-defined approach towards sociality. This is not perceived as a problem, but is a systems theoretical acceptable point of departure: systems theory offers one option for societal analysis among other theoretical options. Other possible forms of analyses or theories are not excluded as 'wrong' or incorrect because of the taken approach or perspective, but are at most seen as not sufficiently adequate. And in so far as there is a critical potential in systems theory, it concerns criticism of its comparison to other theories.¹³

¹¹ Cfr. J. Habermas, *Theorie des kommunikativen Handelns*, Frankfurt am Main 1981; J. Habermas, *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*, Frankfurt am Main 1992; J. Habermas, *Die Einbeziehung des Anderen: Studien zur politischen Theorie*, Frankfurt am Main 1996. Regarding Luhmann's alleged normative neutrality see for instance S. Lange, *Niklas Luhmanns Theorie der Politik – Eine Abklärung der Staatsgesellschaft*, Wiesbaden 2003, especially p.20.

¹² Cf.: 'Was ich dezidiert nicht habe und was wahrscheinlich auch vermisst wird, ist eine normative Vorstellung davon, wohin es gehen soll, um dann zu sagen, ihr müßtet eigentlich dorthin. Das fehlt mir allerdings. Ich fühle mich gar nicht als ein Schulmeister für die Gesellschaft oder als jemand, der es besser weiß, wohin es gehen soll, sondern höchstens als jemand, der beobachtet, wie Änderungen laufen und dann Defizienzen sieht, zum Beispiel Theorie-Defizienzen.' In: D. Baecker & G. Stanitzek (Eds.), *Niklas Luhmann: Archimedes und wir – Interviews*, Berlin 1987, p.117.

¹³ Cf. N.Luhmann, *Soziologische Aufklärung 4*, Opladen 1987, p.37.

Despite the depicted quality of *Suppertheorie*, the foregoing suggests a touch of post modernity in Luhmann's theory. There should be no doubt about Luhmann bidding farewell to what he calls, in soft polemic terms, 'Old European' ideas: his theory is not directed towards the future goals or Archimedean points such as the Universal Reason in the program of the Enlightenment. Although the claim is one of a universal theory, systems theory does not seek to legitimize scientific discourse in the way *grand récits* of the Enlightenment, such as *Kritische Theorie* or Marxism, did. These legitimizations were part of the process of modernization involving, among other things, the differentiation of science. The conviction that modern science, differentiated from other social domains, would guide society towards emancipation, universal reason and therefore a better society, required science to provide an all-embracing narrative; that is the presentation of the unity of society by means of a *grand récit*. Luhmann explicitly dissociates himself from 'unity' as a point of departure or, for that matter, as a directive for a better future.¹⁴ The Luhmannian device calls for 'difference' instead of 'unity', dissensus instead of, for example a Habermassian, consensus. Therefore some critics, for example Klaus von Beyme, depict Luhmann as a typical representative of post-modernism.¹⁵

The observation of Reese-Schäfer pinpoints the matter more adequately though. He considers Luhmann's *style* to be typical of postmodern thinking. Confining postmodernism only to his style, it remains tenable to argue that Luhmann's thinking follows the tradition of modernism.¹⁶ According to Luhmann, the most notable contribution of the postmodern discourse is the propagation of the loss of valid overall descriptions of society, in the sense of absolute validity; however, the postmodern pure negation of the possibility of *grand récits* is too easy a way out of modernism. Furthermore this negation still entails unity albeit in a negative way. It does not tell us what postmodernism is; only that it is not modernism, which is a theoretical dead end or a detour to unity via negation. Instead, the system theoretical assumption is that the impossibility of *grand récits* is due to the fact that there is no possibility to observe the world 'from the outside'.¹⁷ This rigid Luhmannian approach towards unity however ignores the following option: all

¹⁴ That is: unity understood in terms of integration.

¹⁵ Cf. K.von Beyme, *Theorie der Politik im 20. Jahrhundert – von der Moderne zur Postmoderne*, Frankfurt am Main 1991.

¹⁶ W. Reese-Schäfer, *Luhmann – zur Einführung*, *op. cit.* p.12.

¹⁷ N. Luhmann, *Beobachtungen der Moderne*, Opladen 1992, p.8.

though one can reject unity in social theoretical descriptions, *it remains still possible to describe the unity of different societies*. What is more, *this research will inquire into the possibilities thereto by means of Luhmann's theory of society*.

Notwithstanding some postmodern traces in his work, Luhmann does not label his theory as such. So far as Luhmann is willing to acknowledge some postmodern aspects with regard to his work, it is restricted to a strong sense of historical relativism. Besides this, Luhmann considers the postmodern discourse to be 'relatively complex and obscure' and criticizes the notion 'postmodern' as confusing since the structures characterizing modernity, such as science, education and technology, remain intact and one cannot observe the radical break from modernity as propagated by postmodernism.¹⁸ Luhmann states that since there is no actual alternative for modern society, it is also useless to follow a semantic dead end, i.e. the postmodern discourse.¹⁹

Luhmann's 'modernity' causes for example Laermans to raise the question whether Luhmann's description of modern society has become obsolete in the light of recent 'postmodern' social developments.²⁰ Key to Laermans' question is his observation that Luhmann does not give up the basic characterization of Western modernity, that is: the functional differentiation of society into autonomous subsystems such as politics, law, religion, economics and so on. But however modern or postmodern the observation, we may quite safely assume that both elements – descriptions of modern structures and of, in absence of a better denotation, so-called postmodern changes, are to be found in Luhmann's theory.²¹

¹⁸ The continuing existence of modern structures does not, of course, hinder the development of postmodern theory. Luhmann distinguishes between semantics and structures. So, there might be a break with modernity, or rather with modernism, on the semantic level (cf. Lyotard) whereas no such break may be observed at the structural level. Also see: A. Geyer, 1996, 'Man zwingt andere Begriffe zur Anpassung', *Universitas*, p.1025.

¹⁹ Paraphrase. N. Luhmann, *Die Wissenschaft der Gesellschaft*, Frankfurt am Main 1987, p.710.

²⁰ R. Laermans (1996), 'We kunnen ons geen alternatief voorstellen: Luhmanns analyse van de moderne maatschappij', *Tijdschrift voor Sociologie* 17-2, pp.145-161, here p.158.

²¹ Another option is to refer to 'reflexive modern'. The core of this concept lies however in the idea that we do not only observe the consequences of modernization but also have to evaluate them. Cf. U. Beck, *Die Erfindung des Politischen – Zu einer Theorie reflexiver Modernisierung*, Frankfurt am Main 1993.

However ‘modern’ or ‘postmodern’ one might label Luhmann’s social systems theory, a theory of this scope, in its quantitative dispersal as well as in its domain of research and claims, necessitates some restriction regarding the scope of the underlying research. The first restriction is of a ‘temporal’ nature: this research will focus on Luhmann’s newer social systems theory, that is: his theorizing from the mid-1980’s. The reason for doing so is, as said before, that the autopoietic turn radicalized Luhmann’s social systems theory substantially. Precisely this radicalization, pertaining to the reproductive autonomy of social systems, triggered a vast amount of criticism, as will be discussed later on. As the problem of this research refers to the unity of society in view of its complexity, the focus will be on Luhmann’s concept of society. Furthermore, his theory of the legal system will be addressed since law provides a framework for this societal unity.

As Luhmann was a jurist, his account of the legal system is one of his most elaborated ones and can be considered exemplary with respect to his analysis of the social subsystems of society.²² In his otherwise critical article, Kennealy catalogues the benefits legal theory might derive from the social systems theoretical approach of law.²³ A first set of advantages is rather conventional, putting forward that the social systems theoretical approach

enabled us to reach a more refined and differentiated view of the law; that it highlighted important legal characteristics obscured or neglected by other approaches; and that it had greater explanatory power with respect to certain outstanding problems.²⁴

A more particular advantage attributed to the social systems theoretical approach is however that it is ‘a theoretically sophisticated apparatus in dealing with problems insufficiently analyzed by less exalted versions of legal theory’.²⁵ The bene-

²² For example: N. Luhmann, *Rechtssoziologie*, Reinbeck 1972; N. Luhmann (1973), ‘Gerechtigkeit in den Rechtssystemen der modernen Gesellschaft’ in: *Rechtstheorie* 4, pp.131-167; N. Luhmann *Ausdifferenzierung des Rechts. Beiträge zur Rechtssoziologie und Rechtstheorie*, Frankfurt am Main 1981; N. Luhmann (1983), ‘Die Einheit des Rechtssystems’, in: *Rechtstheorie* 14, pp.129-154; N. Luhmann, *Die soziologische Beobachtung des Rechts*, Frankfurt am Main 1986; N. Luhmann (1991), ‘Die Geltung des Rechts’, in: *Rechtstheorie* 22, pp.273-286; N. Luhmann, *Das Recht der Gesellschaft*, Frankfurt am Main 1993.

²³ P. Kennealy, ‘Talking about autopoiesis: order from noise?’ In: G. Teubner (ed.), *Autopoietic law: a new approach to law and society*, Berlin 1988, pp.349-369, here: pp.357-358.

²⁴ *Ibid.*, p.357.

²⁵ *Ibid.*, p.358.

fit is in this case derived from the fact that the social systems theory of law analyzes the legal system as one of the functionally differentiated subsystems within society *per se* and in relation to other subsystems, such as politics and economics. Kennealy puts forward that the systems theoretical approach could offer new perspectives upon such matters as the failure of regulation in respect to its intended results or the conditions for successful interaction between law and politics.²⁶ Even though Kennealy does not elaborate these advantages further, it sheds a light upon what the social systems theoretical approach of law might have to offer. Notwithstanding these advantages, Luhmann's account of law and society also triggered substantial criticism. These criticisms address the most radical consequence of the autopoietic turn, the reproductive autonomy of social systems and its implications. Since the concept of the reproductive autonomy of social systems is pivotal to the evaluation of Luhmann's account of the unity of society and the role of law herein, a short overview of critical comments is in place.

Criticism

More general critical comments were provoked, for example, by the language and the endless series of conceptual distinctions, both contributing to an opaque and *highly abstract theoretical edifice*. Luhmann shares this reproach with his predecessor Parsons but also with other systems theorists of the autopoietic branch such as Gunther Teubner and Helmut Willke.²⁷ According to Van der Eyden, Wilthagen, Van Twist and Schaap, this might have contributed to the fact that social systems theory, especially in the Luhmannian version, has had a slow start in Dutch Academia and has been less at the center of the debate here than elsewhere, for example in Germany and Italy.²⁸ Besides the fact that the highly abstract level of the social systems theoretical approach does not contribute to an easy and pleasant reading, it also impedes the *empirical applicability* of the theo-

²⁶ *Ibidem*.

²⁷ R. Laermans (1996), 'Het systeem ontstaat, "etsi non daretur deus": Luhmanns werk en denkstijl', in: *Tijdschrift voor Sociologie*, 17-2, pp.117-125, here; p.117. Also see: A.P.J. Van der Eyden (1988), *op. cit.*, p.143.

²⁸ A.P.J. Van der Eyden (1988), *op. cit.*, p.143. L. Schaap (1997), 'Bestuurskunde als bestudering van sociale systemen', in: *Bestuurskunde*, Jaargang 6, nr.6, pp.277-290. M. Van Twist, *Verbale vernieuwing – aantekeningen over de kunst van de bestuurskunde*, 's-Gravenhage 1994, p.186 and p.192 for example. T. Wilthagen (1992), 'Recht in een gesloten samenleving – het debat over reflexief recht en autopoesis', in: *Recht der Werkelijkheid* 1, pp.118-137.

ry.²⁹ The latter results in the reproach of *Empirie-vermeidung* as was formulated by critics like Scharpf, Nahomowitz and Von Beyme.³⁰ In the Dutch discussion, the problems pertaining to empirical applicability are duly noted by authors like Wilthagen and Veldman.³¹ Notwithstanding these problems, Laermans suggests a positive perspective: he considers Luhmann's theory a challenge for sociologists to broaden the framework and fuel for ongoing theoretical discussions.³²

The requirement of empirical applicability is undeniably a valid one but is preceded by the questions and criticisms addressing the *theoretical consistency and adequacy* of the social systems theoretical approach. Here, it should be noted that Luhmann's social systems theoretical approach mainly found its way to Dutch legal academia through the work of Gunther Teubner. As Teubner draws upon the work of Luhmann, criticism directed to Teubner's theory applies, at least partially, to Luhmann's theory. This does not, however, apply to Teubner's case for 'reflexive law' for example, that has met a sympathetic but critical reception in, for example, publications of Huls and Stout.³³ As such, the concept of reflexive law is

²⁹ See however for example: C. Smith (2004), 'Autopoietic Law and the "Epistemic Trap": A Case Study of Adoption and Contract', in: *Journal of Law and Society* 31-3, pp.318-344.

Also: M. Neves (2001), 'From the Autopoiesis to the Allopoiesis of Law', in: *Journal of Law and Society* 28-2, pp.242-264.

³⁰ F. Scharpf (1989), 'Politische Steuerung und Politische Institutionen', in: *Politische Vierteljahresschrift* 30, p.12. K. von Beyme (1991), 'Ein Paradigmawandel aus dem Geist der Naturwissenschaften: die Theorieen der Selbststeuerung von Systemen (Autopoiesis)', in: *Journal für Sozialforschung*, 31, p.21. P. Nahamowitz (1987), 'Effektivität wirtschaftsrechtlicher Steuerung – Ein Beitrag zur Autopoiesis-Debatte', in: *Kritische Justiz*, pp.411-433, here: p.430 ('Empiriefarne') and also p.432. See also: K. Knorr Cetina (1992) 'Zur Unterkomplexität der Differenzierungstheorie – Empirische Anfragen an die Systemtheorie', in: *Zeitschrift für Soziologie* 21-6, pp.406-419.

³¹ T. Wilthagen (1992), *op. cit.*, p.131. Wilthagen also provides a short list of (more or less successful) attempts to put social systems theory to the empirical test (*Ibid.*). A.G. Veldman, *Effectivering van sociaal-economisch recht volgens de chaostheorie*, Zwolle 1995, here p.89. Veldman's dissertation seeks to contribute to the empirical test and does so successfully: see N. Huls (1997), 'Boekbespreking', in: *Recht en Kritiek* 23, pp.93-96, here p.96.

³² R. Laermans (1996) "'De rest is zwijgen": Luhmanns visie op sociale systemen', in: *Tijdschrift voor Sociologie* 17-2, p.141.

³³ N. Huls & H.D. Stout (Eds.), *Reflecties op reflexief recht*, Zwolle 1992. H. Stout & J. Stoop (1991), 'Het falen van de wet – Een inleiding tot het autopoietische denken van Gunther Teubner', in: *Regelmaat*. The fact that Dutch legal Academia gives more attention to Teubner instead of Luhmann, is according to Wilthagen owed to the more elegant and more tractable formulation of his ideas: Cf. T. Wilthagen (1992), *op. cit.*, p.126. For a very critical review of Teubner's *Recht als autopoietisches System* (Frankfurt am Main, 1989), especially regarding the concept of reflexive law, see: P. Nahamowitz (1990), 'Autopoietische Rechstheorie: mit dem

not a part of Luhmann's theory of the legal system.³⁴ Teubner follows Luhmann however as regards the *operational closure of the legal system*.³⁵ The operational closure of the legal system proved to be a highly controversial point in legal theory. This is illustrated by the rather severe criticism articulated by Anthony Beck:

The second strange and distinctive feature of Teubner's approach is that he holds that legal systems, [...] are in some sense closed. His notion of what he terms autopoietic systems generally, is of systems which are in this special sense closed. This closure is the most controversial and striking aspect of his theory but its exact definition is elusive. In addition the closed system is not one that formally churns out predictable outcomes but it is in its normal working, indeterminate. [...], indeed an essential critical question is whether this notion has any coherence at all [...].³⁶

In the Dutch debate, Veldman notices that the rigid character of the closure of the legal system meets resistance. She nevertheless concludes that the debate pertaining to the operational closure does not elicit a real controversy but is mainly due to a confusion of ideas or rather a collision of different paradigms using the same

baldigen Ableben ist zu rechnen' in: *Zeitschrift für Rechtssoziologie* 11-1, pp.137-160. This was not the first severely critical account of reflexive law by the same author. P. Nahamowitz (1985), "Reflexives Recht": Das unmögliche Ideal eines post-interventionistischen Steuerungskonzepts', in: *Zeitschrift für Rechtssoziologie* 6-1, pp.29-44. Also see: R. Münch (1985), 'Die sprachlose Systemtheorie. Systemdifferenzierung, reflexives Recht, reflexive Selbststeuerung und Integration durch Indifferenz – Kommentar zu Gunther Teubner und Helmut Willke', in: *Zeitschrift für Rechtssoziologie* 6-1, pp.19-28.

³⁴ See for example Luhmann's comments in: N. Luhmann (1985), 'Einige Probleme mit "reflexivem Recht"', in: *Zeitschrift für Rechtssoziologie* 6, pp.1-18. Another difference concerns the graduality of 'autopoiesis', see: K. Von Beyme (1991), *op. cit.*, p.233. Marcelo Neves states: 'In an attempt to bring together Luhmann's systems theory with Habermas's discourse theory, the concept of 'reflexive law' is introduced, which is presented as a reaction to the functional differentiation of society (Luhmann) and as an 'external constitution' for discursive self-reflection in other social systems (Habermas). 'Reflexive law' is conceived as a type of law that has overcome the limits of formal-rational law and material-legal rationality.' M. Neves (2001), *op. cit.*, pp.257-258.

³⁵ T. Wilthagen (1992), 'Teubner in Leiden of Den Haag?', in: *Recht der Werkelijkheid*, p.76-87. In this review of Huls and Stout's book (*op. cit.*), Wilthagen puts forward that reflexive law has become less important in Teubner's work, who now emphasizes the autopoietic character of social systems (p.77). Also see T. Wilthagen (1992), 'Recht in een gesloten samenleving', *op. cit.*, p.134.

³⁶ A. Beck (1994), 'Is Law an Autopoietic System?', *Oxford Journal of Legal Studies* 14-3, pp.401-418, here: p.405. The first strange feature is, according to Beck, the understanding of law as 'nothing more (or less) than a system of communications'; *ibid.*

concepts such as closure and openness.³⁷ One might also endorse Walter Kargl's observation that the major misunderstanding as regards operational closure is its *limitation* to communication taking place *within the organizations of the legal system*, thus defining the boundaries of the legal system at the institutional level.³⁸

The closure of the legal system, Kargl puts forward, is strictly formal and pertains to the use of the code legal/illegal³⁹ and the use of normative communication. Or, as Kennealy puts it: 'It [the autopoietic conception of the law] has little interest in the content of a legal norm'.⁴⁰ It is evident, according to Kargl, that this observation of law stretches the limits of the law substantially.⁴¹ If this is so, the limits of the law or, in a social systems theoretical formulation, the boundaries of the legal system require further analysis and it does not suffice to refer to the legal code and normative communication.

Roel Pieterman problematizes the '*extreme conception of the autonomy of the legal system*'.⁴² Within the theoretical framework under inquiry, autonomy pertains to the self-production of the legal system: only law can make law.⁴³ Pieterman brings to the attention that closure of social systems is a reproductive closure, not autarky or isolation, and that social systems are to a certain degree open towards their environment. As closure of the legal system brings along that the legal system can neither import nor export legal norms, Pieterman questions what theoretical plausible possibilities remain as regards the social effects of the law. Even though Pieterman is well aware of the theorem of openness based upon closure, he finds Luhmann's account of the relation of the legal system and its environment not satisfying. Referring to the extreme autonomy of the legal system and

³⁷ A.G. Veldman (1995), *op. cit.*, p.66 (paraphrase). Veldman refers to W.J. Witteveen (1992), 'Schrijft de wet zichzelf?' In: N.J.H. Huls and H.D. Stout, *op. cit.*, pp.57-70. Also see: P. De Vries (1991), 'Teubner: voer voor wetgevingsjuristen?' *Regelmaat* 3, p.101.

³⁸ W. Kargl (1990), 'Kommunikation kommuniziert? Kritik des rechtssoziologischen Autopoiesebegriffs', *Rechtstheorie* 21, pp.352-373, here: p.364. Kargl appears to use 'organizations' and 'institutions' as synonyms.

³⁹ 'Unrecht' is translated in 'illegal' by Luhmann. See for example: N. Luhmann (1988), 'Closure and Openness: On Reality in the World of Law', in: G. Teubner (ed.), *Autopoietic law: a new approach to law and society*, Berlin 1988, pp.335-348, for example p.346.

⁴⁰ P. Kennealy (1988), *op. cit.*, p.363.

⁴¹ W. Kargl (1991), 'Gesellschaft ohne Subjekte oder Subjekte ohne Gesellschaft? Kritik der rechtssoziologischen Autopoiese-Kritik', *Zeitschrift für Rechtssoziologie*, pp.136-137.

⁴² R. Pieterman (1998) 'Rechtssociologie als sociologie van aanspreken', in: *Recht der Werkelijkheid* 2, pp.1-34.

⁴³ P. Kennealy (1988), *op. cit.*, p.362.

other subsystems, Pieterman puts forward a related problem that he considers to be the primary problem of social systems theory: *how do social systems communicate with each other?*⁴⁴ A similar critical comment is found in Kennealy:-

The scientific disadvantage is that this absoluteness of closure and guaranteed autonomy of autopoietic systems fails to make sense of those instances of the successful interaction of autopoietic systems. The question posed for the autopoieticists, then, is how to develop the vocabulary of autopoietic concepts in order to make sense of the diversity of interaction between systems. And resolving these questions will also help resolve the practical question of how to identify opportunities and means for the accurate manipulation of one system by another.⁴⁵

In line with the alleged impossibility of, or at least difficulty with, 'interaction' between social subsystems is Anthony Beck's observation that operational closure excludes direct instrumentality.⁴⁶ The legal system has undeniably effects on its environment but not necessarily the effects the legal system intended them to have: people may not pay fines and damages, regulations pertaining to ecological problems may or may not improve the quality of the eco-system, laws against terrorism do not guarantee safety. Although Anthony Beck formulates this as a criticism, it is as a matter of fact the articulation of a consequence of the emphasis on operational closure: it *hinders* direct causal mutual influences or interventions between social systems: there are *no* input/output relations between social systems. As said before, this operational closure does not imply autarky or isolation: social systems are at the same time cognitively open towards their environment. Accordingly, social systems such as politics and law can only exercise influence upon each other in an *indirect* way: only according to their own systemic rules, in their own 'language' so to speak.⁴⁷ This possibility of indirect influence is denoted as structural coupling: a social system uses environmental events ('noise') as contributions to its self-reproduction.⁴⁸ The legal system, for example, observes so-

⁴⁴ R. Pieterman (1998), *op. cit.*, p.4.

⁴⁵ P. Kennealy (1988), *op. cit.*, p.364.

⁴⁶ A. Beck (1994), *op. cit.*, p.409.

⁴⁷ Cf. A.G. Veldman (1995), *op. cit.*, especially Chapter 5. Veldman seeks to overcome this problem by means of 'reflexive legal program', based upon a 'non-linear causality' between policy and law and between law and economy.

⁴⁸ T. Wilthagen (1992), 'Recht in een gesloten samenleving', *op. cit.*, p.126.

cial commotion pertaining to a statistic increase in crime but has no direct control over deviant behavior: it can only produce rules or increase penalties.

This state of affairs results, on behalf of the proponents of social systems theory, in pessimism as regards the *possibility of (direct) regulation or steering* of society through law and politics.⁴⁹ Teubner, Willke *cum suis* sought solutions in concepts such as reflexive law, self steering and self regulation. But the overall findings remain rather gloomy.⁵⁰ It does not surprise then that a regulatory crisis is proclaimed by social systems theorists, following from their own findings with regard to the operational closure of law, politics, economy and so on and the impossibility of linear influence. Is this an adequate analysis or is this so called regulatory crisis in ‘the eye of the beholder’, as Wilthagen puts it?⁵¹ Considering the actual power and possibilities of the political system and hence deeming the proclaimed regulatory inadequacy as a crisis is an exaggerated reflex. At least, Hubert Rottleuthner seems to think so.⁵² Joachim Nocke and Peter Nahamowitz also formulate criticisms of this tendency.⁵³ Rottleuthner’s main objection to ‘theories’ of a regulatory crisis

especially as put forward [...] by Luhmann, Teubner and Willke, is that the existence of a regulatory crisis is taken for granted. There has been no attempt to prove it by giving a comprehensive picture of the approaches and results of research on the efficacy of law or of implementation and evaluation research.⁵⁴

⁴⁹ *Ibid.*, p.82 as well as p.133.

⁵⁰ L. Schaap (1997), *op. cit.*, p.283 ff. Also see N. Huls & H.D. Stout (1992), *op. cit.*; M. Aalders and B. Niemeijer (2001), ‘Zelfregulering en reflexief recht’, in: C. Coolsma and M. Wiering, *Handhaving in stukken – Beschouwingen over theorie en praktijk van de handhaving van het recht*. SIS-WO/VSR-reeks nr.4, Amsterdam, pp.75-114.

⁵¹ T. Wilthagen (1992), *Recht in een gesloten samenleving*, *op. cit.*, p.133.

⁵² H. Rottleuthner (1989), ‘The limits of Law – The Myth of a Regulatory Crisis’, *International Journal of the Sociology of Law* 17, pp.273-285.

⁵³ J. Nocke (1986), ‘Autopoiesis – Rechtssoziologie in seltsamen Schleifen’, *Kritische Justiz* 19, pp.363-389; P. Nahamowitz (1985), “‘Reflexives Recht’: Das unmögliche Ideal eines post-interventionistischen Steuerungskonzepts’, *Zeitschrift für Rechtssoziologie* 6-1, pp.29-44.

⁵⁴ H. Rottleuthner (1989), *op. cit.*, p.274. A rejoinder followed: S.C. Smith (1991), ‘Beyond “Mega-theory” and “Multiple Sociology”: A Reply to Rottleuthner’, *International Journal of the Sociology of Law* 19, pp.321-340, especially p.325.

The heart of the matter is that criticism of this type boils down to the reproach that the concept of social systems, and in this case especially with its emphasis on operational closure, is too global and too empty as to enable an empirically adequate analysis. And this is not the last matter in which the operational closure causes problems. Operational closure implies total self-production of the law: only the law produces law. If this is so, then it is necessary to demarcate between what belongs to the system and what does not; what are legal operations and what not. In Kennealy's words:-

What is it that constitutes a communication as a legal communication? The standard definition is that a legal communication is one designed to have legal effect [...] and it is by no means clear how strictly and unequivocally this separates legal from other social communications. Does it include any communication about law and the possibility of changing it including arguments about what the law should be?⁵⁵

The question about the precise nature of legal communications also occurs in Kargl's contributions to the discussion. Kargl puts forward that the main source supplying irritation and criticism on behalf of the address of the social systems theoretical understanding of the law (and other social systems) as (a) closed system(s) is that the legal system consists of communications and communications only. Kargl links this to the fact that the operational, communicative closure entails that human beings are excluded from social systems. The fact that the boundaries of the legal system are of a communicative nature in combination with the consequence that human beings are no part of it makes it difficult to understand 'what' actually produces 'itself' in this operational closure. The exclusion of human beings to the environment of social systems, such as law and even society, did not win the critics over. It triggered Renate Mayntz for example to describe Lady Justice as the '*Dame ohne Unterleib*'.⁵⁶ Anthony Beck considers this theoretical decision as a contribution to the mystification that the theory breeds: '*The absence of subjects from the 'generated' communication system of law leads to commentators under autopoietic theory's influence to say the "law thinks" and that it*

⁵⁵ P. Kennealy (1988), *op. cit.*, p.364. Kennealy also raises this question at p.359. Not only the demarcation of the legal system causes problems. Nahamowitz criticizes for instance also the demarcation of the economic system in: P. Nahamowitz (1987), *op. cit.*, p.430.

⁵⁶ R. Mayntz (1987), 'Politische Steuerung und gesellschaftliche Steuerungsprobleme – Anmerkungen zu einem theoretischen Paradigma', in: T. Ellwein, J.J. Hesse, R. Mayntz & F.W. Scharpf, *Jahrbuch zur Staat- und Verwaltungswissenschaft*, Band 1, Baden-Baden, pp.89-100.

"has a life of its own".⁵⁷ These critical comments sell the social systems theoretical approach short since it is not a matter of conceptual elimination of human beings but a redirection of its focus, as Van Twist rightly points out.⁵⁸ The inclusion of individuals within one system is ruled out by the existence of plural social systems such as different organizations, law, politics, religion, science and so. Whereas it is plausible that individuals are not completely included in one subsystem, the exclusion from society remains contra-intuitive. The social systems theoretical statement here is that human beings are essentially black boxes and research into their intentions and motivations belong to other fields of expertise.

Nevertheless, this understanding of society and hence communication 'without human beings' necessitates, as Kargl states, that the matter of what precisely are the elements of the legal system must be clarified.⁵⁹ If not, the notion of the operational closure of the law seems to face the reproach of a new legal formalism or a narcissistic ideology on behalf of the legal profession.⁶⁰

Research

The foregoing sketches a range of problems and criticisms in the (inter)national academic debate about Luhmann's social systems theoretical approach. Summarizing the above Luhmann's theory has to confront the reproaches of difficult empirical application of his approach, the problematic if not impossible interaction between social systems, the social systems theoretical steering pessimism, the exclusion of human beings and the question of the precise nature of the elements of, in the above case, the legal system. These criticisms all seem to merge in one particular problematic matter: the emphasis on the operational closure of social systems. Operational closure of social systems expels individuals to the environment, causes the difficulty of linear intervention in social systems since they cannot interact with each other and gives hence rise to a regulatory crisis. The proclaimed regulatory crisis is, according to the critics, not based upon empirical data but follows from the concept of operational closure itself. The problem that precedes these criticisms is whether it is indeed adequate to denote social systems as operationally closed and yet cognitively open.

⁵⁷ A. Beck (1994), *op. cit.*, p.410.

⁵⁸ M. Van Twist (1994), *op. cit.*, p.192.

⁵⁹ W. Kargl (1990), *op. cit.*, p.360. W. Kargl (1991), *op. cit.*, p.120 and p.135.

⁶⁰ W. Kargl (1990), *op. cit.*, p.360.

In view of the above findings, the description of the problem of unity in modern Western society in view of its complexity and contingency requires further articulation. It was stated earlier that the author seeks to inquire whether Luhmann's theory of society can account for the unity of modern Western society and for the normative aspects contributing to the unity of society. If so, Luhmann's theory of society makes a contribution to the understanding as to how unity in modern Western society is constituted, despite its complexity and contingency. In order to enable such an assessment, the central problem of this research as formulated above need to be specified in the terms of Luhmann's social systems theoretical approach of society and law. Therefore, research questions have to address the concept of society as a social system and of the legal system.

Society is, in Luhmann's approach, conceived of as an operationally closed system: it produces and reproduces itself by means of communications and communications only. This reproductive autonomy indicates a, not yet fully specified, unity. Of course, this unity pertains to the operations of a social system and these are communications. This does not however reveal which specific communications belong to which social system and how this is determined. Operational closure becomes manifest, or rather: observable, in the capability of social systems to demarcate their boundaries *vis-à-vis* their environment. By establishing their boundaries and hence by differentiating themselves from their environment, social systems acquire unity. If social systems produce and reproduce themselves by means of their own operations, then the capability to determine what belongs to the system and what to the environment is an operational requirement. Consequently, the *research question* in respect to Luhmann's concept of society is formulated as follows: **Does Luhmann's theory of society offer a univocal concept of society, as a social system, in view of society's demarcation *vis-à-vis* the non-societal environment?**

The legal system supplies a normative framework on behalf of society and claims a specific use of norms. Consequently, it accounts at least partially for the normative aspects of society. Since law is a system within society, its operational closure is brought about in a way that is similar but distinctive from the way society brings about its operational closure. It follows that the problem of operational closure also applies to the legal system. Furthermore, in case of the legal system, it does not suffice to claim that it produces and reproduces itself by means of communications: it concerns communications that can be identified as *legal communi-*

cations. The identification of legal communications elicits what constitutes law and how it contributes, by means of its function, to the reduction of complexity within society. This leads to the formulation of the following *research question*: **Does Luhmann's theory of the legal system provide a clear demarcation of this system and what notions contribute to this description?**

The demarcation of social systems, such as society and the legal system, is all the more pressing, considering that this requirement follows from Luhmann's axiomatic point of departure '*that there are systems*'.⁶¹ The statement that there are systems illustrates that, in Luhmann's approach, social systems are of an empirical nature and not an analytical category:-

The concept of system (as we use the term in our investigations) always stands for a real state of affairs. Thus by 'system' we never mean a purely analytical system, a mere conceptual construction, a bare model.⁶²

Hence:-

Thus the concept of system refers to something that is in reality a system and thereby incurs the responsibility of testing its statement against reality.⁶³

The findings with respect to the above formulated research questions enable the assessment of Luhmann's concepts of society and law in view of the central problem of this research: **does Luhmann's approach account for the unity of modern Western society and for the role normative aspects play in the observation and description of the unity of society?** If a clear-cut demarcation of both systems is possible, a specific kind of societal unity can be identified and it becomes possible to assess whether this kind of unity suffices to describe a specific society such as ours. In the light of this aim, the author will not dwell upon the level of Luhmann's general theory of social systems but will introduce in *Chapter 1* central concepts of the categorical framework, such as autopoiesis and

⁶¹ N. Luhmann (1995), *Social Systems*, *op. cit.*, p.12. Cf. also: W. Reese-Schäfer, (1992), *op. cit.*, p. 26.

⁶² N. Luhmann (1995), *Social Systems*, *op. cit.*, p.442. See however also: 'Die "rein analytische" Bestimmung der Grenzen des Rechts ist bei dieser Vorgehensweise zwar abgelehnt, aber damit entfällt noch nicht die Feststellung, daß alles, was gesagt wird, durch einen Beobachter gesagt wird'; in N. Luhmann (1993), *Das Recht der Gesellschaft*, *op. cit.*, p.16.

⁶³ N. Luhmann (1995), *Social Systems*, *op. cit.*, p.12.

self-reference, contingency and complexity. Furthermore, social systems will be described as self-referential, communicative systems. This description also addresses an important theoretical decision of Luhmann that gave rise to criticism in the academic debate: human beings belong to the environment of social systems.⁶⁴ It will be argued that this decision does not imply a 'dehumanization' of society or a conceptual elimination of individuals from social theory but that Luhmann's theory of society seeks to refrain from inquiries into the 'black boxes' that human beings are to each other and instead focus on what is, according to Luhmann, observable: communications.

Chapter 2 introduces the theory of society: the, not entirely unproblematic, concept of society and the functional differentiation of society and its organizations. The functional differentiation of society brings along the understanding of, among other things, law and politics as functional subsystems. *Chapter 2* will conclude with an analysis of the relation between functional subsystems and organizations, a relation that is often deemed, in literature, as insufficiently elaborated and hence theoretical problematic.⁶⁵ At stake is the question whether Luhmann's theory of society can offer concepts to frame the relation between functional subsystems and organizations. The conclusion is positive in the sense that specific – that is: *specialized* – organizations operate within the wider context of a specific functional subsystem. Courts, for example, support the legal system. This organizational support is understood in terms of a reference to the social function that the functional subsystem fulfils. The legal system, for example, guarantees the stability of normative expectations thus contributing to the reduction of complexity. Courts maintain this stability of normative expectations in individual and specific cases. Finally, findings pertaining to the problem of 'interaction' or direct communication between social systems in the light of their operational closure are formulated: direct communication between social systems is only possible at the level of organizations. These findings contribute at the question regarding the possibility of communication between social systems, as was raised by critics like Pieterman and Kennealy.⁶⁶

Chapter 3 starts with an outline of Luhmann's account of the legal system. The understanding of law as a *functional* subsystem implies that the legal system ac-

⁶⁴ See this Introduction.

⁶⁵ Or so according to T. Blom (1997), *op. cit.*, p. 206 ff.

⁶⁶ See this Introduction.

completes a function on behalf of society. A double claim is entailed in this point of view. First, that there is ‘something’ within society that can be understood as a functional subsystem and secondly, that it can be *observed and described* as such. Luhmann has described, in a variety of articles and books, several functional subsystems such as economy, law, family, art, etc. Since his claim is that social systems theory provides empirical, and not analytical, observations and descriptions, all these descriptions differ from each other on several points. This is not to say that there is no common ground underlying these descriptions but it does not account for a general model of functional subsystems. These common features are, without being complete, a societal function, binary coding and programming. But above all, and in respect of these features, functional subsystems are operationally closed. It was argued before that this operational closure has consequences as regards the relation between social systems, in terms of steering. In this chapter the debate concerning the steering problems is analyzed. It is held that the operational closure of law, politics and economy do not allow for steering *at the level of functional subsystems*. Yet, the possibility of communication at the level of (specialized) organizations, as is shown in the chapter 2, requires moderation of the Luhmannian steering pessimism. In this respect, the conclusion must be that critics such as Wilthagen, Rottleuthner and others, hit the target adequately: the proclaimed regulatory crisis follows primarily from the extreme emphasis upon the operational closure of social systems.⁶⁷

Notwithstanding differences between functional subsystems, operational closure is brought about in a similar way for all functional subsystems, according to Luhmann’s theory of society. And operational closure is pivotal as regards the demarcation of, in this case, functional subsystems. At stake is the tenability, not of the concept of functional subsystems as such, but of law as a functional subsystem in the light of its demarcation.

The analysis in this research is limited to the legal system. The legal system is considered to be exemplary for the concept of functional subsystems since it is one of the most elaborated parts of Luhmann’s theory of society in respect to the concept of functional subsystems. This analysis seeks to contribute to the debate centering on the issue of which communications do belong to the legal systems, as was raised by for example Kennealy and Kargl.⁶⁸ Luhmann’s strict formal ap-

⁶⁷ Idem.

⁶⁸ Idem.

proach of law pertaining to the code legal/illegal and the normative communication was deemed a substantial stretch of the boundaries of law.⁶⁹ This induces an inquiry into the boundaries of law in terms of the demarcation of the legal system. Therefore the matter of the demarcation of the legal system *vis-à-vis* the societal environment will be inquired into. Such will be done through the analysis of Luhmann's primary publications pertaining to this issue. This analysis illustrates the development regarding the demarcation of the legal system in terms of operational closure and the specific operations of the legal system. The conclusion contains an assessment regarding the possibility of a clear demarcation and the notions contributing to this possibility. It is argued that Luhmann's theory of the legal system supplies sufficient notions to understand the legal system as an operationally closed system: it is possible to demarcate the legal system *vis-à-vis* its environment. Understood thus, the legal system contributes to the reduction of complexity by the constitution of a 'normative fabric' as a framework for (successful) communication.

In the final chapter, *Chapter 4*, the problematic concept of 'society' is re-addressed in regard of the demarcation of the societal system. Fundamental criticism by Thomas Schwinn will be discussed: is Schwinn's criticism effective and is Luhmann's theory of society not able to offer a clear and useful concept of society? Schwinn distinguishes two conceptions of society in Luhmann's theory that cannot go together: society as the whole of its differentiated subsystems (excluding all non-coded communication) and society as the totality of all communications. In the view of the author, Schwinn's criticism is not to the point. It serves however as an introduction in eliciting a weak point in Luhmann's conception of 'society', that is: the use of a general theoretical concept of society to describe a specific society. This is preceded, however, first by examining several options to determine the unity of society, such as political-geographical boundaries, normative consensus and societal differentiation. As all these options fail to account for the unity of society as described by Luhmann, another approach is required. The conclusion is that within Luhmann's conception of society, its demarcation rests entirely upon the operational closure of society. Therefore, *the unity of society is an operational unity*. It is here, that the author seeks to make a contribution to the theory of Luhmann.

⁶⁹ Idem.

It will be argued, first, that societal unity in the Luhmannian sense can *only* be understood as an operational unity. This is in line with social systems theoretical premises. It presents society as an over-arching theoretical concept, the most general level of analysis within the theory of society. At this level it is not problematic to define society as the encompassing social system. Its demarcation in this respect is univocal: only communications (as the operations of the societal system) belong to society, all other operations (or data or events and so on) belong to the environment. To denote this state of affairs, the notion of operational closure is adequate and sufficient. However, the social systems theoretical approach towards this general concept of society is not informative at all as regards *specific societies*. Luhmann does not, in his work, distinguish between a general theoretical concept of society and the description of specific societies even though the architecture of his theory compels one to do so. Schwinn's criticism mistook the general concept of society for the description of a specific society.

In this research, the notion of unity is subsequently preserved as a contribution to the observation and description of a specific society, allowing for a more realistic approach of a societal system. The notion of unity is required in order to distinguish between several specific societies: specific societies differentiate, so to say, within the encompassing society. Here, unity does refer to some kind of integration and not the mere homogeneity of operations. *The distinction between society (operational closure) and societies (unity) provokes the necessity for the re-entering of normativity in the description of a specific society.*

The re-entry of normativity does however not refer to the adoption of a normative position but to the re-entry of normative aspects in the description of a society.⁷⁰ Luhmann attributes a formal role to norms as regards the reduction and rebuilding of complexity and the control of contingency. The notion of values is underexposed in his theory of society. In both matters Luhmann has shown no interest in the role norms and values play in respect to the material, besides the formal 'design' of society. This is a consequence of the elaboration of a general theoretical concept of society that offers no room for normative aspects.

⁷⁰ 'Re-entry' is, within the systems theoretical approach, understood as the re-entry of a form into a form. Luhmann adopted this concept from George Spencer Brown; see G. Spencer Brown, *Laws of Form*, London 1969.

Luhmann puts forward that analyses of social phenomena should avoid normative implications and findings must be confined to the factual level.⁷¹

The fact that the design of specific societies, or in any case: modern Western societies, is guided by normative aspects, is underexposed in Luhmann's theory of society. This is due to the fact that Luhmann theorizes at the level of a general theoretical concept of society and hence a general theoretical problem arises: the problem of the reduction of complexity and control of contingency. Luhmann's theory of society fails to supply a reformulation of this problem that elicits problems that specific societies, such as modern Western societies, have to deal with. An author whose theory adds to further articulation of the problem of reduction of complexity and control of contingency is Ulrich Beck. Beck published his famous *Risikogesellschaft – Auf dem Weg in eine andere Moderne* in 1986.⁷² In this publication, Beck introduced the concept of risk society as a particular approach of modern Western society. Interesting is the proposal to put 'risk' at the center of the analysis thus highlighting one specific aspect that contributes to complexity and contingency. Although Luhmann also uses the concept of risk, it is not perceived as a specific problem that specifies the problem of complexity and contingency as characteristic of a *specific* society. Beck's advantage, a strong focal point, is however at the same time its downside: it is but one problem of modern Western society with respect to its complexity. The broader theoretical perspective offered by Luhmann's theory of society complements this one-sidedness. The introduction of risk as a complexity and control problem elicits the function of the organizing principle 'certainty' as it guides the design of our society and contributes to its understanding as a unity in terms of risk society.

The foregoing findings will allow for the *conclusion* that Luhmann's theory of society offers univocal concepts of society and law, as social systems, in view of their demarcation. It is argued that Luhmann's elaboration of operational closure is theoretically adequate. But as these conceptions of society and law focus entirely on the formal, procedural mechanisms that reduce complexity and control contingency, they do not inform us about the material side of social order: unity understood as integration, as a qualitative connection. This research seeks to make a contribution in this perspective and therefore proposes to distinguish between a general theoretical concept of society, as elaborated by Luhmann, and

⁷¹ N. Luhmann (1993), *Das Recht der Gesellschaft*, *op. cit.*, p.31.

⁷² Frankfurt am Main, 1986.

the description of specific societies as a further elaboration (or, if one will, an application) of Luhmann's conception of society. Moreover, it is argued that actual societies have to deal with the problem of complexity and contingency but that this problem appears in a more specified form, like for example in the form of risk. The actual articulation of the problem determines a problem of reference of that society. The way a specific society deals with its fair share of complexity and contingency is directed by its normative aspects, voiced by law and underlying organizing principles. This research concludes that it is only by the introduction of normative aspects in the description of societies, it becomes possible to describe societal unity thus contributing to a more realistic analysis of societies.

Chapter I

Social Systems – Characteristics

1.1 Introduction

An inquiry into the possibility of using Luhmann's social systems theory to describe the unity of modern Western society and the role of normative aspects herein implies first and foremost the understanding of *society as a social system*. The same goes for law in view of its (normative) contribution to societal unity: *law is also conceived of as a social system*. In this first chapter, the general concept of social system is analyzed before turning to society and law as specific social systems. The guiding question in this is which characteristics social systems bear. More specifically, the attention is directed to characteristics that contribute to the demarcation of social systems *vis-à-vis* their environment.⁷³ In this chapter, some 'tools' of social systems theory, necessary for the understanding of Luhmann's analysis or approach of the demarcation of social systems, will be presented.

In section 2, a short overview of the developments in systems theory will be depicted, with regard to the relation between system and environment as this relation sheds a light upon the demarcation of systems. In this respect, the introduction of the concepts of 'self-reference' and 'autopoiesis' into Luhmann's social systems theory constitute a landmark: both concepts refer to the autonomy of social systems regarding their own (re)production and hence their demarcation. Since perception and experience of the contingency and complexity of modern Western society seem to counter a description of societal unity, and moreover since these concepts occupy a central position in social systems theory, section 3 will deal with 'contingency' and 'complexity'. Section 4 presents communication as the elementary unit of social systems and explores how through communication, processes and structures come into existence. These features are necessary prerequisites as regards the *operational closure*, the characteristic of social systems

⁷³ It is not the aim of this research to discuss the complete categorical framework of social systems theory. For further reading on this matter see for example: T. Blom, *Complexiteit en Contingentie – Een kritische inleiding tot de sociologie van Niklas Luhmann*, Kampen 1997.

that so often provokes criticism.⁷⁴ The matter of the operational closure of social systems will be highlighted briefly and will be re-addressed in the next chapters. This chapter concludes with a short inquiry as to how to understand the position of human beings in view of the conception of social systems as communicative systems. Within social systems theory, human beings are part of the environment of social systems. This 'quirk' of social systems theory has led many critics to deem this approach for example as a dehumanization of society whereas it is a matter of focus and re-direction.

1.2 Systems: Self-reference and Autopoiesis

Systems theory evolves in respect to its understanding of the concept of system. Luhmann discerns two paradigms in his magnum opus *Soziale Systeme – Grundriß einer allgemeinen Theorie*.⁷⁵ The first paradigm centers on the difference between system and environment. Systems are unities distinct from an extra-system's environment. Within this paradigm it is possible to attribute distinctive features to systems with regard to their relationship to the environment. Systems were seen as 'open' with respect to their environment. This is the core principle of the 'classical' theory of open systems, as theorized in the fifties by Ludwig von Bertalanffy. The environmental relationships of open systems are conceived of in terms of 'exchange'.⁷⁶

Subsequently, and provoked by the concept of open systems, the constitutive functions of system boundaries have been thematized in theories and models of closed systems. This so-called second paradigm phase has its origins in the work of the Chilean biologists Maturana and Varela, in the sixties, and is referred to as the theory of self-referential, autopoietic systems, which entails a redefinition of the system/ environment distinction. During the late seventies and at the beginning of the eighties, Luhmann started introducing and processing concepts from biology and neurophysiology into a universal sociological theory, culminating in his above-mentioned magnum opus, which provides for a general conceptual

⁷⁴ Cf. Introduction.

⁷⁵ Frankfurt am Main, 1984.

⁷⁶ For this and the following also see: T. Blom & L. (Francot-)Timmermans (1993), 'Recht is recht is recht is... Een introductie op Niklas Luhmanns theorie van het recht als zelfreferentieel systeem', *Recht en Kritiek*, here pp.49-50.

framework. Luhmann interpreted this as the elaboration of a second paradigm shift. The first paradigm shift involved the change from the ‘classical’ theory of the first period, formulated in the fifties by Bertalanffy c.s., of ‘open’ systems to system/environment theories emphasizing the constitutive functions of system boundaries.

The second paradigm shift introduced a strand of thought and triggered a cluster of theories often denoted with the overarching notion of ‘self-referential systems theory’: it concerns systems models and systems theories articulating ‘self organization’ and the autonomy of a certain kind of systems. Still operating at the general level of social systems, self-referential systems can be defined as systems capable of organizing relationships with themselves and of discerning these ‘self-connections’ from relationships to the environment. Or, somewhat differently, one could also say that self-referential systems are characterized by a *circular closure at the level of their most fundamental operations*. The minimal content of this closure is a primary reaction to the systems themselves and not to the environment. The introduction of the concept of ‘self-referentiality’ into systems theory demarcates a break with the occidental tradition in which the ability of reflection was a privilege of human beings or ‘subjects’. *The theory of self-referential systems attributes the ability of reflection also to complex non-living systems.*

In the sixties, the principle of circularity was represented in the concept of ‘self-organization’. Self-organization denotes the capability of systems to organize the transformation of environmental data themselves, considering that their relationship to the environment has to be understood in terms of input/output.⁷⁷ Self-organization, notably, is confined to the level of the system’s structures (e.g. a neural network). A far more radical form of self-referentiality is provided by the concept of ‘autopoiesis’ that is related to, but goes beyond, the notion of self-organization. ‘Autopoiesis’ is a conceptual and, in social theory controversial⁷⁸, innovation elaborated and promoted by the work of Varela and Maturana.

⁷⁷ G. Kiss, *Grundzüge und Entwicklung der Luhmannschen Systemtheorie*, Stuttgart 1990, p.90.

⁷⁸ Critics such as Walter Bühl and Hans Haferkamp reproach Luhmann’s *Empirie-vermeidung*. But at the level of his categorical framework, Luhmann does not aim at empirical data. Cf. W. Reese-Schäfer, *Luhmann – zur Einführung*, Hamburg 1992, p.53. At the beginning, the concept of autopoiesis has prompted a vast amount of critical writing in social science. See for instance J. Nocke (1986), *op. cit.* By now, it has become a more or less accepted or even neglected notion. Also see Luhmann’s short reaction in N. Luhmann, *Das Recht der Gesellschaft*, Frankfurt am Main, 1993, p.47, footnote 17.

Varela and Maturana have constructed the concept of 'autopoiesis' to describe dynamic processes in *living* systems. The autopoiesis of a living system refers to the capability of this kind of systems to produce and reproduce themselves. Here, recursive (re)production is not limited to the systems structures but involves all components of the system. To (re)produce itself, an autopoietic system uses only its own components to produce its own components. As a matter of fact, this type of systems constitutes themselves using a closed network of their components. An autopoietic system produces and reproduces everything required for its existence by itself; therefore we can say that an autopoietic system operates autonomous with regard to its reproduction. In Maturana's words, autopoietic systems

are systems that are defined as unities, as networks of production of components, that recursively, through their interactions, generate and realize the network that produces them and constitute, in the space in which they exist, the boundaries of the network as components in the realization of the network.⁷⁹

By introducing the concept of autopoiesis, Luhmann has brought about a radicalization of the theory of self-referential systems. He has disconnected the original biological concept of living systems, and transmitted its use to psychic and social systems. As a consequence of this abstraction, self-reference is no longer a prerogative of living systems, c.q. the subject.⁸⁰ If the application of 'autopoiesis' on other than living systems is to transcend the status of a metaphor, a reinterpretation of the concept for use in a theory of social systems is a prerequisite. This reinterpretation requires a generalization of 'autopoiesis'. Generalization is, of course, the elaboration of a general concept of autopoiesis not confined to one type of systems but expanded to a variety of systems types. A generalized concept of autopoiesis should not compromise the differences between types of systems but has, subsequently, to be re-specified. For every different kind of system there is a corresponding type of autopoiesis.

If we abstract from life and define autopoiesis as a general form of system building using self-referential closure, we would have to admit that there are nonliving autopoietic systems, different modes of autopoietic reproduction,

⁷⁹ Maturana quoted in N. Luhmann, *Essays on Self-Reference*, New York/Oxford, 1990, p.3.

⁸⁰ Cf. N. Luhmann (1983), 'Die Einheit des Rechtssystems', *Rechtstheorie* 14, pp.129-154.

and that there are general principles of autopoietic organization that materialize as life, but also in other modes of circularity and selfreproduction.⁸¹

Luhmann distinguishes three kinds of autopoietic systems: living systems (cells, brains, organisms), psychic systems and social systems (societies, organizations, interactions). The three types of systems use different basic operations to realize their autopoietic reproduction. Living systems reproduce by means of *life*. Both psychic and social systems are characterized by meaning-based reproduction, respectively via *consciousness* and *communication*. Life, consciousness and communication do not interfere with each other **on an operational level** and constitute operationally closed systems that are as such indispensable environment to each other.

During the process of preparing ‘autopoiesis’ for application to social systems, self-referentiality and autopoiesis appear to be merging in Luhmann’s theory. A self-referential social system produces and reproduces always itself everything it uses: its systemic unity, its processes and structures, and even its own elements. Here the quintessence of autopoiesis, the reproduction of all systemic units, is to be recognized. Furthermore, the system’s reproduction takes place in the mode of self-reference. All units that constitute the system refer to other preceding units. By referring to something they are not, that is another system unit, units refer to themselves. Again, we see that the use of a distinction, a difference, brings about unity. All that is produced and reproduced is a performance of the system. Nothing of a system’s nature – unity, processes, structures, elements – can be found in the environment of the system. In fact, ‘autopoiesis’ and ‘self-referentiality’ telescope into each other in Luhmann’s definition of a self-referential system:-

One can call a system self-referential if it itself constitutes the elements that compose it as functional unities and runs reference to this self-constitution through all the relations among these elements, continuously reproducing its self-constitution in this way.⁸²

⁸¹ *Ibid*, p.2.

⁸² N. Luhmann (1995), *Social Systems*, *op. cit.*, p.33.

1.3 Improbable Order

1.3.1 Contingency

The point of departure, how to transform the improbable into the probable, determines the emphasis of Luhmann's theory. The most basic improbability is the possibility of social order: under which conditions, through which mechanisms does social order become possible. The problem of social order has its own theoretical history and originates, as regards modern political and social theory, in the work of Thomas Hobbes. Theorizing in the same tradition, Luhmann follows and repudiates his predecessor Talcott Parsons. Talcott Parsons chose, for his point of departure, what he referred to as 'the Hobbesian problem of order':-

The first, and most obvious [problem of order in social systems], is that of the regulation of the settlement of the terms of exchange. Because of what every man does is potentially a means (including a hindrance) to the attainment of every other man's goals, it is vitally important to the conception of social order that there should be mechanisms through which the terms of ego will or will not make his 'services' available to alter are settled in such a way as to be compatible with the conditions of the stability of the system. This is the famous Hobbesian aspect of the problem of order.⁸³

Parsons has redefined the Hobbesian problem of order in terms of 'double contingency'. How are actions of a multitude of actors, using scarce means to different ends, 'linked' to each other? What enables an alter and an ego to attune their actions to each other? If we agree with Parsons that the actions of men are potential means to each other's ends and that therefore all men should desire and seek power over one another⁸⁴, the question of 'efficient' coordination of actions becomes pressing. The selected action of an ego depends on the action of an alter and alter's choice also depends on ego's choice, hence double contingency.

⁸³ T. Parsons, *The Social System*, New York 1951, p.71. Reference to the Hobbesian aspect of the problem of order implies at least one other aspect. In this case, the complementary aspect is the so-called Durkheimian one: the problem of integration of functionally differentiated systems (in terms of 'Arbeitsteilung'). Also see: J. O'Neill, 'The Hobbesian Problem in Marx and Parsons', in: J. Loubser, R. Baum, A. Effrat & V. Meyer Lidz (eds.), *Explorations in General Theory in Social Science – Essays in Honor of Talcott Parsons*, New York 1976, pp.295-308.

⁸⁴ Paraphrase: T. Parsons, *The Structure of Social Action*, New York 1949, pp.93-94.

In Parsons' definition, double contingency implies mutual dependency. Therefore, social relations are inherently unstable. As such, social action is a variable factor of social order: actions are not determined and will vary as circumstances may require; but by depending solely on each other's action, and not knowing what to expect from each other, action would become completely indeterminate. In a society with goal directed actors, complete indeterminacy of action would lead eventually to a 'war of all against all'. It follows that if the contingency problem cannot be solved, social action cannot come into existence and, hence, nor can social order. According to Parsons, the solution of the problem of double contingency is '*a basic condition of possibility for social action as such*'.⁸⁵

According to Parsons, social order is not only possible but also relatively normal, despite the Hobbesian implication of double contingency because of a normative solution:-

The most important single condition of the integration of an interaction system is shared basis of normative order. Because it must operate to control disruptive potentialities [...] of the autonomy of units, as well as to guide autonomous action into channels which, through mutual reinforcement, enhance the potential for autonomy of both the system as a whole and its member units, such as a basis of order must be normative. It must guide action establishing some distinctions between desirable and undesirable lines of action which can serve to stabilize interaction in these fundamental senses.⁸⁶

With regard to variability of action, ego and alter's mutual dependency, a reference to a constant framework, a continuous normative consensus, is necessary. Indeterminacy of action is restricted by shared norms and standards but the possibility of choice, between desirable and undesirable lines of action, is maintained. The fact that Parsons considers the contingency problem to be solved by a **continuous** normative consensus, indicates the status of 'double contingency' as an *a priori* of sociality.⁸⁷ Only if the problem of contingency is solved, social action

⁸⁵ N. Luhmann (1995), *Social Systems*, *op. cit.*, p.103.

⁸⁶ T. Parsons, *Social Systems and the Evolution of Action Theory*, New York 1977, p.186.

⁸⁷ 'Sociality' is used as a translation for 'Sozialität' and denotes, as a kind of shorthand, the totality of social phenomena that occur or may occur. Sociality refers to three levels of systems – society, organization, interaction- and is therefore within systems theory a broader concept than society. See B. Pokol, *Komplexe Gesellschaft – Eine der möglichen Luhmannschen Soziologien*,

becomes possible. Without elaborating Parsons' approach much further, it is sufficient to say that his concept of 'action', with its inherent normative orientation, embodies the solution of the double contingency problem. Double contingency is inevitably solved before sociality becomes possible. In his theory, double contingency appears as an analytical problem with a transcendental status.

In search of a different solution, Luhmann puts forward:

the problem of double contingency belongs to the conditions of possibility for action and that therefore the elements of action systems, namely actions, can be constituted only in these systems and only by solving the problem of double contingency.⁸⁸

Contrary to Parsons, Luhmann states that there is no reason to search for a solution exclusively in an already existing normative consensus. The main argument against Parsons' normative solution⁸⁹ is that, according to Luhmann, the contingency of social action cannot be solved or even be reduced by using norms. Norms cannot change the contingency of actions since norms are, in their turn, contingent in nature. A norm is an expectation with regard to future behavior. Luhmann distinguishes two possible reactions for the case of a disappointed expectation. First, one might accept the factual situation, learn from it and adjust the expectation, i.e. the cognitive attitude. Or, secondly, one can maintain the expectation despite the facts of the situation and this is called the normative attitude.

Since norms are expectations that are maintained despite the facts, the possibility of a disappointed expectation is inherent in norms. Norms are pre-eminently contingent because their existence is determined by negation or rather the risk of negation. Furthermore, action does not presuppose the existence of norms, but on the contrary, norms presuppose the possibility of communication/action. It is only through actions or, as we will formulate later on, in communication that norms can be shared.

Bochum 1990, p.14. (N.b.: In the translation of Luhmann's '*Soziale Systeme*' (*op. cit.*) '*Sozialität*' is translated by 'sociability'.)

⁸⁸ N. Luhmann (1995), *Social Systems*, *op. cit.*, p.104.

⁸⁹ Sometimes referred to as 'cultural determinism'.

Unlike Parsons, Luhmann does not understand ‘contingency’ in terms of dependency but turns to the modal logical⁹⁰ concept of *Auch-anders-möglich-Sein* or ‘neither necessary nor impossible’: ‘A fact is contingent when seen as selection from other possibilities which remain in some sense possibilities despite a selection’.⁹¹

As such, contingency entails that possible choices of action are maintained as possibilities, whereas Parsons’ understanding of contingency, once the normative choice has been made, rules out other possibilities as contributions to social order. Of course, deviant actions remain possible but if this occurs on a large scale, social order will be undermined. This is the result of normative orientation of goal directed actors: there is a choice between desirable and undesirable actions and by selection of the preferable one, the other choices cease to exist as *normative* possibilities.

Luhmann, on the contrary, does not distinguish between desirable and undesirable choices, the normative aspect, which is inseparable from Parsons’ solution. Therefore, there is no need to exclude the not-chosen possibilities as possible actions; they remain possible as potentialities. The status of double contingency is, therefore, the one of an ‘absolute’ problem: it cannot be solved. Precisely this ‘negative’ characterization, double contingency as an unsolvable problem, is constitutive with regard to system building. Not in the solution of the problem but in being a problem, double contingency is what Luhmann calls a self-catalyzing factor in the process of system building.⁹² Contingency of this kind emerges when systems are capable of changing their own condition and doubles when systems start to select their condition with regard to the contingency of other systems.⁹³

1.3.2 Complexity and Meaning

In Parsons’ work, the question of systems maintenance has produced the AGIL pattern⁹⁴, the differentiation of the social system into four subsystems each fulfill-

⁹⁰ Any (formal) logic handling modalities such as possibility or necessity and so on. Cf.: <http://plato.stanford.edu/entries/logic-modal>. (Last accessed: 7 Februari, 2008.)

⁹¹ N. Luhmann (1976), ‘Generalized Media and the Problem of Contingency’, in: J. Loubser, R. Baum, A. Effrat & V. Meyer Lidz (eds.), *op. cit.*, p.509.

⁹² N. Luhmann, *Soziologische Aufklärung 3*, Opladen 1981, p.160.

⁹³ N. Luhmann, *Soziologische Aufklärung 2*, Opladen 1975, p.171.

⁹⁴ Parsons’ point of departure was *action* as a system. Action as a system contains possible choices and can be differentiated into subsystems. These subsystems are only ‘aspects’ of ac-

ing a function on behalf of that system.⁹⁵ Although the orderly interaction between subsystems can break down under special circumstances, such crises are clearly seen as exceptional by Parsons and double contingency is no longer permanently looming in the background. In his earlier work, Luhmann offered an alternative approach, called 'functional structuralism', shifting the emphasis from structure to function. Contrary to Parsons, Luhmann's point of departure was an invariant problem to be solved by using variable structures. His point of departure became the problem of complexity. It is difficult to denote one solid definition of 'complexity'.

Luhmann's 'definitions' of complexity do not offer firm ground and seem to change with the development of his work. An early and later definition will be described. An early understanding of 'complexity' starts with 'the world' as a point of reference

Everything in the world acquires form by and through the relationship between system and world, that is: by and through a difference in complexity. The world constitutes the ultimate horizon, the overarching complexity or *Weltkomplexität*, and systems within that world are 'islands' of reduced complexity within the overarching complexity. Social systems come into existence through a reduction of complexity and exist as long as they are able to maintain a 'complexity differential' (*Komplexitätsgefälle*) with regard to their environment.⁹⁶

It is also within this reduction of complexity that their function is located. The system's function of reducing complexity is performed by stabilizing the difference between 'inside' and 'outside'. In fact, complexity appears as a relationship between this 'inside' and 'outside', between system and environment. This relationship

tion. Every action requires the fulfilment of all 'aspects' but the distinction is a purely analytical one. Parsons' AGIL-paradigm reflects the analytical approach of action. In Parsons' approach, systems of action have four maintenance or survival problems, that is: **A**daption, **G**oal attainment, **I**ntegration and **L**atency. Adaptation refers to the material conditions of existence and the attempt to mobilize means and sources; Goal attainment is the aspect of social action directed at the realization of goals; Integration concerns the aspect of social action aimed at solidarity and commitment; Latency denotes the aspect of integrity and authenticity or the maintenance of the general system-pattern. See: J. H. Turner, *The Structure of Sociological Theory*, California 1974 (5th print 1991), p.51 ff.

⁹⁵ For example: S. Lange, *Niklas Luhmanns Theorie der Politik – Eine Abklärung der Staatsgesellschaft*, Wiesbaden 2003, p.41 ff.

⁹⁶ N. Luhmann, *Soziologische Aufklärung I*, Opladen 1970, p.115.

represents no symmetry: the environmental complexity always exceeds the systems complexity.⁹⁷ It is through the inside/outside difference, that systems can distinguish their own complexity from complexity of the world. This early concept of complexity is anchored within the ‘open systems’ approach with its focus on adaptation of the system with regard to the environment. With the autopoietic turn, the emphasis shifted from adaptation to operational closure as a condition for openness. A new understanding of ‘complexity’ was introduced: the problem of complexity became related to the problem of ‘selection’.

The newer concept of complexity is defined by means of the difference between ‘element’ and ‘relation’. Although ‘complexity’ is used in reference to systems, it is clear that the concept has a wider range of applicability. Beside the systems’ complexity, a distinction must be made between the complexity of the world and the complexity of the environment of systems; but complexity always presupposes systems building for else it is not possible to discern the contents of the world and/or the system’s environment. The advantage of using the difference between ‘element’ and ‘relation’ lies in the definition of ‘complexity’ without reference to ‘system’.

If we have a system with an increasing number of elements, it becomes increasingly difficult to interrelate every single element with every other element. The number of possible relations becomes too large with respect to the capacity of elements to establish relations. [...] Every operation of the system that establishes a relation has to choose one among many – complexity enforces selectivity. A complex system comes about by selection only.⁹⁸

The main point of this quantitative understanding of complexity is located in the necessity of *selection*. A complex state of affairs refers to the selection of relationships between elements that constitute this complexity. Such selections of relationships could have turned out differently and thus the notion of contingency returns. It is precisely the experience of this contingency that renders the world complex. The question now becomes: how to deal with this complexity? How to bring about selectivity?

⁹⁷ The notion of complexity is in itself, for example in ‘complex system’, not informative. Only if used in a relationship, in a connection comparing states of affairs, complexity informs us about the situation of the object referred to. Also see N. Luhmann, *Ökologische Kommunikation*, Opladen 1986, p.33 and N. Luhmann (1975), *Soziologische Aufklärung 2*, *op. cit.*, p.210.

⁹⁸ N. Luhmann (1990), *Essays on Self-reference*, *op. cit.*, p.81.

Here we come across the basic concept of social theory, according to Luhmann: *meaning*. 'Meaning' is not an easy concept to grasp since it does not refer to a state of being or some other firm contents. Instead, meaning is the 'form' (see below) in which systems⁹⁹ process the complexity of the world or experience and handle selectivity enforced by complexity.¹⁰⁰ 'Form' implies the unity of a difference. Meaning, then, takes the form of the difference between actuality and possibility.¹⁰¹ Meaning is constituted by the fact that something is selected and actualized whereas the other 'things' are denoted as possibilities. These possibilities remain as such and might be, later on and in a different situation, selected and actualized. It does not neutralize the difference between actuality and potentiality. Every actualized selection brings along new and more possibilities than can be realized in a following selection. Meaning is surrounded by possibilities and thus overburdens experience. This overburdening with possibilities, the excess of references presupposes that meaning 'fluctuates': meaning has no stable moment of actuality and it keeps changing from moment to moment. This is possible since every actuality refers to potential connections. Luhmann concludes:-

Meaning is a representation of complexity. Meaning is not an image or a model of complexity used by conscious or social systems, but simply a new and powerful form of coping with complexity under the unavoidable condition of enforced complexity.¹⁰²

⁹⁹ Both social and psychic systems.

¹⁰⁰ N. Luhmann, *Gesellschaftsstruktur und Semantik – Studien zur Wissenssoziologie der modernen Gesellschaft*, Band 2, Frankfurt am Main 1993, p.26. Or: 'Ich denke den Sinn als ein Surplus, einen Überschuss an Verweisungen, als ein Surplus von Aktivitäten, von Erfahrungen, an denen man mit dem bestimmten Risiko partizipieren kann, den Anschluß zu verpassen', in: D. Baecker & G. Stanitzek (eds.) *Niklas Luhmann : Archimedes und wir – Interviews*, Berlin: Merve Verlag 1987, p.56.

¹⁰¹ Or: 'Sinn kann man definieren als ein Medium, das durch ein Überschuss an Verweisungen auf andere Möglichkeiten erzeugt wird. Letztlich beruht aller Sinn daher auf der Unterscheidung von Aktualität und Potentialität'. in: N. Luhmann, *Soziologie des Risikos*, Berlin/New York 2003 (1st ed. 1991), p.26.

¹⁰² N. Luhmann (1990), *Essays on Self-Reference*, *op. cit.*, p.84. The differentiation of meaning into a temporal, factual and social dimension will not be discussed, but see for instance: N. Luhmann (1993), *Gesellschaftsstruktur und Semantik*, *op. cit.*, p.35 ff.

1.4 Social Systems as Self-referential, Communicative Systems

1.4.1 Communication

So far, a few characteristics of social systems have been depicted: social systems are self-referentially closed systems that have to deal with their own and the environmental complexity and that process meaning. The next step is a further elaboration of self-referential systems in order to attain a useful system concept for a sociological systems theory. The question that comes forward is the one for the nature of the operations of social systems. What kind of operation, of element constitutes a self-referential system as a *social* system?

A nowadays not unusual approach of sociality is the understanding that the social domain is basically of a ‘communicative’ nature. Here, Jürgen Habermas’ concept of communicative action comes to mind, or the language games of Jean-François Lyotard.¹⁰³ In the approach of Luhmann, the concept of ‘communication’ is paramount. Social systems consist in the end of communications.

According to Luhmann, communications have a tripartite structure or are, to put it differently, a three-stroke movement. Every separate communication is the unity of three selections: the selection of *information*, the selection *to utter* this information and a selection on the side of the ‘addressee’ *to understand* the action of the other as an utterance. It is only through the successful synthesis of these three selections that communication becomes a unity, implying that the understanding of a receiver or an Ego ‘finishes’ a communication.¹⁰⁴ Understanding in its turn only becomes manifest via the utterance of information and so on.

The foregoing depicts the image of communication as an enduring, self-pushing process, utterances triggering next ones. Understood thus, communication is a dynamic process in which each separate communication consumes time to gain the quality of an operational unit. A communication has an event-like character: it

¹⁰³ J. Habermas, *Theorie des kommunikativen Handelns*, Frankfurt am Main 1981; J.F. Lyotard, *La Condition Postmoderne*, Paris 1979.

¹⁰⁴ Luhmann’s starting point of the analysis of communication is the ‘understanding’ of an Ego and not, as one might expect, the utterance. Communication takes off, according to Luhmann, at the point that ‘someone’ (a meaning-processing system) understands an event (conduct of utterance) as an act of utterance and simultaneously as information. See: T. Blom (1997), *op. cit.*, pp.125-126 (paraphrase).

disappears in its appearance and is followed by a different element of the same kind. As elements in a self-referential reproduction communications have no duration.¹⁰⁵

It cannot be otherwise: if all communications acquired duration, the result could be nothing else but chaos. '*Without the continuous loss of all their elements, these systems would, after a short span of time, preserve too many elements without then being able to preserve order*'.¹⁰⁶

Note that we are dealing with *reproduction*, the production by means of products. In this case, communications produce communications and through this operational closure systems 'build' themselves, produce their own history. Time is essential in the process of reproduction. According to Luhmann, it is precisely this temporal dimension presenting the focal point of autopoiesis. The question is whether autopoiesis continues or ceases, whether a communication can connect to preceding ones. So far, social systems are to be understood as *temporalized* systems, inherently restless and continuously occupied with their reproduction.

Thus *reproduction* is a continuous problem for systems with temporalized complexity. This theory is not concerned, like classic theories of equilibrium, with returning to a stable state of rest after the absorption of disturbances, but with securing the constant renewal of system elements – or, more briefly, not with static but with dynamic stability. All elements pass away. They cannot endure as elements in time, and thus they must constantly be produced on the basis of whatever constellation of elements is actual at any given moment. Reproduction thus does not mean simply repeatedly producing the same, but rather reflexive production, production out of products.¹⁰⁷

The description of communication as a time-consuming process or as a linear chain – *Nach-einander* – of elements, reveals another characteristic of social systems: *basic self-reference*.¹⁰⁸ In order to become an element of a social system, a communication has to gain unity. The only way for a communication to acquire unity is through a connecting reaction: only if Ego utters at his turn his understanding (including misunderstanding!) of the selected and uttered information of

¹⁰⁵ N. Luhmann, *Das Recht der Gesellschaft*, Frankfurt am Main 1993, p.50.

¹⁰⁶ N. Luhmann (1990), *Essays on Self-Reference*, *op. cit.*, p.83.

¹⁰⁷ N. Luhmann (1995), *Social Systems*, *op. cit.*, p.49.

¹⁰⁸ T. Blom (1997), *op. cit.*, p.132.

an Alter, the communication of Alter is a unit. Or, in different words, an elementary unit gains this quality by referring to something it is not, namely another elementary unit. Consequently, communication can only come into existence as a self-referential process: by referring to another communication, a communication refers to itself and acquires unity.

Given familiarity with sociological tradition, one might wonder what happened to the concept of ‘action’ as the constituent of sociality (cf. Parsons, Weber). The above concerning communication as the elementary unit of social systems may invoke the incorrect suspicion that Luhmann has discarded ‘action’ completely in favor of ‘communication’. Luhmann however opposes the idea that sociality is constituted by and through actions. On the contrary, actions are constituted *in* social systems. The question then becomes: how can actions be constituted in social systems if these social systems consist of communication? How are ‘communication’ and ‘action’ related? One thing has to be clear: we cannot understand a communication as an action or a communication process as a chain of actions. Communication is the processing of selections whereas *action is a self-simplification* performed by a social system. A communication is, as shown above, the unity of three selections and as such a rather complex event. Action comes into existence by means of attribution of a selection.¹⁰⁹ A communication is attributed to one of the contributors as an act(ion) of utterance.

Actions are to be understood as connected events which are fixed to a point in time, and by decomposing the communicative process into a sequence of actions, it becomes possible to attribute the selected information to one of the contributors who can be held responsible for this particular selection, this informative utterance. As such, an action is easier to recognize than a communication: the unity of a communication depends on the third selection of understanding whereas the unity of an action does not depend on understanding but is acquired through rules of attribution.¹¹⁰ Communications are the constituting elements but actions are essential moments in the process of self-constitution of social, com-

¹⁰⁹ This is not to say that all actions are communicative actions or should be perceived of as communications. A ‘simple’ action, such as posting a letter, only gains communicative quality if the actor communicates this action to an Alter.

¹¹⁰ These ‘rules of attribution’ are related to separate systems. Luhmann also refers to ‘social description’ but it remains rather vague.

municative, systems. According to Luhmann, the distinction between communication and action is an analytical one, they cannot be separated:-

They form a relationship that can be understood as the reduction of its own complexity. The elementary process constituting the social domain as a special reality is a process of communication. In order to steer itself, however, this process must be reduced to action, decomposed into actions.¹¹¹

It is now possible to refine the answer to the question of the elementary units of social systems. Social systems consist, in its core, of communications: these are the basic elements. Actions, within this framework, are the products of self-observation of the social system (and hence refer to ways communications are perceived).

1.4.2 Processes and Structures

A self-referential social system is complex because its operations refer to other operations within that system – but *not to all other operations*. Hence a social system cannot interconnect its elements on the basis of an all-to-all correspondence.¹¹² Understood thus, social systems are characterized by a quantitative complexity that necessitates selection if and when the system's reproduction is to be continued. It is therefore not possible for all following communications to be equally probable. Selection pertains to the question which communication can follow another one, which communication fits into the communicative *process*?¹¹³ Once communication takes off, at the same time a theme is chosen. Communication tends to structure itself by revolving around a theme. A theme, in itself already a product of selection, selects communication on the basis of 'a contribution' to the theme or 'not a contribution' to the theme. Comments on, let's say,

¹¹¹ N. Luhmann (1995), *Social Systems*, *op. cit.*, p.139.

¹¹² H. Willke, 'Differenzierung und Integration in Luhmanns Theorie sozialer Systeme', in: H. Haferkamp & M. Schmid (ed.), *Sinn, Kommunikation und soziale Differenzierung*, Frankfurt am Main 1987, p.258. Also see: N. Luhmann (1993), *Gesellschaftsstruktur und Semantik*, *op. cit.*, p.238.

¹¹³ As seen before, social systems are meaning-constituting systems. In this case, communications refer by means of the form 'meaning' to succeeding possibilities of communications. Meaning warrants the connectivity of the communicative process and consequently the systemic auto-poiesis. Cf. G. Kneer, *Rationalisierung, Disziplinierung und Differenzierung: zum Zusammenhang von Sozialtheorie und Zeitdiagnose bei Jürgen Habermas, Michel Foucault und Niklas Luhmann*, Opladen 1996, p.332.

the behavior of the royal family are, in general, hardly a contribution to the euthanasia discussion.

This basic process of self-structuring is not sufficient to warrant the preservation of a more complex social system: communication about a theme can be interrupted in any given way and at any time, communication can become less interesting at a specific moment, fade away, and so on. It must, however, remain possible to pick up the theme later on and to engage in communication again, or else lovers would not dare to interrupt their communication and a court could never adjourn. A higher level of self-referentiality must be entered to enable enduring processes of communication: communication about communication or '*reflexivity*'.¹¹⁴ In this reflexive process, expectations concerning possible contributions come into existence. At their turn, these expectations can be communicated and create new expectations. Only if and when expectations are communicated in their quality of expectations, do they acquire social relevance. Luhmann considers these 'expectations about expectations' to be the core of social structures. So, social structures are also brought about by the system itself. In the same way as communications are not 'natural' building bricks, structures are not 'given' but are an accomplishment of and acquired through communication.

Structures do not determine which communication should follow another one but point out the direction and limit the scope of possible connecting communications. This is not to say that structures 'are' relationships between communications, as if structures exist at the level of the system's elements. Structures abstract from the level of the elements and cannot be relationships between elements. The elements are volatile and the structures will also disappear as they appear.

These relations acquire structural value only because the relations realized at any given time present a selection from a plurality of combinatory possibilities and thus introduce both the advantages and the risks of selective reduction. And only this selection can be held constant across change in elements, that is, can be reproduced with new elements.¹¹⁵

¹¹⁴ Reflexivity is the re-entry of a process into a process. In fact, reflexive communication is a kind of self-observation that, as a concurring control mechanism, provides social systems an image of their own processes.

¹¹⁵ N. Luhmann (1995), *Social Systems, op. cit.*, p.283. The use of the notion 'relations' is somewhat confusing.

According to Luhmann, structures are a complementary reality to communication:-

Thus the concept of structure complements the conceptualization of elements as events. It indicates a condition of possibility for basal self-reference and the system's self-referential reproduction. Therefore, structures can – as the verb 'complements' indicates – never be conceived as a sum or mere collection of elements. The concept of structure indicates a level of order in reality different from the concept of event.¹¹⁶

Structures are not capable of operating autonomously, apart from the systemic elements. Within the theory of self-referential systems such a state of affairs would contradict its very own premises. Instead, the relationship between elements and structures is entirely circular and temporal. Elements have to refer to structures because structures constrain permissible relationships and offer a limited range of possible connecting operations. Structures, on the other hand, depend on operations in the sense that structures without reference to the systemic elements are meaningless.¹¹⁷

1.4.3 Operational Closure

We have seen that self-referential systems are circularly closed at the most basic level of operations. The elements of self-referential systems are not found in the environment but are constituted by systems. In the case of social systems, this entails that social systems consist of communications and communications only: the legal system, for example, is not constituted of lawyers and judges, the courthouse and Barristers' Chambers, but solely of legal communications such as legislation and judicial decisions and so on. This is to say that social systems are operationally closed and thus the systems' boundaries are maintained towards the environment.

¹¹⁶ *Ibid.*, p.289.

¹¹⁷ N. Luhmann, *Soziologische Aufklärung 6*, Opladen 1995, p.12. The concept of structure *per se* is not unambiguous but criticizing concepts within the categorical framework is outside the scope of this research. Cfr. also: '*Realitätswert haben Strukturen nur dadurch, daß sie zur Verknüpfung kommunikativer Ereignisse verwendet werden; Normen nur dadurch, daß sie, explizit oder implizit, zitiert werden; Erwartungen nur dadurch, daß sie in Kommunikationen zum Ausdruck kommen*' In: N. Luhmann (1993), *Das Recht der Gesellschaft*, *op. cit.*, p.46

The legal system does not engage in communication about the factual feasibility of a heart transplant, but a failure of the surgeon could gain legal relevance. Operational closure simply refers to the circularity, which is characteristic of all self-referentiality, of the system's operations, in this case of communications. Operationally closed systems react primarily to themselves and not to the environment. Any systemic change is brought about by the system itself and is not due to the environment. To put it in a different way, the environment has no 'undiluted' influence upon the system unless the system, so to say, allows such influence. Of course, a system produces and reproduces itself always in an environment, and it therefore cannot exist without an environment; but the environment is not able to determine processes and structural developments in a causal way and can only cause 'noise'. In whatever way and to what degree such 'noise' becomes a stimulus or informative for the system, remains a system-internal matter.

The operational closure of social systems does not mean that there is no communication possible about the (social or otherwise) environment. The political system directs its attention towards ecological risks; legal communication includes communication about the social effects of violence – always according to the system's rules of the game. In fact, communication solely about systemic communication would stop being informative at some time: scientific theories about scientific theories that are theories about and so on. Within the system there also has to be communication about the environment: the environment is the 'supplier' of noise and stimuli triggering the system's self-reproduction.

The emphasis on the operational closure of self-referential systems should not leave the importance of the environment underexposed for autopoiesis does not mean *creatio ex nihilo*. Self-referential, autopoietic systems build on already existing material and informational substructures. In this sense, systems are open to data that can be transformed, according the system's rules, to systemic information.¹¹⁸ This simultaneous occurrence of independence and dependence of the

¹¹⁸ Please note that information is a systems-internal quality: systems create information by means of their own distinctions, as an aspect of communication. Information is not something to be imported or exported from the environment but is a systemic creation: 'Information is an internal change of state, a self-produced aspect of communicative events and not something which exists in the environment of the system and has to be exploited for adaptive or similar purposes.' in: Luhmann N., *Ökologische Kommunikation*, *op. cit.*, p.45 (translation L.F.) and also see: N. Luhmann, 'The Autopoiesis of Social Systems', in: F. Geyer & J. Van der Zouwen

system from and on the environment is referred to as the theorem of *openness based on closure*: the system's closure becomes a condition for its openness to the environment.

1.4.4 Observation

From the above follows, that operational closure does not equal isolation. A system has no complete control of its production since it depends, to a certain degree, upon its environment. Operational closure refers to the fact that a system has sufficient causes at its disposal to continue the systemic reproduction in predominantly equal or iterative environmental conditions. Following Maturana, Luhmann describes causal interdependencies between system and environment with the notion of *structural coupling*. Structural coupling implies the dependency of a system on its environment with regard to certain particularities: the system presumes and depends upon them and does so in a structural way. Structural coupling refers to the choice of structures and not to the process of autopoiesis itself. In the case of social systems, structural coupling deals with themes of communication and not with the, contingent, continuation of communication. The performance of structural coupling is selective: it channels 'noise' and irritation that might affect the system in a negative or even destructive way, by ruling out such effects:-

In this sense social systems can only be irritated by consciousness; merely psychological, chemical or organic events (death for example) can only be destructive.¹¹⁹

Structural coupling provides for a co-evolution of system and environment for operational closure implies the impossibility of the system operating in the environment.

The operational closure excludes the possibility of import or export of 'elements'. A system can only acquire access to its social environment by means of *observa-*

(eds.), *Sociocybernetics: Observation, Control and Evolution of Selfsteering Systems*, London 1986, p.181.

¹¹⁹ Author's translation. Original text: 'So lassen soziale Systeme sich nur durch Bewußtsein irritieren; bloß physikalische, chemische oder organische Ereignisse (Tod zum Beispiel) können nur destruktiv wirken'; see: Luhmann N. (1995), *Soziologische Aufklärung 6*, op. cit., p.17.

tion. In Luhmann, the notion of ‘observation’ does not refer to some kind of human occupation or action but to a capability of self-referential systems. Self-referential systems are capable not only of observing the environment but also of observing themselves. In case of social systems, observation refers to a communicative process. At the heart of the matter, ‘observation’ is in fact reflexive communication, communication about communication. Luhmann utilizes an extremely abstract concept of observation based on George Spencer Brown’s logic.¹²⁰ In Luhmann’s view, the operation ‘observation’ is constituted by the difference between a ‘distinction’ and a ‘denotation’. Every observation uses a distinction to demarcate a border between two sides: man/woman, beach/sea, law/politics, etc. At the same time, one of the sides is denoted: a woman and not a man, the sea and not the beach, etc. It is important to bear in mind that ‘distinction’ and ‘denotation’ always occur simultaneously: it is not possible to denote something without a distinction and a distinction without denotation is undetermined. Observation described as above is always the unity of a difference, that is the unity of the difference between a distinction and a denotation.¹²¹

The foregoing might suggest otherwise but observation is to be understood as an *empirical* observation. Moreover, observation and particularly self observation are constitutive and operational moments in the autopoietical reproduction of self-referential systems. The distinction between system and environment is imported into the system by means of self observation and guarantees that what is reproduced, is reproduced *as elements* of the system and nothing else.

Observations can be connected: a first observation can be followed by a second one, the second one by a third one and so on. Through recursive connection, a systemic border comes into existence, between system and environment, and an observer is constituted. An observer is, in this case, nothing else but a system. Therefore, the observations performed by a system are always the operations of a self-referential system. Returning to social systems, observations are always communications. We have seen that every communication, as a systemic operation, refers self referentially to preceding communications. This basic, always concurring, self reference has to be complemented with an external reference. External reference is provided by observation, that is: communication about something. This is how openness is brought about by operational closure. Therefore,

¹²⁰ Cf. G. Spencer Brown, *Laws of Form*, London 1969.

¹²¹ N. Luhmann, *Die Wissenschaft der Gesellschaft*, Frankfurt am Main 1987, p.84.

'complex social systems cannot do without observing operations, their autopoiesis depends on it'.¹²²

Whatever can be observed depends upon the selected distinction used by the observer, again: to observe is to distinguish and to denote. The distinction is decisive for whatever appears 'on the screen' of the observer. Of course this implies a certain circularity: the distinction is always selected by the observer and is not a quality existing independent of the observer. In its turn, the observer's reality, i.e. the environment of the system, depends on the applied distinction. Nothing that is not denoted with the applied distinction can be observed by that particular observation/ observer. Hence the distinction is the ground of the observation, and the use of another distinction implies another observation.¹²³

What cannot be observed from the perspective of that very same distinction is as important as what can be observed by means of the use of a specific distinction. If observation is conceived of as the processing of distinctions, it follows that observation cannot observe itself in its execution as an operation. Executing an observation and observing this in one and the same operation would require the use of the applied distinction to distinguish the observation itself from something else. Consequently, every observation manages its basic distinction as its blind spot: the observer can only observe what is 'on the screen' and not what is not, and this 'what is not' includes the applied distinction; however, the blind spot of one observation can be observed by another observation if this second observation uses a distinction that is different from the distinction applied in the first observation. Luhmann defines this procedure as *second order observation*.

Of course, second order observations also have to operate with a distinction and consequently have their own blind spot. Second order observations cannot uncover their own blind spots but are capable of moderating their own point of view since second order observations are, reflexively, aware of the fact that there are

¹²² *Ibid.*, p.77. Author's translation; original text: 'Komplexe soziale Systeme kommen ohne beobachtende Operationen nicht aus, ihre Autopoiesis ist darauf angewiesen' and please note: social systems observe themselves as action systems since 'communication cannot be observed directly, only inferred. To be observed or observe itself, a communication system must be flagged as an action system.' See: N. Luhmann (1995), *Social Systems*, op. cit., p.164.

¹²³ N. Luhmann (1987), *Die Wissenschaft der Gesellschaft*, op. cit., p.84.

blind spots in *every* observation. It follows that there is neither hierarchical ranking of observations nor privileged positions of observations.¹²⁴

1.4.5 *Exclusion of the Individual*

An understanding of social systems as consisting of communications and communications only, reveals an important theoretical decision of Luhmann: human beings do not belong to social systems. Human beings are not parts or elements of society or its subsystems, or of organizations or even of interactions. In Luhmann's conception, human beings – body and soul, mind and consciousness, all their capacities of perception – belong to the environment of social systems.¹²⁵ Could it be otherwise if we accept the premise of self-referential reproduction of social systems?

Social systems produce and reproduce themselves in a communicative mode, whereas human beings obviously use a different mode of 'reproduction'. Since both modes of reproduction are operationally closed, the rather contra-intuitive consequence is that human beings do not communicate: according to Luhmann, only communications are capable of communicating.¹²⁶ Consequently, individuals cannot communicate *with* social systems. There is no communication possible between individuals and society, or with organizations. These systems emerge as *social* systems, absorbing or consuming everything that emerges as communication. Of course, people participate in one way or another in communication. From a social systems theoretical perspective, they constitute themselves as 'persons' (*Personen*) in this participation. 'Persons' are merely addressees and not 'real' individuals or psychic systems and these addressees are societal structures for directing further communication.

However plausible the decision not to include human beings in the analysis of social systems might be from Luhmann's point of view, it does not clarify the

¹²⁴ N. Luhmann, *Die Kunst der Gesellschaft*, Frankfurt am Main 1995, p.94.

¹²⁵ N. Luhmann (1995), *Soziologische Aufklärung 6*, *op. cit.*, p.10.

¹²⁶ This does not deny that human beings are prerequisites for the possibility of communication but holds that human beings are so to speak not 'in the system'. Also: '*Bewußtsein ist eine unentbehrliche Voraussetzung von Kommunikation, aber nicht selber Kommunikation*', in: N. Luhmann (2003), *Soziologie des Risikos*, *op. cit.*, p.7. About the coupling between communication and consciousness see; N. Luhmann (1987), *Die Wissenschaft der Gesellschaft*, *op. cit.*, p.11 ff.

rather enigmatic finding that only communications communicate.¹²⁷ What does it mean? Surely not 'Stimmen aus dem Nichts', voices from nowhere.¹²⁸ Also inconclusive is Soentgen's proposal that it is metaphorical and stands for the fact that only a human being can communicate.¹²⁹ This is according to Soentgen as absurd as 'communicating communications' since *one* person cannot communicate. Even though Soentgen touches upon the matter, he does not pursue this any further. The sentence 'only communications communicate' provokes the understanding that communications communicate *with* communications. This, to put it mildly, is not informative at all. Following from the notion of communication as a tripartite structure,¹³⁰ it could also be understood that only by means of communication information is transferred and passed on from Alter to Ego and vice versa, thus forming chains of communications and constituting a social system.¹³¹ The finding that only communications communicate refers to the connectivity of communications and *not* to the notion that communications communicate *with* communications. Thus: only communications can constitute chains of communications, or even: chains of communications can only consist of communications.¹³²

It is obvious that an object *per se* (a house, a car, sand, and so on) cannot be a part of a social system. If the sentence 'only communications communicate' is a metaphor, as Soentgen suggests, then it is only a metaphor for the operational closure of social systems. One can only guess why Luhmann phrased it in such a mystifying way.

It may be hard to believe after the foregoing, but the radical abstraction of the individual does not imply a minimized importance of human beings with regard to sociality. After all, communication is not possible without the input of 'psychic systems': a song does not sing itself. The 'human' environment is as such a necessary and indispensable condition for the emergence of social systems: '*Eine Gesellschaft ohne Menschen ist undenkbar*', a society without people is unthinkable.¹³³

¹²⁷ See footnote 104.

¹²⁸ J. Soentgen (1992), 'Der Bau – Betrachtungen zu einer Metapher der Luhmannschen Systemtheorie', *Zeitschrift für Soziologie* 21(6), Dezember, p.457.

¹²⁹ Idem.

¹³⁰ Cf. Par. 4.1 of this chapter.

¹³¹ To put it in a very general sense. Notably further mechanisms of selection define the kind of social system, see the next chapter.

¹³² W. Kargl (1990), 'Kommunikation kommuniziert?', *Rechtstheorie* 21, pp.359-360.

¹³³ N. Luhmann (1995) *Soziologische Aufklärung* 6, *op. cit.*, p.7.

Moreover, an understanding of social systems as communicative systems presumes a whole complex of conditions in the environment that have to be met to enable self-referential reproduction. It concerns, amongst others, other self-referential systems, not only psychic but also physical/living systems, co-existing in interdependent relationships with each other. The environment is always present. It does mean, however, that sociality has its own dynamics, which are not subject to motives or intentions of the participating psychic systems. The selectivity and order of communicative processes is an emergent quality, immanent to communications as an operation. Such does not deny that human beings actually have motives and intentions with regard to their communication. Merely, the radical abstraction of the individual is the consequence of the operational closure of different types of systems.

Luhmann's 'sociocentrism' obviously touched a weak spot as it has been severely criticized in terms of the dehumanization of society, the loss of a normative and ethical basis, banishment of the individual out of sociality and so on.¹³⁴ According to Luhmann, the paramount importance of the individual in, early, modern self-reflection and the central position of 'action' in this century's sociology renders it difficult to exclude human beings as object of sociology. With regard to the concept of 'action' it is taken for granted that only human beings are capable of acting, regardless the problematical attribution of actions and without questioning precisely 'what' is acting. If one wants to observe human beings as such in society, one has to have detailed information about chemical, psychological, neuropsychological etc., processes. Then it is no longer possible to constitute sociology as a '*Menschenwissenschaft*'. Human beings and societies are not described as objects in themselves by systems theory but the latter is concerned with the *differences*, produced and reproduced by these two types of systems.¹³⁵ It is a plausible cause of action and presents, as Van Twist points out, a redirection of focus and not a conceptual elimination of human beings from social systems theory.¹³⁶ But it also

¹³⁴ See for instance W. Kargl (1990), 'Kommunikation kommuniziert?', *op. cit.*; W. Kargl (1991), 'Gesellschaft ohne Subjekte oder Subjekte ohne Gesellschaft – Kritik der rechtssoziologischen Autopoiese-Kritik', *Zeitschrift für Rechtssoziologie* 21, pp.352-373; J. Nocke (1986), 'Autopoiesis: Rechtssoziologie in seltsamen Schleifen', *Kritische Justiz* 19, pp.363-389; H.P. Krüger (1990), 'Luhmanns autopoietische Wende. Eine Kommunikations-orientierte Grenzbestimmung' in: *Selbstorganisation Jahrbuch für Komplexität in die Natur-, Sozial- und Geisteswissenschaften*, Vol.1, Berlin, pp.129-147.

¹³⁵ N. Luhmann (1995), *Soziologische Aufklärung* 6, *op. cit.*, p.10.

¹³⁶ M. van Twist (1994), *op. cit.*, p.192.

burdens the social systems theoretical approach to clarify which elements precisely constitute *specific* social systems such as society and the legal system. We will turn to this matter in the following chapters.

Chapter 2

Contingent Order, Complex Society: Theory of Society

2.1. Introduction

In Luhmann's work, three levels of analysis are to be distinguished.¹³⁷ First, there is the level of general systems theory, entailing the general theory of autopoietic systems. Concepts such as 'autopoiesis', 'self-referentiality' and 'complexity' are the results from (interdisciplinary) research at this level. Second, there is the theory of social systems dealing with the specifics of social self-referential systems, such as the determination of the characteristic operation. As the findings above showed, this turned out to be 'communication'. The foregoing chapter aimed to elucidate the use of the concepts of 'self-referentiality', 'autopoiesis', 'double contingency', 'social complexity' and 'communication' in view of the *demarkation* of social systems.

In this chapter, we turn to the third level of analysis, that is: Luhmann's theory of society. In doing so, the stage is set for further inquiry into the research questions for *the demarcation of society* and *the demarcation of the legal system*. The findings regarding these research questions contribute to the evaluation of the possibility of utilizing Luhmann's theory of society regarding the description of the unity of modern Western society. Therefore, Luhmann's description of the concepts of society, functional subsystems and organizations as specific types of social systems will be discussed.

Within this research, the interest will be directed towards modern society. 'Modern society' refers, in this context, to a type of society as a result of the process of modernization. The starting point pertains to the questions: how is social order in modern society brought about? How to observe the possibility of social order? Which form does social order acquire in modern Western society? We consider the question for the possibility of social order to be the basic question of social theory and related areas of theorizing. But what is meant by 'social order'? Traditionally, order is opposed to chaos. And likewise traditionally, a more or less implicit pref-

¹³⁷ N. Luhmann, *Die Gesellschaft der Gesellschaft*, Frankfurt am Main 1997, pp.79-81.

erence for order is inherent in this opposition. Such an, implicit or explicit, preference may well be rooted in the idea that order provides for clarity thus enabling control with regard to the ordered elements (whatever their nature) whereas chaos bears the risk of loss of control and implies uncertainty.

A similar intuition underlies the proposal of German systems theorist Helmut Willke, entailing that the concept of order could also be opposed to complexity instead of to chaos.¹³⁸ Complexity in this proposal is to be understood as an excess of options and alternatives that cannot all be realized, at least not simultaneous. Redundancy of possibilities produces a high degree of uncertainty and in order to control this uncertainty, choices or selections have to be made. 'Order', as opposed to complexity, is then to be understood as reduced complexity. Order requires the reduction of the amount of possibilities and alternatives. This reduction is to be brought about by means of procedures, structures or patterns enforcing selections, for example: a temporal dispersal of possibilities.

Within the societal framework, complexity refers to a redundancy of possible communications. Order then refers to the reduction of possible communications. How to select communications? And thus: how to bring about social order? In the most general sense, we could say that social order is brought about by social systems. As said before, there are three *types* of social systems: societies, organizations and interaction systems. Society is the 'encompassing' system, in the sense that all communication is included in society and that there is no communication beyond the boundaries of society.

Within modern society, understood as a social system, functional subsystems, such as politics, law, economy, family and so on, are differentiated. It should be noted that even though these functional subsystems are differentiated within society, as social and thus communicative systems that these functional subsystems do not coincide with the societal system itself. The sum of all functional subsystems does not equal 'society'. At this point, the 'status' of these functional subsystems may seem somewhat obscure: functional subsystems must be located at the level of the societal but are not to be seen as a fourth kind or type of system: they are in fact 'societal' systems, contributing to the realization of society and, if a technical-theoretical qualification is required, a system reference (*Systemreferenz*).¹³⁹

¹³⁸ H. Willke, *Systemtheorie entwickelter Gesellschaften – Dynamik und Riskanz moderner gesellschaftlicher Selbstorganisation*, Weinheim/München 1989, p.95.

¹³⁹ N. Luhmann (1997), *Die Gesellschaft der Gesellschaft*, *op. cit.*, p.90.

Besides functional subsystems, society differentiates two other types of social systems: organizations and interaction systems. Both organizations and interaction systems are, since they are social systems, also communicative and self-referential systems. All three types of social systems – functional subsystems, organizations and interactions – can only exist within society. The major distinctive feature in this case is the way operational closure is accomplished. Whereas functional subsystems close their boundaries by ‘coding’, organizations use the rule of membership to differentiate between system and environment. Interactions are demarcated by the distinction presence/absence.

In section 2, an overview of the concept of society and problems related to the concept will be given. Section 3 will deal with differentiation, in terms of systems differentiation, symbolically generalized media as mechanisms of societal differentiation and functional differentiation. The findings of these sections will serve as an upbeat for the answer to the first research question pertaining to the matter of a univocal concept of society in view of its demarcation, as will be addressed in chapter 4. In section 4, characteristics of functional subsystems will be dealt with: coding, programming, function and performance. Section 5 will conclude this exposé of Luhmann’s theory of society with a description of the concept organization as a type of social system. Finally, section 6 presents an analysis of the relation between functional subsystems and organizations. Here, the guiding question is whether Luhmann’s theory of society offers sufficient concepts to determine the relation between functional subsystems and organizations. Both types of social systems are characteristic of modern society but in Luhmann’s theory, their relation has been underexposed and only received attention in Luhmann’s later work, such as *Die Gesellschaft der Gesellschaft*.¹⁴⁰ In view of this research, *the relation between functional subsystems and organizations is pivotal to the question of the demarcation of the legal system, as will be elaborated in the next chapter, but also contributes to the understanding of how social systems communicate which each other.*¹⁴¹

2.2. Society

There is no *theoretical* hierarchy with regard to different *types* of social systems, but ‘society’ intuitively acquires a top-position because it is, simply said, the ‘largest’

¹⁴⁰ *Ibid.*

¹⁴¹ Cf. the critical comments of authors such as Pieterman and Kennealy, see Introduction.

system. Luhmann defines society, already in an early work, as the 'all-compassing' social system.¹⁴² Recapitulating the findings of the previous chapter, the notion of society as the all-compassing social system entails the following. Understanding society as a system implies, from the perspective of systems theory, that there is also an environment. The distinction between society and environment corresponds with the difference between the social and the non-social. The specification of society as a social system refers to the fact that the basic operations of the societal system are communications. The statement that society is the all-compassing system therefore implies that society includes all communications and that 'society' is a totalizing notion. By means of the ongoing reproduction of communication through communication, society demarcates itself from its environment. Its environment is constituted by different systems (biological, chemical, neurological, etc. systems).¹⁴³

Furthermore, society is to be understood as a self-referentially closed system: it produces and reproduces itself exclusively by and through its own operations.¹⁴⁴ Its closure is absolute: there is no communication to be found outside society. Societies are '*encompassing systems in the sense that they include all events which, for them, have the quality of communication*'.¹⁴⁵ All communication proceeds within society and, as a consequence, all other kinds of social systems, interactions and organizations, are included by society. This absolute closure implies that, whereas interactions and organizations are capable of communicating with their (societal) environment, there is no communication possible outside society, that is: in its environment or between society and its environment.¹⁴⁶ At the risk of belaboring the obvious this does not mean that there is no communication possible and necessary about the environment, only that the boundary of society is determined by the distinction between communicative and non-communicative events.

¹⁴² N. Luhmann, *Soziologische Aufklärung 2*, Opladen 1975, p.11.

¹⁴³ N. Luhmann, *Ökologische Kommunikation*, Opladen 1986, p.24.

¹⁴⁴ N. Luhmann, *Das Recht der Gesellschaft*, Frankfurt am Main 1993, p.522.

¹⁴⁵ N. Luhmann, 'The Autopoiesis of Social Systems', in: F. Geyer & J. Van der Zouwen (eds.), *Sociocybernetics: Observation, Control and Evolution of Selfsteering Systems*, London 1986, p.173.

¹⁴⁶ It seems that 'societies' are referred to as 'society' since '*all societies have been world societies*' in: N. Luhmann, *Essays on Self-Reference*, New York/Oxford 1990, p.178 and see also N. Luhmann, *Soziologische Aufklärung 2*, *op. cit.*, p.11. In my view however, 'society' refers to the *general theoretical* concept, whereas '*societies*' refer to more concrete types of society (the Dutch society, the Greek society, information or risk society, and so on). This issue will be dealt with in Chapter 4.

The foregoing does not imply, however, that society is to be understood as the sum of its parts. Society is not, for example, the sum of all interactions and organizations and does not solely exist in its possibility of building interaction systems and/or organizations. In Luhmann's perspective, there is however a special relationship between interaction systems and society, and this might offer a firmer grasp on the concept of society.¹⁴⁷ Interactions, as is to be expected, are communicative systems that are self-structuring and revolve around a theme. Constitutive of interaction systems is the concept of 'presence': 'They [interaction systems, LF] include everything that can be treated as *present* and are able, if need be, to decide who, among those who happen to be present, is to be treated as present and who not.'¹⁴⁸

'Presence' is not solely a physical-spatial denotation. The fact that a party can hear every word of couple's dispute in the next room does not entail the party's engagement in the interaction system 'dispute'. Physical presence is however important because interactions come into existence since *perception* of the physical presence provides for a basis of communication. In fact, mutual perception of those present is a constitutive precondition of interaction. Perception is a psychical information-processing mode but gains social relevance because perception is almost inevitably mutual and becomes reflexive. Reflexive perception enforces communication: if one perceives that he/she is perceived and that his perception is perceived in its turn, one has to observe that his action is understood as an utterance in communication.

Typical of interaction is a 'double track' of explicit verbal communication and the mutual perception of the participants as regards non-verbal communication.¹⁴⁹ Interaction is the minimal production-level of communication. Social systems would not be possible without interaction. Yet, interaction does not equal society. The relationship between society and interaction is one of 'distinction'.

One can capture an important aspect of the relationship between society and interaction – namely, the temporal aspect – with the concept *episode*. Interac-

¹⁴⁷ T. Blom (1997), *op. cit.*, p.214 ff.

¹⁴⁸ N. Luhmann, *Social Systems*, Stanford, California, 1995, p.412. A slightly different translation from: 'Sie schließen alles ein was als anwesend behandelt werden kann, und können gegebenenfalls unter Anwesenden darüber entscheiden, was als anwesend zu behandeln ist und was nicht'; see: N. Luhmann, *Soziale Systeme - Grundriß einer allgemeinen Theorie*, Frankfurt am Main, 1984, p.560.

¹⁴⁹ T. Blom (1997), *op. cit.*, p.204.

tions are episodes of societal process. They are possible only on the basis of the certainty that societal communication has been going on before the episode begins, so that one can presuppose sediments of earlier communication; and they are possible only because one knows that societal communication will still be possible after the episode concludes. The beginning and end of an interaction are merely caesuras in society's autopoiesis.¹⁵⁰

One aspect of the distinction between society and interaction is of a temporal nature. Interactions differentiate in 'episodes', one after the other in time, and create so to say a 'history'. These episodes can follow quickly after one another, with minimal temporal rupture: a discussion about soccer turns into a comparison of wages, a new participant adds his opinion, and so on. At some point the discussion stops and will perhaps be started again at another point in time or not at all. Interactions are in a certain way strings of communication, shorter or longer, one after the other. Society, on the other hand, contains all communication and has to differentiate synchronous, different communication processes occurring at the same time. Society appears, necessarily as regards interactions, as the ongoing communicative context, providing for stability that interactions lack by definition: the possibility to start and end, against the background of stabile structures, well-known themes, meaning-patterns.

Society and interactions are different kinds of social systems. Society guarantees the meaningfully self-referential closure of communicative events, thus the capacity to begin, end, and form connections of the communications in each interaction.¹⁵¹

Besides the temporal difference between society and interaction, Luhmann also distinguishes a social and fact(ual)¹⁵² difference. The social difference refers to the fact that society appears as a complex network of freedoms and commitments to interaction systems. Within the interaction system, there are also expectations to be met but these are more or less clear, for example, the assignment of household duties in a family on a regular Saturday. But the members of the family also have other, 'external', obligations (school, work, in-laws, the bridge-club, and so on) that bear consequences on the 'internal' commitments: the dishes cannot be done because of homework (or *vice versa*). This way the societal environment is, to put it simple, reflected in the interaction system by the participants' other obligations

¹⁵⁰ N. Luhmann (1995) *Social Systems*, *op. cit.*, pp.406-407.

¹⁵¹ *Ibid.*, p.416.

¹⁵² The translation of 'sachlich' in Luhmann's 'Social Systems' is 'fact'.

and provides for system-internal presentation of the difference between system and environment.

The difference between society and interaction transforms commitment into freedom. In interaction every participant can demand consideration for the fact that one has further obligations to fulfill and can thereby gain distance.¹⁵³

Finally, the difference between society and interaction also has consequences in the fact(ual) dimension, entailing the themes of communicative interaction. Interaction systems have a range of themes at their disposal and are not restricted to one theme. In interaction, according to Luhmann, themes are chosen concrete and yet at the same time contingent. Contingency refers to the fact that all interaction takes place within society and that society offers more/other possibilities for interaction. Yet interaction chooses its theme sufficiently concrete because not 'anything goes'. The wedding cannot start until the bride has arrived. Luhmann denotes this selection of themes from a societal pre-structured range as 'articulated' contingency (as opposed to radical contingency).¹⁵⁴

At this point, society appears as the 'playing field' for all communicative processes, interactions in the first place, providing for continuity by means of consolidated structures that outlive the short(er) duration of interactions. Furthermore, society enables the combination of freedom and commitment within interactions and provides for a range of themes. Nevertheless society is not solely to be understood as the playing field enabling interaction systems. It works both ways: interaction systems, on their turn, contribute to the realization of society and are the lowest level of production.

The concept of society as a *unity* of all communication abandons political-territorial as well as normative concepts and notions of society. It differs from the notion of *societas civilis*, society as system constituted in a political-legal way. Furthermore, 'society' as the encompassing communicative system has, according to Luhmann, no need for a normative basis to demarcate its boundaries and, therefore, to constitute its unity normatively. Luhmann opposes such a normative basis as it would present an exaggeration of the actually existing consensus. He illustrates this by reference to criminals: by accepting a normative unity, it is implied that even criminals accept the norms of society. This denies however that a criminal is part of society not because of his compliance to norms, illustrated by covering up his

¹⁵³ N. Luhmann (1995), *Social Systems*, *op. cit.*, p.419.

¹⁵⁴ T. Blom (1997), *op. cit.*, p.215.

crime, but precisely in his pursuit of the opposite.¹⁵⁵ Therefore, normative consensus cannot be the basis of society. Instead, the unity of society is located in the disjuncture of accepted and deviant behavior, and a complementary differentiation of expectations and reactions.¹⁵⁶

'Society' circumscribed as above, provides at least for a minimal theoretical demarcation of 'who' or rather 'what' does or does not belong to society: all communication including all communication about communication, about the environment, about people but not human beings as such, no chemical processes, no organisms, and so on. Luhmann's circumscription of society has a distinct analytical advantage: society is radically closed at its operational level and as such the locus of performance of social processes. Society carries social evolution and offers the framework for observation and description of social changes. The advantage of a concept of society in terms of communications is that it is able to take many different forms of society throughout history into account in a more not-anachronistic way than for example normatively defined concepts of society.¹⁵⁷

Luhmann's concept of society is indeed very formal and general: the only societal unity accounted for is of an operational nature. It raises the question whether Luhmann's understanding of society meets in fact his own solid theoretical requirement:-

Sociology must have a concept for the unity of the totality of what is social – whether one calls this (depending on theoretical preferences) the totality of social relations, processes, actions, or communications.¹⁵⁸

There should be sufficient social coherence observable to designate a 'carrier of social evolution' and Luhmann's approach is not considered to be entirely unproblematic. Indeed, Blom points out that the status of society *as a social system* is at stake.¹⁵⁹ He reformulates Luhmann's approach as follows. A social system has its reality in the factual connection of successive communicative events. So, its reality is *not* located in structural possibilities or in what could have been but not

¹⁵⁵ N. Luhmann (1975), *Soziologische Aufklärung 2*, *op. cit.*, p.11.

¹⁵⁶ *Ibid.* (paraphrase).

¹⁵⁷ N. Luhmann (1993), 'Gesellschaftstheorie und Normentheorie', in: U. Fafis & C. Jachen (Eds.), *Gesellschaftstheorie und Normentheorie – Symposium zum Gedenken an Theodor Geiger 9.11.1891-16.6.1952*, Basel, p.16.

¹⁵⁸ N. Luhmann (1995) *Social Systems*, *op. cit.*, p.408.

¹⁵⁹ T. Blom (1997), *op. cit.*, p.218.

happened. According to Blom, this is the unavoidable consequence of the autopoietic turn and of accepting an 'event-like' approach. But, he continues, how is modern society (or even world-society) to be understood as a unity, otherwise than on the condition that society does not only exist in actual connecting communications but also in *possible* connecting communication?¹⁶⁰ Such would however be problematic for the status society as a social system, having its reality in the actual connection of communications. The return to an earlier description of society could provide for a solution. In this earlier description, society is understood as the social system that institutionalizes fundamental reductions of complexity, thus providing a framework or starting point for other social systems.¹⁶¹

Blom states that this definition represents more or less Luhmann's interpretation of the relationship between society and interaction and he wonders whether 'society' could be replaced by 'culture'. 'Society' is then to be understood as a set of generalized meaningful structures, specified and reproduced over and over again by interactions. Blom offers two considerations in favor of this interpretation. Social structures, in the first place, are meaning structures and there is no reason to expect that *societal* structures are something else. The second consideration is provided for by the dictum of self-referential closure of social systems. Self-referentially closed social systems produce their own structures. According to Luhmann, interaction systems and organization are also self-referentially closed systems that produce their own structures and that are self-structuring. If this is so then the reduction of complexity, provided for by society, has its reality solely in semantic differences produced by interactions and organizations. A 'culturalistic' interpretation of 'society' after the autopoietic turn would be therefore preferred.

Interaction systems can and must continually be abandoned and begun anew. This makes necessary an overarching semantics, a culture, which guides the process toward what is probable and has proven reliable. By providing this, society works selectively on what occurs as interaction without, of course, entirely excluding what is contradictory and deviant.¹⁶²

¹⁶⁰ *Ibid.* (paraphrase).

¹⁶¹ 'Gesellschaft ist...jenes Sozialsystem, das letzte, grundlegende Reduktionen institutionalisiert. Gesellschaft schafft damit die Voraussetzungen, an die andere Sozialsysteme anknüpfen können. Gesellschaft – das ist dasjenige Sozialsystem, dessen Strukturen darüber entscheiden, wie hohe Komplexität der Mensch aushalten, das heißt in sinnvolles Erleben und Handeln kann.' Luhmann, as quoted by T. Blom (1997), *op. cit.*, p.219.

¹⁶² N. Luhmann (1995), *Social Systems*, *op. cit.*, p.433.

Interpreting society as an overarching semantics does however not elucidate how societal *unity* is brought about. At this point, and for now, it should suffice to say that unity here refers to a complex of homogeneous, be it volatile, elements and is considered as an operational category. This 'operational' understanding seems to meet at least a social systems theoretical requirement: society is demarcated *vis-à-vis* its non-societal environment. The question remains if this informs us about the unity of a specific, concrete society. This question will be re-addressed in the final chapter.

2.3. Differentiation of Society

2.3.1 Differentiation

The typical performance of society is its reduction of complexity. Society institutionalizes a basic reduction of complexity and creates the preconditions for the possibility of other social systems to operate. The selections performed at the level of society enable selections of other social systems. The most basic selection is of course the one between communication or non-communication. Other social systems, be it interactions, organizations or functional subsystems, do not need to differentiate between communication or non-communications: it is a consequence of their position within society.

It is implied by the definition of society as the encompassing system that the societal system 'carries' social evolution and that therefore society is to be understood as the point of reference as regards the research of social evolution: '*Only societal systems are possible carriers of evolutionary processes*'.¹⁶³ Social evolution must be understood as the process of succession of different kinds of societal differentiation and integration. Society is always internally differentiated and evolutionary variation is located in the primary form of differentiation. This includes an increasing differentiation of social systems and, inherently but not equated with, increasing social complexity.¹⁶⁴ With regard to complexity it can therefore be said that 'society' as a totalizing concept not only refers to 'all communications' but also to the form in which a (complex) society has its order. Order is to be understood as the

¹⁶³ Author's translation; original text: '*Nur Gesellschaftssysteme sind mögliche Träger evolutionärer Prozesse*', in: N. Luhmann (1975), *Soziologische Aufklärung 2, op. cit.*, p.12.

¹⁶⁴ N. Luhmann (1997), *Gesellschaft der Gesellschaft, op. cit.*, chapter 4 and also N. Luhmann *Gesellschaftsstruktur und Semantik – Studien zur Wissenssoziologie der modernen Gesellschaft, Teil 1*, Frankfurt am Main 1993.

way differentiated systems are related to each other. As a consequence of the notion of society as a totalizing concept (at the operational level), all differentiation must be internal differentiation. The building of subsystems in society is based on the repetition of the difference system/environment within the societal system. The difference system/environment enables to discern separate communicative processes (this communication belongs to the legal system, that event belongs to the environment), revolving around different themes (communicative chains about the upcoming elections, a marital dispute), from each other.

Within the theory of society, systems differentiation entails the differentiation of society. The form of social differentiation articulates the way in which subsystems relate to each other. Working within the sociological tradition, Luhmann discerns the following types of differentiation: *segmentary differentiation*, *hierarchical-stratificational differentiation* and *functional differentiation*. The reference is always to the *predominant* form of differentiation which does not imply that the referred form is the only, exclusive differentiation within society but only that it is the prevailing form at the level of the societal system. Functional differentiation, for example, does not rule out hierarchical-stratificational differentiation within a societal subsystem. An (organizational) hierarchy, for instance, characterizes the subsystem politics.

Archaic societies are according to Luhmann, characterized by a *segmentary differentiation*. Segmentary differentiation is characterized by the differentiation into more or less similar units – such as families, clans, and tribes - of equal value or rank. Communication takes place solely through the medium of language and remains restricted to interactions regulated by general norms. Social control and a magical-normative framework, institutionalized within traditions and taboos repress offences or infringements. Social order is merely stabilized through a lack of alternatives: a different kind of order is not possible because of the invariability of kinship. Social order is directly related to the position of individuals within their kinship.¹⁶⁵

From an evolution-theoretical perspective, the bottleneck is located in ‘variation’. This situation changes when kinships are broken open by means of family-expansion and conquests, enabling the transition from a segmentary social order to a *hierarchical-stratificational* one in *Hochkulturen*.¹⁶⁶ Society is now predominantly differentiated into social strata in a hierarchical connection. From that

¹⁶⁵ N. Luhmann, *Ausdifferenzierung des Rechts*, Frankfurt am Main 1981, p.28.

¹⁶⁶ N. Luhmann (1995), *Social Systems*, *op. cit.*, p.425.

point on, larger and more complex social connections come into existence. Social control is no longer sufficient because communication breaks through the limitations of interaction, via the invention of writing and printing. As a consequence it becomes increasingly uncertain if normative expectations can be maintained, at least contra-factual, in case of a conflict.¹⁶⁷

The omission of social control, inherent in a shared life-world, triggers the development of legal institutions maintaining social order through decisive procedures that are issued at a central level. The main point is now located within 'selection': which procedures and, consequently, which order. The foregoing types of differentiated social order do not contain any specific political, economic, scientific or legal segments or strata. The various aspects of social life are dispersed through all subsystems. For example, political or economical rights are attached to the position of a person within his kinship or rank/standing.¹⁶⁸

Only by means of increasing rationalization of the world-view, a social division of labor comes into existence. This is a differentiation based upon occupations/trade or productions groups (Adam Smith, Emile Durkheim). Later on, the concept of division of labor is generalized in such a way that all domains of life, all social domains are covered. Society is differentiated in subdomains or subsystems that carry out specific social functions, for example politics, science, law and so on. Generally, this is denoted as 'functional differentiation' which is to be considered a characteristic of modern society.

2.3.2 *Media*

It should be noted that all three types of differentiation are forms of systems differentiation, referring to the capacity of a system, i.e. society, to internally build or form subsystems. Differentiation within society is always differentiation within communication; subsystems of society are always connections of communications, in one way or another demarcated from each other and from society. Against this background, social evolution appears as the succession of different types of societal differentiation wherein, according to Luhmann, the *media of dissemination* (*Verbreitungsmedien*)¹⁶⁹ played a major role.

¹⁶⁷ N. Luhmann (1989), 'Law as a Social System', *Northwestern University Law Review* 83, p.146.

¹⁶⁸ H. Willke, *Systemtheorie entwickelter Gesellschaften – Dynamik und Riskanz moderner gesellschaftlicher Selbstorganisation*, München 1989, p.32.

¹⁶⁹ N. Luhmann (1995), *Social Systems*, *op. cit.*, p.161.

The media of dissemination, that is: writing, printing and, nowadays, electronic broadcasting, enlarge the temporal-spatial range of communication enormously. Via the Internet, it is possible to communicate with someone on the other side of the world within seconds. By means of books, it is possible to communicate with readers not even born yet, and so on. Communication as such and the increase of the communicative range brings along certain problems. The take-off of a communicative process requires that auditors are reached and that the uttered information is understood more or less in conformity with the understanding of the 'speaker'. A *successful* communication however requires that an auditor accepts the selections offered by a speaker as a premise for his or her own further experience and action.

As seen before, a communication is constituted of three selections. The first two selections are the choice *to utter* information and the choice to communicate *something*. It is precisely this possibility of a choice that constitutes communication as a social phenomenon: the fact that the selections are contingent, possible but not necessary. One is not forced to express oneself, but one can do so in different ways or communicate information of an entirely different kind. This also applies to the one that *understands* the utterance as an offer to communicate. 'Understanding' implies a contingent choice as well and is as such the third selection. After all, it is possible to understand information in different ways since Ego and Alter are 'black boxes' to each other and can only guess at the reasons and motives guiding the other.¹⁷⁰ Once the recipient has understood the information, he is confronted with the choice between accepting or rejecting the information.

Luhmann's notion of communication as a threefold selection implies as many societal problems. The first is *the problem of understanding* (*Verstehen*): it is rather improbable that an Ego actually understands what Alter means because Alter and Ego observe each other as black boxes. The second problem is *reaching* the recipient. It is improbable that a communication reaches more recipients than actually present in a concrete situation, due to the extended temporal and geographical possibilities of communication. Immediate interaction sufficiently guarantees attention and stops at the moment when the participants communicate the wish not to continue communication. Beyond the boundaries of interaction, these properties of interaction do not function. In accordance with Luhmann's notion of communication as a threefold selection, a third problem can be pointed out, *the*

¹⁷⁰ The use of 'Alter' and 'Ego' refers to '*hochkomplexe sinnbenutzende Systeme, die für einander nicht durchsichtig und nicht kalkulierbar sind*'. These could be, according to Luhmann, social or psychic systems. See N. Luhmann (1984), *Soziale Systeme, op. cit.*, p.156.

problem of acceptance: even if a communication is understood, the understanding does not guarantee the acceptance of it. Why should the recipient accept the offered information, what could motivate his acceptance? Only if the acceptance of a communication offer takes place, a communication is considered to be successful. Or, in Luhmann's words, a communication is successful if Alter accepts the information selected by Ego, as the premises of Alter's succeeding behavior.

It is true, however, that everyday communication is usually unproblematic in its continuation. For example if we participate in an economic transaction, say buying a book, we know that we have to pay and that *money* is generally accepted as a device to do so – unproblematic acceptance is expected. In marriage, *love* is expected to be accepted on a mutual and exclusive base. The *power* of the state to impose taxes, is accepted (however unwilling) and, as a principle, rarely put into doubt. It needs no argument that these are rather simplified examples of situations in which the (conflictual) potential of double contingency seems not to be challenged. But underneath the surface of normality, the *improbability of communication* is hidden, as opposed to an unquestioned assumption of reciprocity.¹⁷¹

In order to enable successful communication and therefore systems building, the three improbabilities of understanding, reaching and acceptance have to be transformed into probabilities. To this purpose, Luhmann distinguishes three different types of media. The first problem, the understanding of communication, is solved by what could be called the most general medium: *language*.¹⁷² Secondly, the problem of reaching persons beyond the border of direct interaction finds its solution in the *media of dissemination*, which are in a sense the double-codes of language: script, print and tele-communication. Finally, the problem of acceptance requires the development of *symbolically generalized media*.¹⁷³

¹⁷¹ This 'unquestioned reciprocity' could be advocated on the basis of the existence of shared norms and values, offering a framework for complementary expectations of the individuals in interaction. This is a general accepted idea in sociology but holds the danger of an 'oversocialized conception of man' See: D.M. Berkhout, *De symbolische media van de samenleving - over interpenetratie in de moderne samenleving*, Utrecht 1990, p.24.

¹⁷² For the system theoretical account of language, see: E. Esposito, 'Zwei Seiten-Formen in der Sprache', in: D. Baecker (ed.), *Probleme der Form*, Frankfurt 1993, pp.88-119.

¹⁷³ The concept of the symbolically generalized media of communication originates in the work of Talcott Parsons. Talcott Parsons deduced the media from the necessity of interchange relationships between subsystems of the general social system that differentiated according to the four functions- or AGIL-paradigm. The symbolically generalized media provide for integrative mechanisms between the subsystems of society – economy, polity, fiduciary system and societal community.

From an evolutionary perspective the solution of the problem of double contingency¹⁷⁴ solely by reference to a 'shared symbolic system' such as a common set of norms and values, as was suggested by Talcott Parsons, only applies to 'primitive' communities. As mentioned before, *language* is the medium of the shared symbolic system and the medium that enables understanding between the actors. Social communication in simple communities is characterized by direct interaction between present actors. The subjects share a common life world, i.e. the same language, common presence enabling direct interaction, a shared frame of reference.¹⁷⁵ Norms can be shared as they can be directly communicated.

However, communication does not remain restricted to face-to-face interaction. Through invention of *script* and later of *printing*, it becomes possible to free communication from the limitation that is inherent in interaction, i.e. immediate presence. Now it is possible to store information that enables spreading beyond the boundaries of interaction and directed to anonymous recipients. The temporal and spatial restriction is removed. This enormous increase of possibilities of communication confronts society with an important problem: the advantage of a greater social reach of communication is 'bought' at the price of the omission of a shared life-world.

Successful communication becomes less likely: an unknown Alter (Why should one accept something from a stranger?), a not so plausible content (why pay taxes?) or problematical attribution of the selection (why follow an order without knowing who issued it?). The connection between the selection presented by an Ego and the motivation of an Alter to accept this selection is not in itself evident. The risk of rejection is inherent to every communicative offer: why would Ego accept Alter's selection and use it as a premise for his own communication? How can Ego be motivated to do so? Only if the acceptance of a communication-offer takes place, a communication is considered to be successful.

The fact that in our everyday experience communication is mostly successful and to a high degree is expected to be so, is due to the *symbolically generalized media*. The function of the media is to enable successful communication by enabling the

¹⁷⁴ Ego might or might not want to express himself. And if he does, he is free with regard to the contents of his utterance. Alter might or might not conceive Ego's behavior as an offer of communication. And if he does, why should he accept the information Ego selected?

¹⁷⁵ W.L. Schneider, *Objektives verstehen - Rekonstruktion eines Paradigmas: Gadamer, Popper, Toulmin, Luhmann*, Opladen 1991, pp.190-191.

transfer of selected information (i.e. reduced complexity) and by motivating the recipient to accept the information, thus ensuring the connection of selections even in highly contingent situations. To put it differently: symbolically generalized media are semantic provisions enabling successful communication despite its intrinsic improbability.¹⁷⁶

Luhmann distinguishes the following media of communication: power, love, art, religion, money and truth. These media cover all primary social domains and are the basis of their differentiation in modern society. Taxes are paid because the state has power to enforce it. A medium combines selection and motivation thus enabling that Alter uses Ego's selection as a premise for connecting communication. Symbolically generalized media provides for a generalization of meaning-orientations thus enabling, relatively independent from situation and communication-partner, the maintenance of identical meaning.¹⁷⁷

The distance between Ego and Alter can be bridged through the combination of identity and not-identity.¹⁷⁸ This proceeds via symbols that simplify complex situations of interaction. For example: the symbol of 'property' is 'money'. Money is a generally accepted means of payment, bridging the distance between property and non-property. Originally, the 'hardware' of property used to be gold but is, and without this being problematic, symbolized by paper or plastic money or virtual money. Every medium is in fact a social lubricant avoiding renewed gaining and assessment of information in every interaction. Since successful communication is a basic requirement for the building of social systems and thus for enabling social order, the media are within the architecture of Luhmann's theory of paramount importance.¹⁷⁹

2.33 *Functional Differentiation*

The theory of functional differentiation describes the process of specialization and autonomization of communicative processes concerning primary social domains like politics, economy, law and so on. The result of the process of functional differentiation is a society differentiated into autonomous, self-referential subsystems; each specialized in the fulfillment of one specific social function.¹⁸⁰ This functional specialization is brought to a point at which the fulfillment of one

¹⁷⁶ N. Luhmann, *Liebe als Passion – Zur Codierung von Intimität*, Frankfurt am Main 1982, p.21.

¹⁷⁷ N.Luhmann, *Macht*, Stuttgart 1975, p.31.

¹⁷⁸ *Ibid*, p.177.

¹⁷⁹ N. Luhmann (1975), *Soziologische Aufklärung 2, op. cit.*, p.2.

¹⁸⁰ N. Luhmann, *Die Wissenschaft der Gesellschaft*, Frankfurt am Main 1990, p.479.

social function excludes all others: the legal system cannot replace the scientific system, the political system cannot deal with the religious function, and so on.

All these functional subsystems operate, so to say, at the same level of importance within society and build each other's environment. As a consequence of their specialization, subsystems are to a certain extent dependent on each other: each functional subsystem depends for the fulfillment of its own function on the performances of the other functional subsystems. For instance, the political system can only operate adequate if the legal system provides for legal back-up of the political decisions; the economy cannot perform without the legal regulation of the market, which is an output of the legal system; the legal system cannot do without the performance of the educational system and so on. But with regard to their specialization, subsystems operate autonomously.

The autonomy of the functional subsystems also brings along a structural risk in modern society, a risk inherent in specialization: vulnerability and dependency of functional subsystems. Functional autonomy entails an increased dependency in relation to the societal environment. Each functional subsystem depends for the fulfillment of its own function on the performances of the other functional subsystems.

It can be said that functional inequality, on the one hand, and equality concerning the importance as regards society, on the other, go together in the concept of functional differentiation. As far as the functions are concerned, each subsystem accounts for its own function and does so in an exclusive way. Each subsystem is however equally important to society: politics cannot be substituted for science or economics, religion or morality cannot perform the legal function and so on. This is to say that functional differentiation refrains from a particular and/or strict ranking amongst subsystems. Within society, political decisions do not contribute more, but also not less, to the preservation of the societal system than legal norms do. There is no hierarchy of functions but a heterarchy: not one system has a privileged, dominant position, but every subsystem has primacy (*Universalkompetenz*) on behalf of the subsystem's function. To the educational system, the function of education is far more important than all other functions. The legal system is primarily interested in the distinction between legal and illegal. So, as far as there is a hierarchy, it is only from the perspective of the functional system itself, concerning only its own function.¹⁸¹

¹⁸¹ *Ibid.*, p.28.

2.4. Functional Subsystems

2.4.1 Coding

We have seen that the operational closure of the societal system is based on the distinction between communications and operations of a non-communicative nature. Modern society has evolved towards an increasing differentiation and specialization of communications, which are characteristic of specific subdomains of society, such as art, religion, politics, science, law and so on. Such a separation of communicative processes or the differentiation of subsystems only occurs under certain circumstances. The most important requirement is the possibility to denote precisely to which subdomain certain communicative processes belong: is the event a political decision or a legal judgment, is it an act of love or the wrath of God?

We have seen before that the demarcation of one system towards another, and towards its environment in a broader sense, has to be brought about on the basis of operational closure. Operational closure 'takes care' of closing a system and makes it recognizable as such: no border, no unity, and hence no point of recognition. It raises the question how this operational closure is brought about. How is a legal communication to be distinguished from a political one and in such a way that all legal communications are linked to each other and discerned from all other communications?

Within society, the operational closure of subsystems has to meet different requirements than the closure of society. It does not suffice to distinguish between the communicative and the non-communicative. At the level of the societal subsystems, it must also be possible to differentiate with regard to the material contents of communicative processes: for example, legal communications must produce and reproduce legal communications but scientific communications must be excluded from the legal system. The differentiation of function-specific communication requires a device, a principle or mechanism that somehow 'channels' similar communications. This takes place through coding and all functional subsystems share this characteristic.¹⁸²

¹⁸² N. Luhmann, *Kann die moderne Gesellschaft sich auf ökologische Gefährdungen einstellen?*, Opladen, 1985, p.24.

Such a code consists of, in Luhmann's approach, a strict binary scheme. A code contains a positive and a correlated negative value, related to a specific societal function. For instance, the legal system is coded by legal/illegal, the political coding is government/opposition, the scientific coding is composed of the values true/untrue. For the legal system, more specifically, this entails that the legal system gains its orientation through the question: is this, or another, event to be qualified as legal or illegal? An event is legal if and when it is in accordance with the norms of the system. The negative value applies in case of non-compliance with legal norms.¹⁸³

The basic operations of the law differentiate themselves as legal communications from other communications via their orientation towards the difference legal/illegal. Codes are distinctions used by the system to observe its own operations: the code determines the unity of the system. Codes enable the system to recognize which operation contributes to its reproduction and which event does not and is, as a consequence, not a part of the system. It is therefore not a function *per se* that triggers functional differentiation but a code that sees to the fulfillment of a function that does so. Functional subsystems do not differentiate through the orientation towards unity (for example the unity of function) but direct themselves towards a difference, a negative and a positive code-value.

A second condition for societal differentiation based on a code is a sufficient distance between semantic differences, that is: codes, and 'daily' or commonplace communications, especially morals. The duality of the code is strict and excludes third values such as, in case of the legal code, moral justice or political opportunity. The presumption underlying this condition is that a system differentiated on the basis of a code, has control over the choice between the code-values and is not guided by a moral preference for the positive value: *'The functional subsystems are coded at a level of high amorality.'*¹⁸⁴ This higher amorality entails that, concerning the legal system, the values legal/illegal do not refer to justice or injustice. At the level of the code, the legal system is not concerned with the determination of justice or injustice but with the question if 'something' is legal or illegal, with the system's constituting question whether 'something' belongs to the systems or not. Of course, an 'outsider' might be very well concerned with the matter of justice – and mostly will be so. But it is not the question that differentiates a legal system.

¹⁸³ N. Luhmann (1993), *Das Recht der Gesellschaft*, *op. cit.* p.178.

¹⁸⁴ Original text: *'Die Funktionssysteme codieren sich auf einer Ebene höherer Amoralität'*, in: N. Luhmann (1987), *Soziologische Aufklärung 4*, *op. cit.*, p.25.

It must be observed that the code is a purely technical tool, it is a rule of duplication: everything, every event can appear as legal or illegal, true or untrue, belonging to the government or to the opposition. As such, codes offer schemes for observation wherein everything that is observed, appears as contingent, *als auch anders möglich*.¹⁸⁵ The positive value does not express a preference or a directive: the legal system does, on the level of its operations, not care about justice or injustice but has to determine what is legal or illegal according to the law. The 'amoralization' of the legal code entails that the determination 'illegal' does not automatically equal a moral judgment. One can engage in a legal case risking its loss but without having then to face the loss of respect/esteem as a person. Even though the code-values are of a technical nature and of formal equivalence, the positive value provides for the (better) connection between communications, it represents the *Anschlußfähigkeit*¹⁸⁶ or conditions of connectivity in the system, whereas the negative value serves as a reflection-value. Who resides in the government obviously has the better political opportunities. But in itself, the code gives no program or directives for correct behavior:-

Truth itself cannot be 'right'. The values of the code only open up a contingency space and secure that all operations of the system can be subjected to the opposite assessment, but do not instruct how to decide. They secure the differentiation of the system and its independence regarding natural premises, but they do not steer the system in the sense of directing and fixating right operations.¹⁸⁷

Furthermore, there is an intrinsic relation between code and function (which is to be discussed later on). A functional subsystem claims universal validity both for its code and the fulfillment of its function. For example, the code legal/illegal is strictly coupled with the legal function (stabilization of normative expectations). The legal function is not a regulative idea. Nor are the values of the code directives for just behavior. The legal function is not a goal in itself, the code does not provide for rules to perform systems operations. On the other hand, everything in

¹⁸⁵ N. Luhmann (1984), *Soziale Systeme*, *op. cit.*, p.47.

¹⁸⁶ In N. Luhmann (1995), *Social Systems*, *op. cit.*, p.xxvii (translated as 'conditions of connectivity').

¹⁸⁷ Original text: 'Die Wahrheit selbst kann nicht 'richtig sein'. Die Code-Werte öffnen nur ein Kontingenzraum und stellen sicher, dass alle Operationen des Systems auch der entgegengesetzten Wertung unterliegen könnten; aber sie geben nicht an, wie zu entscheiden ist. Sie stellen nur die Ausdifferenzierung des Systems und seine Unabhängigkeit von naturalen Prämissen sicher; aber steuern das System nicht im Sinne des Dirigierens und Festlegens richtiger Operationen.' N. Luhmann (1990), *Die Wissenschaft der Gesellschaft*, *op. cit.*, p.198.

the environment can become relevant to a functional subsystem under the aspect of its code, serving as a rule of duplication (*Duplikationsregel*). Every event in society can become relevant to, for example, the legal system but only in terms of legal/illegal; or to the scientific system in terms of true/untrue, and so on. Furthermore, codes are rules of duplication. Events can become relevant in either the positive value or the negative value: nothing can be legal and illegal at the same time, both true and untrue. A code is in its effect totalizing, because the special quality of the code is located in its capability to provide any random item in its realm with a complementary item.¹⁸⁸

To the political system, operating under the distinction government/opposition, applies that everything that occurs, everything that can be spoken about or referred to, be it drugs, ecology, education and so on, occurs as something of political importance or meaning. On the risk of belaboring the obvious, the same events can also become relevant to the legal system, from the perspective legal/illegal; or gain scientific relevance under true/untrue, or enter the economic realm with pay/not to pay. Since each functional subsystem is bound by its own code, there is however no such thing as an overarching observation and description of the same event. Each subsystem employs its own perspective and thus constructs its own reality. Between its two values, the code constructs a binary world. Within this world, there is nothing else but the events observable within the range of that specific distinction. Yet, everything can be observed by means of that specific distinction. Codes combine universality ('everything') and specificity (only these two, a positive and a negative, values).

It may seem that the concept of coding is little more than a detour to a trivial matter: the political system is occupied with political matters, the economy with economical questions and so on. The core of the matter pertains to the fact that coding is the basis of the differentiation of functional subsystems: a system can close its boundaries and operate autonomously only on behalf of the code. Since the code is the device of operational closure, the code also pertains to the unity of functional subsystems. A functional subsystem cannot 'transcend' its code and, indeed, cannot question its own application of the code. As regards its code, a functional subsystem operates 'blindly' without reflecting its use of the code. This is an operational or technical necessity: a system cannot question its own unity. The legal system cannot reflect on the question if the application of the distinction legal/illegal is in itself legal or illegal, since this would cause a paradox effec-

¹⁸⁸ N. Luhmann, *Soziologische Aufklärung 3*, Opladen 1981, p.268.

tuating all operations to cease. In order to make this latent paradox invisible or to 'de-paradoxize', subsystems operate tautologically at the level of its operations: the system is what it is, as the world is, what the system observes it to be.¹⁸⁹

2.4.2 *Program*

As coding closes functional subsystems, the code in itself is not sufficient to bring about differentiation. The legal code, for example, does not provide for criteria to enable a choice between legal or illegal. Yet it is a system-internal decision whether an event is attributed to the negative or to the positive value. Therefore, the code has to be completed with a set of rules and criteria that enables the system's decision concerning the attribution of events to the proper code values. Differentiation, to put it differently, is only possible if the system is capable of programming its choices with regard to the code values. The scientific system, for example, uses methods and theories; the programming of the political system consists of its party programs and positive law programs make up the legal system. Whereas the code is a constant, programs can be changed. Of course, there should always be a relation between a program and a code. A treaty of law cannot be related to truth/untruth – at least not in the technical way we are dealing with at this point. In one way or another, a change in the systems programming should reproduce the code of that system or else it could not be recognized as a change of programming of the system.¹⁹⁰

Whereas the code closes the system at the level of its operations, it is by means of programming that a system opens itself to the environment. By its programs, external data are allowed to get 'into' the system. Values excluded by the strict binarity (and amorality) of the code can be taken into account at the level of the system's programs. The code legal/illegal excludes considerations concerning justice but justice enters the system via its programs, positive law. The code government/opposition consigns political opportunity to the party programs, the public opinion is excluded at the level of the code but enters the political system via its programs and so on. If functional subsystems are to be understood as self-referential systems wherein operational closure must go hand in hand with informational openness then it is clear that coding and programming are complementary tools: the code brings about the closure of the system and the programs

¹⁸⁹ N. Luhmann (1986), *Ökologische Kommunikation*, *op. cit.*, p.77. At a 'higher' level than the operational level, a subsystem might be well aware of this problem and thematize such by means of a reflection theory.

¹⁹⁰ N. Luhmann, *Die soziologische Beobachtung des Rechts*, Frankfurt am Main 1986, p.40.

open it up towards environmental data. In case of the legal system for example, we say that it is normatively closed but cognitively open. A functional subsystem cannot be self-referentially reproduced by coding or programming only but exclusively by the combination of the two.

The function of the program, to 'riddle' the self-referential closure with external data and thus opening up the system towards its environment, requires the possibility of changing programs in terms of adaptation in the course of time, as opposed to the identity-constituting code.¹⁹¹ The capability of functional subsystems to learn and to adapt is located in their programming. Luhmann holds that the code defines the unity of the system: the code enables the recognition of operations that contribute to the reproduction of the system and of operations that do not contribute. Programs, on the other hand, are structures that can but need not be used in operations. Programs can be altered by operations of the system but the code is invariable.¹⁹²

2.4.3 *Function and Performance*

The findings above show that modern society, at the level of the societal system, is differentiated into functional subsystems. A functional subsystem gains its unity from its coding, not from its function and it is as coded communicative processes that a functional subsystem fulfils its function. It was also indicated above that each of these functional subsystems perform one, and only one, function on behalf of the societal system. The question for the function of a subsystem is the question: which problem is solved with the differentiation of this specific cluster (*Zusammenhang*) of communicative processes? For example, which societal problem is solved with the differentiation of a legal system?

In Luhmann's observation of the legal system, its *primary* function is not, as one might expect, the avoidance of conflicts. The law '*merely seeks to avoid the violent*

¹⁹¹ Of course, codes are subject to changes too but these are far less frequent. For changes in the political code see for example: N. Luhmann, *Die Politik der Gesellschaft*, (posthumous, published by A. Kieserling), Frankfurt am Main 2000.

¹⁹² Paraphrase: '[Aber] der Code definiert die Einheit des Systems, er macht erkennbar, welche Operationen das System reproduzieren und welche nicht. Programme sind dagegen Strukturen, die in den Operationen mal verwendet, mal nicht verwendet werden. Programme können auch, anders als der Code, durch Operationen des Systems geändert werden. Man kann die Beziehung Code|Programm daher mit den Begriffen konstant|variabel formulieren, kann daraus aber nicht auf ein Rangverhältnis schließen [...]'. in: N. Luhmann (1990) *Die Wissenschaft der Gesellschaft*, op. cit., p.401.

*resolution of conflicts and to make suitable forms of communication available for every conflict.*¹⁹³ The legal system enables, so to say, the trial of conflicts. It generates laws as an instrument to settle current and future disputes. In fact, the legal system deals with expectations facing disappointment. The function of the law is to protect against a future that does not turn out as expected.¹⁹⁴ The law produces, to formulate it differently, expectations that can be maintained legally even if they are factually disappointed and rejected. The law has a time-binding character, which is to say that, the legal system here and now puts down how to decide with regard to future conflicts.¹⁹⁵

Of course, not every random expectation gains this 'legal status'. From the vast amount of communicated expectations only those that are supposed to be sufficiently general are selected. So according to Luhmann, the legal function is to provide society with expectations of conduct, which are to be maintained, even if factual events occur and frustrate those expectations. We have seen before that the core of social structures is constituted by expectations of expectations and that there are two *modi* of expectations: normative and cognitive expectations. Normative expectations hold contra-factual, in and despite situations of (probable) disappointment. It is precisely to this type of expectations the legal function pertains: the legal system stabilizes norms as an indispensable mode of expectations.

The above findings do not entail that the law 'absorbs' all norms. A considerable amount of norms are 'left' to other functional subsystems, such as religion or morality. Luhmann: '*Das Rechtssystem kann allenfalls einen spezifischen Gebrauch von Normativität für sich in Anspruch nehmen*'.¹⁹⁶ This specific use of normativity could be understood as the law constituting itself as second order normativity: legal norms can only be brought about by legal norms. Legislation is tied to previous legislation, judicial decisions root in law in force, and so on. The legal system, in short, processes *Rechtsgeltung*. If the legal system is to be understood as an autopoietic functional subsystem than it applies that only the legal system itself is capable of producing and reproducing legal norms. Only the law decides to what the law holds as law: '*Das rechtliche Gesolltsein symbolisiert die Einheit und Geschlossenheit des Systems. Es gibt kein Recht außerhalb des Rechts*'.¹⁹⁷ This tautol-

¹⁹³ N. Luhmann (1995), *Social Systems*, *op. cit.*, p.375.

¹⁹⁴ N. Luhmann (1988), 'Positivität als Selbstbestimmtheit des Rechts', *Rechtstheorie* 19, p.25.

¹⁹⁵ N. Luhmann (1993), *Das Recht der Gesellschaft*, *op. cit.*, p.129.

¹⁹⁶ N. Luhmann (1983) 'Die Einheit des Rechtssystems', *Rechtstheorie* 14, p.147.

¹⁹⁷ N. Luhmann (1986) *Die soziologische Beobachtung des Rechts*, *op. cit.*, p.20.

ogy is denoted as the positivity of the law. Luhmann shows that the positivity of the law (i.e. the circular construction of the law) is correlated to the differentiation of the law as a functional subsystem, self-referentially closed at the operational level.

A function contributes to the solution of a problem at the level of the societal system. This is however only one system's reference. The second system's reference to be considered is the one between functional subsystems. Functional subsystems do not operate autarkic but self-referential and autonomous. And however independent in the fulfillment of a specific function, subsystems remain mutually dependent with regard to the conditions of their functioning. The simultaneous occurrence of independency and dependency is reflected in the combination of function and performance.

Performance pertains to the second system's reference and qualifies the relationship (of dependency) between functional subsystems: law, politics, religion, education, etc. provide for performances on behalf of each other. Whereas each subsystem fulfils one function, several performances can be provided for. For example, the legal function is the stabilization of normative expectations but legal performances can be: securing possibilities of capital building, determining the constitutional boundaries of politics, avoidance of conflicts, regulating compulsory attendance at school and so on. Performances are to be described in terms of input/output-patterns. The output should be at the disposal of the other subsystems but this does not imply an interchange of systemic operations: scientific operations cannot connect to payments, political decisions not to legal communications. In short, performances are to be observed as actions enabling, in one way or another, other subsystems to operate. As regards performances, organizations play an important role. In order to enable the analysis of the relation between functional subsystems and organizations we first turn to the concept of organization.

2.5. Organization

2.5.1 *Decisions and Expectations*

If we categorize 'organization' as a social system, several properties come forward. Organization is a specific mode of systems building, 'a special kind of differ-

entiation and preservation of boundaries'.¹⁹⁸ Within the presented framework, organizations are self-referential systems implying that social events – of a communicative quality – are connected in a selective way. At first sight, and within the context of Luhmann's social systems theory, it seems a trivial matter that organizations consist of communications since it has been stated before that organizations can only exist within society. And since society contains all (possible) communications, the elements of organizations must be communications. In itself this is correct but not complete. The communications of organizations distinguish themselves through a certain quality from the communications of other social systems: they are 'decisions'. In Luhmann's description, 'decisions' are not 'made' and then these decisions need to be communicated: a decision is not a psychical process, but a communication and thus a social event.

By qualifying the elements of organizations as decisions, it has still to be elucidated how decisions differ from other communications.¹⁹⁹ What qualifies a communication as a decision? Notably, whatever acts as an element in the system, is determined by the system. Decisions are not 'natural building bricks', extracted from the environment of the organization.²⁰⁰ Consequently, decisions are products or artifacts of the system itself. In answering the question what qualifies a communication as a decision, we have to take into account that the system decides what acts as a systemic decision: a decision is everything the organization qualifies as such.²⁰¹

Generally, the essence of a decision is said to be located in the choice between several options. According to Luhmann, it is not the choice *per se* that constitutes a decision. The choice between options is only a part of a decision. The total, or in

¹⁹⁸ N. Luhmann (1990), *Die Wissenschaft der Gesellschaft*, *op. cit.*, p.673. And also: 'Eine bestimmte Form des Umgangs mit doppelter Kontingenz. Jeder kann immer auch anders handeln und mag den Wünschen und Erwartungen entsprechen oder auch nicht – aber nicht als Mitglied einer Organisation. Hier hat er sich durch Eintritt gebunden und läuft Gefahr, die Mitgliedschaft zu verlieren, wenn er sich hartnäckig querlegt', in: N. Luhmann, *Die Gesellschaft der Gesellschaft*, Frankfurt am Main 1997, p.829.

¹⁹⁹ After his 'autopoietic turn', Luhmann alternately refers to decisions as communications or actions. This is due to the complementary relation between communication and action. Communication and action cannot be separated and the connection between these two components must be understood in terms of reduction of the system's own complexity. See Chapter 1 (*supra*). And see: N. Luhmann (1984), *Soziale Systeme*, *op. cit.*, Chapter 4 (concerning 'communication/action').

²⁰⁰ Of course, this is not to say that there are no decisions to be found outside organizations.

²⁰¹ Cf.: 'Eine Entscheidung ist also alles, was die Organisation als Entscheidung ansieht', in: N. Luhmann (1988) 'Organisation', *op. cit.*, p.168.

system theoretical terms, the unity of a decision exists in the relation between the concerned alternatives, this means: the chosen alternative against the background of the other not-chosen alternatives.²⁰² In this case, every other possible decision is to be considered as an alternative. To put it somewhat differently, the fact that one possibility is actualized does not rule out the other alternatives in their quality of alternative. In fact, Luhmann describes this as a transformation of contingency: before the decision is made, a selection out of several options is possible. It concerns a contingent selection – another choice is possible. After the decision is made, this becomes fixed contingency: it could have been another decision. It is this effect of a decision, the transformation of contingency, which constitutes the unity of a decision.²⁰³ A decision must present itself as a unity even though it is possible to ‘deconstruct’ this unity in sub decisions. This requirement follows from the mode of self-referential reproduction, for only by presenting itself as a unity, a decision can act as a premise for the following decision and thus bringing about the required self-selectivity.

A decision does not only require a choice between alternatives but also with regard to its connection with other decisions. In this sense, decisions are double selective. The first selection concerning the alternatives evokes a second selection. From a somewhat different perspective, decisions show a ‘time-binding’ quality: a decision relates to previous decisions (as a consequence) and to following decisions (as a premise). Decisions are not isolated phenomena, they do not occur in a ‘decision-free’ space. Without other decisions, it is not possible to decide. There cannot be a random succession; the elements must fit into a recursive network of the organization. The problem is though that decisions, as communications with a certain quality, are event-like, volatile elements. Decisions disappear in their appearance. They are so to say ‘hard to catch’, marking a short discontinuity in time and ‘*can never gain the quality of a structure*’.²⁰⁴ The question is then how an organization determines whether a decision ‘fits’ into the recursive network. Or to put it differently: how does a decision gain systemic identity? To this end, we must again turn to expectations. Decisions can be observed as such if they react to expectations. Expectations bridge the gap between volatile, event-like decisions and maintain their identity. Thus the orientation towards expectations enables a relative durability. As such decisions and expectations are complementary realities, one being meaningless without the other:-

²⁰² N. Luhmann, *Organisation und Entscheidung*, Opladen 1987, p.10.

²⁰³ N. Luhmann (1984), *Soziale Systeme*, op. cit., p.402.

²⁰⁴ N. Luhmann, *Die Wirtschaft der Gesellschaft*, Opladen 1988, p.402.

Only in this function, enabling the reproduction of elements out of elements, the expectation itself gains reality. And the other way around, without referring to expectations, decisions would not come into existence. Without related expectations, decisions could not maintain/determine their identity in the difference of before and after.²⁰⁵

It is by means of expectations that communication in organizations can be identified as decisions. With this, the final distinctive feature of 'decision' is given. In short: a communication is a decision if it is directed towards an expectation and can be identified by means of that expectation. Actually, it concerns the attribution of a certain event to an expectation. There has to be an intrinsic relation between an event and an expectation. One could mention that all communication is directed towards expectations and that this does not evoke the need to decide *per se*. We will only speak of a decision if the communication itself is expected, implying the possibility of acting in conformity with, or deviant towards, the expectation.²⁰⁶

Returning to the general characteristics of self-referentiality of social systems, it is now possible to define organizations as '*soziale Systeme [...] die aus Entscheidungen und nur aus Entscheidungen bestehen, und zwar nur aus Entscheidungen, die sie selbst anfertigen*'.²⁰⁷ The circularity of this definition may be somewhat irritating but it is important to keep in mind that its recursivity pertains to the form of the operations and not to the content. Self-referential reproduction is not the repetition of earlier decisions – this would be a recursion of both form and content, reducing at least the informative value of the decision.

2.5.2 *Membership and Formality*

If an organization differentiates constellations of decisions within society, there must be a 'rule of recognition', enabling to determine which decisions are systemic elements of the organization and simultaneously: to which specific organization. To this end, Luhmann introduces the rule of 'membership'. Evidently, by means of the membership rule, the organization discerns who is and who is not a member of that particular organization.²⁰⁸ The rule of membership is the first and most fundamental decision of the organization. It is in fact this particular decision

²⁰⁵ *Ibid.*, p.284.

²⁰⁶ *Ibid.* p.279. Luhmann refers to this as a kind of meta-contingency. Not only communication is contingent but also the concerned expectation.

²⁰⁷ N. Luhmann (1988) 'Organisation', *op. cit.*, p.166.

²⁰⁸ *Ibid.*, p.171.

that is constitutive with regard to the formation of a social system as an organization. An organization can only differentiate if there is a criterion to select personnel and to define specific positions.²⁰⁹

By means of the rule of membership, that is: not membership as such but the decisions concerning membership, organizations determine their boundaries towards their societal environment, based on the distinction between members and non-members. But the membership-rule does not only demarcate the border between organization and environment but also functions as a rule of attribution: these decisions are systemic elements, those are not. It is this distinction that enables organizations to acknowledge (and recognize) the communications of their members – and only those – as systems specific elements. That is: as far as the members communicate within the framework of their membership.

Organizations can use this distinction in order to condition behavior of members partitioned from behavior of non-members. Consequently, organizations enable – through their specific conditioning – rather improbable behavior but highly specialized behavior, not directly supporting individual interests.²¹⁰ It is likely that an organization is not willing to accept anyone as a member. Therefore, certain requirements are attached to membership, which provide a ground for decisions about acceptance or resignation. The decision about membership also entails a decision about the acknowledgement of the requirements concerning membership that is, the decision to accept the decision's premises, including legitimate changes of such premises. Membership then is to be understood as:-

A distinguished set of expectations concerning conduct, which can become subject to conditions. Through this, the member acquires a special status that can be granted and withdrawn or be given depending whether the member shares or does not share certain expectations.²¹¹

So, joining an organization is an act, a decision that marks the crossing of a border or a change of status: from non-member to member. It entails the explicit

²⁰⁹ Cf.: 'Sie [membership, LF] wird durch Entscheidung (und hier typisch: eine Kombination von Selbstselektion und Fremdelektion) erworben und kann durch Entscheidung (hier entweder Austritt oder Entlassung) verloren gehen. [...] Als Systemform markiert Mitgliedschaft die 'Innenseite' der Form, also das, was im System primär interessiert und in seinen Konsequenzen zu beachten ist.' N. Luhmann (1997), *Die Gesellschaft der Gesellschaft*, op. cit., p.829.

²¹⁰ N. Luhmann, *Soziologische Aufklärung 4*, Opladen 1987, p.9.

²¹¹ N. Luhmann, *Funktion und Folgen formaler Organisation*, Berlin 1964, p.35. Also: 'Die Lösung des Problems der doppelten Kontingenz liegt darin, daß die Mitgliedschaft konditioniert werden kann, und dies nicht nur mit bezug auf den Eintrittsakt, sondern als Bedingung der Aufrechterhaltung des Status', in: N. Luhmann (1997), *Die Gesellschaft der Gesellschaft*, op. cit., p.829.

acknowledgment of the membership rules and the necessity to act in conformity with the expectations related to membership. The submission to the expectations of an organization must be compensated one way or another, for membership has to be more attractive than not being a member. An organization needs to motivate its members to act in conformity with systemic expectations and does so, in most cases, by means of money.²¹² From the moment acknowledgement of the systemic expectations and acting in accordance with those expectations becomes a duty of members, organization is to be understood as a formal organization. Furthermore, by means of formalization of the organization, the existence of the organization becomes independent from its individual members.

2.6. Analysis: The Relation between Functional Subsystems and Organizations

The foregoing findings show that *modern* society is characterized by functional differentiation. Furthermore, it is not out of the ordinary to record that organizations play an important role in modern society. This raises the question how to understand the relation between functional differentiation and organizations. Functional differentiation, as described earlier, entails the differentiation of society into functional subsystems. Therefore, the question could refer to two aspects. The first aspect pertains to the evolutionary aspect: to what degree have organizations contributed to the process of functional differentiation? The second aspect concerns the relation between two types of social systems *in* a functionally differentiated society: functional subsystems and organizations. The first aspect requires a socio- historical approach and is outside the scope of this analysis. We will turn to the second aspect and assume that the, as yet undetermined, relationship between organizations and functional subsystems results from social evolution.

Social evolution, as mentioned before, is perceived as the increasing differentiation of society. The process of societal differentiation leads to increasing specialisation and autonomy of social systems, resulting in a functionally differentiated society. At this stage of social evolution, social systems are operationally closed and, at the same time, to a high degree dependent on the performances of the environment. With Willke, we could speak of a simultaneous increase of inde-

²¹² N. Luhmann (1997), *Die Gesellschaft der Gesellschaft*, *op. cit.*, p.830.

dependencies and interdependencies.²¹³ This state of affairs also has its impact on the relation between organizations and functional subsystems. This relation is a recurring issue in (systems theoretical) literature.²¹⁴ The matter at stake in this section is whether Luhmann's theory of society can offer concepts to frame the relation between these two types of social systems.

In a first step, the relation between organizations and functional subsystems can be analyzed by taking a detour via Luhmann's comparison of 'organization' and 'medium'. In Luhmann's view, both medium and organization are two different forms of the constitution of special, exigent expectations, of the transformation of improbability into probability.²¹⁵

As discussed before, (some) functional subsystems dispose of a medium. More in particular, media here refers to the symbolically generalized media. These are mechanisms to increase the possibility of successful communication. Media provide for a generalization of orientations enabling to maintain identical meaning, relatively independent from the situation and partner in communication. This is established by means of symbols simplifying complex situations of interaction. A classic example is 'property', using 'money' as a symbol. Money maintains its meaning in different situations and forever changing users. Since the same information does not have to be acquired and evaluated over and over again in always changing situations, we could say that money (as a medium) 'lubricates' communication by reducing complexity. In a similar way, organizations also deal with the problem of a communication offer.

Through the membership rule, organizations are able to condition the behavior of their members: provided that membership of a particular organization is sufficiently attractive, (would be) members submit themselves to the 'rules' of that organization. Through the conditioning of the behavior of its members, organizations guarantee the success of highly improbable behavior, serving the organization and not the individual interest of its members.²¹⁶ Here too, it also concerns the reduction of complexity – in this case by means of the organization. Members have to acknowledge and to act in accordance with the expectations of the or-

²¹³ H. Willke (1989), *Systemtheorie entwickelter Gesellschaften*, op. cit., p.48 ff; p.115 ff.

²¹⁴ R.N. Stern & S.R. Barley (1996) 'Organizations and social systems: organizations theory's neglected mandate', *Administrative Science Quarterly* 41, p.151.

²¹⁵ *Ibid.*

²¹⁶ N. Luhmann (1987), *Soziologische Aufklärung 4*, op. cit., p.41.

ganization, which entails substantial limitations of possibilities and, since possibilities always evoke the necessity of selection, reduction of social complexity.

On an abstract level, media and organizations are functional equivalents as regards the 'lubrication' of, and are as such mechanisms enabling, communication. Or on a higher level of abstraction: as regards the reduction of complexity and absorption of uncertainty. All functional subsystems depend on the combined efforts of medium and organization. In order to use both, they should be clearly distinguished from each other, that is: perform their function in different ways. Media connect operations within a system in a more loose way, providing a 'loosely coupling' of elements. Organizations, on the other hand, provide for a tighter connection: operations tie each other up in a more strict way than is brought about by media. Here, we speak of 'strict coupling'.²¹⁷

So, according to Luhmann, the most notable difference between medium and organization is the way their separate operations are connected. Symbolically generalized media are in fact sets of loosely coupled elements. This is to say that media consist of '*disconnected, mutual independent events*'.²¹⁸ A clear example is separate payments being operations of the medium money. Motives can change with every single payment: you can buy a rose, a car or make a telephone call but there is no necessary connection between these actions. The operations of organizations, on the other hand, are characterized by a far more rigid coupling. Decisions in formal organizations have to be closely related to each other: each decision has to act as a premise to a next decision and is rooted in a previous one. Therefore, organizations limit the scope of possibilities far more in comparison to symbolically generalized media. According to Luhmann, the reason for their difference is simple. Each functional subsystem 'has' a lot of organizations but only one medium. If a medium would be integrated in the same way as an organization, the functional subsystem would be reduced to one organization. However, the fact remains that both organizations and symbolically generalized media are functional equivalents with regard to the transformation of improbability into probability.

The above sketches what, on a very abstract level, organizations contribute to society, what organizations 'do' in systems theoretical terms. This allows for a more detailed analysis of the relation between organizations and functional sub-

²¹⁷ *Ibid.*, p.42

²¹⁸ N. Luhmann (1988), *Die Wirtschaft der Gesellschaft*, *op. cit.*, p.203

systems. Organizations 'belong' to functional subsystems but are not the same – organizations are not functional subsystems, their boundaries do not coincide nor does the unity of a functional subsystem, in Luhmann's view, depend upon its organizations: for example, the legal system cannot be equated with its courts.²¹⁹

The distinction between functional subsystems and organizations came forward after Luhmann started applying the theory of social systems on society and is not explicitly to be found in his early work on organizations.²²⁰ In his more recent work *Die Gesellschaft der Gesellschaft*, functional subsystems are clearly depicted as the wider context, the encompassing systems as regards organizations. For example, Luhmann puts forward that education is not limited to schools and universities nor does medical treatment stop at the threshold of hospitals.²²¹ On the other hand, there is no point in denying that the above mentioned organizations, 'belong' in some way to a specific functional subsystem: one might mistake the nation-state for the political system but would never consider it to be a part of science. These organizations are specialized organizations, that is: organizations performing in reference to one specific social function of a functional subsystem.²²²

Such specialized organizations support the proper functional subsystem. To what does this support pertain? First, we can cast the organizational support in terms of a contribution to the social function. The concept of function pertains to a specific systems reference. In this case, function articulates the reference of a functional subsystem to the societal system. We have seen before that each functional subsystem fulfils one function on behalf of society. Therefore, fulfillment of a function is always *Vollzug*, realization of society. On the most abstract level, this always pertains to the reduction of complexity (and bringing about another kind of complexity: organized complexity) and the control of contingency in order to enable the reproduction of society. All social functions contribute to this, one way or another. The legal system, for example, stabilizes normative expectations thus reducing complexity (the same stabilized normative expectation does not need to be articulated over and over again but is offered by the legal system). It controls con-

²¹⁹ N. Luhmann (1997), *Die Gesellschaft der Gesellschaft*, op. cit., p.841.

²²⁰ Cf. N. Luhmann (1964), *Funktionen und Folgen formaler Organisation*, op. cit.

²²¹ N. Luhmann (1997), *Die Gesellschaft der Gesellschaft*, op. cit., p.841.

²²² Cf.: 'Unbestreitbar bilden sich jedoch, wenn nicht die meisten, so doch die wichtigsten und größten Organisationen innerhalb der Funktionssystemen und übernehmen damit deren Funktionsprimat. In diesem Sinne kann man Wirtschaftsorganisationen, Staatsorganisationen und sonstige politische Organisationen, Schulsysteme, Wissenschaftsorganisationen, Organisationen der Gesetzgebung und der Rechtsprechung unterscheiden', in: N. Luhmann (1997), *Die Gesellschaft der Gesellschaft*, op. cit., p.840.

tingency since, to a certain extent, one knows (or should know) what to expect in certain situations. As far as organizations operate on behalf of a functional subsystem and consequently under the aspect of the proper code, they contribute via the functional subsystem to the reproduction of society. Notably, organizations and especially specialized organizations make such a contribution to the fulfillment of the social function but, as Luhmann states, in complex societies none of the primary social functions can be transferred to one organization system or gain unity by means of one organization.²²³ However, the fact remains that both organizations and symbolically generalized media are functional equivalents with regard to the transformation of improbability into probability.

Besides 'function', Luhmann distinguishes a second systems reference of functional subsystems that might shed some light upon further differentiation and specification of functions. This reference concerns the societal environment and is cast in the notion of 'performance'. Each functional subsystem provides several performances to other functional subsystems and receives performances from its environment. These performances can be observed in terms of input and output. The connection between organization and performance can be seen as follows. We have to take into account that functional subsystems, due to their self-referential, operational closure are **not capable of communicating** with their (societal) environment. All coded communications are operations of the system itself. But how do functional subsystems relate to their societal environment?

The introduction of self-referential closure has radicalized the distinction system/environment and excludes (that is: at the operational level) the possibility of direct causal relationships between the system and its environment. On the level of functional subsystems, Luhmann uses the concept of 'structural coupling' to describe their interrelation. Structural coupling entails the dependency of a system on its environment with regard to certain particularities: the system presumes and depends upon them and does so in a structural way.²²⁴ For example, the legal system 'depends' on the political system to back up its judicial decisions with power and, if necessary, with force. The point is that structural coupling channels and selects 'noise'. Consequently, structural coupling does not take place as communication - structural coupling can only cause irritations, surprises and noise in the system. These irritations and so on can become information on the score of the system's programs. Concerning its structural development the legal

²²³ N. Luhmann (1975), *Soziologische Aufklärung 2, op. cit.*, p.16.

²²⁴ N. Luhmann (1993), *Das Recht der Gesellschaft, op. cit.*, p.441.

system, for instance, is very sensitive to events within the political system, and almost exclusively to events within the political system. To put it differently, it is mainly in and through a political filter that the societal environment can influence legal programs. So, structural coupling enables the connection between functional subsystems in terms of the canalization of irritation but does not, in any sense, provide for communication between societal subsystems.

According to Luhmann, organizations are the only social systems capable of communicating internally achieved results to the outside, to their societal environment.²²⁵ Therefore, organizations might be considered as functional equivalents for structural coupling with regard to the connection between societal subsystems. This relationship is articulated in terms of performances. Functional subsystems provide for and receive performances through their organizations. If we take into account the operational closure, accomplished by the code and related to the function, the openness of functional subsystems (by means of their programs) is bound to be operationalized at the level of their organizations. For instance, the performances of the legal system seem to point in this direction. As 'possible' performances of the legal system, Luhmann suggests 'steering of behavior' and 'solving conflicts'.²²⁶ It is only by means of legal organizations that these performances can be provided: the solution of (legal) conflicts takes place in courts or in settlements arranged by members of the legal profession, the steering of behavior is a matter of applying and enforcing positive law. In both cases, it is clear that legal organizations make decisions on the score of the legal programs, i.e. positive law. It is however only as late as the publication of *Die Gesellschaft der Gesellschaft* that Luhmann acknowledges this relationship explicitly: *'In order to attribute the capability of external communication to functional subsystems [...], it is necessary to form organizations in functional subsystems [...]'*.²²⁷

Summarizing the above, it can be observed that organizations and functional subsystems interrelate in various ways. First, in a functionally differentiated society, organizations acknowledge the primacy of one social subsystem. These 'specialized' organizations receive criteria for their decisions from the concerning

²²⁵ N. Luhmann (1990), *Die Wissenschaft der Gesellschaft*, op. cit., p.672.

²²⁶ N. Luhmann (1993), *Das Recht der Gesellschaft*, op. cit., p.145 and p.157.

²²⁷ Original text: *'Um Funktionssysteme mit externer Kommunikationsfähigkeit auszustatten [...], müssen in den Funktionssystemen Organisationen gebildet werden [- sei es mit angemessenen Sprecherrollen, so wie die Arbeitgeber- und Arbeitnehmerverbände angeblich für 'die Wirtschaft' sprechen; sei es mit den Großzentren komplex verschachtelter Organisationseinheiten, den Regierungen, den internationalen Korporationen, der Militärführung]*, in: N. Luhmann (1997), *Die Gesellschaft der Gesellschaft*, op. cit., p.843.

functional subsystem, which also orders the nearby societal environment of organizations. We could say that, against the background of a functional subsystem, specialized organizations contribute to the realization or reproduction of society. Furthermore, functional subsystems have to provide for performances to each other. Taking into account that, due to their operational closure, functional subsystems cannot communicate with each other, specialized organizations have to be the loci for offering and receiving performances. In this way, organizations contribute to the preservation of a functionally differentiated society. The operational closure of functional subsystems entails autonomy concerning their social function. The specialization of functional subsystems implies however always an increased dependency on the societal environment, i.e. other functional subsystems. In order to maintain their autonomy and, at the same time, to articulate their dependency on the societal environment in terms of performances, functional subsystems 'use' specialized organizations. A last remark though: none of the connections discussed above implies a kind of hierarchical relationship between organizations and functional subsystems. According to Luhmann, organizations cannot be seen as subsystems of functional subsystems, nor of society. Organizations are a specific type of social systems and are located at the same *theoretical* level as society and interactions.²²⁸ Precisely this theoretical position of organizations is, in literature, perceived as problematic, since Luhmann's theory of society would lack a general model of the relationship formal organization-society.²²⁹ For now, the conclusion must be that Luhmann's theory of society seems to offer sufficient possibilities to analyze the relationship between organizations and functional subsystems in terms of the latter's dependency on performances from the societal environment and, on a higher level of abstraction, in terms of similar but distinct contributions to the transformation of improbability into probability. Whether this is also the case as regards the relation organization-society will be re-addressed in Chapter 4.

²²⁸ N. Luhmann (1984), *Soziale Systeme*, *op. cit.*, p.551.

²²⁹ See for example T. Schwinn (1993), 'Funktion und Gesellschaft – Konstante Probleme trotz Paradigmawechsel in der Systemtheorie Niklas Luhmanns', *Zeitschrift für Soziologie* 3; and T. Blom (1997), *Complexiteit en contingentie*, *op. cit*

Chapter 3

Law as a Social System: Boundaries

3.1. Introduction

The findings in the foregoing chapter illustrated that Luhmann's concept of society, or rather its interpretation, induced some problems that will be re-addressed in the final chapter. Also, in following Luhmann's multi-layered theoretical approach, the scope was narrowed down to functional subsystems and organizations as other types of social systems, besides society. The different layers or levels in Luhmann's social systems theory require that analysis and criticism are differentiated accordingly: criticism might be directed towards the theory of autopoietic systems *per se*, towards the understanding of social systems as communication systems or towards the concept of society. Criticism also might concern the conception of law as a self-referential and hence operationally closed system within society.²³⁰

So far, the premises of the theory of self-referential systems and the understanding of social systems as communicative systems are accepted as point of departure of the analysis. It is also an accepted approach to understand society as a social system and therefore as a communicative system, be it at this point not without problems. It implies that a theory-internal point of view is chosen.²³¹ In this chapter the level of functional subsystems, and more in particular the legal system, is the core of our interest. The description of the legal system is the most elaborated one within Luhmann's approach of functional subsystems. Therefore, Luhmann's account of the legal system will be described and, in view of a specific aspect, assessed according to the rules of his own 'language-game'. The specific aspect at stake is the operational closure and the typical elements of the legal system. In doing so, an answer pertaining to the second research question is sought: **does**

²³⁰ N. Luhmann, *Das Recht der Gesellschaft*, Frankfurt am Main 1993, p.54, footnote 24. 'Autopoietic' is understood as 'self-referential', cf. Chapter 1 of this dissertation. Also see: N. Luhmann, *Politische Theorie im Wohlfahrtsstaat*, München 1981, pp.33-34.

²³¹ The constructivist character of Luhmann's work brings about this approach. 'External' criticism is inadequate from a systems theoretical point of view and at the same time adequate from almost any other theoretical point of view.

Luhmann's theory of the legal system provide a clear demarcation of this system *vis-à-vis* society and which notions contribute to this description?

Section 2 will deal with the systems theoretical account of the legal system, describing its core features such as coding, programs, function and its internal differentiation into courts and parliaments. Section 3 deals with the relation between the legal and the political system in terms of steering. The discussion centring on the steering pessimism or regulatory crisis, deemed typical of the social systems theoretical approach, illustrates the necessity of further clarification of the issue of the demarcation of the legal system. Section 4, therefore, presents an analysis and evaluation concerning the demarcation of the legal system. In several articles and books, Luhmann attempts to provide an unequivocal demarcation. Is it indeed possible, by means of Luhmann's concepts, to determine the boundaries of the legal system *vis-à-vis* its environment? The conclusion will be that the combined application of several concepts account for the demarcation of the legal system.

3.2. The Legal System

3.2.1 Coding

The findings of the previous chapter have shown that the code is one of the essential features contributing to the differentiation of a functional subsystem. A functional subsystem is coded and has to be so in order to bring about its operational closure and thus its demarcation from the environment. Coding, as explained in chapter 2, denotes a situation wherein a binary pattern functions as a guiding difference with regard to a certain realm of communications, that is: as the basic difference guiding all further processing of information within a subsystem. Willke refers to coding in terms of *Engführung*, a canalization in the flow of communications.²³² Within a coded system 'something', an event, a state of affairs, only acquires meaning in terms of the negative or positive value of the code. Only

²³² H. Willke, 'Strategien der Intervention in autonome Systeme', in: D. Baecker *et al.*(eds.), *Theorie als Passion*, Frankfurt am Main 1987, p.339. For now and the following also cf.: T. Blom & L. (Francot-) Timmermans (1993), 'Recht is Recht is Recht is... . Een introductie op Niklas Luhmanns theorie van het recht als zelfreferentieel systeem', *Recht en Kritiek*, p.58 ff.

by directing itself to one of the two values, communications gain connection within the system.

The legal system is consequently always directed towards the question: is 'something' legal or is it not legal?²³³ This question also reveals the fact that everything referred to occurs as something of legal relevance. By means of coding, the legal system totalizes its realm of relevance: everything can acquire legal relevance – marital problems, drugs, electricity and so on. Events that cannot be observed as such do not appear on the legal 'screen', do not 'exist' legally. This is not the same as to say that modern society is characterized by an excessive increase of legal regulation, provoking a call for de-regulation. This might well be so but refers to a different perspective. It means that the legal perspective, the code, covers the world: everything might gain legal relevance.

Of course, different functional subsystems can refer to one and the same event, for example a car crash. Moreover, such might be the case most of the times. But a car crash has different consequences in view of the legal system, compared to science, the economic system or the family. The personal tragedy of the car crash has little bearings on the legal system, as opposed to the questions of legal (penal) responsibility, liabilities and other legal consequences in terms of compensation, and so on. The legal code closes the law operationally and allows only legal – both negative and positive – communications. The strict 'functionality' of the code, its binary schema and technical character, enables the processing of vast amounts of legal communications, at their turn enabling the law to react to internal and external conditions. Luhmann denotes this as the increase of *Resonanzfähigkeit*. As a consequence of the functionality of the code, third values such as justice or political opportunity are *excluded at the operational level* of the legal system. As said before, third values re-enter the system at the level of programming. Programs allow the system to take external data into account, that is to determine the conditions for the assignment to one value or the other. For example, section 162, subsection 2 of book 6 of the Dutch Civil Code determines under what conditions an action becomes legally relevant.

²³³ This translation of the values of the legal code is taken from: N. Luhmann (1995), *Social Systems, op. cit.*, for example p.374. In this translation, *schema* or *schematism* is used (instead of *code*) to denote the distinction legal/illegal.

This illustrates that it is a decision of the system itself whether the negative or positive value of the code is assigned to an event; the positive value is applied when a situation concurs with the norms of the system, the negative value is applied when a situation presents a violation of those norms. In this, the legal system itself constitutes whatever is deemed “situation”: there is no external actor telling the legal system what it should consider to be a legally relevant state of affairs.²³⁴

Events and situations circulating within the system as information are not by their nature or some moral *a priori* assigned to one of the code values. Killing someone is not in itself illegal and in times of war even encouraged. The world is whatever it is, but through coding, everything can be treated as contingent. Within the system, the constitution of contingency through coding brings about freedom of choice or of selection. At the same time the pressure of selection inevitably increases. The legal system reproduces itself as a sequence of legal communications and does so under the ongoing pressure of having to decide whether ‘something’ is legal or not legal without the possibility to refer to external, already existing criteria of selection. The code itself does not offer such criteria.

3.2.2 *Program*

As the legal code, the difference legal/illegal provides no instructions favoring the selection of the positive value. Nor is truth in itself a value. Differentiation based on coding requires, as was shown in the previous chapter, the possibility of the system to program its selections with regard to the two code-values. Science is programmed by theories and methods as instructions for the assignment of truth and untruth. According to Luhmann, the legal system is programmed by constitutions, laws, statutes, treaties, judicial sentences: in short, by positive law.²³⁵

Code and program are complementary by necessity. Only the combination of code and program enables the reproduction of a functional subsystem as a system that is closed by means of the code and at the same time open through its programs. Programs allow for the system to be ‘sensitive’ towards environmental factors. The legal program determines which external circumstances and factors

²³⁴ N. Luhmann (1993), *Das Recht der Gesellschaft*, *op. cit.*, p.178.

²³⁵ N. Luhmann (1986), ‘Die Codierung des Rechtssystems’, *Rechtstheorie* 17. See also: N. Luhmann (1993), *Das Recht der Gesellschaft*, *op. cit.*, p.93.

should be involved in a case and in which way these elements should be taken into account in the decision. Who fired the gun? Is the suspect criminal responsible? Was it premeditated? Programs do not only regulate the 'allo-reference'²³⁶ of the system but they also enable the inclusion of options of other functional subsystems, such as economic profitability or political opportunity, excluded by the legal code as basic options. Legislation, judge-made law, etc. enable the inclusion of these options into the legal system. Programs riddle so to speak the self-referential closure of the system with external information and thus open up the legal system to its environment. This presupposes the possibility of the system to change its programs (as opposed to codes providing the system's unity, as a fixed point of reference). The capacity of learning and adaptation is therefore limited to the level of the system's programs.

With regard to legal programs, Luhmann distinguishes between two logical forms of programs. A conditional program (*Konditionalprogramme*) has the logical structure of an implication (an 'if... than...'-statement). The antecedent has a cognitive content whereas the consequent is of a normative nature. The conditional program determines under what conditions the positive or the negative value applies.²³⁷ According to Luhmann, conditional programs are the most authentic and most suitable legal programs since they are instructive regarding the ongoing connection between external reference and self-reference: the antecedent 'opens' the system up for its environment whereas the consequent presents norms that must be applied in this case.²³⁸

Besides conditional programs, there is also another type of programs in the legal system: goal directed programs, *Zweckprogramme*. Goal directed programs bring about the evaluation of actions under reference to legal/illegal in view of their (causal) influence upon a future situation, *Sollzustand*, that is a situation presented as a desirable one. The rise of the welfare state has led to the fact that state bureaucracy, political administration and to a lesser degree jurisdiction became submitted to goal orientation. From a political perspective and aimed at redistributive justice this situation may be sensible, within the legal system however, it results in an increase of arbitrariness. Someone can be convicted, here and

²³⁶ Allo-reference: which information with regard to system external events acquires system internal relevance.

²³⁷ N. Luhmann (1993), *Das Recht der Gesellschaft*, op. cit., p.197.

²³⁸ *Ibid.*, p.195.

now, in view of an undesirable event that has not yet occurred. It might even be questionable whether this event will ever occur, but it is denoted as a *possible* consequence of his action.

Luhmann considers the rise of environmental law as a confirmation of the increase of legal uncertainty. The ecological perturbation was passed through by the political system unto the legal system. The ecological issue became more manifest in the slipstream of a higher awareness of risk, and requires risk-control of future damages to the environment. Therefore a legal judgment of action is asked for, in view of possible future negative consequences against the background of what at this point in time is considered to be an acceptable state of affairs. Such environmental law, in terms of goals, requires ecological ultimate values and threshold values of pollution. But what, Luhmann wonders, does the legal system know about the capacity of the environment to cope with pollution and so on, now or in the future? And since when does the legal system occupy a privileged position and is it capable of judging which risks are acceptable to whom? Luhmann puts forward that jurists do not linger on the question how people calculate and predict risks, neither does the science of empirical risk bear relevance for jurists. In the end, jurists must decide in conformity with selfproduced maxims and some remaining risks are unavoidable and are thus acceptable.²³⁹

3.23 *Function*

Notably, in Luhmann's concept of functional differentiation the unity of a functional subsystem is not connected with its societal function but with its code. The differentiation of a societal subsystem does not ensue from orientation towards a function, but is brought about by coding. A functional subsystem fulfils its function by means of its reproduction as a coded process of communication. As pertaining to the function of the legal system, Luhmann puts forward that the law does *not* seek to avoid conflicts. On the contrary, the differentiation of a legal system increases the potential of conflicts.

It [the legal system, LF] merely seeks to avoid the violent resolution of conflicts and to make suitable forms of communication available for every conflict.²⁴⁰

²³⁹ N. Luhmann, *Ökologische Kommunikation*, Opladen 1986, pp.137-138.

²⁴⁰ N. Luhmann (1995), *Social Systems*, *op. cit.*, p.375.

The legal system offers a possibility of dealing with conflicts in a specific way. It generates law as an instrument to settle present and future conflicts and disputes. From a societal point of view, the legal system is all about *stabilizing expectations facing disappointment*.²⁴¹ The legal system, to put it differently, produces expectations that are to be maintained legally even in case of rejection and disappointment. Consequently, the legal system is time-binding, according to Luhmann, referring to the fact that how future disputes should be settled is determined in the present.²⁴² Of course, not every expectation can or will be stabilized in this sense. From the vast amount of communicated expectations in society, the legal system selects those sufficiently general or suitable to be generalized and strives to do so in the most congruent way.

So, the function of the law is to provide society with expectations that are to be maintained even in case of factual rejection or disappointment. In doing so, the legal system is connected in a specific way to the guiding function of social structures. The core of social structures is constituted by 'expectations of expectations' – these are disappointed very frequently. It is possible to react upon rejection or disappointment by adjusting the expectation at stake. Here, the disappointment is an incentive to learn. On the other side, it is also possible to maintain the expectation and demand satisfaction from the one who has not met the expectation, for example an apology. Luhmann distinguishes two modes of dealing with the disappointment of expectations: the former is referred as a *cognitive* mode and the latter as a *normative* mode.

Normative expectations or *norms* are maintained counter-factual, that is to say, in view of and despite of their possible disappointment. The function of the legal system pertains to the normative expectations as indispensable structures for social systems. The legal system does not usurp all normativity: parts are left to, for example, morality or religion. But the legal system can claim a specific use of normativity.²⁴³

More specifically, the law is constituted as *second order normativity*. Legal normativity always presupposes preceding normativity. Norms can only acquire legal quality by means of legal norms. Legislation is connected with previous legisla-

²⁴¹ For example: N. Luhmann (1993), *Das Recht der Gesellschaft*, *op. cit.*, p.138.

²⁴² *Ibid.*, p.129 ff.

²⁴³ N. Luhmann (1983), 'Die Einheit des Rechtssystems', *Rechtstheorie* 14, p.147.

tions, judicial decisions root in law, proceeding from previous judicial decisions and laws. In short: the legal system processes legal quality. If indeed the modern legal system is a self-referentially closed system than norms directing legal processes must be constituted by the legal system itself. The law cannot import legal norms but has to produce these norms itself. Law is what the legal system considers to be law. This tautology is usually denoted as legal positivism. Luhmann holds that this positivism is actually a correlation of the differentiation of the law as a functional subsystem. The doctrine of legal positivism is the reflection of this state of affairs, as is the legal theoretical commonplace that norms cannot be deduced from facts.

Against the background of this functional interpretation of law as a system realizing itself in the form of an ongoing process of production and reproduction of normative expectations, the idea of closure of the legal system can be determined further. As said before, the self-referential closure of the legal system is brought about by the legal code. This is not to say that within the legal system there is only communication about law. However, an event gains legal relevance, not by the nature of the event, but by legal norms acquiring their legal quality from other legal norms. It is precisely this normative component that constitutes the continuously concurring self-reference of successive legal communications. The self-referential closure of the legal system thus appears as normative closure: '*It is a system of legal operations using normative self-reference to reproduce itself and to select information*'.²⁴⁴

3.2.4 *Within the Legal System: Courts and Parliaments*²⁴⁵

Luhmann puts a lot of effort in describing the external boundaries of the legal system and does so for all other functional subsystems. Such is of course not without reason since the cogency of Luhmann's approach of social systems theory depends to a very substantial degree upon the arguments pertaining to the operational closure of social systems. An extensive elaboration regarding systemic boundaries does however not guarantee tenability and will be put to the test in order to reveal potential theoretical flaws. This will be discussed later on. Nev-

²⁴⁴ N. Luhmann, 'The Self-reproduction of the Law and its Limits', in: G. Teubner (ed.), *Dilemmas of Law in the Welfare State*, Berlin 1986, p.114.

²⁴⁵ Sometimes also referred to as *Justiz and Legislative*, judiciary and legislation; Cf. N. Luhmann (1993), *Das Recht der Gesellschaft*, *op. cit.*, p.145.

ertheless, there is more to the legal system besides its boundaries. The differentiation of an operationally closed system requires a concurring 'internal' development, an internal differentiation of the, in this case, legal system.²⁴⁶ However, the reader who hopes to acquire some insight regarding Luhmann's ideas about the contents of justice, of just rules and so on, finds himself disappointed.

Luhmann is not primarily interested in what the law is about but offers a description of the 'appearance' of the legal system, a pattern of observations. The question for internal differentiation does not concern the 'traditional' legal division into public and private law or constitutional law and international law, penal or civil law and so on. Luhmann does not aim at the description of a semantic internal differentiation. This would have been, in the view of this author, a logical consequence since the legal system appears as a semantic field of legal communications and since all systemic differentiation is conceived as an iterative process.²⁴⁷ Luhmann locates the starting point in the differentiation between courts and legislation.²⁴⁸ The internal differentiation of the legal system is therefore of an *organizational* kind. In a 1990 article, 'Die Stellung der Gerichte im Rechtssystem', Luhmann puts forward that the differentiation of a self-constituting legal system has its organizational back-up in the differentiation of legislation and courts.²⁴⁹

In this article, Luhmann's statement leaves no doubts as regards the importance of organizational back up in the process of system's differentiation. This outspoken point of view is rather exceptional and is in, for example, *Das Recht der Gesellschaft* not repeated in similar and equally firm formulations.²⁵⁰ The importance of organizations in the process of differentiation of functional subsystems is a recurring and yet a somewhat under-exposed theme in Luhmann's work, its theoretical consequences left unrevealed. One might conjecture that the impact of organization systems upon the closure and openness of functional subsystems is far greater than Luhmann's theory yields at first sight.

²⁴⁶ *Ibid.*, p.297.

²⁴⁷ *Ibid.*, p.298: 'Semantische Einteilungen dieser Art werden sich nicht unabhängig vom Komplexitätsniveau des Systems entwickeln; aber sie geben noch keinen Aufschluß über die operativen Systembildungen im Rechtssystem.' This does however not clarify Luhmann's recourse to the organizational back-up.

²⁴⁸ As regards the historical background of this differentiation, see: *ibid.*, p.299 ff.

²⁴⁹ N. Luhmann (1990), 'Die Stellung der Gerichte im Rechtssystem', *Rechtstheorie* 21, p.460.

²⁵⁰ Cf. N. Luhmann (1993), *Das Recht der Gesellschaft*, *op. cit.*, p.321.

In the 1990 article, Luhmann introduces also that the *function* of the difference between courts and legislation is not located at the organizational level but on the societal level. The *differentiation* between courts and legislation is in itself a division of labor and consequently a matter of formal organization. On the societal level, however, the *distinction* courts/legislation is the form of a unity. And in collaboration with other distinctions such as the code legal/illegal and programming through positive norms, the distinction courts/legislation offers the conditions for the operational closure of the legal system: it enables the legal system to differentiate itself from its environment and to produce its own operations.²⁵¹

One might expect a hierarchical relationship between legislation and courts, since everybody including judges (and the legislator) are bound by law. Luhmann states that this is not an adequate observation. The relationship between legislation and courts is rather of a circular nature in terms of mutual limitation: the courts apply law in separate cases, operating within the limits the legislator has set. The legislator at his turn sees to the fact that new laws can be fitted in the framework of decisions (premises) of jurisdiction. The cause of this inadequate observation of a hierarchy in these subsystems, Luhmann blames on a lack in understanding of the particular position of the courts within the legal system.

An indication concerning the contents of the special position of courts is given by the insight that courts operate under the pressure of the obligation to decide. The core-business of courts is the ‘application’ of law upon separate cases. The mode of this application is ‘decision’²⁵². The courts cannot initiate procedures, cannot create law immediately but they must decide. In doing so, they might well create new rules. Paramount is to take into account that, as it comes to the internal differentiation of the legal system into *organizational* subsystems, *decisions* play a central role. In this case the importance of ‘decisions’ cannot be overestimated. Making decisions is not only the core-business of the courts, what they do, but in this they do not have any choice at all: once confronted with a legally relevant problem, they have to decide. This state of affairs is denoted as *Verbot der Justizverweigerung*, or (in negation) the obligation to decide on all legal matters put before a court. The obligation to decide contributes in an unambiguous way to the reproduction of law. Luhmann states that the obligation to decide and the con-

²⁵¹ N. Luhmann (1990), ‘Die Stellung der Gerichte’, *op. cit.*, p.463.

²⁵² The systems theoretical concept of decision was dealt with in Chapter 2 and we will not dwell upon it at this point.

curing freedom to account for, with however dubious arguments, the decisions is restricted by perspectives on justice. This link between obligation, freedom and restriction produces law: an increase in the simultaneous production of *Gesetzesrecht* and *Richterrecht*, laws and judge-made law.²⁵³

Verbot der Justizverweigerung is an *institutional* precaution enabling the legal system to operate with universal competence and yet, at the same time, with the capability to decide. The prohibition is cast in the appropriate legal form, that is: a norm. This norm contains a double negation: it is *not* allowed *not* to decide. The formulation takes into account the universality of the principle of legal protection, concurring at its turn with the legal universal claim regarding its competence for all legal questions. Furthermore, the prohibition takes into account that the legal system is not able to anticipate all requests it will be dealing with. The legal system is, as seen before, an operationally closed system that is at the same time open. This openness refers to a readiness to react to any stimulus if offered in a legal form and the obligation to decide guarantees openness via closure.²⁵⁴

Thus, the legal system adapts to a fundamentally contingent environment. The environmental contingency only gains relevance in terms of the system's coding, that is if and when a state of affairs can be qualified as legal or illegal. This is in fact a systems internal arrangement of contingency: by means of the code, the system disposes of re-formulated contingency enabling the system to select and change its own state or situation, and to develop its own programs. It also enables the legal system to change when and if something is denoted as legal or as illegal.

In order to determine the exact position of the courts within the legal system and therewith to denote the form of internal differentiation, Luhmann constructs the following argument.

The system's internal obligation and hence necessity to decide and the operational closure of the system, that is: the disconnection of direct participation in the environment, complement each other. Systemic differentiation consists of a difference between the state of the system and the state of the environment. The system considers this difference between system and environment as an ongoing problem. After long experience with this difference and the development of legal

²⁵³ N. Luhmann (1993), *Das Recht der Gesellschaft*, *op. cit.*, p.304.

²⁵⁴ *Ibid.*, p.467.

institutions to deal with it, the system puts itself under the pressure of having to decide. This part of the argument pertains to the connection between differentiation and internal differentiation.

This is, however, a somewhat hazy argument. From a historical, or rather: evolutionary point of view, courts precede law *as an operationally closed system*.²⁵⁵ If Luhmann, by means of this argument, wants to show that organizations (here: courts) were of paramount importance as regards the differentiation of the law as a functional subsystem, then it makes sense. The central position of the courts is, subsequently, plausible. But it is difficult to see how this argument, as presented in the above article, would sustain a connection between differentiation of law within society, as a semantic structure, and the internal differentiation of the law.

In *Das Recht der Gesellschaft* the above issue re-appears and gains clarity, when Luhmann in reference to the universality and reliability of the legal code puts forward that within the legal system, an *organized subsystem* comes into existence that puts its members under the obligation to decide and to direct these decisions to the programs of the legal system, in other words: the legal norms.²⁵⁶

Here, it becomes clear that Luhmann identifies a 'hard core' within the legal system, which is constituted by an organized decision system. Luhmann uses this notion to denote the unity of the differentiated subsystems within the legal system, courts and parliaments. Luhmann's reference to differentiated subsystems is somewhat misleading.²⁵⁷ Sure, organization systems use a qualified type of communications, i.e. decisions. These communications can even become double qualified when decisions are *primarily* directed towards one code and one social function. But even so, organizations always operate in more than one functional subsystem at the time. Not all communications within organizations are decisions, not all decisions within courts concern the law: moral evaluations, for example, take place as well and are shared. The same goes for economic and cultural considerations. To put it short: organization systems constitute overlapping zones. A variety of functional systems 'co-operate' in these overlapping zones. In

²⁵⁵ Not law as such. Note that law as an operationally closed system is considered to be a characteristic of modernity.

²⁵⁶ N. Luhmann (1993), *Das Recht der Gesellschaft*, *op. cit.*, p.145.

²⁵⁷ *Ibid.*

this sense, organization systems are not differentiated subsystems but rather back-up or hard core systems.

3.3. Between Law and Politics: Steering

3.3.1 *Law and Politics*

It is evident to presume a special connection between law and politics, already because the legal system depends for the realization of its function upon political means of power, in the last resort upon the monopoly on the use of force claimed by the state. The political system, on the other hand, depends upon the law for the legitimization and legislation of its performances. And although Luhmann acknowledges the mutual dependencies between law and politics, he maintains that both politics and the law are two separate, strictly distinctive systems in modern society, as is in accordance with the premises of his social systems theory.

The political system is, similar to law, a functional subsystem, according to Luhmann. Consequently, the political system shares some key features with the legal system, albeit of a different content. First, there is the matter of the code. Whereas the legal code is presented unambiguous and invariable, the political code has a history. The contemporary political system is coded by the binary scheme government/opposition. This is, according to Luhmann, a relatively 'young' code²⁵⁸. From an historical point of view, the medium-code power (*Macht/Unmacht*) precedes the code government/ governed. Within the development of democracy, the code government/governed has been completed, but not exchanged for a new notion complementary to the positive code-value 'government', i.e. 'opposition'. Opposition serves, within the political code as a constant reminder, as a reflection value, that there are also always other political possibilities.

In comparison to other codes, such as legal/illegal, true/untrue, pay/not to pay, it should be noted that the binary structure of the political system is not of a semantic nature. Government/opposition refers to an organizational back-up. From a historical perspective in the traditional community of old Europe, govern-

²⁵⁸ Since this code refers to democracy. Cf. N. Luhmann (1987), *Soziologische Aufklärung 4*, *op. cit.*, p.126.

ment/opposition, as said above, was preceded by the semantic duality power/no power.²⁵⁹ In societies with a central or hierarchical organized political system, dominion (rule) was a moment of natural social order and perceived as necessary in order to avoid chaos. The ruler was at all times subject to rivalry and dominion was understood as a *right* to rule. Opposition was a position of rivalry and as such a challenge of the legitimacy of dominion. A ruler who did not rule lawfully, was a tyrant and as such to be challenged. At this point in history, the code of power was transcended by the legal code thus subjecting all political rivalry to the question of legitimacy.

In the 18th and 19th century, with the transition to the modern state, an important change becomes manifest. The state usurps the decision concerning legal/illegal. The decision is no longer regarded as ‘natural’ – that is to say: given by nature – but defined as ‘arbitrariness’. Arbitrariness is, for the sake of peace, only acceptable at one point in the system: at the top. Only the ruler, subjected to no one, can decide in an arbitrary way. Such sovereignty is not possible *per se*, but only in distinction to subjects submitted to this sovereignty. This changed state of affairs was articulated by the distinction government/governed.²⁶⁰

With the development of democracy, the code government/governed is completed with – and not exchanged for! – a new notion, complementary to the positive code-value government: opposition. There is a perfect relationship of reversal: who resides in the government, does not so in the opposition and the other way around: if you are in the opposition, you cannot govern.²⁶¹

It was put forward that all functional subsystems have a similar ‘technical’ structure; they operate, formally speaking, in the same way and more or less under the same conditions. However, even though the technical structures are similar, each functional subsystem fulfils one and only one function on behalf of society. The

²⁵⁹ The difference between ‘traditional’ and ‘modern’ societies is determined by the difference in origin or source of social order. Traditional order is perceived as order given by God or by nature whereas modern order is to be considered to be a construct (by means of human decisions).

²⁶⁰ Cf. N. Luhmann, *Die Politik der Gesellschaft*, Frankfurt am Main 2000, p.98 ff.

²⁶¹ N. Luhmann N. (1986), *Ökologische Kommunikation*, *op. cit.*, p.170. Notable is the fact that in the case of political coding, Luhmann presents a kind of development, be it sketchy, of the code throughout societal history. The legal code, on the other hand, seems to be steadily constituted by the values legal/illegal.

specific code and complementary programs are always strictly related to this function. The political code can never operate by means of legal/illegal even though it 'uses' law to achieve its own targets. Legal/illegal directs legal communication and not political communication. Of course, the political system communicates about the law but always from the perspective government/opposition. The point is that all functional subsystems fulfill dissimilar functions under different codes but are equally important, with regard to the modes and social importance of their functioning, in respect of their contribution to the reduction of complexity and bringing about social order. The political function is according to Luhmann, the '*Bereitstellung von Durchsetzungsfähigkeit für bindende Entscheidungen*' or, in a more frequently used formula, the production of collectively binding decisions.²⁶² The latter formulation is somewhat misleading as it seems to imply some kind of political output at the level of the functional subsystem: this is only possible at the level of the organizations of the political system. But it can be considered shorthand for the political capacity to implement and enforce collectively binding decisions. The code and the function of the political system both entail references to some kind of organizational back-up. The same goes for the elements of the political system: communications with a certain quality, i.e. decisions.

The political code is, as are all codes of functional subsystems, not informative about the relationship between the political system and its environment. It closes the political system at the level of its operations, but the political system is also cognitively open towards its environment. In this case, Luhmann specifies the societal environment in terms of 'public opinion'. The 'public' of the political system is constituted by the governed and stems from the older code government/governed. The political system uses public opinion as a 'mirror' to reflect its (self)observations with the demands and expectations of the public as its social context, its environment.²⁶³ The public opinion, with its claims and expectations, provides for the social context of the political system. The effect of the public opinion is however limited, according to Luhmann. As a part of the political environment, the public opinion is very complex and not transparent to the political

²⁶² N. Luhmann (1981), *Politische Theorie im Wohlfahrtsstaat*, op. cit., p.81. In his *Die Politik der Gesellschaft* (Frankfurt am Main 2000) Luhmann formulates, at p. 84, the function of the political system slightly different: '[D]as Bereithalten der Kapazität zu kollektiv bindenden Entscheiden'.

²⁶³ N. Luhmann (2000), *Die Politik der Gesellschaft*, op. cit., for instance p.274 ff.

system. Furthermore, the real opinions, expectations, moods and so on, of the public must be processed according to the systems logic, that is: based upon the political code. As a differentiated self-referential system, the political system cannot operate outside its own boundaries. In order to open up towards the environment, the political system has to develop system-specific programming, i.e. election programs.

This brief sketch of the political system illustrates that the political system has technical or formal characteristics in common with the legal system, yet they concern two distinct systems within Luhmann's theory of society. That it concerns two different systems is however easily obscured by the concept of *Rechtsstaat* as a kind of representation of unity. To the legal system, the concept of *Rechtsstaat* is nothing else but the expression of the universal-societal relevance of the law: law is everywhere; there is no 'lawless' domain within society, no space for unregulated arbitrariness and violence.²⁶⁴ From the perspective of the political system, the concept of *Rechtsstaat* holds the idea that the political system can dispose of the law as an instrument to enable and realize political goals.²⁶⁵

According to Luhmann, it only makes sense to examine structural relationships between the political and the legal system by reference to their distinction. Luhmann analyzes these relationships in terms of *structural coupling* between law and politics. More generally, structural coupling denotes the situation where '*a system permanently presupposes certain peculiarities of its environment and structurally depends on these peculiarities*'.²⁶⁶ The legal system 'entrusts' the political system to back-up judicial decisions with power and, when necessary, with force. Systems, theoretically speaking, connect structures and select 'noise'. The legal system, for example, is extremely sensitive to events within the political system and almost exclusively to those events. To put it differently: the societal environment affects the legal programs mostly in a by the political system filtered way.

This substantial reduction of complexity comes at a price: the legal system cannot or can hardly escape the noise and irritations evoked by the political system. The political system, on its turn, depends upon the legal system to formulate collec-

²⁶⁴ N. Luhmann (1993), *Das Recht der Gesellschaft*, op. cit., p.422.

²⁶⁵ Original text: '[W]enn ein System bestimmte Eigenarten seiner Umwelt dauerhaft voraussetzt und sich strukturell darauf verläßt', *ibid.*, p.424.

²⁶⁶ *Ibid.*, p.441.

tively binding decisions indeed as *collectively* binding – but under the conditions of the legal system. The fact that it concerns two distinct, self-referentially closed systems should prevent the law to be definitely instrumentalized by the political system. The mutual *influences* are, according to Luhmann, to be denoted as *interpenetration*. Talcott Parsons, the author of the concept, defined interpenetration as a mutual penetration of systems, brought about by the fact that the same actions are at the same time elements of different systems. Luhmann too, sees interpenetration of two functional subsystems as including a partial ‘overlap’.

In case of the political and the legal system, the overlap is located in the legislative activities of parliaments. The most essential feature of interpenetration is, in Luhmann’s opinion, that two interpenetrating systems force their complexity upon each other. In addition, all received complexity is always over-complexity to a system; it is always ‘noise’ and is as such a stimulus for further development of internal structures. The political system, for example, stumbles in its preparation of laws upon the ‘self-will’ of the law: only in accordance with the rules of the law, including criteria of legal consistency and coherency, the law can be altered. To politics, legislation is only relevant from the perspective government/opposition: does a proposition of law increase the possibility to govern or does it lead to opposition? Within the political system, the law appears as the constraint to comply with legal logic of which the grounds are not transparent to the political system. The political system can only counter this constraint by ongoing adjustment of its own options and expectations.²⁶⁷

3.3.2 *A Regulatory Crisis?*

In the eighties of the last century, the discussion about the limits of the Welfare state and its steering or regulation crisis has been without doubt an excellent hot-house for the dissemination of Luhmann’s ideas. Luhmann’s thesis of self-referential closure of functional subsystems confirms the doubt about the ability of the state to direct societal developments by means of law. His model of functional differentiation results in a description of society as a connection of

²⁶⁷ N. Luhmann (1993), *Das Recht der Gesellschaft*, *op. cit.*, p.479. Also see N. Luhmann (1986), ‘Die Codierung des Rechtssystems’, *op. cit.*, p.202, in which Luhmann states: ‘Die politische Logik eines balancierens von Konsens und Zwang ist politisch vollauf einsichtig. Für das Rechtssystem ergeben sich daraus Vertrauensverluste und in absehbarer Zeit dann wohl auch Selbsthilfeeinrichtungen neuen Stils’.

autonomous subsystems not capable of determining each other's processes and structural developments. Whatever connections between the law and politics exist, in terms of structural coupling and interpenetration, the legal system cannot simply be used as a political instrument of steering.²⁶⁸

The relationship of mutual affirmation between law and politics is also the cause of the blurring and massive multiplication of legal and political effects in modern society. The action radius of political power is increased by means of, and at the same time limited by, legal possibilities. The double coding of political power by law does not only imply legal control upon the exercise of political power and hence the submission of political 'supreme' power to the law. It also implies an instrumental use of law by the political system. The prerequisite for this state of affairs is an autonomous legal system, not reduced to a set of norms or law in the books, but a system producing, constituting and organizing all information and procedures in accordance with its own rules. The autonomy of the law represents a particular restraint as regards the political instrumentalization of the law. The limitation of politics by law is illustrated by the increase of legal litigation in the public and administrative domain. The 'blurring' of political power also becomes manifest in the possibilities to mobilize legal procedures in order to control or to attack actions or the lack of it of public authorities, to control respect and application of the law, or to protect oneself from the violation of rights.

The complex and indirect effects of power, double-coded by the law, show the complexity of the architecture of the *Rechtsstaat*. A legal or political theory taking the foregoing findings into account, cannot abstract from the political effects of the pacification performance of the legal system, because the contribution to 'internal' peace determines what is 'do-able' by the political system (that is: by political decisions), restraint by law concerning the use of force, in order to maintain social order. From this perspective, public force symbolized by political power becomes less and less an appropriate *modus operandi* to acquire desired results in the application of regulation. On the contrary, a public demonstration of political power might be a risk and induce the opposite result, being contra-productive in

²⁶⁸ For this and the following, cf.: T. Blom & L. (Francot-)Timmermans (1993), 'Recht is Recht is Recht is... ', *op. cit.*, p.66 ff. Also see: T. Blom & L. (Francot-)Timmermans (1996), 'Het recht van de systeemtheorie – een kritische uiteenzetting van Luhmanns rechtssociologie', *Tijdschrift voor Sociologie*, 17, p.225 ff.

particular contexts.²⁶⁹ A pure display of power in acts of force and violence will rather often be valued as weakness by the public opinion. Using political force to impose a contestable or contested piece of legislation could provoke contravention or at least opposition of those affected by this law. In this perspective, the law seems to be the means to enable conflicts within the legal framework of which the causes are located outside it. It could be preferable and the better strategic solution of the political system to remain inactive or to freeze a political project in a 'jammed' situation where opposition is raised to a degree requiring the exercise of force. Given the above, this should be avoided (of course not only from a strategic point of view). To the political system, this is of course all a matter of opportunity, their popularity being the politicians' first concern. The question whether force should be used or not and, hence, whether the norm should be applied or not, can only be answered against this background of mutual affirmation and conditioning of politics and law.

In view of the above findings, we now turn to the question which 'systemic' conclusions impose themselves upon the matter of political steering. The political system formulates laws and sets its hope on the wanted effects. In applying laws, politics brings about results, independent from any consideration concerning knowledge as regards causal relations. These results are already shown, as all political communication concerns the realization of political projects. The political system is always able to claim that it has provoked its desired results, no matter what reactions might follow these 'results'. We have to take into account that these results are observed by means of the distinction government/opposition, that the interpretations of political effects result from a program of regulation and that they are at the same time a gain and a loss. Politicians have to use, at any rate, a political language enabling to evoke a political success, to gain time and to make promises. To be able to face an environment that is far more complex than the system itself, with a growing demand and unforeseeable events, the political system cannot avoid a politics of symbolism. The rituals and the *mises en scènes* in political communication, reproducing reduction of complexity, do not solely have a symbolical function. They are also part of the closed domain of the political system that cannot gain access to its environment with its particular reconstructions of reality. The improvement of these internal representations entails a chance for the political system that is not reduced to a discourse but that problematizes the difference between the communicative surplus and possible actions. The problem

²⁶⁹ As for example in the matter of abortion.

concerns the matter of the position of politics in a functionally differentiated society, in which no system can claim a supreme position from where society might be regulated and steered. From the above findings follows that, within the theory of functional differentiation and self-referential systems, all steering and regulation is, and only can be, self-steering and self-regulation. That is: according to Luhmann.

This also determines the point of departure with regard to a theory of steering. At the level of their code, every functional subsystem is 'sovereign' and operates without any external interference. They 'are' society, actualized from their particular perspective of a closed communicative context directed towards an exclusive function. Once again: this closure is, at the same time, the condition for cognitive openness towards the environment, thus of resonance, and the capability of adaptation, at the level of its programs. Only at the level of programming, the idea of steering could be re-introduced.

In this perspective, Luhmann understands steering as a specific distinction in order to reduce complexity or of a difference.²⁷⁰ Understood thus, steering is a systems internal operation, a program of reduction of differences used by each functional subsystem with regard to their self observation and/or the observation of their environment. Contrary to cybernetic approaches or action theory, systems theory repudiates every possibility of linear causal relations between system and environment. All systemic input and output are internal constructions and are a part of the difference used to reduce the difference. Every kind of steering moves into the direction of one of the two selected values, for example the reduction of unemployment, of drug abuse, of criminality; or increase of equal chances, of ecological protection, of productivity and so on.²⁷¹

Functional subsystems are capable, by means of their programs of reduction of differences, to measure their success or failure as regards self-regulation. In this perspective, politics cannot but accuse political failure or claim success of its own political programs. The law cannot control or harmonize political structures but by means of its legal categories or dogmas.²⁷² This self-regulation of systems by means of specific steering programs has an immense effect on society, on other systems using other distinctions. According to Luhmann, each system is able to

²⁷⁰ N. Luhmann, *Die Wirtschaft der Gesellschaft*, Opladen 1988, p.328.

²⁷¹ *Ibid.*, p.338.

²⁷² For example: more or less severe punishment in case of an increase or decrease in criminality.

observe how and with what results other systems engage in self-regulation. As such, an observed steering effort provokes reactions on the side of the observing system where it can be considered as noise or perturbation or a positive contribution. And this possibility might, at its turn, be anticipated by the observed system that is well aware of the fact that its programs are being observed.²⁷³

The above 'constructivist' approach sheds a new light on the fine-tuning of possibilities of political steering. In differentiating between the systemic autonomy (on the level of the code) and the level where the system organizes its reactions towards the environment (the level of programs), one has to take into account that the political system might present steering programs aimed at the provocation of a corresponding reaction at the level of steering programs of another system. The political system has the capability to try and influence the self-regulation of another program. Such an action presupposes knowledge of the functioning mode of that particular steering and this knowledge is, at its turn, the result of a construction or model by the observing system, which cannot import any information but has to produce its own information. Since all systems handle information according to their own criteria, it suffices to know whether the results the political system seeks to provoke in the system that is to be 'intervened', are transformed to internal information by the political system. Within the theory of self-referential systems steering cannot be but contextual steering directed at reaction on the level of self regulation.²⁷⁴ This concept of steering is consistent with the idea that boundaries of systems interrupt any form of linear or direct causality. An observed system is always a black box to the observing system wherein the results of contextual steering are not necessarily the desired ones. This is to say that despite the possibility of contextual steering, nothing guarantees that the intervention brings about the desired results.

The problems of steering are increased by the fact that the political system also has to use, as seen before, the law as an intermediary. The political system therefore has to take into account that the legal system is also an autonomous system, operating within its own border and according to its own criteria. Subsequently,

²⁷³ A judge can observe the political demand for higher sanctions and he can anticipate on the fact that if he does not comply, legislation will be adjusted in this sense and compliance becomes unavoidable.

²⁷⁴ As regards 'Kontextsteuerung' see H. Willke, *Systemtheorie entwickelter Gesellschaften – Dynamik und Riskanz moderner gesellschaftlicher Selbstorganisation*, Weinheim/München 1989, p.58 ff.

political intervention has to be ‘translated’ into communication comprehensible for and connectible within the legal system. In doing so, the political system risks to compromise and alienate its effects by the transformation into the legal ‘logic’. The legal criteria of validity are therefore the first interruption of the political causality. So there is a complex legal system on the one hand, and on the other, the need of the political system to instrumentalize law in order to obtain political objectives.

Regulation programs conserve their legal validity amidst the context of legal communication but cannot foresee the normative effects on the intra-societal environment of the law, because social validity depends on criteria of resonance presented by the self-regulative programs of other social contexts. The restraints of a legal-political steering do not solely result from the autonomy of functional subsystems and their barriers but also from the use of legal action as an instrument. Systems theoretical approaches of steering cannot, therefore, be anything else but the translation of the state of affairs that the legal-political steering must be the regulation of self-regulation of other autonomous systems. The point of departure of this approach is the capability of functional subsystems to problematize the effects of their identity upon their environment. The concept of reflection represents this mode of self-observation: the subsystem takes into account its internal models, differences and contradictions between itself and its environment. As a consequence, systems might learn from, and adapt to, their environment but only within the range of limited possibilities of adaptation provided for by the theory of self-referential systems. It provokes the question how to improve these adaptation processes in the sense of self restriction and self-learning. Applied to a model of steering by the political system by means of law, this entails that this particular system must develop and/or improve the observation of the reactions of other systems with respect to the result of their programs. Starting from the political/legal failures of steering, the political system must learn to observe that society cannot be regulated from a center or privileged position at the top, by means of linear causalities.

The theory of functional differentiation and self-referential systems allows only for one conclusion: society cannot be directed from one central point. There are only functional subsystems reproducing themselves autonomously by means of their own operations. The conclusions of the systemic perspective are radical: no system can operate outside its boundaries; no system can operate with another

system's pattern of observation. Only the operational closure sheds a light upon the way self-referential systems organize their relations with, including their own reactions to, the environment. The political system would lose its unity if it would do the things the legal system or the economy do. On the other hand, politics is able, precisely because of its 'political exclusivity', to influence other systems and to modify the conditions under which they operate. The political system can point out its intentions by means of its traditional tools or might create new organized systems, establishing or actualizing 'interfaces'. The political system also has to be aware of the fact that what it conceives to be political effects, are, or may be, perceived otherwise. For example in the economy, a political effect might be perceived as a matter of costs and hence as a matter of decisions concerning prices, investments and so on.

This state of affairs makes it necessary to distinguish between different types of observations. There is no such thing as one point of view or a societal consensus. If one accepts the conclusions of a constructivist-systemic perspective, one has to agree that all observed effects of a steering program are only projections of system-internal models or constructs of reality. Does the above imply a steering pessimism in systems theory? Not necessarily, as has been shown above. The evaluations of problems of steering show nothing else but the state of affairs of which the theory of self referential systems has been aware for some time: politics, economy, law or religion are not capable of intervention in society. But such systems are capable of learning how to improve the control on their effects and results, to improve the 'reading' of reactions to their effects in the environment, to take into account that their effectiveness has to be compatible with other social domains.

In the seventies, Habermas has put a lot of effort in portraying Luhmann as a right-wing conservative. Notwithstanding these efforts, Luhmann managed to catch the interest of sociologists and political theorists of social-democratic signature in the eighties. Without taking a course of radical anti-steering pessimism, Teubner, Willke, Ronge, Japp, Ladeur, Bendel and others seem to consider Luhmann's steering pessimism as a kind of social criticism or at least as a move away from fossilized dogmas of socialist planning and progressive/conservative dichotomies. An obvious reaction to this Luhmannian trend in legal sociology is the objection that it concerns an overreaction regarding the actual power and possibilities of the state. Peter Nahamowitz, for instance, points to supporters of

'reflexive law' such as Teubner and Willke, who represent a somewhat late wave of the neo-liberal/neo-conservative tide of the mid seventies.²⁷⁵ In the mid eighties, this kind of criticism does not impress the institutionalized sociology, if only because it loses its point in reflexive application upon itself. Understanding this, Nahamowitz corroborates his dislike of all kinds of Luhmannian steering pessimism by a host of empirical data. The findings should show that political regulation and steering of the economy is not only possible but can also be proven to be 'acceptable effective'. The question, however, is what this contributes to a theoretical discussion of steering. Not only do Luhmannians have their own empirical data, but is also rather naive to believe that constructivists would acknowledge empirical data, cut loose from any theory and model of steering, as independent data capable of deciding the discussion in an objective and compelling way. Empirical arguments have no impact unless they are connected with a fundamental criticism of Luhmann's theory. To put it differently, empirical objections against a Luhmannian steering pessimism only gain strength if it becomes plausible that the empirical deficit is an unavoidable consequence of theoretical decisions and conceptual strategies underlying the autopoietic systems theoretical sociology.

Critics of 'reflexive law' have elaborated such line of argumentation. Overviewing the discussion, there are at least three strands of thought to be discerned, three lines of inquiry attempting to transform an empirical displeasure into criticism of a more theoretical nature. Critics such as Nahamowitz, Nocke and to a certain degree also Kargl,²⁷⁶ located the theoretical root of all evil in the concept of autopoiesis as such. That this is trivial follows not only from Luhmann's autopoietic theory of differentiation that modern society is submitted to centrifugal, disintegrative powers but also from the view that the political system is not capable of determining or regulating processes within other functional subsystems. Regulation can only succeed as self-regulation. Nahamowitz or Kargl may indeed point out that Luhmann, before his autopoietic turn, was more optimistic as regards

²⁷⁵ P. Nahamowitz (1985), 'Reflexives Recht: Das unmögliche Ideal eines postinterventionistischen Steuerungskonzepts', *Zeitschrift für Rechtssoziologie* 6, p.29-44; P. Nahamowitz (1987), 'Effektivität wirtschaftsrechtlicher Steuerung – Ein Beitrag zur Autopoiesis-Debatte', *Kritische Justiz* 20, p.411-433; P. Nahamowitz (1988), 'Autopoiesis oder ökonomischer Staatsinterventionismus', *Zeitschrift für Rechtssoziologie* 9, p.36-73.

²⁷⁶ W. Kargl (1990), 'Kommunikation kommuniziert? – Kritik des rechtssoziologischen Autopoiesebegriffs', *Rechtstheorie* 21, pp.352-373; W. Kargl (1991), 'Gesellschaft ohne Subjekte oder Subjekte ohne Gesellschaft? – Kritik der rechtssoziologischen Autopoiesekritik', *Zeitschrift für Rechtssoziologie* 12, pp.120-141.

possibilities of stabilization and of steering. But the appeal of Luhmann's autopoietic theory of differentiation is, for example for Willke or Ronge, located in the possibility of a theoretical directed observation and description of a complex of problems occurring anyway in society.

According to Scharpf, one of the leading figures in German political theory, the problem is not located in Luhmann's acceptance of the concept of autopoiesis but in his decision to promote communications as elementary units of social systems instead of actions or actors. If we try to carry back the empirical motivated doubt concerning Luhmann's theory of society to the premises underlying his sociology, Scharpf puts forward that the focus on autopoietic, self producing systems is even less successful than limitation to communication systems.²⁷⁷ True, Luhmann uses the category 'action' but conceived of as the product of a simplifying self-observation of communicative processes.²⁷⁸ Scarf on the other hand claims that political regulation, or steering as an opportunity of goal-oriented, self-induced change of the community, cannot be conceived without subject of political action.²⁷⁹

Similar to Nahamowitz' or Kargl's criticisms, Scharpf's approach hits its target in a trivial way. Trivial in the sense that there is undeniably a relationship between the point of departure that social systems are constituted by communicative processes and Luhmann's objections against the idea of political steering of functional subsystems understood as the model of an intentional (micro/macro) actor strategically trying to realize preconceived targets. The problem with both types of criticism is that it does not bring us any further: the rejection of the concept of autopoiesis or of social systems as communicative systems also implies an absolute rejection of Luhmann's sociology. There might be, of course, good reasons to do so but solely the disagreement with the position of Luhmann c.s. as regards the discussion of steering ignores possible benefits of the theory.

A less severe line of criticism is also triggered by the discussion as regards the problems of steering. This is also to be found with Scharpf. It is formulated as the reproach that Luhmann in his analyses of steering and regulation problems capi-

²⁷⁷ F. Scharpf (1989), 'Politische Steuerung und politische Institutionen', *Politisches Vierteljahresschrift* 30, p.12.

²⁷⁸ See Chapter I.

²⁷⁹ F. Scharpf (1989), 'Politische Steuerung', *op. cit.*, p.12 (paraphrase).

talizes excessively on the aspect of functional differentiation.²⁸⁰ In Luhmann, ‘political steering’ is first of all an ‘interaction’ between differentiated, to each other in-transparent, functional subsystems. The problem with this primacy of the societal system is that it is not the correct level of analysis with regard to political steering. All things considered, steering concerns a relationship between divergent kinds of organized communication, the attempt to influence the ‘behavior’ of other organizations through communication organized by the state. Political steering is, shortly, another word for the attempt to influence the decisional behavior of, for example, economic or scientific organizations through collectively binding decisions cast in laws. As such, steering is not directed towards the basic operations of a functional subsystem.

The third line of criticism boils down to the suggestion to shift, within the analysis of the possibilities of steering, the primacy of the social system society and its subsystems to a focus upon political steering as a problem or phenomenon concerning the relationship between organizations. Here, society appears as a typically structured context, providing conditions for its subsystems. Of course, this suggestion relocates the discussion about steering in a different context and sheds another light upon the discussion as compared to the view of Luhmann, Teubner or Willke. It does however not imply a complete rejection of Luhmann’s social theory. For a start, we can still hold on to the idea of organizations as autopoietic systems emerging as self referentially closed networks of decisions. Decisions are still communications and as such suffice to meet the requirement of Sharpf and Schimank for macro-actors capable of performing actions. Functional subsystems are indeed not conceivable as actors capable of actions. Organizations on the other hand are, via self-binding, able to develop a unified capacity of action, to present themselves as hierarchically structured ‘actor-systems’. The acknowledgement of the latter, including the idea that the development of organizations as macro-actors facilitated through programs of decision-controlled input/output orientation, does not imply a hidden return to an intentionalist, action-theoretical approach. No more are the problems of steering completely solved as if all (scientific, economic, legal) organizations were completely at the mercy of the political

²⁸⁰ *Ibid.*, p.15. See also: R. Mayntz (1988), ‘Differenzierung und Verselbständigung – zur Entwicklung gesellschaftlicher Teilsysteme’ in: R. Mayntz *et al* (eds.), *Differenzierung und Verselbständigung – Zur Entwicklung gesellschaftlicher Teilsysteme*, Frankfurt am Main, p.11-45; B. Rosewitz & U. Schimank (1988), ‘Verselbständigung und politische Steuerbarkeit’, in: R. Mayntz *et al* (eds.), *op. cit.*, p.295-329.

system. Organizations are also self-referentially closed, autonomous systems submitted to their own local logics. If we maintain that the self-referential closure of organizations is at the same time the condition for their openness, this position would to a high degree concur with the theoretical and empirical research of so-called neo-institutionalists such as Schimank and Weyer. Consequently, Luhmannian steering pessimism must be modified.

3.4. Analysis and Evaluation

3.4.1 Demarcation

Luhmann's approach of law, as depicted in the earlier sections, holds a theoretical offer: a realistic description of law, facilitated by the concept of functional subsystems. In presenting law as a functional subsystem there is at least one basic requirement that has to be met: it must be possible to demarcate the system's boundaries. The question therefore is: does Luhmann's description of functional subsystems offer sufficient notions to demarcate between the legal and the non-legal? The following analysis pertains to the legal system. Luhmann's theorizing about the legal system as a functional subsystem is the most elaborate and extensive one and can be considered exemplary as regards the concept of functional subsystems.

Our point of departure is the understanding of law as a social system. This entails, as was discussed in Chapter 1, that the legal system (re-)produces itself in a self-referential mode. Consequently, the legal system must be operationally closed. To put it differently, the legal system constitutes its own elements by means of its own elements. These elements are communications.²⁸¹ Furthermore, in this self-referential (re-)production, a social system reduces and transforms contingency and complexity.

The above premises are not challenged within the scope of this research since it aims at a social systems theoretical internal perspective. As regards the legal system, Luhmann states that the legal system 'belongs' and contributes to the realization of society, as a subsystem of society. In Luhmann's view, society is not simply

²⁸¹ Cf. N. Luhmann, 'Closure and Openness: On reality in the World of Law', in: G. Teubner (ed.), *Autopoietic Law: A new Approach to Law and Society*, Berlin 1988, p.340.

the environment of law. Society is at the same time more and less than that environment. More, as society includes the legal operations; less, in so far as the legal system also has to deal with the non-societal environment, especially the mental and physical realities of people.²⁸²

In case of the legal system, the above question can now be redefined: how to differentiate legal communications from all other communications? Note that whatever is identified as law is exclusively a matter of the legal system. The thesis of operational closure entails that there is no import or export of legal communications from or to the environment into the legal system. The matter of the demarcation provoked a recurring debate in literature²⁸³, since Luhmann's approach differs from a more traditional understanding of the legal system as a set of rules or as the system of legal organizations. Luhmann's successive writings pertaining to the matter of the boundaries of the legal system did seem to offer a diversity of options as regards the nature of legal operations.²⁸⁴ From the outset it was however clear that Luhmann's notion of the legal system included far more, whatever that 'more' might be, which usually is attributed to the legal system. This assumption, in combination with what might be seen as an initial lack of resolution on Luhmann's account, gives rise to questions concerning the legal demarcation of the legal system. Is small talk in a pub concerning more severe punishment for juvenile delinquents a 'legal communication', is it an elementary operation of the legal system? And what about television documentaries portraying sensational court cases? Or lectures at faculties of law?²⁸⁵ In literature, the problematic character of the concept of functional subsystems is subject to different analyses and approaches. Thomas Schwinn, for example, focused on the difficult connection between functional subsystems and the societal system, following from the lack of unity as regards the concept of society.²⁸⁶

²⁸² N. Luhmann (1993), *Das Recht der Gesellschaft*, *op. cit.*, p.55 (paraphrase). Note that the demarcation *vis-à-vis* the non-social environment is accounted for as the premise of the differentiation between communications and not-communications.

²⁸³ Cf. P. Kennealy, 'Talking about autopoiesis: order from noise?' In: G. Teubner (ed.), *Autopoietic Law: A new Approach to Law and Society*, Berlin 1988; W. Kargl (1991), *op. cit.*; P. Nahmowitz (1987), *op. cit.*

²⁸⁴ See the following.

²⁸⁵ The matter provoked a substantial discussion, cf. Rothleutner and Teubner, Schwinn, Pokol.

²⁸⁶ Cf. Chapter 4.

The issue of the empirical demarcation of the legal system is closely related to Luhmann's theory of functional differentiation.²⁸⁷ Different 'perspectives' on, for example, a plane crash show that functional subsystems are distinct from each other as different modes of information processing. The plane crash 'is' every time something different to different systems. This is the result of the system's specific, code-directed mode of observation and information processing. Or, as Luhmann illustrates this:-

An act of payment is economically relevant, but may also take place in fulfillment of a legal obligation. An act of legislation has political meaning, and if legally valid, simultaneously brings about a structural change in the legal system.²⁸⁸

It indicates that functional differentiation does not result in domains that are separated from each other in an ontological way.²⁸⁹ Functional differentiation refers to differentiation of *Informationspotentiale*, information potentialities, as possibilities to communicate about something as 'this and nothing else'. Consequently, processing information can be understood as the creation of differences through differences.²⁹⁰ The fact that functional differentiation is not ontological, i.e. does not differentiate exclusive *Seinsregionen*, constitutes the advantage of differentiation based on coding: chains of communications can swiftly switch over from the legal to the political code, from the scientific to the economic code, and so on.²⁹¹

Functional differentiation is not anchored in distinctions at the basic level of communications as elementary units of systems (re)production, but primary in differential codes, in semantic distinctions, that is to say: in system structures as a reality complementary to communicative processes.

²⁸⁷ For this and following, cf.: T. Blom & L. (Francot-)Timmermans (1993), 'Recht is Recht is Recht is ...'; *op. cit.*, pp.68-70.

²⁸⁸ N. Luhmann (1988), 'Closure and Openness', *op. cit.*, p.342.

²⁸⁹ Luhmann refers to his theory as being part of a 'post-ontological theory design' and puts forward that, within this theoretical framework, 'it is quite possible to assert that everything that 'is' is formed through complexity reduction, and that the autopoietic systems in consequence form everything that acts as unit for them through their own operations; [...]', in: N. Luhmann (1988), 'Closure and Openness', *op. cit.*, p.339.

²⁹⁰ N. Luhmann (1987), *Soziologische Aufklärung 4*, *op. cit.*, pp.15-16.

²⁹¹ N. Luhmann (1986), *Ökologische Kommunikation*, *op. cit.*, p.87.

Béla Pokol understands this as a hidden shift towards an ‘analytical’ concept of systems, in the line of for example the work of Talcott Parsons.²⁹² According to Pokol this is the root of all problems concerning the empirical demarcation of functional subsystems. Parsons denotes his approach as analytical because the systemic connection he identified was conceived of as connections between aspects of given units: connection between elements that could only be differentiated conceptually or theoretically. In Parsons, a social system was not constituted as a unity of actions that are to be distinguished from other concrete actions but as a theoretical construct lifting out a certain aspect, a specific dimension from the general action system. Pokol considers Luhmann’s concept of functional differentiation to result in a similar aspect like or analytical understanding of systems: a communication belongs to a certain functional subsystem because the informational part is dealt with from a specific perspective.

It is a severe criticism on Luhmann’s account. Already in an early stage, Luhmann repudiated Parsons’ analytical concept of systems in favor of a ‘realistic’ understanding of systems and also from the point of view that there is no way back to an empirical application from an analytical understanding of systems. Luhmann could reply Pokol’s criticism by stating that there is a mix up of different things. Maybe functional subsystems perceive their environment from a certain perspective or under certain aspects but these are still the operations of factual, ‘real’, processing systems. Even distorted perspectivistic reconstructions of reality are the results of real constructive processes and this is the point of a realistic understanding of systems. Nevertheless, this criticism touches a tender spot in Luhmann’s theoretical edifice, which is shown by lack of resoluteness in dealing with the problem of empirical demarcation by Luhmann himself.

At the outset, Luhmann brought forward that within the legal system’s realm of relevance a hard core was to be distinguished, constituted by ‘actions with legal consequences’ (*Rechtsfolgen*). The thesis was that actions can *only acquire the quality of elementary unit of the legal system when they change the legal position*.²⁹³ The self-reproduction of the law is realized as an ongoing transformation of law, as the

²⁹² P. Pokol (1990), ‘Professionelle Institutionensystemen oder Teilsysteme der Gesellschaft?’, *Zeitschrift für Soziologie* 5, pp.329-344 (here: pp.330-331).

²⁹³ In Luhmann’s words, actions ‘*nur dann die Qualität einer elementar Einheit des Rechtssystems erhalten können, wenn sie die Rechtslage ändern.*’ N. Luhmann (1983), ‘Die Einheit des Rechtssystems’, *op. cit.*, p.136.

*transfer of the quality of normative validity onto, at least, partially new expectations.*²⁹⁴ Such provides for an empirical principle of demarcation but does so at a high cost. All kinds of legal consultation, deliberation or negotiation that normally are considered as legal communications or at least as actions typical of the legal system, are now excluded considering that it does not change the legal situation. It would be quite far-reaching not to include actions of lawyers or settlements if they do not change the legal situation.

In a 1986 article, 'Die Codierung des Rechtssystems', Luhmann's view seems to be broadened: communicated legal claims or assertions of law (*Rechtsbehauptungen*) do belong empirically unambiguous to the legal system. 'Legal claim' does not only refer to the claim *per se* but also to the preparation of its possibility, like for example drafting a contract or getting legal information.²⁹⁵

Whenever there is communication within the context of the legal system, it is about the preparation, the drafting, the clarifying of assertions of law, decisions pertaining to these assertions, and so on. Put more generally, Luhmann states that the code exclusively serves to process legal claims.²⁹⁶ This interpretation also includes procedural rules, codes of conducts for lawyers, legal consultation and so on. In short: all those elements that are commonly conceived of as belonging to the legal system. Luhmann's understanding of the legal system however goes beyond this common perception. For example, attempts to prevent illegal actions are now also elementary units of the legal system. A call for civil disobedience (to prevent the state from illegal action) is considered a legal claim. The boundaries of the legal system are thus stretched substantially. Is every call for civil obedience an elementary unit of the legal system? Is every public claim on a right a legal communication?

In the 1991 article 'Die Geltung des Rechts',²⁹⁷ Luhmann offers another option. The description of the legal system revolves around two things that is 'decision' (*Verfügung*²⁹⁸) and 'argumentation'. 'Decision' denotes a change in the legal situa-

²⁹⁴ *Ibid.*

²⁹⁵ N. Luhmann (1986), 'Die Codierung des Rechtssystems', *op. cit.*, p.179.

²⁹⁶ Original text: '[D]aß der Code ausschließlich dem prozessieren von Rechtsbehauptungen dient.' *Ibid.*

²⁹⁷ N. Luhmann (1991), 'Die Geltung des Rechts', *Rechtstheorie* 22, pp.282-283.

²⁹⁸ The translation of 'Verfügung' in 'decision' follows from the translation used in: N. Luhmann (1995), 'Legal Argumentation: An Analysis of its Form', *The Modern Law Review* 58-3, pp.285-298.

tion (*Rechtslage*) by means of legislation, judicial sentences, treaties, wills, and so on. A change in the legal situation refers to an alteration in what up till now had legal validity.

In distinction to Luhmann's earlier position, in which units of the legal system were those events or actions that change the legal situation (actions with legal consequences), the legal system is no longer only observed and described as a connection of 'decisions' but also utilizes 'argumentation' as a mode of operation.²⁹⁹ Through 'argumentation', for example the judicial obligation to explain or justify, closing speech or counsel's argument, the legal system checks its disposal of the code values legal/illegal. Pivotal to legal theory is the question if there are firm grounds to conclude that something is legal or illegal.

Continuing this line of thought, the question for the identification of legal action can be answered, at this point, as follows: only those actions are elements of the legal system that are directed towards legal programs in order to determine what is legal or illegal at this moment or in the future. It concerns a double orientation, towards the code and programs of the law. This approach of the problem of the empirical demarcation has a typical consequence. The implication is that a communication as a 'legal action' unfolds a double presumption. First, a communication is motivated by a decision-context in the sense that the minimal assumption is that an action is a moment of a process, leading to determining whether something is legal or illegal. Secondly, the person to whom the responsibility for the communication, as his or her action is attributed, is presupposed to have factual, be it minimal or partial, knowledge of the law.

As such, the identification of a communicative event as a 'legal action' entails a double hypothesis and this also applies to the mode used by the legal system to observe itself as an action system. An important difference between legal-internal and 'everyday' observation of legal actions is that the law in its 'center' systematically seeks to limit the risks taken with this double hypothesis. By means of regulating the access to the professional-organizational complex and via institutionalized control upon the operations within the organizations, the legal system tries to minimize uncertainties concerning the appropriateness of the double hypothesis inherent in its self-observation – if possible, in advance. Not only applies that only those able of presenting proof of their legal knowledge can gain access to the

²⁹⁹ N. Luhmann (1991), 'Die Geltung des Rechts', *op. cit.*, p.283.

legal profession (even though this does not exclude shortcomings), furthermore, ministers, judges and the Bar supervise the actual involvement of members of the legal profession in legal processes of decisions, implementing their formal/official involvement. Finally, judges are submitted to the legal obligation of having to decide, to rule.

This last option depicts a more realistic picture of the kind of operations belonging to the legal system, once the matter of empirical demarcation is explicitly connected to 'programming'. The line of thought sketched in this article served as a point of departure for further elaboration by Luhmann in his 1993 book *Das Recht der Gesellschaft*, which can now be considered to be his 'closing argument' on the legal system. There, Luhmann emphasizes once more the operational closure of the legal system and hence the differentiation of legal communication as a *social system*, that is: a system consisting of actually realized operations that are communications with a legal quality and not, as is common among jurists, understood as a connection of rules geared to one another.³⁰⁰

We bring back to mind that if the point of departure is a difference between system and environment, the issue becomes how to recognize which operations (communications) belong to the system and which do not (and therefore constitute the environment). Or, to put it differently, how is the operational closure of the legal system and its differentiation within society brought about? Luhmann puts forward that the differentiation of an operationally closed system is brought about through the recursive reference of legal operations to legal operations. The legal system operates in an ongoing reference to itself: in order to qualify its own operations as legal, the legal system has to discover what it has been doing up till now and will go on doing in order to qualify its own operations as legal ones.³⁰¹

The above formulates, so to say, a systems theoretical 'rule of recognition'. In order to 'recognize' legal communication, legal communications always have to refer to legal communications on hand, to already existing law. This notion depicts the legal system as a historical machine, highlighting the temporal dimen-

³⁰⁰ N. Luhmann (1993), *Das Recht der Gesellschaft*, *op. cit.*, p.41.

³⁰¹ *Ibid.*, p. 57: 'Die Ausdifferenzierung eines operativ geschlossenen Rechtssystems erfolgt durch rekursive Bezugnahme rechtlicher Operationen auf rechtliche Operationen. Das System operiert, wie jedes autopoietische System, in ständigem Selbstkontakt. Um eigene Operationen als rechtliche qualifizieren zu können, muß es herausfinden, was es bisher schon getan hat oder weiterhin tun wird, um eigene Operationen als rechtliche zu qualifizieren'.

sion of social systems. Here, once again, it is illustrated how the self-referential reproduction pushes itself forward in time, by connecting to preceding operations of the system. Exemplary in this case is the course of a legal procedure in successive courts. The Supreme Court refers to the judicial decision of the Court of Appeal: without the judgment of the latter, the Supreme Court cannot reach a verdict. The Court of Appeal in its turn refers to the judgment of the District Court, and the latter takes, as its starting point, a claim based on positive law.³⁰²

The fact that the law propels itself in time, prompts Luhmann to state that, from a historical perspective, there is no such thing as the beginning of the law, only situations wherein it is plausible to presume that legal norms were also applied before.³⁰³ Only as regards *Legitimationsmythen*, the marking of a beginning of law can fulfill a function and breach the circularity (law is law is law ...), thus relocating the arbitrariness, inherent in any selection, outside the law.

The foregoing depicts the temporal aspect of self-referential reproduction of the legal system but cannot account for its operational closure. According to Luhmann, this requires two more evolutionary achievements: a functional specification of the legal system, that is: reference to a specific societal problem, and secondly, a binary code (legal/illegal). According to Luhmann, both achievements together bring us again a step closer to the recognition of legal communications since only through the combination of code and program, it becomes possible to differentiate typical legal communications from others.³⁰⁴

So far, the operational closure of the legal system has been depicted. Necessary in this respect, is the understanding of law as a historical machine, its specific function and coding. Still, an exact identification of legal communications has not taken place. According to Luhmann, not all use of legal notions or matters with some legal background (such as asking a receipt of purchase) produces legal communications. In respect to the question 'what' legal communications are, Luhmann presents the code as of paramount importance: within the legal system there are only coded communications, only communications that claim an attribution to the values legal and illegal. Only such a communication connects to the

³⁰² In case of the regular course of procedures.

³⁰³ N. Luhmann (1993), *Das Recht der Gesellschaft*, *op. cit.*, p.57.

³⁰⁴ *Ibid.*, p.61.

legal network. Attribution to the code can come into existence for many different reasons.³⁰⁵

For example, according to Luhmann statements of the type “I do or don’t have the right to do so or so”, however implicit but in reference to legal rules, is an operation of the legal system. Another example of legal communication is a proposition to change the law, if and when the norm subject to change is communicated. Who initiates this proposition is, according to Luhmann, of no importance: political parties, lobby groups or social movements. In order for such a proposition to be a legal communication, it is not necessary that its initiator is a part of a legal organization. It does not follow however that every reference *per se* to the legal code is sufficient to qualify a communication as a legal communication. In legal education, for example, communication about cases does not belong to the legal system. Neither do newspaper articles about legal cases. In these cases, communication does not refer to the values of the code, according to Luhmann, but clearly belong to other functional subsystems.

Since reference to legal organization is a possibility but not a necessity for a communication to gain legal quality, Luhmann’s approach extends the boundaries of the legal system substantially in comparison to more traditional legal theoretical or sociological approaches. The domain of the legal system is frequently limited to the scope of its organizations. But Luhmann puts forward that from a sheer quantitative perspective, the law operates far beyond its organizational-professional core. The daily course of the law operates under different conditions than legal professionals sometimes can imagine. A DNA-swap from an alleged juvenile delinquent, for storage in a public databank, might be well in compliance with the law but is often experienced as a severe infringement of the right to privacy of the alleged juvenile delinquent. On the other hand, the increase of regulation concerning safety, such as the possibility of camera surveillance in public places or preventative body search, seems to cause more anxiety in the legal profession whereas the public does not care or even claims to feel safer.

The qualitative aspect of the boundaries of the legal system seems however even in Luhmann’s work connected to the specialized organizations of the system. The boundaries of the decision system (courts and parliaments) influence the bounda-

³⁰⁵ *Ibid.*, p.67.

ries of the legal system and determine to a great extent the ‘willingness’ of the legal system to engage in communication about legal and illegal events.³⁰⁶

The previously described ‘disconnection’ between whatever it is that constitutes the legal system as such and the legal organizations provoked criticism, by, for example, Pokol. Pokol presented a different approach in his *Komplexe Gesellschaften – Eine der möglichen Luhmannschen Soziologien*.³⁰⁷ Since Pokol’s work offers alternatives worth considering and interesting points of departure for further development, his book demands a short analysis.

Drawing upon the theories of Luhmann, Talcott Parsons, Munch and Habermas, combined with the results of his empirical enquiries, Pokol states that if the functional differentiation of society is accepted as a premise, the problem of the demarcation of functional subsystems is articulated through the demarcation between ‘professional communication’ and ‘laymen communication’. For Parsons this demarcation did not present a problem since his approach was a pure analytical one. Luhmann, who repudiated Parsons’ approach, incidentally addressed the differentiation between professional and laymen communication in the context of the legal system but not with regard to other functional subsystems.

Up to now the law has been treated either from the perspective of jurisprudence, as a complex of norms, or as a system of knowledge, in abstraction from real social behaviour. Jurists saw the legal system as a macro-text. Or, as is customary in sociology, the focus was shifted to institutions that are concerned with law on a full-time basis, whether those institutions were organizations, or the legal profession. This perspective permitted empirical treatment of such problems as “access to the law”. Yet distinguishing between the legal system and the state as the basis for organizations and the source of power was difficult. Political influence on the law was conceived as a kind of input (of the law into the law). Alternatively, the legal system as a whole was even conceived from the standpoint of the political system, as an “implementation” of politics. For all its ambivalence, this perspective has left a definite mark on jurists’ attitudes towards the relationship between law and politics.³⁰⁸

³⁰⁶ *Ibid.*, p.149.

³⁰⁷ Bochum, 1990.

³⁰⁸ N. Luhmann (1989), ‘Law as a social system’, *op. cit.*, p.141. However, also see: N. Luhmann, (2000), *Die Politik der Gesellschaft*, *op. cit.*, p.221.

Pokol notes that if one accepts the principle of functional differentiation of society, the problem of the differentiation between lay communication and professional communication remains unsolved. We have seen that the boundaries of functional subsystems are determined by a binary code 'absorbing' all communication directed towards one of the code values. Thus there is no difference between communication of laymen and of professionals: there is but one semantic field of legal communication. The communication of jurists about a court case belongs to the legal system but so does the friendly discussion between truckers in a pub about the same court case. Luhmann states explicitly that the boundaries of the legal system are not anchored in its institutional or professional back up. After due empirical research, Pokol has come to the conclusion that the boundaries of functional subsystems have to be narrowed down to the professional components. On the level of society, there are *professionelle Institutionssysteme* with boundaries determined through an equivalent of coding, *Wertdualen*. Professional communication is organized around these *Wertdualen*. The communication excluded thus from the professional subsystems, is referred to as *Alltagsleben*, a somewhat Habermasian concept. This *Alltagsleben* is dominated by more diffuse, more sensitive and private relations.³⁰⁹ Pokol's *Alltagsleben* is different from Habermas' *Lebenswelt*. The difference is mainly located in the fact that, in Habermas, *Lebenswelt* is restricted to the moral community and that in the differentiation of systems, the emphasis is put on the destruction of the *Lebenswelt*.³¹⁰

Pokol situates *Alltagsleben* and professional systems at the same level, that is: society, and there is no antagonistic relationship or threat of colonization. Even more, there is a harmonious mediation between *Alltagsleben* and the professional systems by means of mass media and publicity.³¹¹

Pokol's innovation pertains to the limitation of the boundaries of functional subsystems to their professional components. This theoretical decision shifts, in its consequences, Pokol in the direction of Habermas. In limiting subsystems to their professional components, a 'new' realm of communications is constituted: the

³⁰⁹ B. Pokol (1990), *op. cit.*, p.7.

³¹⁰ *Ibid.*, p.85. Cf. Schütz about *Lebenswelt*: '[...] das nichtexplizierte Hintergrundwissen der gemeinsam handelnde Personen – hinsichtlich der Beurteilung der Situationen. Das ist also die Welt der Selbstverständlichkeiten, welche Handlungskoordinationen ohne komplizierte Vereinbarungen ermöglicht.' in: *ibid.*, p.80.

³¹¹ *Ibid.*, p.48.

not professional or laymen communication.³¹² After this correction, social evolution is no longer understood as the functional differentiation of subsystems but as the pronounced demarcation of professional institution-systems from the *Alltagsleben*.

Another correction concerns the importance and influence of the economic market rationality with regard to internal valuation standards within universities and scientific domains. Pokol states that it is difficult to maintain the idea of 'isolation' or rather closure of subsystems such as science, economy, politics and so on whereas the scientific domain, for example, is obviously penetrated by economic standards. Here, Pokol returns to the difference made by Polanyi: the difference between a 'substantial' concept of economy, referring to the domain of material production, and a 'formal' concept of economy referring to market mechanisms. It is precisely the latter understanding of economy that elicits an important theoretical problem: the formal understanding of economics incorporates more and more the organization of a whole set of societal subsystems.³¹³

A similar spreading of politics and the law has been discussed for several decennia, with shifting accents. Pokol therefore wonders whether it concerns a mutual involvement or absorption of subsystems. Here, Pokol readdresses the concept of inclusion. Opposed to Parsons, who used 'inclusion' in connection to population, Pokol reformulates the concept in terms of a growing incorporation of societal situations.³¹⁴

As to the demarcation of functional subsystems, Pokol criticizes Luhmann's approach as follows. As is known, Luhmann's approach consists of the idea that a functional subsystem demarcates itself in its function to the degree it is capable of organizing communications around a binary code. According to Luhmann, organization systems are not constitutive as regards the boundaries of functional subsystems: only the code controls the selection of communications. Pokol spots a major problem. Within a subsystem, codes do not discern between professional communication and laymen or everyday communication. Therefore, all commu-

³¹² *Ibid.*, p.7.

³¹³ *Ibid.*, p.9.

³¹⁴ *Ibid.*, p.10.

nications referring to the legal code belong to the legal system, regardless the 'source', professional or layman.³¹⁵

Subsequently, in using such a broad interpretation of subsystemic boundaries, Luhmann cannot but ignore the analysis of those structures that enforce professional participants to apply and maintain the specific code in a strict mode.

Pokol's alternative demarcation is not entirely without attraction. It suggests a clear demarcation: it makes sense to limit legal communication to the legal profession, political communication to politicians and administrators, and so on. This 'professional' communication demarcates the boundary of a system. Such a system, Pokol calls a professional institution system. All other communications that cannot be attributed to professional institution systems belong to the *Lebenswelt*. A problem is however that Pokol does not elaborate the concept of professional institution systems so it is not clear to what this concept precisely pertains. How does it, for example, differ from the professional organizations within law and politics, if at all? And when jurists communicate about the returns of their law firm: does this communication belong to the *Lebenswelt* or the professional institution system or, in Pokol's approach unlikely, to the economic system? And the communication of a client with his legal representation, concerning the client's legal matter? Law students discussing case law? Professional institution systems may offer empirical demarcation but do so in a very limited way.

3.4.2 Conclusion

In search of an answer to the research question regarding the issue whether Luhmann's theory of society provides a clear demarcation of the legal system and which notions contribute to such a description, the above inquiry was limited to Luhmann's theorizing about the legal system. Point of departure was the assumption that the legal system is a social system. It follows that its elements are communications and that it produces and reproduces itself in a self-referential mode. Consequently, the above question was further refined: what qualifies a communication as a legal communication? Pokol's offer of professional institution systems presented itself as an interesting but not completely satisfying perspective. So, it is time to evaluate Luhmann's concept of functional subsystems in respect to the

³¹⁵ *Ibid.*, p.22.

possibility of demarcation between legal and non-legal, or: all other, communications

The foregoing illustrates that the qualification of the typical operations of the legal system went from *Rechtsfolgen*, via *Rechtsbehauptungen* to *Verfügung* and *Argumentation* as typical legal communications or as a mode of determining those (argumentation). If nothing else, it illustrates Luhmann's changing presentation of his insights as regards the demarcation of the legal system, from a rather limited legal realm to a more two-dimensional understanding of the boundaries of the legal system. *Das Recht der Gesellschaft* was his last and most comprehensive book about the legal system. In this research it is considered to be conclusive as regards the issue of the empirical demarcation of the legal system. From the outset, it is clear that in Luhmann's work, the boundaries of the legal system do not coincide with those of legal organizations, such as courts and the legal profession, even though they play an important role in demarcating the legal system. It is safe to say that the identification of the elementary units of the legal system requires a set of notions beside that of legal organizations.

Consistent with the premises of social systems theory, demarcation is understood as an achievement of the system itself. Only the legal system can bring about its unity as a social system. Luhmann depicts the legal system as a historical machine. Law determines what law is in reference to law at hand, to existing law. This also reveals another state of affairs: the legal system is an operationally closed system. There is no import (or export, for that matter) of law. Luhmann:-

Thus, legal quality (whether validity or invalidity) of claims and decisions can be derived only from the operations of the same system (for instance, by reference to statutes or to precedents or to such dubious recourses as "prevailing opinion"); it cannot be supplied from external sources like religion or politics or the economy; and if in the legal system such references to external sources can be found, then these references are in turn already legal norms, which legally legitimated block acceptance of external norms or decisions [...].³¹⁶

Decisive in this respect is the legal code. Only operations directed towards legal or illegal are elementary units of the legal system. As regards this effect, it is im-

³¹⁶ N. Luhmann (1988), 'Closure and Openness', *op. cit.*, p.345.

material to what value the operation is directed, the positive or the negative value as long as the communication is submitted to regulation by the legal code.³¹⁷

In itself a code is not a norm, only a structure of recognition and attribution of societal autopoiesis. It follows that coding as such is not *existenzfähig*, not capable of existing.³¹⁸ The identification of legal communications therefore requires not only coding, but also orientation towards function. Function entails that the legal system operates at the same time normatively closed and cognitive open.³¹⁹ The latter refers to the necessity of programming. A code can only be productive in combination with programs, such as laws and for example judicial precedents.³²⁰

In short, programs consist of positive law. Those programs are produced, changed and effectuated by what Luhmann calls the organized decision system, or within this research: specialized organizations of the legal system, courts and parliaments. Note that Luhmann limits the specialized organizations to those that are authorized to make decisions concerning legal matters that dispose of the authority to decide about legal/non-legal. Especially the courts, underlying the obligation to decide anyway anyhow, now seem to be a point of gravity as it concerns the demarcation of the legal system. This approach does not include the Bar, legal counseling like mediation or legal insurance, or notary's practices into the specialized organizations, but does not at the same time exclude these organizations from the legal system. So, even though organizations play an important role in the demarcation of the legal system it is not an exclusively defining role. One remark though is in place. In reference to the societal function of the legal system, the point of gravity seems to be located in parliaments (or legislation). The stabilization of normative expectations refers, at the level of performances, to the formulation of rules. This is primarily the task of parliaments. The courts see to the maintenance of these rules in case of conflicts.

By disconnecting the boundaries of the legal system from its specialized organizations, Luhmann meets at least his own theoretical requirement regarding the universality of the code: everything can gain legal relevance, everyone (more pre-

³¹⁷ Cf.: 'Es kommt darauf an, daß die Kommunikation sich der Regulierung durch den Code unterstellt. Aber es kommt natürlich nicht auf die Wörter an, sondern auf das Verstehen des gemeinten Sinnes', in: N. Luhmann (1993), *Das Recht der Gesellschaft*, op. cit., p.69.

³¹⁸ *Ibid.*, p.190.

³¹⁹ *Ibid.*, p.77.

³²⁰ *Ibid.*, p.93.

cisely: everyone's communication) can be included in the legal system. Access is not strictly limited to legal professionals, were the system limited to specialized legal organizations, everybody can make an appeal to the law.

The above invites to the formulation of a few comments. The combination of concepts depicts a fairly clear image of the legal system and its boundaries: the understanding of the legal system as a historical machine, its operational closure by means of the code, programs and the importance of courts and parliaments. To enter the realm of law, a reference to law is necessary but apparently it can, but does not need to be an explicit reference as in a legal claim. A legally intended meaning or an implicit reference suffices. The boundaries of the legal system are therefore not an ontological matter, not a fixed 'border' but shifts every moment a (implicit or explicit) reference is made to law. Whenever, in a negative or positive sense, a reference to law is made, by whoever, this reference is a legal operation. This seems to include also all rules of law operating as a framework, as 'silent' law and not only legal claims, as in the case of conflicts. For instance: the act of purchase is an implicit reference to legal rules, enabling the purchase. This understanding is consistent with the societal function Luhmann attributes to the legal system: the stabilization of normative expectations.³²¹ It does not only seek to solve and whenever possible to avoid conflicts but also provides for a pre-selection of possible actions, thus reducing complexity. Understood thus, the legal system constitutes a 'normative fabric', a framework for (successful) communication.

³²¹ Cf. N. Luhmann (1993), *Das Recht der Gesellschaft*, *op. cit.*, p.199.

Chapter 4

Society and Societies

4.1. Introduction

So far, the research focussed on the concepts of society, of organizations and functional subsystems as *social systems*. More specifically, the inquiry pertained to the issue of the demarcation of society and the legal system, as well as of the role of organization therein. In the literature, the issue of demarcation is a recurring topic of criticism. This is not surprising. Luhmann repudiated an analytical understanding of social systems (cf. Parsons) in favor of a more ‘realistic’ approach of social systems. This approach is condensed in the phrase ‘there are systems’. The burden of proof rests upon Luhmann’s theory of social systems. One particular important aspect is therefore the possibility to differentiate between system and environment: can one observe and describe the boundaries between system and environment?

This final chapter will readdress the concept of ‘society’ and seeks to formulate an answer to the first research question: **Does Luhmann’s theory of society offer a univocal concept of society, as a social system, in view of society’s demarcation as regards the non-societal environment?** ‘Society’ is the pivotal concept of his theory of society and is much discussed and sometimes severely criticized. In this chapter, the criticism of Thomas Schwinn will be dealt with. Schwinn addresses the problem of the concept of society in terms of its unity. He furthermore identifies problems with the concept of functional subsystems following from the overarching problematic understanding of ‘society’. The question is whether Schwinn’s criticism is effective or if something else is at stake.

The discussion of Schwinn’s criticism will serve as an upbeat for further evaluation of Luhmann’s concept of society.³²² Furthermore, several options to determine societal unity will be catalogued. The conclusion will be however that from a systems theoretical perspective unity cannot be but an operational, hence communicative, one. Such may well induce the conclusion that our society is now-

³²² Cf. Chapter 2.

days *Weltgesellschaft*, world society, but this allows only for a description of society on a very general level. An alternative perspective on the Luhmannian concept of society will be proposed: on the one side, the understanding of ‘society’ as the general-theoretical concept and the most abstract level of analysis. On the other side, a more ‘realistic’ understanding of specific, empirical societies based on the general concept of society is proposed.

This alternative understanding of ‘society’ sheds a new light upon the matter of normativity, which always has been an underexposed aspect in Luhmann’s theory of society. By distinguishing between a general theoretical concept of society and more qualified elaborations (*societies*), the importance of normative aspects as regards the specific ‘content’ of a specific society re-enters the theory of society.

Even though Luhmann accounts for norms and values, the theory does not attribute a paramount role to values as regards specific forms of social order and displays a certain one-sidedness regarding the importance of normative aspects/organizing ideals in society. The theory offers however opportunities to do so and allows for a differentiation between form and contents of social order within a specific society.

The preceding findings allow for the conclusion that social systems theory provides first and foremost a description of society at a very abstract and general level. However, an informative description of modern Western society by means of social systems theory is possible only if normative aspects are also accounted for in the theory of society. These normative aspects or organizing principles pertain to the contents of social order.

As seen before, society as a social system reduces and builds complexity. How a specific society reduces complexity is however not only a ‘technical’ matter. The thesis is that a specific society also transforms complexity and adds a qualitative aspect. Pivotal is a normative content or aspect: an organizing ideal contributing to the contents, that is: the material side, of social order in that specific society. To put an organizing ideal into effect, it has to be cast in terms of normative goals. Subsequently, in our modern society organizations are the proper social systems to formulate normative goals and to direct their output towards these goals.

Section 2 of this chapter will deal with the concept of society and the criticism of Schwinn. In view of this criticism, several options to determine the unity of soci-

ety will be catalogued and evaluated. It will be argued that pertaining to 'society', the concept of operational closure suffices to denote its demarcation, whereas 'unity' is reserved to demarcate specific societies. Section 3 focuses on the possibility of a social systems theoretical description of a specific society: modern Western society. This is further elaborated in Section 4. It is argued that a description of a specific society requires the re-entry of normativity. Normativity is interpreted in terms of organizing principles. Finally, one organizing principle and a concurring societal problem are highlighted: certainty and risk.

4.2. Society

4.2.1 *The Concept of Society*

The concept of society was dealt with at some length in Chapter 2. With regard to a concluding evaluation of Luhmann's theory of society, attention is once again directed towards this not at all unproblematic concept. Luhmann's aim was to develop a theory of society rather than a societal theory.³²³ The latter deals with social phenomena or separate social sub domains whereas the former aims at a better insight in society as totality, as a particular social system besides others such as organization or interaction. The concept of society nowadays takes many shapes and reference is made to information society, knowledge society, organization society and so on. From a systems theoretical point of view, in these cases it is presumed that one characteristic would adequately represent the totality. Luhmann's theory opts for a different approach, trying to avoid what he considers a case of 'mistaken identity'. One characteristic is just that and, in Luhmann's view, society is the all-compassing social system of all communications and not a national or cultural unity.³²⁴ The question is, however, whether Luhmann's understanding of society is at all as clear and univocal as is presented in his theory of society, particularly in respect of the demarcation of society with respect to its environment.

³²³ Especially in: N. Luhmann, *Die Gesellschaft der Gesellschaft*, Frankfurt am Main 1997.

³²⁴ N. Luhmann (1993), 'Gesellschaftstheorie und Normentheorie', *op. cit.*, p.15, also see p.16.

4.2.2 *Criticism: Schwinn*

A profound criticism concerning the problem of a useful notion of society is provided by Thomas Schwinn. According to Schwinn, problems pertaining to the concept of society already occurred in Luhmann's early work and his so-called autopoietic turn did not provide a solution.³²⁵ In Luhmann's early work, 'society' is already presented as the encompassing system and as such the necessary level of analysis for a range of problems. Yet, the problem is, according to Schwinn, that Luhmann cannot offer '*klare, aussagekräftige Gesellschaftsgrenzen*', clear, cogent societal boundaries.³²⁶ The boundaries of social systems, according to Schwinn's reading of Luhmann's early work, are constituted by meaning and Luhmann presents the unity of society as the boundaries of possible and meaningful communication, as the limits of accessibility/ attainability and of what is understandable.³²⁷ Meaning enables both a reduction and an increase of complexity. With regard to the internal complexity of systems, meaning provides for the state of affairs that there are always more possibilities for action than actually are realized.³²⁸

At a certain level however, society is overburdened with complexity: too many possibilities require the societal system to differentiate within itself in order to maintain societal unity. Internal differentiation refers to the differentiation of society into subdomains. These subdomains are also characterized as systems demarcating boundaries and obtaining, within these boundaries, a certain degree of autonomy. According to Schwinn this solution reveals a problem: the unity of society can no longer be represented as the unity of a *Sinnzusammenhang* (a connection of meaning), since reduction of complexity in a differentiated societal system is the main performance of its subsystems. Schwinn puts forward that the *Sinnsgrenzen* (meaning boundaries) regulating these performances of reduction of complexity (truth, love, law, politics and so on) do no longer coincide with the boundary of society understood in terms of meaning. Consequently, if society is more than a pure structure enabling different action, a conception of its bounda-

³²⁵ Cf. Chapter 1.

³²⁶ T. Schwinn (1994), 'Funktion und Gesellschaft – Konstante Probleme trotz Paradigmawechsel in der Systemtheorie Niklas Luhmanns', *Zeitschrift für Soziologie* 3, p.201.

³²⁷ Original text: '*als die Grenzen möglicher und sinnvoller Kommunikation, als Grenzen der Erreichbarkeit und der Verständlichkeit*', T. Schwinn (1994), *op. cit.*, pp.202.

³²⁸ Cfr. Chapter 2.

ries is a sheer necessity. But the search in Luhmann's theory for a clear, univocal conception of 'society' is in vain, Schwinn states,³²⁹

Also in Luhmann's more recent work, that is: after the autopoietic turn, the concept of society still constitutes a problem. In the theory of self-referential systems, the core of systems building is the constitution of a difference between the system and its environment by means of self-referential reproduction. The importance of the unity of society remains unchallenged. The importance of a clear and useful concept of society forces itself upon Luhmann's theory. Its necessity is located in the fact that society is 'what' carries, the locus of, social evolution, 'what' differentiates into other systems because without this unity separate subsystems are not capable of reproduction and hence existence.³³⁰ According to Schwinn, autopoiesis meets its limits if the reproduction of the totality is disturbed since it is the meaning of differentiation to be comprehended as a unity: in this sense, difference unites but without normative integration or operational control of the encompassing system. Schwinn states that the unity of the societal system can only be depicted through the '*Konstruktionsprinzip seiner Differenzierung*'³³¹, the constructive principle of its differentiation.

As shown before, differentiation is both differentiation of society and the form in which societal subsystems observe themselves as societal subsystems.³³² Each subsystem reconstructs society from within its own perspective. So, the unity of society is *represented* by the form of its functional differentiation.³³³ Schwinn states that at this point further problems emerge: functional subsystems differ in their evolution and it is not at all clear what Luhmann's concept of society has to offer. Societal reference and the notion of societal unity are maintained. The differentiation of subsystems is closely related to the fulfillment of societal function. In order to fulfill its function, each subsystem has to produce its own description of society. But to each other, the subsystems are black boxes and cannot 'know'

³²⁹ T. Schwinn (1994), *op. cit.*, p.202 (paraphrase).

³³⁰ *Ibid.*, p.204.

³³¹ *Ibid.*, p.205.

³³² Cf. Chapter 2.

³³³ A representation of unity is however not the same as the actual unity. Furthermore Schwinn seems to presume that unity is the totality (the sum) of the parts whereas 'society' is to be understood as an *Emergenzphänomän* that is: it has more and different qualities than following from the sum of its parts. Also see: B. Pokol, *Komplexe Gesellschaft – Eine der möglichen Luhmannschen Soziologien*, Bochum 1990, p.17.

each other's description of society, let alone align these. Schwinn puts forward that Luhmann is not able to clarify how, with regard to the mutual intransparency of the subsystems, societal unity can be brought about. Since society is nothing beyond the operations of its subsystems, according to Schwinn, the connection of an autopoietic subsystem and its reference to a problem of society has to appear magically from the high hat of evolution.³³⁴

Schwinn's criticism centers on the idea that there is a tension between the claimed functional autonomy of subsystems on the one hand and holding on to a societal unity on the other, providing the point of reference with regard to functional subsystems. The connection between the societal system and its subsystems is a problem left unsolved by Luhmann, also in his newer work. Schwinn then wonders if 'society' will ever be more than wishful thinking, an inexplicable black box.³³⁵ According to Schwinn, there is not much to be found in Luhmann with regard to concrete processes of intersystemic coordination. We have seen that there are three systemic references: function, performance and reflection. As was shown in Chapter 3, the concept of functional subsystems causes problems with regard to their empirical demarcation. Next to these problems, function turns out to be a weak reference, since it refers to 'society' in all its vagueness. Reference to 'society' through function therefore is not informative, or so says Schwinn.³³⁶

It is only in performance that subsystems encounter in their environment unities that can be addressed and are capable of action. An inherent problem immediately appears: functional subsystems are not capable of communicating directly with their environment. The only social systems capable of doing so, as argued in Chapter 3, are organizations. According to Schwinn, this implies the 'disintegration' of society because connections between subsystems should culminate in one point which one could define as 'society'. Even though modern Western society is often denoted as an organization-society, societal unity cannot be brought about by organizations.³³⁷ On this point, Schwinn finds himself in agreement with Luhmann.

³³⁴ T. Schwinn (1994), *op. cit.*, p.206 (paraphrase).

³³⁵ *Ibid.*, p.206.

³³⁶ *Ibid.*, p.207.

³³⁷ That is if organizations are understood as distinct social systems. Society is of course organized in a certain way, in the sense of Maturana and Varela: communications are linked in a selective way to each other and not at random. Social complexity is 'organized' or, as Luhmann puts it, determined and this is what we can observe. Note that the reduction of complexity, for

Schwinn's point is that the two concepts of unity he distinguishes in Luhmann – societal unity represented by the form of its differentiation and societal boundaries of a communicative kind – cannot go together. Functional subsystems do not present the only differentiation within society. There is also uncoded communication, diffuse or *lebensweltliche* communication.³³⁸ But then it is difficult to claim that the societal unity is located in its form of differentiation since there is a substantial amount of communicative connections that do not appear on the screen. This contradiction is best shown by the relationship between society and interaction systems. In modern society, there is a vast amount of 'free' interaction that exists, according to Schwinn, quite indifferent as regards societal structures. The question is raised how interaction systems acquire structural relevance. The point is, according to Schwinn, that there appear to be two different concepts of society, a narrow and a broad one. The former defines the unity of society by means of the form of its differentiation alone and the latter includes uncoded communications as well. The broader concept claims that everything is communication and hence society. The result is, however, that its defining quality is zero. Society understood as the sum of all communication does not inform us about the relation between functional subsystems and uncoded interaction systems.³³⁹

Following Schwinn's understanding of Luhmann's concept of society, it is clear that a set of problems lies dormant within it. Luhmann himself frames his approach with the statement that there is no clear notion connected to the word society.³⁴⁰ This does however not suffice since Luhmann's theory of society builds upon his concept of society. Is a concept of unity of society not first and foremost a theoretical requirement, and less an empirical one?³⁴¹ Society, whatever its unity

this is what 'organization' or determination pertains to, is produced precisely by means of this observation. Cf. N. Luhmann, *Soziologische Aufklärung 2*, Opladen 1975, p.19.

³³⁸ Such is acknowledged by Luhmann, for example, in N. Luhmann, *Ökologische Kommunikation*, Opladen 1986, p.75. Furthermore, in Luhmann's work it was never claimed that all communication is coded. Schwinn does not take into account that functional differentiation is the primary but not sole form of differentiation of modern society. It co-exists with segmentary and stratificatory differentiation, cf. Chapter 2 of this dissertation. Differentiation is not restricted to functional subsystems. Organizations and interaction systems are also differentiated systems but do not use a code. See also: N. Luhmann (1997), *Gesellschaft der Gesellschaft*, *op. cit.*, especially Chapter 4.

³³⁹ T. Schwinn (1994), *op. cit.*, p.209.

³⁴⁰ N. Luhmann (1997), *Die Gesellschaft der Gesellschaft*, *op. cit.*, p.16. In Luhmann's words: '[M]it dem Wort Gesellschaft verbindet sich keine eindeutige Vorstellung'.

³⁴¹ Even though Luhmann claims that his theory of society concerns the observation of *empirical* systems.

might be, carries on despite all social theory. And is there nothing in Luhmann to be found to meet the theoretical requirement of unity?

4.2.3 Unity

So far we have learned that, in Luhmann's opinion, the boundaries of society are of a communicative nature. Consequently, the unity of society is *vis-à-vis* the non-social environment (psychic, physical, biological etc. systems) located in the purely communicative nature of society. The tacit assumption underlying the foregoing findings was that the boundaries of society and its unity are complementary notions. The former cannot be determined without the latter and *vice versa*.³⁴²

As seen before, Luhmann abandons political-territorial and normative concepts and notions of society. He underlines this approach in *Die Gesellschaft der Gesellschaft* by putting forward that the theory of society (or more general sociology) is burdened by tradition.³⁴³ These *Traditionslasten* or, to put it somewhat differently, false premises are, according to Luhmann, hindering an adequate analysis of society. The first false premise is the assumption that society is comprised of concrete individuals. As a consequence, the second premise pertains to the assumption that society is constituted by or at least integrated through consensus between individuals about their values and interests. The third burden of tradition pertains to the notion of societies as differentiated from each other by political or territorial boundaries. And because of that political or territorial notion it is, finally, possible to observe societies as groups of individuals or territories 'from outside'.³⁴⁴

Consequently, his own understanding of society is aimed at avoiding these pitfalls. *Human beings*, as noted in Chapter 1, do not belong to society but are part of its environment. Luhmann puts forward that if, within systems theory, human beings were to be understood as a part of society, the theory of differentiation would have to be a theory of division of human beings: in strata or nations, groups, and so on.

³⁴² G. Kneer (1996), *Rationalisierung, Disziplinierung und Differenzierung*, *op. cit.*, p.383.

³⁴³ Luhmann refers to Gaston Bachelard's '*obstacles épistémologiques*' (epistemological obstacles), translating this as '*Traditionslasten*'. N. Luhmann (1997), *Die Gesellschaft der Gesellschaft*, *op. cit.*, p.23.

³⁴⁴ *Ibid.*, p.25.

And this would imply 'einen eklatanten Widerspruch zum Konzept der Menschenrechte, insbesondere zum Konzept der Gleichheit', a tremendous contradiction with the notion of human rights, especially the right to equality.³⁴⁵ Less rhetorical is his objection that the understanding of society as consisting of human beings leads to the hypothesis that structural problems in society appear as individual deviant behavior.³⁴⁶

Society is also not to be understood as the aggregate of *human action*. The possibility of a societal unity is of a different level and anchored in a supra-individual reality. For example, organizations such as universities remain participating at any given point in time, independent of individuals. The same goes for family or political parties. The fact that social systems develop dynamics of their own might not be surprising at all.³⁴⁷ In case of the societal system, these dynamics are however difficult to observe. What is a society more than a collection of organizations and individuals? This is especially difficult to see since *modern* society is characterized by a high degree of formal organization.

From a historical point of view, organization appears as a feature of Modernism and the development of organizations, such as university, courts, corporations, hospitals, schools, bureaucracies, has taken place within the context of society. However, organization does not provide for societal unity.³⁴⁸ This would reduce society to its formal organization. Nevertheless, organizations play a major role to the description of modern society. We will turn to this point later on.

Furthermore, his bidding farewell to *normative contents*, for example, repudiates the idea that a shared context of norms or a normative consensus could provide for societal unity.³⁴⁹ Normative unity collides with the consequences of functional differentiation. Society cannot be understood as the sum of its parts. The process of functional differentiation is the iterated process of the application of the difference between system and environment: it brings along social systems within society that are environment to each other. Functional differentiation of society also

³⁴⁵ *Ibid.*, p.30. On Luhmann and human rights also see: G. Verschraegen (2002), 'Human rights and Modern Society: A sociological analysis from the perspective of systems theory', *Journal of Law and Society* 29-2, pp.258-281.

³⁴⁶ N. Luhmann (1997), *Die Gesellschaft der Gesellschaft*, *op. cit.*, p.28.

³⁴⁷ One might wonder to what degree social systems gain independency from individuals.

³⁴⁸ Cf. N. Luhmann (1997), *Die Gesellschaft der Gesellschaft*, *op. cit.*, p. 847; p.866.

³⁴⁹ Note: this is about *unity*, not about *identity*.

includes a differentiation of values and norms, as guidelines for actions. These differentiated sets of norms can be incompatible. For example, in the case of science, innovation is not necessarily of social use or relevance. In the economy, profit might and often does endanger the ecological system. In politics, strategic correct compromises are opportunistic.³⁵⁰ Meeting the system-internal requirements as regards the fulfillment of the social function leads to results that might be evaluated less positive from another perspective or even conflicts with the requirements of other systems. Nevertheless, all functional subsystems continue the course of action considered the best or 'right' with regard to the fulfillment of the social function. To presuppose a shared normative order as an explanation of the possibility of social order is therefore, in Luhmann's view, too easy. Therefore, according to Luhmann, the unity of society should be located on a *much more abstract level* of society. By means of reference to its operations, Luhmann's proposal limits the unity of society entirely to the operational level.

The understanding of society as the all encompassing system provokes another issue as well. Communication does not seem to stop at *geographical boundaries* or at the *political organization*-mode of the state, democratic or otherwise. Luhmann bids farewell to the Old-European tradition in this respect and defines society also as *Weltgesellschaft*: 'the modern society is a world society. There is no communication beyond its borders'.³⁵¹

If Luhmann is right, or at least consistent, is society today a *Weltgesellschaft*, a world society? Worldwide interdependencies, the disappearance of temporal and spatial limitations by means of modern information and transport technology, such as the internet and air traffic, seem to favor this approach. And notions such as transnational and international appear to be missing the point: what is the unity in its diversity, what is its 'inter' and its 'trans'? What is the common ground enabling the discussion of 'world society'? Luhmann's point of departure is a rather trivial observation: the full discovery of the earth (and perhaps the possibility of space travels) elicits that the world has become a demarcated connection of

³⁵⁰ W.L. Schneider, *Objektives Verstehen – Rekonstruktion eines Paradigmas: Gadamer, Popper, Toulmin, Luhmann*, Opladen 1991, p.180.

³⁵¹ Original text: 'Die moderne Gesellschaft ist Weltgesellschaft. Es gibt keine Kommunikation außerhalb ihrer Grenzen', in: N. Luhmann (1993), 'Gesellschaftstheorie und Normentheorie', *op. cit.*, p.16.

communications. In principle every point on the planet is communicative accessible, despite possible technical, political or geographical hindrances.³⁵²

In an early work,³⁵³ Helmut Willke followed Luhmann and stated that nowadays society is a world society. As a consequence, it would be meaningless to speak of a German, a Dutch or an American society. More adequate would be the reference to risk society, organization society, information society and so on. Consequently, Willke states that the political-territorial definition of society loses its significance. The state as the form of organisation of society becomes outdated even though it is still not without significance.³⁵⁴

Later, however, in for example *Supervision des Staates*,³⁵⁵ Willke revoked this point of view on behalf of a much more limited notion of society, thus enabling an elaboration of the idea of self steering.³⁵⁶ Here, Willke countered Luhmann's notion of modern society as a world society and recurs to an understanding of society as a territorial and normative limited unity of social self organisation.³⁵⁷

In Willke's view, autonomous production of structures of self steering is reserved to territorial and normative limited systems. He puts forward that it makes no sense to speak of *Weltgesellschaft* as long as there are no procedures, rules or authority providing for worldwide norms of self steering. So, Willke adds in a certain way a qualitative requirement to the operational understanding of society.³⁵⁸

One might or might not endorse Willke's conviction of the possibility of (self) steering, but there is much to be said in favor of a more limited notion of society – in more than one way. One of the problems occurring from the concept of society as communicative system pertains to the matter of which communications are referred to. Luhmann's definition seems simple and clear enough: all communica-

³⁵² N. Luhmann (1997), *Die Gesellschaft der Gesellschaft*, *op. cit.*, p.150, also see p.148.

³⁵³ H. Willke, *Systemtheorie entwickelter Gesellschaften - Dynamik und Riskanz moderner gesellschaftlicher Selbstorganisation*, Weinheim/München 1989.

³⁵⁴ *Ibid.*, p.23.

³⁵⁵ Frankfurt am Main 1997.

³⁵⁶ This is a central idea in this work of Willke, struggling with the need for some mechanisms of intersystemic coordination.

³⁵⁷ H. Willke (1997), *Supervision des Staates*, *op. cit.*, p.9. Also: H. Willke, *Ironie des Staates*, Frankfurt am Main 1992, p.356.

³⁵⁸ Also see; H. Willke (1992), *Ironie des Staates*, *op. cit.*, p.356.

tions. But does this involve all actual and possible communications? The matter has been addressed by Willke. In *Supervision des Staates*, Willke swiftly states his point: society consists of communications, but the reference to all possible communications refers to 'world' and not to 'society'.³⁵⁹

4.2.4 Society and Societies

After the foregoing it will not be surprising that unity, in conformity with the premises of the theory of self-referential systems, is first and foremost a state of affairs that is brought about by the system itself and is located in its operational closure. Unity is not a condition or quality that is given *a priori*.³⁶⁰ This applies not only to its operations (communications) but also to its processes and is the case at the systemic level. Unity is brought into existence, according to Luhmann, by operations, processes and systems producing a relation. That is to say: by referring to something that is not the same: either an operation or a process or a system acquires unity. The fact that unity is the product of self-referential systems results in the loss of '*substantiellen, auf Letztelementen gegründeten Weltgemeinschaft aller Systeme*'.³⁶¹ Consequently, the unity of society is a product of society itself. By referring to the non-social environment, society acquires its unity.

The determination of societal unity is, as suggested before, in any case a theoretical requirement. It limits the research domain of social systems theory, the domain for the analysis of society and of social phenomena. Furthermore, if society is to be observed and described as the carrier of social evolution, this requires probably at the least that society *should be observable as a unity*.³⁶² As seen before, some options regarding the determination of societal unity are fiercely rejected by Luhmann, such as a normative unity or a political-geographical one.

³⁵⁹ H. Willke (1997), *Supervision des Staates*, *op. cit.*, p.9.

³⁶⁰ For instance: N. Luhmann (1984), *Soziale Systeme*, *op. cit.*, p.58.

³⁶¹ *Ibid.*, p.653.

³⁶² Note: the emphasis on unity is unorthodox within social systems theory where the emphasis is put on difference. Cf. D. Pollack (1991), 'Bestandserhaltung oder Kritik oder: Weder Bestandserhaltung noch Kritik – Die Intention der Systemtheorie Niklas Luhmanns', *Deutsche Zeitschrift für Philosophie* 39, p.95-99.

Another option is to define unity by means of 'social order'.³⁶³ The unity of society would then be located in its order. The constant factor of this unity is the 'formal' side of order, that what remains more or less unchanged in the course of social evolution and what is in fact a circumscription of 'order': the fact that it concerns selectivity, reduction of complexity by means of selection and the connections established by this reduction, the absence of total randomness and control of contingency. Here, not the process of how selection is brought about is to be observed but the result of that process. Observations of order, however, are only moments in time and therefore 'static', whereas the process of selection is an ongoing enterprise and thus 'dynamic'. If unity of society is to be observed we cannot but take a moment in time, stop at a point and differentiate along the temporal dimension. And at that point we turn at the 'material' side of order: the question how order is actually 'shaped' at that point in time: how are complexity and contingency reduced and/or transformed, how are selections brought about? This is primarily reflected in the form of societal differentiation. When social order is observed, it is anchored in a form of societal differentiation, for example functional differentiation. The problem with this, according to Schwinn, is that a lot of *lebensweltliche* or uncoded communication does not appear on the screen and that societal unity would be limited to functionally differentiated communication. Schwinn, however, does not take into account that functional differentiation is the *primary* form of societal differentiation, that does not exclude the co-existence of segmentary and stratificatory differentiation besides functional differentiation in one society.

Furthermore, and this is the core of the problem, Schwinn mistakes the *general concept of society* for a description of a *specific society*. It is an easy mistake to make and yet it elicits a flaw in Luhmann's theory of society, but a different one than Schwinn aims to expose. Luhmann in his own presentation does not show a clear distinction between a general theoretical concept of society and specific societies. The architecture of the theory of society however compels to understand the concept of society in this sense: Luhmann's own understanding of society as the encompassing social system and its unity located at the operational level. It also elicits why Luhmann has no use for normative concepts of political-territorial notions of society.

³⁶³ If social order is understood as the form of societal differentiation, one might read this approach in Schwinn.

Since the above options to define societal unity turn out to be inadequate, we are left with a unity of society that, in systems theoretical terms, cannot but be located at an operational level: its unity resides in its communicative boundaries, through the operational realization of communication.³⁶⁴ Luhmann:-

The unity of the societal system is [...] located in the demarcation towards the outside, in the form of the system, in the operational ongoing produced difference.³⁶⁵

The qualification of unity as an operational one meets a theoretical requirement: it meets the requirement of demarcating the domain of research. On an operational level, it is not problematic to speak of ‘society’. It is *per se* at the same time not very informative if one wants to understand a *specific* society or *societies*. In this respect, it does offer a necessary frame of analysis as it is the starting point, but not a sufficient frame of analysis of functional subsystems, organizations and mechanisms of inter-systemic coordination. For example, the relationship between society and its functional subsystems and organizations cannot be clarified by reference to society as the total of all communications. With regard to ‘what’ do functional subsystems fulfill their functions? Can the legal system, for example, fulfill its function – stabilizing normative expectations – with reference to a rather non-descript ‘collection’ of communications, or with reference to the non-communicative environment? As regards organizations, Luhmann has finally elaborated the relationship between organizations and functional subsystems in *Die Gesellschaft der Gesellschaft*.³⁶⁶ The relationship between organizations and the societal system however still remains underexposed. In literature this point is subject to criticism, for instance formulated as the omission of a formal-theoretical frame of the relation between (formal) organization and (modern) society.³⁶⁷ Following from this specific formulation, this critical approach wants

³⁶⁴ N. Luhmann (1997), *Die Gesellschaft der Gesellschaft*, *op. cit.*, p.96.

³⁶⁵ Original text: ‘Die Einheit des Gesellschaftssystems liegt also lediglich in der Abgrenzung nach Außen, in der Form des Systems, in der operativ laufend reproduzierten Differenz.’ in: N. Luhmann (1997), *Die Gesellschaft der Gesellschaft*, *op. cit.*, p.90. The difference referred to is the one between *Selbstreferenz* (reference to the system itself) and *Fremdreferenz* (reference to the environment – in a general sense). Also see: N. Luhmann (1984), *Soziale Systeme*, *op. cit.*, p.495.

³⁶⁶ In the line of thought as elaborated in Chapter 2 and 3 of this dissertation.

³⁶⁷ Also see: T. Blom (1997), *Complexiteit en Contingentie*, *op. cit.*, as well as H. Grünberger (1975), ‘Organisation statt Gesellschaft? Über den Stellenwert formal organisierter Sozialordnung in der Gesellschaftstheorie Niklas Luhmanns’, in: *Gesellschaft*, Band III, Frankfurt am Main, pp.98-235.

to cover both the relation between organization and society and between formal organization and modern society in one strike. Here also, two concepts of society are in fact mixed up. The latter relation between formal organization and modern society is well accounted for by Luhmann, as was discussed in the foregoing chapters. Modern society is characterized by its functional differentiation. Functional subsystems contribute to the realization of modern society.³⁶⁸ Formal organizations, in particular specialized ones, contribute at their turn to the performances of those functional subsystems. At the level of the general concept of society, this contribution of organizations can be cast in a more abstract formulation: they also present a certain mode of dealing with double contingency.³⁶⁹

It follows that determination of societal operational closure not suffices as regards informing us about the distinct relations between the societal system and the different types of subsystems differentiated within a *specific* society. In order to analyze these relations, it might well be that not the way operational closure of society is brought about but how societies are to be *observed* and *described* yields information about intersystemic relations.³⁷⁰

The conclusion so far is that Luhmann's theory of society gains clarity by differentiating two concepts of society. First, there is the understanding of society as the encompassing social system, the totality of all communications, operationally closed *vis-à-vis* the non-communicative environment. This concept limits in the most general sense the domain of research. As such, 'society' offers a point of departure for research. However necessary such a limitation, such a starting point is not sufficient as regards the analysis of specific societies. The latter requires further qualification of the general concept of society by adding distinguishing features of characteristics, as to limit the domain of research to a specific society.

³⁶⁸ N. Luhmann (1987), *Soziologische Aufklärung 4*, *op. cit.*, p.35.

³⁶⁹ N. Luhmann (1997), *Die Gesellschaft der Gesellschaft*, *op. cit.*, p.829.

³⁷⁰ *Ibid.*, p.885: '*Anders gesagt: auf operativer Ebene kann das System nie seine eigene Einheit sein; es kann sie nur, wie immer flüchtig bezeichnen.*'

4.3. Societies: Modern, Western Society

4.3.1 (Self) Description, Operational Closure, Unity

At this point, the above findings allow for the conclusion that at the most general or abstract level, society is not demarcated by a normative consensus or borders of a political-geographical nature. Its unity, as is denoted by Luhmann, does also not reside in a form of social order or in a kind of aggregation of human beings or of human action. The unity of society is located at an operational level. Consequently, it makes sense to speak of operational closure rather than unity. Moreover, Luhmann may well aim at describing society in general and not aim at a specific one but this collides with his description of the political system, limiting the analysis to modern, Western societies.³⁷¹ This, in the view of this author, illustrates that Luhmann himself blurred two concepts of society, necessitating, as stated above, an alternative interpretation of ‘society’. Its understanding is two-fold: a general concept of *society* and an elaborated concept denoting specific *societies*. Bearing the above findings in mind, we now turn to the question how to observe and describe societies. What does Luhmann’s theory of society has to offer in order to operationalize his general concept of society?

If we start from this general concept of society, as the framework for further analysis, society cannot be observed and described from a point outside society since all communication takes place within society. Any observation and/or description of society therefore contribute to the *Vollzug* or realization of the societal system since both observation and description are to be understood as communicative operations. Anyway, who would nowadays claim to practice social theory from an Archimedean point? It is at this point, however, difficult to see how society, without further differentiation, can be observed and described in an informative way, from ‘inside’ with nothing else to work with except a concept solely defined at an operational level.

If and when communication about society takes place within society, this communication refers to or uses, according to Luhmann, constructions of the unity of society. Such constructions, Luhmann calls ‘self descriptions’.³⁷² The notion of ‘self description’ continues the line of thought that self-referential communicative

³⁷¹ See Chapter 3 of this dissertation.

³⁷² N. Luhmann (1997), *Die Gesellschaft der Gesellschaft*, *op. cit.*, pp.866-867.

systems are capable to relate to themselves in distinction to their environment, be it non-social or otherwise. In case of self description, the societal system is supposed to be capable of reflecting upon its own unity, by means of themes and in distinction to its environment.³⁷³ This self-reflection can also be cast in texts, like for example newspaper articles about pollution or about the situation in the Middle East. The most basic self-description consists of a name: a rigid, invariable designation that can repeatedly be used and re-used in different situations and under different circumstances, like for example 'organization society' in order to denote the fact that organizations are structuring society but also to moan the loss of individual freedom and subjection to 'the system'.

Two issues come forward pertaining to the self-description of society. If a general concept of society is distinguished, the notion of *self*-description is tautological since all communication takes place within society. The question then would be: what 'self' is described in a self-description? This cannot be the totality of all communications, as it would not explain why a war on terror is a necessity for example, at least from a certain perspective. Furthermore, since all communication takes place within society, society cannot grasp its own unity.³⁷⁴

Furthermore, and as explained before, description will always be partial, a full grasp of society as a totality of all communications is not possible. Consequently, any description will be limited in the sense that it uses a specific perspective, focusing on specific domains or problems within society such as religion or war on terror, thus enabling multiple and, almost certain, competing descriptions. These descriptions add, induced by the fact that they use perspectives, certain focal points to the general concept of society, leaving out others. A description does not pertain to the full complex reality of the societal system but to specific societies.

³⁷³ *Ibid.*, p.880. Texts produced for multiple use and recognition is referred to as 'semantics' by Luhmann, *ibid.*, p.887. As regards 'theory', see: *ibid.*, p.964.

³⁷⁴ Cf.: 'Alles, was kommuniziert wird, wird in der Gesellschaft kommuniziert. [...] Das gilt auch für Beobachtungen und Beschreibungen, mit welcher Autorschaft immer (Subjekt, Wissenschaft, usw.) diese sich ausstatten mögen. Eben deshalb kann aber die Einheit der Gesellschaft [...] nicht in die Gesellschaft [...] wiedereingeführt werden. Sie kann nicht als Einheit beobachtet werden, nicht beschrieben werden, und schon gar nicht auf der Grundlage von konkurrenzloser Repräsentation oder von beherrschender Autorität', N. Luhmann, *Die Wissenschaft der Gesellschaft*, Frankfurt am Main 1992, pp.716.

Subsequently, we opt for a distinct use of ‘operational closure’ and ‘unity’ instead of using the two notions, as Luhmann does, as interchangeable. Operational closure is used to denote the homogeneity of operations or elementary units of a social system. Within this research *unity* will be understood in terms of a designation of typical characteristics informing us about specific societies, thus keeping distance from Luhmann. In strict systems theoretical terms this might be referred to as a ‘self description’ or a semantic. Here reference is made to unity in order to incorporate normative elements or organizing principles characterizing society, an aspect that is underexposed in Luhmann’s theory of society. After this *intermezzo* concerning the possibilities of observing and describing societies we now return to *modern* society and its specific features.

4.3.2 *Characteristics of Modern Society*

To recapitulate the foregoing: Luhmann’s proposition to understand society as the encompassing social system entails the formulation of a theoretical point of departure. The operational closure of society resides in the differentiation between the communicative and the non-communicative. To observe and analyze a specific society within this specific theoretical approach, further differentiations are required. To denote the distinction between a specific society and its intra-societal environment (especially: other societies), its unity must be demarcated. We return to the notion of unity here, since it makes no sense to speak of an operational closure. For example, Dutch society is not operationally closed as regards the French or German society: all these societies use communication. Besides this amendment of the systems theoretical approach of ‘society’, it is maintained that Luhmann’s theory of society facilitates the observation and description of features of a *modern* society, be it also at a general level. In summarizing features of modern society as described in earlier chapters, its systems theoretical description has to take into account the following.

We follow Luhmann’s lead as regards the observation that modern society is characterized, amongst others, by *social complexity* and *contingency*. All features described at the general level of Luhmann’s theory of course apply to specific societies as well. These features appear, in a specific society, in a specific form. Nowadays it is, for example, almost customary to refer to our society as being very complex. Its complexity resides in a vast multitude of options, possibilities and choices. Moreover, functional differentiation multiplies perspectives upon

events. There are multiple options to observe and describe the world. Furthermore, complexity also has a qualitative aspect. Complexity enforces selectivity: not all options can be realized, at least not at the same time. For example: we can travel to any place on the globe, one at the time, or travel not at all; there's a wide variety of academic and non-academic courses to choose from but it is also an option to leave it all aside, and so on. On the level of the societal system, several systems of healthcare come to mind. All these options do not only enable freedom but require choices at the same time. Not to select is not an option and would be in any case a selection in itself. The necessity of selectivity therefore requires the creation of rules enabling selection, such as requirements concerning preliminary education in view of academic studies or the general rule that everyone must have access to health insurance and be accepted.

High complexity requires increased selectivity and brings along a certain indifference of a complex system to most events in the environment. The options realized by the system are most likely the ones that are most compatible with the description of the system. These selected options or decisions are not necessarily in the best interest of the whole society. The increase of complexity *per se* is first and foremost a problem, bringing about an uncontrolled and undirected potentiality.³⁷⁵

Nevertheless, complexity is, in addition to being a problem, also an opportunity of modern society. It is possible to understand complexity as more options, possibilities and choices. Therefore, complexity is the capital or the potential of a modern society. The opportunity inherent in complexity can be denoted in terms of *Machbarkeit* or positivization.³⁷⁶ A modern society is, so to say, created by means of decisions. That is: as far as it concerns forms of social order. Any form of social order is no longer self-evident but subject to choice or, within this language-game, selection. Choices, consequently, need to be legitimated: why this form of social order and not one of the other options? These decisions are formulated in rules that are in themselves contingent. A rule can be formulated in one way or another. Basically there is no limit as far as arbitrariness is concerned.

³⁷⁵ H. Willke, *Entzauberung des Staates*, Königstein 1983, p.53. It becomes an opportunity, according to Willke, when and if a complementary requirement is fulfilled: '[D]iese Bedingung ist die Integration der differenzierten Teile auf einem weiteren Emergenzniveau'.

³⁷⁶ This translation of 'Positivierung' or 'Machbarkeit' is adopted from: N. Luhmann, *Observations on Modernity*, Stanford (Ca.) 1998, for example p.59. (translation from the German original: *Beobachtungen der Moderne*, Opladen 1992.)

In a democratic *Rechtsstaat*, arbitrariness is limited or at least re-located through procedures – these are also in themselves decisions. These procedures have to comply with democratic principles, such as discursive decision making, the rule of majority, and protection of minorities. Furthermore, these procedures are subject to functional requirements of the law. The legal system carries the burden of legitimacy and control over decisions. In fact, the procedures of the democratic *Rechtsstaat* do not exclude arbitrariness completely but rather transform it into arbitrariness that is justified by procedures and the law.

The above already implies that *contingency* is another feature of modern society. The presumption that social order is created rather than given, puts a heavy burden upon the formation and legitimacy of such an order, since it is only one option amongst others. The principle of creation substitutes to a large extent for order by means of tradition, religion and other symbolic systems as legitimacy of rules for societal communication. Contingency cannot be overestimated as a parameter for the possibility of legitimacy. For the political system, as the locus of decisions concerning binding rules, the possibility of contingency creates a black hole. It is true though that the political system as a secular mechanism of social order owes its existence to this particular approach of rules, but it also puts realized (manifest) forms of social order under the pressure of possible alternatives. Punch line is the control of contingency. Paramount in this respect is the position of the political system as well as of the legal system or rather their organizations.

Furthermore, Luhmann draws our attention to an understanding of society not only as characterized by social complexity and contingency, but also as a functionally differentiated system. The concept, we bring it back to mind, refers to the form in which society is ordered, to how its subsystems relate to each other. In modern Western society there is no hierarchy, no center of society. Society is primarily differentiated into equal domains or systems, each taking care of a specific function. We came across this in Chapter 2. Now it is time to turn to the consequences of functional differentiation as regards possible descriptions of societies.

The fact that a description brings along a specific perspective is one of the consequences of the process of modernization. The features of a modern, complex society, as analyzed above, create a set of problems for that type of society. Functional differentiation shatters a modern society into a multitude of specialized,

autonomous subdomains. *Machbarkeit* or positivization causes an excess of contingency and possible social orders, and the danger of loss of control over this contingency. Self-reference and autonomy raise the question how to transcend the self-will of subsystems in order to enable the development of the total society.

Functional differentiation constitutes therefore, at least partially, a problem for modern society. Every subsystem has its own logic and *Leitdifferenzen*, both in accordance with each other within one subsystem. If and when hierarchy is no longer a realistic option in a complex, differentiated society then consequently a description (of unity) imposed top-down is neither. This brings along that only partial and competing descriptions can be provided for. One description can of course cover the whole society (in terms of world society) but is nevertheless limited in itself, by its perspective. Willke puts forward that the debate centers on the difficult question about the possibility of a coherent, capable of action, ethical-responsible identity of complex societies.³⁷⁷

It might well seem very difficult or even impossible if we want to operate within systems theoretical requirements and assumptions: competing descriptions are unavoidable, all are limited in their scope, and there is no standard by which to choose the 'right' one.³⁷⁸ This, however, could also be seen as an opportunity in the sense that systems theory offers space for the development of different descriptions of unity, putting different problems and solutions in perspective, within a specific, historically determined society.

Regardless the opportunity offered by systems theory with regard to the development of multiple descriptions, it does not provide for a perspective or a code to do so. It gives an oversight of the structures of modern society and discusses its features at an abstract level. It tells us that modern society is complex and functionally differentiated, that it needs to reduce its complexity by means of systems and at the same time these systems have to increase their complexity.

³⁷⁷ H. Willke (1983), *Entzauberung des Staates*, op. cit., p.11.

³⁷⁸ At any rate possible and maybe even desirable. Cf. N. Luhmann (1997), *Die Gesellschaft der Gesellschaft*, op. cit., p.891-892: 'Jede einzelne Selbstbeschreibung trägt dann als Beschreibung ihrer eigenen Kontingenz Rechnung. Sie berücksichtigt (und gibt zu erkennen, daß sie berücksichtigt), daß es auch andere Selbstbeschreibungen desselben Systems geben kann. Oder wenn sie sich dieser Einsicht verweigert und totalisierend auftritt, wird sie abweichungsempfindlich und intolerant. Und macht es sich politisch schwer'.

A description of the unity of a society, then, could inform us about the way a specific society deals with its contingency and complexity and about the concrete nature of that complexity. This refers in the first place to the *form* of social order in a society. As said before social order comes into existence by means of reduction of complexity and transforming it into another type of complexity but its *contents* or its *material side* is also determined by normative aspects or organizing principles. The selected perspective in the underlying research is, at the risk of belaboring the obvious, that of the scientific system: a systems theoretical account of the possibility of social order in a modern society.

4.4. Normativity's Re-Entry: Organizing Principles

4.4.1 *Transforming Complexity, Controlling Contingency*

Whereas there is, if focusing at a general theoretical concept of society, no need to return to concepts such as normative consensus, political-geographical borders and other limitations (or qualifications), the analysis of a specific, historically determined society cannot do without further qualifications in order to limit and define which specific society is subject to inquiry. The general concept of society is defined in reference to its operational closure. We refrain from using the notion of unity in this case since the aim is nothing more than to denote the homogeneity of the operations and not some kind of *unitas multiplex* or social integration of human beings or their actions. Luhmann declined this approach in favor of a more abstract one, as was illustrated before. The concept of unity is reserved, in this research, to denote a specific society, distinct from other societies. The distinction between operational closure and unity enables a 'neutral' understanding of 'society' and leaves room to re-enter other qualifications, such as normativity, values, political geographical aspects and so on, into the description of a specific society. This does not collide with Luhmann's claim of normative neutrality with respect to his theory of society. It does not seek to offer guidelines or blueprints for a better society, whatever that may be.³⁷⁹ On the other hand, the suggested alternative approach does not ignore that normative aspects play a substantial

³⁷⁹ Cf. Introduction of this dissertation.

part in the design of society. Indeed, it emphasizes this.³⁸⁰ Taking normative aspects into account does not (necessarily) imply the adoption of a normative position since the former pertains to a description of society.

Any 'normative' reproach addressing Luhmann should be put into perspective since normativity fulfills a formal function within his theory of society, in terms of 'norms'. Norms are, in his approach, expectations that can be maintained contra-factual, that is to say: facing disappointment. Even though the legal system is not the only 'locus' of norms, its specific societal function is to stabilize normative expectations.³⁸¹ In this respect, normativity plays a formal and somewhat limited role, as a *mechanism*, as regards the transformation of uncertainty into certainty. Luhmann's understanding of norms and normativity is therefore not informative about the *contents* of social order within a specific society. This follows from the fact that Luhmann himself does not distinguish between a general theoretical concept of society and description of specific, 'empirical', societies.

Furthermore, Luhmann does not attribute to norms a problem-solving potential on a more general level. In Chapter 1 it was discussed that norms, being contingent themselves, could not solve the problem of double contingency and, hence, could not constitute social order. Instead, Luhmann presents double contingency as triggering social order. As a consequence, Luhmann's point of departure cannot be but the inquiry into the transformation of the improbable into the probable and the notion of social order as the most basic improbability. The question then is raised: under which conditions, through which mechanisms does social order come into existence?

As said before, the thesis is that social order consists of two aspects.³⁸² First: its *form* pertaining to the fact that social systems organize complexity and reduce contingency through selection as well as the way different social systems relate to each other. In case of modern Western society, this refers in the first place to the functional differentiation of the societal system. Luhmann's theory is in this respect adequate. The other aspect is the *contents* of a social order within a specific

³⁸⁰ A retreat into the distinction between structures and semantics and subsequently referring to normativity as a matter of semantics, does not discharge from analyzing organizing principles. Cf. N. Luhmann (1992), *Beobachtungen der Moderne*, *op. cit.*

³⁸¹ Cf. Chapter 3 of this dissertation.

³⁸² See paragraph 4.2.3 of this chapter.

society. Complexity is not organized for the sake of organization as such. The reduction of contingency does not proceed at random. Luhmann's theory does however not account for the fact that social systems organize complexity and reduce contingency in ways that are characteristic for a specific society.

Since Luhmann's understanding of norms is a formal one, recurrence to his concept of values might be more informative. Notably, the concept of values does not play a substantial part in Luhmann's theory of society. First and foremost, values are understood in terms of preferences and are used to assess reality. Luhmann states that since they are 'only' preferences, they can be fixed points: they constitute an 'inviolable' in communication and offer some stability in an otherwise contingent reality.³⁸³

The function of values is to create common ground for communication. According to Luhmann, common ground or a shared framework of reference is improbable, due to the operational closure of psychical systems and hence the experience of double contingency. Since Alter is a black box to Ego, anything could happen and communication could cease any time. Because of this, we need a recursive consolidation of presuppositions within the communicative process itself.³⁸⁴ To this end, certain communication techniques are available: presupposition of values and their tacit acceptance. Explicit communication of values would open the possibility for contradiction. Values function however only as long as they are not challenged, as directives for communication: values are nothing but very mobile points of view.³⁸⁵

The specific function of values, creating a common ground, comes at a price: values are capable of directing communication in only a very limited way. Because values are very abstract, they do not provide *per se* operational criteria for communication. Given the foregoing features, values could be understood as symbolically generalized media: but as media that provide for a very loose coupling between communications. Values generate only very general programs, nothing more than a general direction and do not generate a binary code. Freedom as a

³⁸³ N. Luhmann (1997), *Die Gesellschaft der Gesellschaft*, *op. cit.*, p.799.

³⁸⁴ *Ibid.*, p.341.

³⁸⁵ N. Luhmann (1997), *Die Gesellschaft der Gesellschaft*, *op. cit.*, pp.341-342.

value enables a lot of possible action and the presumption that freedom is a universal value does not offer any guarantees as to its realization in specific cases.³⁸⁶

As a consequence of the abstract and general character of values, they cannot be core structures of society. There is no hierarchy of values and there are no absolute values nor instructions in case of collision. Their universal applicability is paid for by the impossibility to re-specify values as such for specific situations.³⁸⁷ It may be true that values in themselves do not give any concrete procedures or instructions as to how to deal with specific situations. But Luhmann underestimates the extent to which values contribute to the material side of social order within societies. In fact, values function as organizing principles and in that capacity direct the transformation of complexity and contingency in accordance with certain normative preferences within a specific society.

The legal system in modern Western society, for example, enables litigation. It does so, not only as a procedure but also in a manner to guarantee a fair trial.³⁸⁸ The subsequent stages of a procedure contribute to the organization of complexity and reduction of contingency. This does not mean that legal procedures are not complex; they are complex within limits. Their complexity is, so to say, prescribed by the legal system itself: it is in fact a *transformation* of complexity. The organization of complexity in this case pertains to the fact that possibilities of reparation are limited if one wants to maintain a disappointed expectation. It is prohibited to take the law into one's own hands even though this might grant instant satisfaction but would cause a lot of uncertainty as regards (long-term) consequences. In this sense, legal procedures reduce (but do not annul) contingency: within ranges, consequences are predictable. But not anything goes for the sake of organizing complexity and reducing contingency.

The requirement of fairness 'designs' the actual procedure. It requires, for example, the equal access to, and equality before, the court, equality of arms, the right to a public hearing, an independent and impartial tribunal, the presumption of innocence, the prohibition of self-incrimination and so on. It limits the power of the prosecution *de facto* and protects the defendant. This is not (only) to create

³⁸⁶ *Ibid.*, p.408.

³⁸⁷ *Ibid.*, p.800.

³⁸⁸ For example article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms and article 14 of the International Covenant on Civil and Political Rights.

clarity of arrangement but these demands voice organizing principles such as equality and individual autonomy.

The same applies to the political system in modern Western society. If its only function (and performance) would be the organization of complexity and reduction of contingency without reference to normative principles, then democracy would not be such a compelling notion. Dictatorship could serve that particular purpose as well. Here also, democracy articulates specific organizing principles: freedom, equality, welfare.

It is exemplary that in both cases organizing principles set goals that can never be fully attained but that nevertheless prescribe how complexity should be transformed. Putting these organizing principles into effect and contributing to the transformation of complexity, is a performance that only organization systems can bring about. In the above examples, the organizations transforming complexity and controlling contingency include courts and parliaments, and the state.

It follows that several principles, organizing complexity in a certain way, can be identified. There is however not a fixed set of principles given *a priori*, with a universal range and an unlimited period of validity. In tune with the social systems theoretical approach, these principles too are subject to selection and as such brought about by *modern* society via, implicit or explicit, decisions. The principles mentioned above, for example, are typical of the social-liberal tradition. So, organizing principles may vary and accents may shift from one principle to another as can be seen nowadays, where the accent on individual freedom seems to shift towards (public) safety.³⁸⁹ Consequently, the contents of social order in modern society is in itself a contingent matter. Willke puts forward that the heart of the matter in modern societies is no longer a single, given order but simultaneous possible orders – the contingency of order – in view of the complexity of these societies.³⁹⁰ At the level of observation and description, this contingency might well be reflected in the fact that there are competing descriptions of social order

³⁸⁹ Exemplary is: H. Boutellier, *De veiligheidsutopie*, Den Haag 2002. (Also available in English: *The Safety Utopia*, Kluwer 2004) Such a shift or reconsideration usually follows after a prevailing type of social order is confronted with events that shock and challenge that specific social order, such as the '9-11'(-like) event(s).

³⁹⁰ H. Willke (1989), *Systemtheorie entwickelter Gesellschaften*, *op. cit.*, p.95. Willke however does not differentiate between form and contents of social order but his observation is in both matters adequate.

in a specific society possible, depending on the (set of) normative organizing principle(s) taken into account.

4.4.2. *An Example: Certainty and Risk*

As society within this research is understood as the overarching theoretical level, the problems according to Luhmann rendering social order within society rather improbable are likewise general and abstract: the reduction of complexity and control of contingency. The foregoing findings allow for a re-formulation. Within a specific society, these problems acquire specificity as well. First, the reduction of complexity turns out to be a transformation of complexity. The legal system, for instance, contributes to the reduction of overall societal complexity by replacing it by its own typical legal complexity. Moreover, the legal function of stabilizing normative expectations can be specified in view of the problem of transforming complexity and controlling contingency in its qualified formulation within a particular society. The latter can be denoted in several ways. A rather traditional approach is the political geographical qualification: the boundaries of a society collide with the borders of a nation-state. In the era of globalization this approach has lost a lot of its appeal and cogency. In a sociological or social-theoretical description, the unity of a society can also be determined under reference to a (set of) feature(s) that sets it apart from other societies, such as prevailing organizing principles or a core-problem.

Of course, any description of a society is inevitably partial because it is limited by a perspective. Within systems theory, one can readily assume that perspectives are to be linked to functional subsystems. Thus, the economy would describe society under the heading of capitalism whereas politics would refer to democracy to typecast modern society, for example. But, descriptions are not necessarily limited to perspectives related to functional subsystems. They can also focus on other aspects, highlighting specific social phenomena or present-day problems.³⁹¹ As said before, social systems theory offers room for multiple, competing descriptions. In this context, 'information society' and 'risk society' come to mind. Luhmann holds that the concepts of information society and risk society are not limited to separate functional subsystems but that these concepts are nevertheless

³⁹¹ See also N. Luhmann (1997), *Die Gesellschaft der Gesellschaft*, *op. cit.*, p.1089.

compatible with a description of society referring to functional differentiation as the societal form.³⁹²

If the characteristics of modern, Western society as described earlier as well as the notion of society as world society should be taken into account, the concept of *risk society* might prove an informative description of society. Notably, this is of course *only one* possible description of modern Western society amongst others and is, in this sense, a highly contingent selection. ‘Risk society’ translates the general societal problems of complexity and contingency into the concrete problem of a specific society and does so in terms of ‘risk’. Furthermore, it highlights one specific normative principle: ‘certainty’. ‘Certainty’ is as traditional, in social theory, as it is modern under the heading ‘safety’.³⁹³ If certainty finds its articulation in the wish for safety as a normative goal, the avoidance or prevention of uncertainty can be articulated as the regulation of risks. Risk then is understood to be the uncertainty-problem of modern, Western society.

The impact of this normative aspect upon the contents of social order is underexposed in Luhmann’s theory of society, as any other organizing principle. As was argued before, this is due to the fact that Luhmann has no use for normative aspects considering the level of abstraction featured in his theorizing. If, for example, unity is an operational category, why refer to normative consensus as a prerequisite for unity? On the other hand, such an approach hardly elucidates why our society reacts to terrorism the way it does or why the legal system and the political system issue (by means of their organizations) decisions that curb freedom and privacy.

The concept of *risk society* is owed to German sociologist Ulrich Beck. In 1986, Beck has cast the concept of risk society in his, for social theory ground-breaking, *Risikogesellschaft – Auf dem Weg in eine andere Moderne*.³⁹⁴ Since this book has drawn a lot of attention, world-wide, a short excursus is appropriate.

³⁹² *Ibid.*, p.1091.

³⁹³ Cf. Hobbes, Locke.

³⁹⁴ Frankfurt am Main, 1986. Translated into English: U. Beck, *Risk Society – Towards a new modernity* (M. Ritter, translator), Sage, 1992.

Excursus

In Risikogesellschaft, Beck develops an analysis of modern society in terms of danger and risks. Beck puts forward that the process of modernization has brought along welfare; by means of, amongst others, industrialization, the basic material needs were met. In this industrial or class-society, the debate centered on the question 'wie der gesellschaftlich produzierte Reichtum sozial ungleich und zugleich "legitim" verteilt werden kann'.³⁹⁵ Now, we are at the threshold of another type of society that has to deal with this matter and, at the same time, has to face the consequences of the process of modernization. In fact, modernization has not only brought welfare but produced alongside, unforeseen and unwanted, dangers and risks. Its problem, or according to Beck, its paradigm, can still be understood as a problem of distribution:-

How can the risks and hazards systematically produced as part of modernization be prevented, minimized, dramatized, or channelled? When they do finally see the light of day in the shape of 'latent side effects', how can they be limited and distributed away so that they neither hamper the modernization process nor exceed the limits of that which is 'tolerable' – ecologically, medically, psychologically and socially?³⁹⁶

By defining the main problem of risk society in terms of distribution, Beck ensures continuity as regards the kind of problem successive types of societies have had to deal with: first distribution of wealth in the industrial or class society, now of risks. There is something rather contra-intuitive in this approach: why attempt to distribute unwanted abundance, instead of solving the problem of risks altogether? It must be noted that Beck distinguishes between personal or traditional risks and 'modern' risks. With regard to the former type of risks, Beck has in mind situations such as hurricanes, diseases as a consequence of poor personal hygiene or falling from a horse: these are of all times and are beyond human control and/or only affect one or a couple of persons. Modern risks are thought of as structural, self-inflicted or self-produced risks, inherent in the process of modernization:-

The risks and hazards of today thus differ in an essential way from the superficially similar ones in the Middle Ages through the global nature of their threat (people, animals and plants) and through their modern causes. They are risks

³⁹⁵ U. Beck (1986), *Risikogesellschaft*, op. cit., p.26.

³⁹⁶ U. Beck (1992), *Risk Society*, op. cit., p.19.

of modernization. They are a wholesale product of industrialization, and are systematically intensified as it becomes global.³⁹⁷

In Beck's view, modern risks cannot be eradicated without abandoning the benefits brought about by the process of modernization. Since this is not a realistic option – we cannot turn back time nor do we seek to go back in time – we are stuck with modern risks and hazards as the by-product of welfare. The foregoing approach of risks therefore induces the problem of risk society as a problem of distribution. As consequence, this approach implies in the view of this author that, since risks are self-produced, the problem is not primarily the distribution of risks but that the problem is rather the distribution of responsibility and liability correlated with risks and their effects. In Beck's description of the characteristic features and effects of modern risks, the problematic nature of distribution of responsibility and liability is also illustrated.

*In Beck's early analysis of risk society, risk is primarily conceived of as an ecological matter. Risk society is understood as a type of society dealing with the side-effects of industry and technology on its environment. In his more recent *Die Erfindung des Politischen*, risk society is still depicted as a phase in the development of modern society, that is: its reflexive modernization, but the concept of risk is extended to the social, political and individual domain.³⁹⁸*

*Without being complete, it is necessary to sketch the most striking features of modern risks, as formulated in Beck's *Risikogesellschaft*. The first aspect of a modern risk is that it exists in knowledge. Modern risks are not visible or in any other sense tangible, like open gutters, rats or hurricanes.*

The focus is more and more on hazards which are neither visible nor perceptible to the victims: hazards that in some cases may not even take effect within the lifespans of those affected, but instead during those of their children; hazards in any case that require the 'sensory organs' of science – theories, experiments, measuring instruments – in order to become visible or interpretable as hazards at all.³⁹⁹

³⁹⁷ *Ibid.*, p.21.

³⁹⁸ U. Beck, *Die Erfindung des Politischen*, Frankfurt am Main 1993, p.35.

³⁹⁹ U. Beck (1992), *Risk Society*, *op. cit.*, p.27.

The industrial pollution of the environment is exemplary: we cannot observe the pollution as such, but by scientific quantification of the amount of CO₂ in the air. Neither can we observe the hole in the ozone layer as such, but this knowledge is mediated through science. This also implies that modern risks are constructs or artifacts: whatever the scientific system defines as a risk and whatever society conceives as a risk, is a matter of definition.

It is also at this point that the notion of world society can re-enter the description of modern society, be it as the domain affected by risk rather than an operational category. That is not to say that all specific societies (limited in a geographical territorial sense) are risk societies but rather that its effect has a global reach.

The potential for self-endangering developed by civilization in the modernization process thus also makes the utopia of a world society a little more real or at least more urgent.⁴⁰⁰

The fact that risks are by-products of modernization, more specific of industrialization and of (one could add) the development of technology, also elicits that the caused damage is of a structural and systematic nature. This causes to formulate requirements as regards solutions: 'Erst damit wird es zum langfristigen, systematisch bedingten, nicht mehr lokal behebbaren, sonder politische Lösungen erfordernden Problem'.⁴⁰¹ However, it goes too far to conclude, based on the insight in the correlation between industrialization and the existence of modern risks, that this allows for a clear and simple determination of cause and effect. That this is not possible is due to the complexity of modern Western society. Beck attributes this complexity largely to the high degree of specialization and division of labor, bringing about interdependencies but also a general lack of responsibility:-

In other words, corresponding to the highly differentiated division of labor, there is a general complicity, and the complicity is matched by a general lack of responsibility. Everyone is cause and effect, and thus non-cause. The causes dribble away into a general amalgam of agents and conditions, reactions and counter-reactions, which brings social certainty and popularity to the concept of the system.⁴⁰²

⁴⁰⁰ *Ibid.*, p.47

⁴⁰¹ U. Beck (1986), *Risikogesellschaft*, *op. cit.*, p.41.

⁴⁰² U. Beck (1992), *Risk Society*, *op. cit.*, p.33

If risks cannot be eradicated without the loss of welfare, than this might be the core-problem modern society has to deal with: the distribution of risk-related responsibilities and liabilities without full knowledge of cause and effect other than the correlation between modernization c.q. industrialization and risks.

* * *

Beck provides his readers with a sweeping but fairly pessimistic panorama of the risk society. He presents an outspoken perspective upon the major problem that, according to Beck, is haunting modern Western society. His keen eye for current ecological problems and dangers, still high on the political and public agenda, make his theory attractive and valuable. On the other side, what Beck's analysis of risk society does not account for and this makes his approach quite intuitive, is the lack of a formal theoretical framework: a concept of society, an analysis of social complexity, his specific understanding of functional differentiation and so on.⁴⁹³ Even if not flawless, this is precisely what Luhmann's theory of society does offer.

To what does the concept of risk pertain and how can it be related to certainty, or safety, as the organizing principle or normative goal? In his *Die Gesellschaft der Gesellschaft*, Luhmann irritates,⁴⁹⁴ by stating that risk is everything that possibly can go wrong, implying risk to be a universal notion that excludes nothing and does not grasp the historical novelty of our society.⁴⁹⁵ In the view of this author, Luhmann in his turn ignores the novelty regarding the cause of modern risks, that is: the idea that modern risks are self-inflicted and self-produced. This is rather surprising since the understanding of risk as a product of the societal system itself would fit very well in the theory of self-referential systems. A more differentiated point of view is to be found in his *Soziologie des Risikos*.⁴⁹⁶

Characteristic of Luhmann's theorizing is the emphasis on difference instead of unity. The determination of concepts always takes place through differences: by referring to something it is not, the concept acquires its meaning or at least its contents. The same goes for 'risk'. An obvious 'counter-value' would be certainty.

⁴⁹³ Beck uses these and other concepts without elaborating them.

⁴⁹⁴ In the systems theoretical sense, that is.

⁴⁹⁵ N. Luhmann (1997), *Die Gesellschaft der Gesellschaft*, op. cit., p.1093.

⁴⁹⁶ N. Luhmann, *Soziologie des Risikos*, Berlin/New York 2003.

But according to Luhmann, certainty is not informative and leads to detours in quantifications. Furthermore, total certainty is never to be achieved. Another approach would be to understand risk in a temporal pattern: present/future. Risk is understood as something that, if and when it occurs, will certainly bring along damage. The concept of risk however also refers to the future. The damage might occur somewhere in the future but it also might not: at the present we cannot know. The one thing known in the present is that the future is determined in a desired or in an undesired way. Which way the future will turn out depends on a *decision* yet to be made. Within the framework of this research, the relation between risk and decision is pivotal: something is a risk, when a decision can be discerned as the *conditio sine qua non*, the prerequisite for damage and loss. Or: without this specific decision, this specific damage cannot come into existence.⁴⁰⁷

In a next step, Luhmann opposes risk to danger thus indicating that there is uncertainty in view of future damage. There are two possibilities: if and when damage occurs and it can be attributed to a decision, this state of affairs is denoted as risk. Or, when the damage cannot be linked to the decision but has an 'external' cause and is hence attributed to the environment, we speak of 'danger'.⁴⁰⁸ It follows that, in Luhmann's view, there is a certain asymmetry in the duality risk/danger. Danger is not due to one's own decision but something one is exposed to, due to the decision of another party or due to non-controllable sources such as nature.

Risk on the other hand is to be related to a decision and can be attributed to the one making the decision. Such an approach presupposes that it is possible, under all circumstances, to determine the origin of the decision that brings along the risk, in an unequivocal cause-and-effect relation. It will be clear that in a complex society this is mostly not the case. Ecological damage is exemplary in this matter.⁴⁰⁹ Notwithstanding the problem of attribution, the understanding of risk as correlated to decision underlines the notion of modern risks as self-produced and self-inflicted.⁴¹⁰

⁴⁰⁷ *Ibid.*, p.25.

⁴⁰⁸ *Ibid.*, p.31.

⁴⁰⁹ *Ibid.*, p.35.

⁴¹⁰ In the light of the above, Luhmann's suggestion to extend the reach of risk society seems plausible: '*Bei Risikogesellschaft ginge es nicht nur um die Technologieabhängigkeit der modernen Gesellschaft, sondern genereller um die Unterstellung, daß die Zukunft in allen wesentlichen Hinsichten von gegenwärtig zu treffenden Entscheidungen abhängt, so daß immer jetzt schon über die*

There is nothing as such that compels the perception of risk as a problem. Of course, 'risk' is presented as an accelerator of social complexity and a pinnacle of contingency – its connotation is as negative as the valuation of freedom is positive. This perspective on risk is understandable once it is linked to the organizing principle of certainty. The possibility of an actual social order depends to a high degree to the possibility to bring about certainty. This is nothing else than the desired result of the reduction of complexity and the control of contingency.

künftigen Gegenwart entschieden wird, obwohl man die Zukunft nicht kennen kann. Das mag zum beispiel den Trend zur Politisierung aller Risikofragen, zu einer Art Schutzpolitik (an Stelle bloßer Verteilungspolitik) verstärken', N. Luhmann (1997), Die Gesellschaft der Gesellschaft, op. cit., p.1091.

Concluding Remarks

We perceive our modern Western society as increasingly complex and contingent: a sheer abundance of possibilities goes hand in hand with a lack of an overall direction or guidance. Not only is it almost impossible to map everything we can do (at least theoretically) within a lifespan, it is also equally difficult to make selections, to choose what to do and what is best left aside. Guidelines are no longer offered exclusively by a dominant religion or popular political strand of thought: there is a multitude of competing language games. To some extent, the legal system and a basic set of normative principles, as a residue of modernization, delimit our possibilities and contribute to social order (both in form and content).

In an era wherein our own identity becomes a matter of construction and selection,⁴¹¹ the macro level of a description of societal unity constitutes however a no less demanding task. But despite all social complexity and contingency, societies are still in one way or another perceived as unities and it appears that law and normativity play an important role. It is this perspective that has defined the focus of this research: *the problem of the description of the unity of modern Western society in view of its complexity and contingency*. It is apparent that, in order to tackle this problem, we require first and foremost a concept of society and an understanding of complexity and contingency as social phenomena. In view of these requirements, Niklas Luhmann's social systems theoretical account of society is considered as a plausible theoretical offer and the central problem of this research was therefore reformulated in this question: **does Luhmann's approach account for the unity of modern Western society and the role normative aspects play in the observation and description of society?**

If so, it is possible to describe the unity of modern Western society, taking into account its multitude of options and possibilities. In the view of this author such a description is necessary, since it offers a framework to analyze not only the possibilities but also, and maybe even more so, the impossibilities of law and politics to limit and transform social complexity and contingency. If we want and need to know what law and politics can and cannot contribute to social order, we need to know how social order is constituted within the unity of a society. But how to

⁴¹¹ As illustrated in the work of Zygmunt Bauman and Anthony Giddens amongst others.

observe unity or rather: how to understand unity within the context of Luhmann's theory of society? In order to operationalize this concept, some important criticisms concerning Luhmann's approach were inventoried in the Introduction.

It was shown that Luhmann's theory of society provoked a variety of criticisms ranging from a difficult if not impossible empirical application of his social systems theoretical approach, the problematic or even impossible interaction between social systems, difficulties to define the precise nature of the elements of social systems (more specifically: of the legal system), a regulatory crisis as an unavoidable but mostly theoretical consequence of social systems theoretical approaches and the dehumanization of social theory (since human beings do not 'belong to' a social system such as society not merely to the environment).

The common ground of criticism of the above kind is the social systems theoretical dictum concerning the *operational closure of social systems*. Operational closure, it must be noted, goes hand in hand with cognitive openness of social systems. Nevertheless, all (critical) eyes are upon the operational closure as this leads to the 'banishment' of individuals to the environment of society, fences off social systems with regard to intersystemic interaction hence causing a regulatory crisis. At the same time, and despite all operational closure, it remains difficult to demarcate between social system and its environment, in terms of the nature of the systemic elements. The question that precedes these criticisms, however, is if it is indeed adequate to describe social systems as operationally closed (and yet cognitively open). It is here that the author sought to make a contribution to the social systems theoretical debate.

Operational closure contributes to the unity of social systems. It is a primary mechanism to bring about this unity, since unity is – in social systems theoretical perspective – brought about by the system itself. At a basic level this unity refers to operations of social systems, which are communications. Operational closure becomes manifest or observable in the capability of social systems to demarcate their boundaries in view of their environment. So, in view of the perspective of this research, that is: the possibility of a description of the unity of our contemporary complex society and the offer of social systems theory in this regard, the research questions concentrate on the demarcation of social systems.

This leads to the formulation of two research questions. The first pertains to Luhmann's concept of society: **Does Luhmann's theory of society offer a univocal concept of society, as a social system, in view of society's demarcation vis-à-vis the non-societal environment?**

The second research question regards the legal system, in the light of its contribution to the unity of society: **Does Luhmann's theory of the legal system provide a clear demarcation of this system and what notions contribute to this description?**

In view of the above research questions, Chapter 1 introduced central concepts of the categorical framework that are necessary for the analysis of Luhmann's theory of society. Therefore, Chapter 1 dealt with concepts such as autopoiesis, self-reference, complexity and contingency.

In the tradition of social theory, Luhmann's theory of social systems centers on the question of the possibility of social order. He tackles the question in an unorthodox way: Luhmann's point of departure is the *improbability* of social order. Social order is rather improbable, according to Luhmann, because of its key features: contingency and complexity. Contingency, understood as neither necessary nor impossible, is an 'absolute' problem that cannot be solved. Luhmann especially repudiates recurrence to normative consensus as a solution for the problem of contingency. Contingency presents a problem in so far as it implies a multitude of options, and thus necessitates selection. In this respect, *contingency* triggers system building. The other 'obstacle' as regards social order is *complexity*. Complexity refers, to put it simple and in a general sense, to the state of affairs wherein all elements within a unity cannot be connected with each other at the same time. Consequently, complexity also implies the necessity of selection. The differentiation of social systems seeks to contribute to the reduction and control of both contingency and complexity. After his so-called 'autopoietic turn' in the eighties of last century, Luhmann understands social systems as self-referential systems: they produce and reproduce themselves with and through communications and communications only. Everything that is brought about within the system – elements, structures, processes, unity – is a performance of the system itself. Consequently, social systems are operationally closed. It follows that human beings belong to the environment of social systems and are not elements of social systems. This theoretical decision provoked a lot of discussion and criticism in terms

of the dehumanization of society, the loss of a normative and ethical basis, banishment of the individual out of sociality and so on.⁴¹² Criticism of this kind is however not very adequate and misses the point. Luhmann does not seek to exclude human beings from sociality and underlines the indispensability of the ‘human’ environment. Instead Luhmann refrains from describing human beings since we are essentially black boxes to each other, intransparent and highly complex. But if society does not ‘consist’ of human beings, the matter of its constitutive elements requires further examination.

Society is, within this context, understood as a social system to which human beings make indispensable contributions but they are not a part of the system. With this finding, the realm of Luhmann’s theory of society is entered into in Chapter 2. His theory of society covers the description of several social systems: society itself, functional subsystems, organizations and interactions. Even though there is no hierarchical order regarding different types of social systems, society is in Luhmann’s view the all-compassing social system. Society is constituted by all communications and differentiated from the non-communicative environment. Within society, the system/environment distinction is repeated and several systems are differentiated. Modern society differentiates functional subsystems, such as the legal and the political system, the economy, religion, moral, art, science and so on. Besides functional subsystems, Luhmann distinguishes organizations and interactions.

All types of social systems have in common that they contribute, at the general and abstract level of sociality, to the reduction and control of complexity and contingency. Each type of social system does so by means of selection, based on a distinction. Society differentiates between all actual communications and non-communicative operations.⁴¹³ This is the basic differentiation, allowing for all further differentiations. Interactions differentiate themselves within society based on the distinction between presence and absence. Organizations operate through the membership rule and differentiate between decisions and other communications. Since Luhmann understands modern society as a functionally differentiated societal system, he also discerns functional subsystems. Functional subsystems also differentiate ‘strings’ of communications within society. A binary code is the pivotal mechanism to this end. In case of the legal system for example, the

⁴¹² See Chapter 1.

⁴¹³ The inclusion of all possible communications would be a reference to *Welt*.

binary code consists of the positive value legal and the negative value illegal. The political code in a modern society is constituted by government/opposition. Besides a binary code, all functional subsystems have programs at their disposal that attribute communications to one of the values of the code. Code and program are related to the function a functional subsystem executes on behalf of modern society. For example, the legal system provides for the stabilization of normative expectations, the political system guarantees collectively binding decisions. Notably, both functions seek to contribute to the reduction of complexity and the control of contingency within a specific – that is: modern – society. Chapter 2 sought to contribute to the debate⁴¹⁴ regarding the problem of interaction between social systems in view of their operational closure. The conclusion was that interaction between social systems is only possible at the level of organizations.

Within the framework of Luhmann's theory of society, the focal point of attention is the demarcation of social systems, more in particular of society and a functional subsystem, in this case the legal system. Since it was beyond the scope of this research to analyze Luhmann's findings on all functional subsystems, the inquiry was limited to law as a functional subsystem. This selection was induced by the fact that Luhmann's description of the legal system is the most elaborated one as regards functional subsystems and provides substantial information on the matter of demarcation. In Chapter 3, we sought to answer the *research question pertaining to the clear demarcation of the legal system and the notions facilitating such a demarcation*. A set of features that can be identified in most functional subsystems was described. In short, the legal system fulfils a function on behalf of the societal system: the stabilization of normative expectations. 'Normative' refers to possibility to maintain an expectation in face of its disappointment. The limitation to normative expectations excludes a reservoir of other expectations from law thus guaranteeing sufficient flexibility in societal structures: other expectations might be subject to change in the face of disappointment. Furthermore, the legal system does not stabilize all normative expectations but selects a set 'worth' stabilizing. This selection is brought about, according to Luhmann, in the interaction between public opinion and the political system, and appears on the legal screen via the structural coupling between law and politics. The organizations providing for this structural coupling are first and foremost the parliaments. Since Luhmann highlights the formal role of norms, that is: in terms of mechanisms contributing to the form of social order, he does not elaborate how the selection of normative

⁴¹⁴ Cf. Introduction.

expectations is directed. Only the introduction of description of organizing principles, such as freedom, equality, welfare, certainty, could elicit which specific normative expectations are 'worth' stabilizing.

The issue of demarcation of the legal system is closely related to its operational closure. In view of the fulfillment of its societal function, the legal system operates according to Luhmann exclusively and universal. No other functional subsystem is capable of fulfilling this specific function. The fact that Luhmann understands societal structures in terms of expectations seems to attribute a major role to the legal system but such is explicitly not the aim. Even though the legal system is the only system capable of stabilizing a selection of normative expectations in its specific mode (especially: conditional programs), it is at the same time one functional subsystem amongst others. This brings along that only the legal system can determine what law is: there is neither import nor export of legal communications. The question for its operational closure is thus reformulated: how are legal communications differentiated from all other communications? This question is also a recurring topic in the critical discussions of Luhmann's work on the legal system⁴¹⁵. In the course of successive articles and books, Luhmann repeatedly dealt with the issue of the nature of legal communications, with different results. His qualification of legal communications went from *Rechtsfolgen*, via *Rechtsbehauptungen* to *Verfügung und Argumentation*. The final stage of this development is found in *Das Recht der Gesellschaft*, his last and most comprehensive book on law. It is remarkable that legal communications are no longer denoted via a keyword such as 'legal consequences' or 'legal claims'. Luhmann restricts himself to the use of 'legal communications', thus including all previous keywords and even more. This is, in the view of this author, illustrative for the fact that the qualification of communications as legal operations requires a set of notions rather than an identifying label or solely a reference to the binary code.

In *Das Recht der Gesellschaft*, Luhmann emphasizes (once again) that legal communications are not the exclusive output of the core legal organizations, courts and parliaments. Law is not limited to these legal organizations. Such a conception is consistent with the notion of the legal system as a semantic field, a differentiation of qualified communications within the encompassing communicative field, constituted by the societal system. Of course, organizations also differenti-

⁴¹⁵ Cf. P. Kennealy (1988), *op. cit.*, p.359 and p.364; W. Kargl (1990), *op. cit.*, p.360, as well as W. Kargl (1991), *op. cit.*, p.120 and p.135.

ate communications of a specific type: decisions. In this respect, organizations are also communicative differentiations within the societal system. What justifies the differentiation between the boundaries of the legal system and those of its organizations is the fact that not all legal communications are decisions: a legal advice is just that. It may become the premise of a legal decision but this is not necessarily the case. And on the other side: within legal organizations not all decisions are of a legal character. The decision to modernize the courts in order to increase the efficiency is an economic decision. Jurists might oppose that such a decision can and most often will have legal consequences. Such might be true. A certain impact upon the family system or upon the scientific system is equally conceivable. But this is not the aim of the decision: its goal is clearly economic. It does show however that an, and really any, organization marks the intersection of several functional subsystems.

The specialized core organizations of the legal system, courts and parliaments, play nevertheless an important role in the differentiation of legal communications. According to Luhmann, they pre-determine the boundaries of the legal system. To put it somewhat different: the legal organizations contribute through the production of legal programs (laws, judicial findings, verdicts and so on) to the operational closure of the legal system. These programs attribute communications to values of the legal code. The legal code functions, so to say, as the gatekeeper of the legal system and is constitutive regarding the identity of the legal system. In itself the code is however sterile and requires the employment of the legal programs for the fulfillment of the societal function of the legal system, the stabilization of normative expectations. Consequently, the combination of legal code and program demarcates the legal system.⁴¹⁶ The identification of a communication as a legal operation requires a, implicit or explicit, reference to positive law. What renders this demarcation of the legal system somewhat counter-intuitive is its result: no labels, no keywords, not an ontological fixed system of rules or persons or organizations. Understood in this way, the boundaries of the legal system shift constantly every time an explicit reference or 'legal intention' is communicated. *These findings allow for a positive answer as regards the second research question.*

⁴¹⁶ The understanding of the legal system as a historical machine, as described in Chapter 3, accounts for the coming into existence, a sort of starting point, of law as an operationally closed social system.

As the issues pertaining to the demarcation of the societal system and the legal system are dealt with, the concept of 'society' is readdressed and evaluated in view of the theoretical status and locus of 'society' within Luhmann's theory of society in Chapter 4. Chapter 4 seeks to conclude the answer to *the research question regarding Luhmann's concept of society and more specific: its demarcation.*

The matter of the demarcation of social systems in Luhmann's theory of society has met profound criticism in literature. In this research, the criticism of Thomas Schwinn was highlighted. Essentially, Luhmann's concept of society was deemed not univocal since it did not offer a clear demarcation with respect to its environment. Luhmann's 'more realistic' approach of social systems, in contrast to Parsons' analytical conception of social systems, provoked this type of criticism. The first question of this research therefore was whether Luhmann's theory of society could offer a univocal concept of society, as *a social system*, in view of the *demarcation* of society with regard to the non-societal environment. The conclusion is that this is indeed the case: society as the encompassing social system consists of all communications. Outside society there is no communication. Hence, *the unity of society is an operational one*. Since unity bears the connotation of integration of some sort and the aim is not to denote anything more or less than the homogeneity of operations, the notion of 'operational closure' is favored instead of unity. This is a highly abstract and general understanding of society even though it is not without 'empirical' attraction. Who would claim that there is communication outside society? Moreover, society as the encompassing, operationally closed, social system does not necessitate notions such as normative consensus or political-territorial or the understanding as an aggregate of human actions, to demarcate its boundaries. These notions are, in this case, not relevant.

It was concluded that such an abstract and general understanding of *society* limits the domain of research in a general way and offers, in that sense, a necessary framework. However necessary, it was deemed not sufficient as regards the analysis of a *specific* society, such as modern Western society. Such an analysis requires further specification of that particular society in order to differentiate it from other specific societies.

Luhmann himself does not differentiate between a general concept of society and societies but interpreting it as such is a logical consequence of his presentation of society as the encompassing social system. The general concept of society is the canvas, providing

a startingpoint for the analysis of specific societies. Luhmann's work also offers notions to narrow down the analysis of the societal system such as social complexity and contingency as the problems propelling systems building. As regards modern society, Luhmann offers extensive descriptions of functional differentiation (or more precisely of several functional subsystems) and organizations as typical modern achievements contributing to social order.

The conclusion regarding the demarcation is, as stated before, positive: Luhmann provides a clear demarcation of 'society'. Society is the encompassing social system, constituted by all communications. Consequently, the demarcation of 'society' is completely located at the operational level. Furthermore, it was argued that this is indeed a clear theoretical demarcation but also an inconclusive one in view of analyses of specific societies. 'Society' per se is therefore nothing more but also nothing less than a general theoretical concept: it provides a point of departure and necessitates, at the same time, the addition of notions that enable the analysis of 'real' societies, specifying the concept of society more and more. Luhmann's theory of society induces a top-down approach and offers room to do so. The differentiated use of 'society' and 'societies' does not collide, for example, with limiting societies to geographical borders, or even normative consensus. Where Luhmann opposes this, it is because the general-theoretical concept of society does not allow for such limitations. In view of this, a further differentiation was suggested. The notion of operational closure suffices to denote the demarcation of 'society', the notion of unity is used to denote the boundaries of a specific society. To attribute operational closure to a specific society is not relevant since within 'society' a variety of specific societies can be observed. Unity, on the other hand, allows for the observation of differentiated societies.

The criticism of Schwinn reflects the necessity of a differentiation between a general theoretical concept and elaborated descriptions of specific societies. He criticizes the lack of a univocal concept of society. In Schwinn's view, one of the consequences of this omission is that the functional subsystems have no clear reference in the fulfillment of their societal function. For example, does the legal system stabilize normative expectations on behalf of all communications? This would indeed be meaningless. Functional subsystems are however already a characteristic of a specific society: modern Western society. This is an empirical (or 'real'), historically determined form of appearance of 'society'. The functional subsystems function in reference to this society. The same goes for the criticism

that Luhmann's theory of society lacks a formal-theoretical account of the relation between formal organization and society.⁴¹⁷ Formal organization is an achievement of modern society and the relation can only be understood in reference to that specific society. Luhmann offers insight into this relation via the relation formal organization-functional subsystem.⁴¹⁸

Furthermore, any social system is a contribution, at a general level, to the reduction and rebuilding of social complexity and the control of contingency. For each description of a specific society, these general problems must be specified in order to enable further specification of the relations (or interdependencies) between social systems, like for example between society and functional subsystems or between society and formal organizations. How, for example, does the problem of social order appear in our modern Western society? In this research, it was proposed to make a distinction between the formal and the material side of social order.⁴¹⁹ The formal side or the form of social order refers to the conception that dealing with complexity and contingency results in systems differentiation. As regards the modern western society this entails functional differentiation, the differentiation of organizations and interactions. In my view, Luhmann's theory of society accounts sufficiently for the description of the form of social order and the *mechanisms* to bring about social order. It falls however short concerning the material side or the contents of social order. His theory of society does, following from its typical architecture, also not account for the unity of societies. Both issues are consequences of the mix-up of 'society' and 'societies'. Only in the case of a specific society, the *principles* organizing the material side of social order can be identified in relation to the specific problem of social order in that society. The proposition is furthermore to observe the unity of a society also in relation to these organizing principles and not to recur, for example, to political-territorial notions of societies. The introduction of organizing principles allows for the re-entry of normativity in the theory of society. As an illustration, this research described the problem of risk as one aspect of the problem of social order in modern Western society and certainty as the principle organizing social order, and thus transforming complexity and controlling contingency.

⁴¹⁷ Cf. T. Blom (1997), *Complexiteit en contingentie, op. cit.*

⁴¹⁸ Cf. Chapter 2.

⁴¹⁹ Cf. Chapter 4, Section 4.2.3.

In view of the above finding, the conclusions regarding the two research questions are positive. Luhmann's theory of society provides for a clear demarcation of the societal system and the legal system. Does it *suffice* however to account for the unity of modern Western society and the role normative aspects play in the observation and description of the unity of a specific society? Here the answer must be no. Luhmann's theory of society offers a *starting point* to do so. Societal unity in the Luhmannian sense can only be understood as an operational unity. Therefore it provides no less but also no more than the most general level of analysis and description. Such a general concept is not informative regarding specific societies. Consequently, the description of the unity of a specific society requires a modification within the social systems theoretical approach, as was discussed above.

Samenvatting

Inleiding

De complexiteit van onze moderne Westerse maatschappij neemt toe – of we ervaren het in elk geval als zodanig. Tegelijkertijd wordt het steeds moeilijker om vat te krijgen op ‘wat’ de maatschappij samenhoudt of integreert. Vanuit een iets ander perspectief: het is moeilijker om de moderne westerse maatschappij als een eenheid te observeren en te beschrijven. Er is een toename van mogelijkheden in alle levensdomeinen en dat noodzaakt tot een bijna voortdurend maken van keuzes. Tegelijkertijd is het niet meer mogelijk om terug te vallen op de stabiliteit van bijvoorbeeld een dominante religie of een eenduidige indeling van de maatschappij in klassen. Meer nog: leidraden en kaders voor keuzes uit vele opties zijn zelf eveneens voorwerp van selectie. Een duidelijke en eenduidige grondslag voor de gemaakte selecties lijkt niet voorhanden te zijn. We zouden kunnen zeggen dat de willekeur van onze keuzes en beslissingen aan het licht komen en dus dat, in deze zin, alles anders zou kunnen zijn. De moderne Westerse maatschappij wordt gekenmerkt door complexiteit en contingentie. We zijn (grotendeels) van God los maar toch niet helemaal op drift. Welke andere begrenzingsen verder ook denkbaar zijn, de vrijheid (en bijgevolg de noodzaak) tot het maken van selecties wordt in elk geval begrensd door het recht. En wat ons, in de moderne Westerse maatschappij, ook als individuen scheidt, de meesten delen bepaalde voorstellingen van en voorkeuren voor vrijheid, gelijkheid, welzijn en zekerheid. Dergelijke normatieve aspecten spelen derhalve een rol in de waarneming en beschrijving van de eenheid van onze maatschappij, hoe problematisch ook.

Het voorgaande vormt de achtergrond van dit onderzoek: de beschrijving van de eenheid van de moderne Westerse maatschappij in het licht van haar complexiteit en contingentie. Het theoretische aanbod dat met het oog op deze maatschappijbeschrijving wordt onderzocht, is de maatschappijtheorie van de Duitse sociaal theoreticus Niklas Luhmann. De probleemstelling wordt als volgt geformuleerd: kan met behulp van Luhmanns maatschappijtheorie de eenheid van de moderne Westerse maatschappij worden beschreven en verdisconteert deze theorie de rol die normatieve aspecten spelen in de beschrijving van de eenheid van de maatschappij?

Luhmanns maatschappijtheorie zou kunnen worden begrepen als een *specialis* van zijn sociale systeemtheorie. Zijn sociale systeemtheorie behelst een complex begrippeninstrumentarium en conceptueel apparaat waarmee de (moderne) maatschappij adequaat geobserveerd en beschreven kan worden. In vergelijking met andere beschrijvingen van de maatschappij, zou Luhmanns sociale systeemtheorie veel geschikter zijn om de complexiteit van de moderne maatschappij te analyseren. Het hoge abstractieniveau en het breed uitgewerkte conceptuele kader zouden moeten aansluiten op de complexiteit van onze moderne maatschappij en bijdragen aan inzicht in sociale fenomenen.

De sociale systeemtheorie is het meest algemene niveau van Luhmanns theorievorming. Het uitgangspunt is de onwaarschijnlijkheid van sociale orde in termen van complexiteit en contingentie. Deze concepten keren terug in Luhmanns uitwerking van zijn sociale systeemtheorie op het niveau van zijn maatschappijtheorie. In het kader van zijn maatschappijtheorie werkt Luhmann het concept 'sociale systemen' uit. 'Maatschappij' is het meest omvattende sociale systeem. Binnen dit alle communicatie omvattende sociale systeem differentiëren andere sociale systemen uit: functiesystemen (zoals recht, politiek, economie, kunst, moraal, etc.), organisaties en interacties.

De concepten 'maatschappij' en 'functiesystemen' als sociale systemen stuiten in de literatuur op kritiek. De grote gemene deler lijkt daarbij de demarcatie van beide typen sociale systemen te zijn. Zo men al van sociale systemen wil spreken, moet het mogelijk zijn de systeemgrenzen vast te stellen. Deze noodzaak verkrijgt nog eens extra scherpte door Luhmanns axiomatische uitgangspunt 'daß es Systeme gibt.'⁴²⁰ Luhmann neemt aldus afstand van de analytische benadering van sociale systemen zoals geformuleerd door zijn voorganger Parsons, ten faveure van een meer 'realistische' benadering.

De door Luhmann zelf als meer realistisch aangeduide benadering nodigt echter, zoals eerder gesteld, uit tot kritiek. In de literatuur zijn een aantal belangrijke kritiekpunten gericht op de theoretische consistentie en toereikendheid van Luhmanns benadering. Zo blijkt met name de operationele geslotenheid van sociale systemen, waarbij het rechtssysteem illustratief is in de discussie, nogal wat vragen te doen rijzen. Een daaraan gerelateerde kritiek concentreert zich op de vraag naar de mogelijkheid van communicatie tussen dergelijke operationeel gesloten

⁴²⁰ N. Luhmann, *Soziale Systeme*, op. cit., p.30.

sociale systemen, nu mensen blijkbaar geen deel uitmaken van het systeem maar tot de niet-systemische omgeving daarvan behoren. En als communicatie of interactie tussen sociale systemen moeilijk of zelfs onmogelijk is dan werpt dit ook een schaduw over de mogelijkheden van sociale sturing. De zogenoemde sturingscrisis lijkt echter met name voort te vloeien uit de theoretische bevindingen van Luhmann c.s. en niet per se een adequate observatie van de feitelijke stand van zaken, zo wordt door critici gesteld. In de kern lijken deze kritieken te culmineren in het verwijt dat het concept van sociale systemen, vooral door de nadruk op operationele geslotenheid, een te algemeen en in zekere zin te leeg begrip is om een adequate empirische analyse mogelijk te maken. Ook illustratief in dezen is de kritiek die de vraag centraal stelt hoe, gezien de operationele geslotenheid, een communicatie van het rechtssysteem geconstitueerd wordt als juist dat: een communicatie van het rechtssysteem en niets anders. Of iets ander geformuleerd: hoe demarceert het rechtssysteem, en eigenlijk: elk sociaal systeem, de grenzen van het systeem?

In het licht van deze kritieken worden in dit onderzoek twee vragen behandeld. Ten eerste wordt de vraag gesteld of Luhmanns maatschappijtheorie een eenduidig maatschappijbegrip kan bieden en wel in termen van een eenduidige demarcatie tussen de maatschappij en de niet-maatschappelijke omgeving. Ten tweede wordt Luhmanns beschrijving van het rechtssysteem aan nadere analyse onderworpen met het oog op de mogelijkheid van een eenduidige demarcatie ten opzichte van de sociale en niet-sociale omgeving, en de vraag welke concepten bijdragen aan de observatie en beschrijving van de demarcatie van het rechtssysteem.

Met het oog op deze vragen zal worden beargumenteerd dat Luhmanns maatschappijbegrip een algemeen theoretisch concept is, dat als zodanig te weinig informatie biedt om een concrete historisch bepaalde maatschappij te observeren en te beschrijven. Dit maatschappijbegrip, maatschappij als het meest omvattende sociale systeem, biedt wel een voldoende eenduidige demarcatie: alle communicatie vindt in de maatschappij plaats. Dat impliceert een demarcatie tussen het communicatieve en het niet communicatieve. Om deze communicatieve homogeniteit te beschrijven kan worden volstaan met de notie 'operationele geslotenheid'. De notie 'eenheid' wordt gereserveerd voor de beschrijving van een specifieke, historisch bepaalde maatschappij. De differentiatie tussen 'maatschappij' en

‘maatschappijen’ creëert de mogelijkheid om normativiteit, als sociaal fenomeen, weer in de beschrijving van een specifieke maatschappij in te voeren.

Luhmann claimt voor zijn benadering normatieve neutraliteit. Luhmann maakt echter geen onderscheid tussen het innemen van een normatieve positie en het beschrijven van normatieve aspecten als kenmerkende elementen van een specifieke maatschappij. Het laatste refereert aan ordenende beginselen, zoals zekerheid, vrijheid, welzijn, gelijkheid. Zonder een analyse van dergelijke ordenende beginselen is niet te verklaren waarom sociale orde in een bepaalde, specifieke maatschappij een bepaalde inhoud en vorm heeft.

Hoofdstuk 1

Sociale Systemen - Kenmerken

De in dit onderzoek opgeworpen vragen omtrent de demarcatie van ‘maatschappijen’ en ‘recht’ nopen tot een overzicht van het beschikbare instrumentarium. In dit hoofdstuk worden een aantal primaire concepten geïntroduceerd: hiermee wordt in kaart gebracht welke bouwstenen Luhmanns maatschappijtheorie biedt. Dit laatste geeft ook de grenzen van dit hoofdstuk aan. Luhmanns maatschappijtheorie is, zo zou men kunnen zeggen, een *specialis* van zijn algemene theorie van sociale systemen. Begrippen en concepten die ontwikkeld zijn binnen dit algemene raamwerk, komen echter nadrukkelijk aan bod binnen Luhmanns maatschappijtheorie. Daarom worden in dit hoofdstuk begrippen als complexiteit, contingentie, zelfreferentie, communicatie en operationele geslotenheid toegelicht.

De sociale systeemtheorie beschrijft hoe sociale orde begrepen kan worden. Luhmanns uitgangspunt is de onwaarschijnlijkheid van sociale orde en hij werpt de vraag op hoe het onwaarschijnlijke in het waarschijnlijke kan worden getransformeerd. Het probleem waardoor sociale orde eerder onwaarschijnlijk wordt, is het probleem van de ‘dubbele contingentie’. Dubbele contingentie verwijst, kort gezegd, naar het gegeven dat er een wereld aan keuzemogelijkheden is: alles is ook altijd anders mogelijk. Dit is de katalysator voor complexiteit: er zijn zoveel elementen dat ‘een op een’ relaties tussen alle elementen niet meer mogelijk zijn. Omgaan met complexiteit vereist selectie. Deze algemene concepten zijn toe te passen op sociale systemen: sociale systemen zijn operationeel gesloten systemen

die hun eigen complexiteit en de omgevingscomplexiteit moeten hanteren. Hun elementen zijn communicaties die gestructureerd worden door verwachtingen.

Het voorgaande onthult een belangrijke theoretische beslissing: mensen maken geen deel uit van Luhmanns maatschappijtheorie. Luhmann brengt een strikte scheiding aan tussen sociale systemen en mensen, of zoals hij het formuleert: psychische systemen. Sociale systemen zijn niet te begrijpen als aggregaten van psychische en biologische processen, ofschoon zowel sociale als psychische systemen zinverwerkende systemen zijn. Het door Luhmann verwachte voordeel van deze beslissing, de focus op communicaties, is dat het pas dan mogelijk is de kenmerken en bijzonderheden van sociale systemen in kaart te brengen.

Hoofdstuk 2

Contingente Orde, Complexe Maatschappij: Maatschappijtheorie

Centraal staat Luhmanns uitwerking van het begrip 'maatschappij', dat even onmisbaar voor de analyse van sociale fenomenen is als, volgens de kritische literatuur, theoretisch problematisch. In eerste instantie gaat het om het begrip van maatschappij als een *sociaal systeem*. De aanduiding van maatschappij als een sociaal systeem, houdt onder andere in dat de maatschappij opgebouwd is uit elementen, gekenmerkt wordt door structuren, haar grenzen ten aanzien van andere (sociale) systemen op een bepaalde wijze afbakt, en eveneens op bepaalde manier complexiteit hanteert.

Op het niveau van de maatschappijtheorie beschrijft de sociale systeemtheorie de moderne, complexe maatschappij, haar functiesystemen, organisaties en interactiesystemen. Sociale orde wordt tot stand gebracht door bijdragen van de verschillende systemen en hun onderlinge relaties. Op het meest algemene niveau zijn die bijdragen te kwalificeren als de reductie en opbouw van complexiteit.

Volgens Luhmann is het constituerende element van de maatschappij 'communicatie' en complexiteit verwijst in deze context naar de enorme hoeveelheid relaties die tussen communicaties mogelijk zijn. Maatschappij is het meest omvattende systeem. Het uitgangspunt is dat de moderne westerse maatschappij zich van alle voorgaande maatschappijformaties onderscheidt als een functioneel gedifferentieerde maatschappij. In de lijn van de sociologische traditie wordt functionele

differentiatie door Luhmann opgevat als het proces dat heeft geleid tot de vorming van afzonderlijke, relatief onafhankelijke maatschappelijke deelgebieden die zijn gespecialiseerd in de vervulling van een specifieke maatschappelijke functie. Deze deelgebieden duidt Luhmann aan met ‘functiesystemen’, zoals politiek, recht, economie, religie, e.d. Verder onderscheidt Luhmann binnen de maatschappij organisatiesystemen en interactiesystemen. Het geheel van sociale systemen zou men kunnen aanduiden met ‘socialiteit’. Kenmerkend voor alle typen sociale systemen is dat de systeemgrenzen op een karakteristieke manier worden bepaald en in stand gehouden.

Het belangrijkste mechanisme van functionele differentiatie is, volgens Luhmann, het zogeheten ‘coderingsproces’. Van codering is sprake wanneer een binair schema (samengesteld uit een positieve en een daarop betrokken negatieve waarde) communicatie gaat ‘kanaliseren’. Subsystemen differentiëren dan als gespecialiseerde communicatieprocessen. Iets anders geformuleerd zou men kunnen stellen dat het gaat om een afsplitsing en verzelfstandiging van communicatieprocessen die tot stand komen doordat communicatie zich begint te oriënteren op een vastomlijnd beslissingsprobleem, en alle gebeurtenissen en standen van zaken, die in de vorm van informatie binnen het systeem circuleren, gaat betrekken op de vraag welke codewaarde er aan moet worden toegekend – is het recht of onrecht, waar of onwaar, etc. Het geheel van criteria en richtlijnen dat voor de afhandeling van dergelijke beslissingsproblemen ter beschikking staat, wordt door Luhmann aangeduid als het ‘programma’ van het gecodeerde systeem.

Een van de grootste pluspunten van de sociale systeemtheorie is dat de theorie het niet alleen mogelijk maakt sociale domeinen zoals recht, politiek, economie, etc. op zichzelf te analyseren maar vooral ook in hun onderlinge verbanden. Luhmanns maatschappijtheorie kent echter ook een aantal manco’s. Zo wordt niet geheel duidelijk hoe de eenheid van een specifieke maatschappij kan worden beschreven nu deze slechts zuiver operationeel lijkt te zijn. Dit punt komt in hoofdstuk 4 weer aan de orde.

Dit hoofdstuk wordt afgesloten met de analyse van een andere, door Luhmann in eerste instantie niet volledig uitgewerkte en derhalve problematische relatie, namelijk de relatie tussen functiesystemen en organisaties. Centraal staat de vraag of Luhmanns maatschappijtheorie concepten levert waarmee deze relatie in kaart kan worden gebracht. In recent werk stelt Luhmann dat functiesystemen in elk

geval begrepen kunnen worden als het groter verband waarbinnen gespecialiseerde organisaties functioneren. Hun 'specialisme' heeft dan betrekking op de *functie* die door het specifieke functiesysteem wordt vervuld. Voorts zijn organisatiesystemen de enige sociale systemen die in staat zijn met elkaar te communiceren. Op deze wijze dragen organisaties bij aan de *prestaties* die functiesystemen ten behoeve van elkaar leveren. In het licht hiervan is de vraag met betrekking tot Luhmanns conceptuele aanbod positief te beantwoorden. Voorgaande analyse is van belang met het oog op de rol die formele organisaties in de demarcatie van sociale systemen (kunnen) spelen, met name met het oog op het rechtssysteem, en de mogelijkheden tot communicatie tussen sociale systemen. Dit komt in de volgende hoofdstukken verder aan bod.

Hoofdstuk 3

Functiesystemen: Recht als Sociaal Systeem

Voorgaande bevindingen vormen het maatschappijtheoretische kader voor Luhmanns beschrijving van recht als sociaal systeem. De kwalificatie van recht als *sociaal* systeem behelst in de eerste plaats dat de elementen van het rechtssysteem communicaties zijn. Nu maatschappij is te begrijpen als het meest omvattende sociale systeem, volgt dat recht een in de maatschappij gedifferentieerd subsysteem is. Ten tweede volgt uit de kwalificatie sociaal *systeem* dat de demarcatie van een functiesysteem zoals recht ten opzichte van de sociale omgeving eenduidig dient te zijn. In dit hoofdstuk staat deze demarcatie van het rechtssysteem centraal met het oog op de beantwoording van de tweede onderzoeksvraag.

Luhmanns maatschappijtheorie voorziet niet in een algemeen model van functiesystemen maar er zijn uit beschrijvingen van verschillende functiesystemen zoals recht, wetenschap, politiek etc., wel gedeelde kenmerken te distilleren, zoals in het vorige hoofdstuk ter sprake kwam. Daartoe behoren de noties van functie en prestatie, codering en programmering. Deze noties komen in dit hoofdstuk opnieuw aan bod in relatie tot het rechtssysteem. Het rechtssysteem wordt gecodeerd door het schema recht/onrecht en geprogrammeerd door de regels van het positieve recht. De combinatie van code en programma zorgt ervoor dat het recht tegelijkertijd normatief gesloten en cognitief open in het maatschappijstelsel opereert. Het feit dat het rechtssysteem normatief gesloten opereert, houdt overigens niet in dat het recht aanspraak maakt op alle normen maar wel op een spe-

cifiek gebruik van normen. Het recht, zo zou men kunnen stellen, is geconstitueerd als tweede orde normativiteit. De combinatie van geslotenheid en openheid vindt zijn back-up in de interne differentiatie van het rechtssysteem. Luhmann stelt dat het recht intern gedifferentieerd is in centrum – rechtbanken – en periferie – parlementen.

De functie van het recht is, volgens Luhmann, het stabiliseren van normatieve verwachtingen. Op deze wijze draagt recht bij aan sociale orde. Welke normatieve verwachtingen uit het reservoir van verwachtingsverwachtingen gestabiliseerd worden, volgt uit de interactie tussen publieke opinie en politiek. Het resultaat van deze interactie komt weer bij het recht terecht (structurele koppeling tussen politiek en recht).

Nu het politieke systeem bepalend is voor de selectie van te stabiliseren normatieve verwachtingen is een korte beschrijving van de politiek als sociaal systeem op zijn plaats. In overeenstemming met de premissen van zijn sociale systeemtheorie, kan Luhmann recht en politiek niet anders beschrijven dan twee onderscheiden systemen in de maatschappij. Ten overvloede: zulks volgt uit de notie van de functionele differentiatie en de operationele geslotenheid van sociale systemen. Deze benadering van recht en politiek als operationeel gesloten systemen noopt Luhmann eveneens tot een pessimistische inschatting van politieke sturingsmogelijkheden, middels het recht, van de maatschappij, nu communicatie en derhalve sturing niet mogelijk is op het niveau van functiesystemen. De mogelijkheid van communicatie op het niveau van organisaties biedt echter een uitweg en leidt tot matiging van het Luhmanniaanse sturingspessimisme. De kritiek, zoals geformuleerd door Wilthagen, Rottleuthner e.a., namelijk dat de sturingscrisis vooral het ‘product’ is van de sterke nadruk op de operationele geslotenheid van sociale systemen, lijkt daarom adequaat te zijn. Dit noopt tot een nadere analyse en evaluatie van operationele geslotenheid nu dit mechanisme cruciaal is voor de demarcatie van het rechtssysteem. In het licht hiervan wordt de vraag gesteld hoe rechtscommunicaties gedifferentieerd worden van alle andere communicaties. Daarbij staat voorop dat wat een rechtscommunicatie ook mag zijn, dit alleen door het rechtssysteem kan worden bepaald. Operationele sluiting impliceert immers dat er geen import en/of export van rechtscommunicaties van of naar de omgeving van het recht plaatsvinden. Daarnaast ziet Luhmann ook geen heil in meer traditionele benaderingen waarbij de elementen van recht begrepen worden als een set van rechtsregels of de typische organisaties van het recht, zoals recht-

banken en advocatuur. Zijn bepaling van wat binnen de grenzen van het recht moet worden gerekend omvat in elk geval meer dan rechtsregels en organisaties, wat dat 'meer' dan ook mag zijn. Dat dit ook voor Luhmann niet eenvoudig was vast te stellen blijkt uit de reeks opties die hij in opeenvolgende artikelen en boeken heeft gepresenteerd: dit voert van *Rechtsfolgen*, via *Rechtsbehauptungen*, *Verfügung* en *Argumentation* tot communicaties met rechtskwaliteit in zijn laatste grote werk over het rechtssysteem, *Das Recht der Gesellschaft*.⁴²¹ Hierin wordt duidelijk dat er meerdere noties gecombineerd moeten worden om duidelijk te maken wat tot het rechtssysteem hoort en wat niet. Het volstaat derhalve niet te verwijzen naar de code van het rechtssysteem om te bepalen wat rechtscommunicaties zijn, daarvoor zijn eveneens de programma's van het recht (het positieve recht) noodzakelijk. Er moet tevens in het oog worden gehouden dat het recht een 'historische machine' is en niet in een rechtsvrije ruimte opereert, maar rechtskwaliteit vaststelt en doorgeeft door een teruggrijpen op het verleden van het rechtssysteem. In elk geval onderscheidt Luhmanns benadering zich van de meer traditionele opvatting dat de grenzen van het rechtssysteem samenvallen met die van haar organisaties of het begrip van recht als een hiërarchie van normen. Niettemin spelen de formele organisaties van het recht, gerechten en parlement volgens Luhmann, een belangrijke rol in de demarcatie van het rechtssysteem: zij fungeren gezamenlijk als het beslissingssysteem van het recht. Het stabiliseren van normatieve verwachtingen, de functie van het recht, leidt in termen van prestaties van het recht, tot de formulering van regels. Dit is primair de taak van parlementen, aldus Luhmann, terwijl de handhaving ervan in geval van conflicten het terrein van de gerechten is. Hoe belangrijk deze organisaties ook zijn voor de demarcatie van het recht, het gaat om het samenspel tussen code, programma, organisaties en de geschiedenis van het systeem. De conclusie is dat de grenzen van het recht niet gefixeerd zijn, geen ontologisch gegeven zijn maar van moment tot moment wijzigen, telkens als er aan het recht wordt gerefereerd.

Hoofdstuk 4

Maatschappij en Maatschappijen

In voorgaande hoofdstukken is een aantal problemen in Luhmanns maatschappijtheorie aan de orde gekomen. Op het algemene niveau van zijn maatschappijtheorie is gesteld dat zijn *concept* van maatschappij problematisch is waar het de afba-

⁴²¹ N. Luhmann 1993, op. cit.

kening en derhalve de eenheid van de maatschappij betreft. In het kader van Luhmanns theorie, zo moet worden geconcludeerd, is eenheid enkel op het niveau van de operaties, d.w.z. communicaties, vast te stellen. Een dergelijke operationele eenheid is echter weinig informatief waar het gaat om specifieke – dus naar tijd en plaats bepaalde - maatschappijen. Daarom wordt, op basis van dit onderzoek, voorgesteld een onderscheid te maken tussen ‘maatschappij’ en ‘maatschappijen’. ‘Maatschappij’, als algemeen theoretisch concept, dient dan als uitgangspunt voor nadere analyse; ‘maatschappijen’ verwijst naar specifieke, naar plaats en tijd bepaalde vormen van sociale orde. De notie ‘eenheid’ wordt gehanteerd in relatie tot de beschrijving van een specifieke maatschappij, zoals onze moderne Westerse maatschappij.

De sociale orde binnen een specifieke maatschappij wordt bepaald door de keuze(on)mogelijkheden met betrekking tot communicaties. Op inhoudelijk niveau zorgt met name normativiteit, in al haar verschijningsvormen, voor een beperking: *anything goes* maar binnen welbepaalde normatieve grenzen. In Luhmanns werk blijven normatieve aspecten van de moderne maatschappij onderbelicht.⁴²² Daarmee rijst de vraag of een maatschappijtheorie die geen of althans onvoldoende oog heeft voor de normatieve componenten wel een adequate beschrijving kan geven van onze moderne maatschappij.

De beschrijving van de moderne, Westerse maatschappij stuit volgens Luhmann in elk geval op de consequenties van de theorie van zelf-referentiële systemen en van functionele differentiatie. Conform deze uitgangspunten is er geen communicatie buiten de maatschappij mogelijk en bestaat er geen geprivilegieerde positie in de maatschappij. De maatschappij kan als het ware niet van buitenaf beschreven worden maar er bestaat ook binnen dit sociale systeem geen beschrijving die aanspraak kan maken op een totaal beeld van de maatschappij. De beschrijving van de maatschappij vindt altijd plaats IN de maatschappij, vanuit een bepaald perspectief en is derhalve altijd partieel. Dat kan vanuit een organisatie, of vanuit een van de functiesystemen, zoals politiek, recht, economie, religie, etc. Luhmann spreekt in dit kader over een ‘zelfbeschrijving’. Zo is ook Luhmanns sociale systeemtheorie één van de mogelijke zelfbeschrijvingen van de maatschappij. De

⁴²² Let wel: het is nadrukkelijk niet Luhmanns bedoeling een normatief maatschappij-ideaal te formuleren maar hij analyseert niet expliciet de normatieve aspecten die bepalend zijn voor *inhoud* van de sociale orde in de moderne westerse maatschappij. De beschrijving van de functie van normativiteit is iets anders dan de formulering van een normatief ideaal.

door Luhmann aangebrachte beperking in deze beschrijving is, zoals hierboven aangeven, het buiten beschouwing laten van normatieve componenten die typerend zijn voor de inrichting of vormgeving van de Westerse maatschappij.⁴²³

Dit verwijt moet wel genuanceerd worden, aangezien normativiteit wel een formele rol in Luhmanns maatschappijtheorie vervult. Zo is bijvoorbeeld de functie van het recht het stabiliseren van normatieve verwachtingen. Waar Luhmann m.i. ten onrechte, maar gezien de architectuur van de sociale systeemtheorie welhaast gedwongen, aan voorbij gaat is het inhoudelijke aspect van normativiteit. Pas als ook dit inhoudelijk-normatieve aspect in de beschrijving wordt meegenomen, ontvouwt deze complexiteit van onze specifieke maatschappij zich in al haar facetten. Deze inhoudelijke normativiteit vinden we terug in organiserende principes die typerend zijn voor de beschrijving van specifieke maatschappijen, zoals bijvoorbeeld in de liberaal-sociale traditie van de moderne Westerse maatschappij een prominente plaats wordt toegekend aan individuele vrijheid en welzijn als normatieve noties. Echter, het meest basale organiserende principe is 'zekerheid': een zeer hoge mate van voorspelbaarheid van effecten en resultaten van handelingen. Dit komt in onze moderne Westerse maatschappij vooral tot uitdrukking in de normatieve notie van 'veiligheid'.

Derhalve dient een adequate beschrijving van de maatschappij rekening te houden met in ieder geval twee aspecten van sociale orde. Het formele aspect verwijst naar de vorm van de sociale orde, i.c. functionele differentiatie. Dit vinden we terug in Luhmanns theorie. Het tweede aspect is het materiële of kwalitatieve aspect: de 'inhoud' van de sociale orde, welke vorm wordt gegeven door een organiserend principe, een normatieve component. Daarbij valt te denken aan vrijheid, gelijkheid, welzijn, zekerheid. Dergelijke normatieve componenten komen in Luhmanns theorie onvoldoende naar voren. Deze beide, formele en inhoudelijke, aspecten moeten in een zelfbeschrijving verdisconteerd worden, wil deze adequaat zijn. Een dergelijke beschrijving schept het kader waarbinnen de problemen van die specifieke maatschappij geanalyseerd en structurele oplossingen geformuleerd kunnen worden.

⁴²³ Het gaat er hier niet om dat Luhmanns theorie geen onderscheidend vermogen heeft tav bijvoorbeeld verschillende politieke modellen, zoals democratie of technocratie. Sterker nog: zijn beschrijving van het politieke systeem lijkt exclusief van toepassing op democratie. Het gaat erom dat zijn beschrijving ééndimensionaal blijft en geen inhoudelijke aspecten van sociale orde beschrijft.

Concluderend wordt gesteld dat Luhmanns sociale systeemtheorie, indien een aantal lacunes wordt opgevuld, als uitgangspunt kan dienen voor de beschrijving van de moderne, westerse maatschappij en haar eenheid. Luhmanns maatschappijtheorie *per se* is dermate algemeen dat het weliswaar mogelijk is om daarmee een *Weltgesellschaft* te beschrijven en een begrippenkader te ontwikkelen maar geeft te weinig houvast voor een adequate analyse van een specifieke maatschappij, hoe dan ook getypeerd: zij het als Nederland, Duitsland, Europa of als risico- of informatiemaatschappij. Met het oog op een dergelijke analyse moet de sterilität van Luhmanns maatschappij doorbroken worden en is het onvermijdelijk normatieve noties in de analyse mee te nemen, en wel de inhoudelijke aspecten die de identiteit van een specifieke maatschappij bepalen.

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